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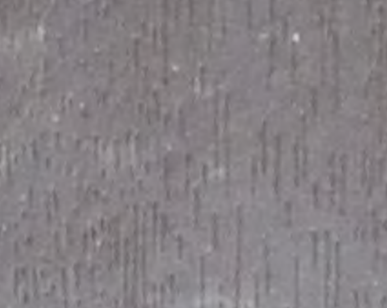
THE CODE OF CIVIL PROCEDURE

Twentieth Edition

Justice Kurian Joseph
Namit Saxena

Volume I
Sections 1 to 58

LexisNexis



NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

BENGALURU

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THE CODE OF CIVIL PROCEDURE

First edition	*1900*	*by Sir D F Mulla*
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Eleventh edition	*1941*	*by Sir Sajba Rangnekar & Diwan Bahadur P B Shingne*
Twelfth edition	*1953*	*by Sir R C Mitter*
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MULLA

THE CODE OF CIVIL PROCEDURE

Including The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015

by

Sir Dinshaw Fardunji Mulla

Twentieth Edition

Justice Kurian Joseph
Former Judge, Supreme Court of India

Namit Saxena
Advocate on Record, Supreme Court of India

Volume 1

Sections 1 to 158

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PREFACE TO THE TWENTIETH EDITION

The celebrated commentary on Code of Civil Procedure by Sir Dinshaw Fardunji Mulla is one of the oldest and longest serving commentary on the civil procedural law in the country. The book has received consistent overwhelming response from academicians, professionals, research scholars, judges and students of law. The proposal for revising and updating this legal classic was not only exciting and adventurous but also an honour for us as it associates us with perhaps one of the greatest running books on civil law ever written. It gives us immense and immeasurable pleasure to revise and update the 20th edition of this book and we hope it will succeed in maintaining the highest level of respect the book has earned over the years.

As the last edition of the book was published in 2017–18, we chose to focus more on case law and amendments post that. Therefore, our sweep of case law covered ranges primarily from 2017–18 onwards till April-May 2021. During the process of revision we found that the book missed certain relevant case law and commentaries prior to 2018 as well, so in all fairness and in the interest of readers we deemed it fit to incorporate the missed commentaries and refresh those portions as well. The fact that one of us (Justice Kurian Joseph) retired as a judge of the Supreme Court with practice experience at the bar for many years and another one of us is an advocate on record at the Supreme Court, gave us all a wider view on the subject and helped us immensely in quick and effective revision of the book.

Keeping with the high traditions set by illustrious predecessors, we have tried that this edition contains almost every relevant pronouncement on the instant subject by the Hon'ble Supreme Court and by the Hon'ble High Courts since the preceding revision which was printed and published in 2017–18.

We have incorporated around 200 judgments while revising and updating the book. In addition, we have also tried to give our suggestions and critically analyse few judicial pronouncements so that the reader may develop a thought process on how to simplify the provision and apply it to facts of a case. We seek forgiveness, if due to inadvertence; any important comment has been missed being mentioned.

We are thankful to Mr. Arjun Bhargava, Ms. Radhika Kohli and Ms. Saumya Chitranshi from the team of LexisNexis India for their effective cooperation in revising and shaping this edition. We are also grateful to Mr. Siddarth Chechani, Advocate for his assistance throughout the preparation of this edition. Special mention deserves to be given to Ms. Arushi Dhawan, Advocate, for her support throughout.

It is our endeavour that the book is useful not only for the bar, bench, students, researchers and academicians but also proves its utility for those who wish to learn procedural aspects

of vast civil law in India. We would appreciate suggestions for improvement of the book as they will certainly help us for revision of future editions as well as further evolution of the law on the subject.

New Delhi
July, 2021

Justice Kurian Joseph
Former Judge, Supreme Court of India
Namit Saxena
Advocate on Record, Supreme Court of India

PREFACE TO THE NINETEENTH EDITION

Civil procedural law in India achieved its current form after three consecutive experiments by the British in 1859, 1877 and 1882, when in 1908 it was concreted. There is scarcity of books and commentaries which carry within their fold, an updated thesis on the subject with various interpretations before the current form was finalised. One of such rare books is the celebrated commentary on *Code of Civil Procedure* by Sir Dinshaw Fardunji Mulla. One of the oldest and longest serving, the commentary runs today in its 117th year since the first publication. It is astonishing to note the consistent overwhelming response this book has received from all sections of readers and is not only considered prestigious but also sacred for readers of civil procedural law. The proposal for revising and updating this legal classic was not only exciting and adventurous but also an honour for us as it associates us with perhaps one of the greatest running books on civil law written ever. It gives us immense and immeasurable pleasure to revise and update the 19th edition of this book and we hope it will succeed in maintaining the highest level of respect the book has earned over the years.

Although, the 18th edition of the book was published in 2011 but as it was updated in 2013, we chose to focus more on case laws and amendments post 2013. Therefore, our sweep of case laws covered ranges primarily from 2013 onwards till May 2017. However, we also found that the book missed certain relevant case laws and commentaries prior to 2013 as well, so in all fairness and in interest of readers we deemed it fit to incorporate the missed commentaries and refresh those portions as well. The fact, that two of us retired as judges of the Supreme Court after practising at the bar for many years and one of us is an upcoming advocate at the Supreme Court, gave us a wider view on the subject and helped immensely in quick and effective revision of the book.

The commentary is unique in its precision, carries easy readability, critical analysis and has been throughout appreciated for its authenticity. Keeping with the high traditions set by illustrious predecessors, we have tried that this edition contains almost every relevant pronouncement on the instant subject by the Hon'ble Supreme Court and by the Hon'ble High Courts since the preceding revision which was printed and published in 2013.

We have incorporated around 300 judgments while revising and updating the book. In addition, we have also tried to give our suggestions and critically analyse few judicial pronouncements so that the reader may develop a thought process as to how to simplify the provision and apply it to facts of a case. We seek forgiveness, if due to inadvertence, any important comment has missed mention. Another thing which we found had become gradually essential was that AIR citations ought to be supplanted by the respective SCC citations which we have added in this edition.

We are thankful to Ms. Supriti Narayanan, Mr. Rishi Dixit, Mr. Mrinal Jain, Ms. Nancy Kadyan, Ms. Saumya Chitranshi, Ms. Aastha Khanna and Ms. Shweta Jain apart from the entire editorial and commissioning team of LexisNexis India for their effective cooperation in revising and shaping this edition. We are grateful to Mr. M.A. Rashid, who himself is

the distinguished author of Ratanlal and Dhirajlal-Indian Penal Code among other books for his valuable inputs in updating this edition. We are thankful to Mr. Krishna Kumar Raizada, Mr. Ardhendumauli Kumar Prasad, Mr. P.V. Dinesh, Mr. Kunal Verma and Mrs. Taruna Ardhendumauli Prasad, Advocates for sharing their professional experiences which proved important in improving this edition. We appreciate the efforts put in by Ms. Poorva Saxena, a Company Secretary for her valuable inputs, suggestions and guidance. We are also grateful to Mr. Panshul Chandra and Ms. Arunima Bhattacharjee for their assistance throughout the preparation of this edition. We also acknowledge the important clerical support rendered by Mr. Sunil Kumar Sah.

It is our endeavour that the book is useful not only for the bar, the bench, students, researchers and academicians but also proves its utility for those who wish to learn procedural aspects of vast civil law in India. We would appreciate suggestions for improvement of the book as they will certainly help us for revision of future editions as well as further evolution of the law on the subject. For queries and suggestions, the authors may be contacted at namitsaxenaoffice@gmail.com.

New Delhi
June, 2017

Justice Deepak Verma
Justice Chandramauli Kumar Prasad
Namit Saxena

PREFACE TO THE EIGHTEENTH EDITION

The proposal for the revision of the 18th Edition of Mulla's Code of Civil Procedure was very exciting and a signal honour for us as it meant that we would be associated with this great work as revising editors twice. The first hand experience of one of us of the application of the provisions of the Civil Procedure Code to litigation in the country's courts—from the Sub-Divisional Magistrate to the Apex Court—has been of inestimable value in the revision of this formidable work.

During the revision of the 17th Edition, we found that the legal pronouncements on provisions inserted by Amending Acts of 1999 and 2002 were few and the Courts of Record in India were still in the process of interpreting the new provisions inserted in the CPC. The approach in this regard has been succinctly laid down in these words : "*Procedural law cannot betray the substantive law by submitting to subordination of complexity. Courts equipped with power to interpret law are often posed with queries which may be ultimate. The judicial steps of the Judge then do stir to solve novel problems by neat innovations. When the statute does not provide the path and precedents abstain to lead, then they are the sound logic, rational reasoning, common sense and urge for public good which play as guides of those who decide. Wrong must not be left unredeemed and right not left unenforced. Forum ought to be revealed when it does not clearly exist or when it is doubted where it exists.*"[1] Therefore, we expected that this 18th Edition would carry the judicial mandate and interpretation of the newly inserted provisions, and in that way, the 18th Edition would mark a water-shed.

However, the initial excitement was soon lost upon realization of the arduous task ahead which we came to know only after interacting with the Editorial Team of the publishers – they wanted this book to be not just a march ahead but a simultaneous march backwards. After the 15th Edition, the revising authors had thought it fit to omit various old case-law. But upon feedback from the eminent members of the Bar & Bench, the publishers were of the view that those omitted judgments needed a reappraisal and re-induction if appropriate, for the short and crisp manner in which those old judgments coined the legal propositions. Also asking for a re-appraisal was the part of the book dealing with Letters Patent which was left out after the 15th Edition.

In today's times, when information is unified through Internet and other modes of communication, Municipal Law is not only restricted to a particular country. E-commerce and transnational disputes between private parties have ushered in a completely new arena of litigation wherein not only the conflict of law has to be addressed but also the different legal systems have to be harmoniously streamlined so that no party is put to any prejudice or obtains any benefit because of change in the nationality of the governing law or the forum.

Needless to say, "*a procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved. A procedural law is always subservient to the substantive*

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1. LAHOTI, J. (as His Lordship then was) in *Dhannalal v. Kalawatibai*, (2002) 6 SCC 16.

law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law".[2]

Against this backdrop, it was a huge challenge to maintain the standard of this epic commentary in an all-round manner so as to meet the expectations of not only the Bar and Bench, but also the third important limb of the fraternity i.e. the Educationists comprising of the teachers and the students. It is pertinent to mention here that the student community today, especially with the introduction of 5-years course through National Law Schools, is not as docile as it used to be some years back. Thus, taken together, all these three limbs – the Bar, the Bench and the Educationists are today equally participating in the endeavour to lay down the law as it should be.

With this brief in hand, we hope that the 18th Edition of Mulla's Code of Civil Procedure will be able to meet the expectations. In addition, we have also given various suggestions at different places, as also the suggestions given in various judgments which have been duly highlighted by us, such as that relating to the anomaly arising due to the non-deletion of Section 23(3) of CPC after the insertion of Section 25 of CPC in its present form in 1976.[3] We hope that all these will also help the Law Commission and the law-makers in removing the anomalies in the Code of Civil Procedure.

We are thankful to Shri S.B. Sanyal, Shri Rakesh Munjal, Shri Sunil Kumar, Shri Sidharth Luthra, and Shri Neeraj Kr. Jain, all Senior Advocates, who were ever ready with their valuable suggestions and guidance based on their practical experiences.

Assistance from within the family was also always forthcoming in the form of Mr. U.S. Prasad, Ms. Anita Mohan and Ms. Kaveri Mohan in logistics and research.

We are also grateful to colleagues Ms. Priya Hingorani, Ms. Ketaki Goswami, Mr. C.D. Singh, Mr. Bhaskar Poluri, Mr. Nagendra Kumar, Mr. Pramod Dubey, Ms. Anita Pandey, Mr. Umang Shankar, Mr. Ardhendumauli Kr. Prasad, Mr. Kunal Verma, Mr. Nirmal Ambastha and Mr. Parveen Kumar, Advocates for their assistance as and when required.

A special mention in this regard is due to two law students, namely Ms. Shaliza Katoch and Ms. Puja Sarkar. They were a great help in the research work and together they helped us in concentrating more on the revising work as they took upon themselves the task of research which was never found wanting in quality. Having been exposed to this epic work so early in their career, I have no hesitation in predicting a bright future ahead for both of them.

Our thanks are also due to the Editorial Team of LexisNexis Butterworths Wadhwa Nagpur and Wadhwa Brothers for bringing out this edition in its present form. We hope that it will be useful not only for the Bar and the Bench but also the administrative machinery instrumental in appointing Commissions of Inquiry. Suggestions for improvement would be highly appreciated, as they can be a useful source for improvements in the future edition.

6 October 2011
New Delhi

B M Prasad
Manish Mohan

2. MISHRA, J. in *Saiyad Mohd. Bakar El-Edroos v. Abdulhabib Hasan Arab*, (1998) 4 SCC 343.
3. *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648 : AIR 2009 SC 285.

PREFACE TO THE SEVENTEENTH EDITION

Volume 1

A journey of a thousand miles must begin with a single step.

—Lao Tsu

The seventeenth edition of Mulla's CPC which is amongst the most popular law books with the judicial fraternity is now available for the readers. The book has continuously served the readers for the last several decades. It was initially authored by the renowned legal luminary Sir D.F. Mulla and subsequently revised from time to time by eminent members of the legal fraternity. The fruits of the earlier efforts have been retained, nurtured and expanded by our efforts and only obsolete parts have been weeded out.

The body of this Code, consisting of the Sections part is expressed in more general terms and has to be read in conjunction with the more particular provisions contained in the respective Orders and Rules. However, the part which deal with the sections contained in this Volume I assumes importance because of the basic factual position that in case of conflict between the body of the Code contained in this Volume I and the Rules contained in the other Volumes, the former must prevail, notwithstanding the fact that both the Sections and the Orders and Rules contained in the code have their relative importance in this procedural law. Therefore, we feel extremely overwhelmed for being associated with this part of the esteemed book.

It would not be possible for us to give the details of all the changes and alterations incorporated in this edition of Volume I due to space constraint. However, a few of them are referred to below.

The readers would find a number of new synopses in the important sections 9 to 11, 47 etc. The important section 11 pertaining to *res judicata* has been extensively dealt with in about 250 pages, 46 headings and more than 100 sub-headings. This particular important provision is like a book with in a book and covers all the aspects pertaining to the doctrine of *res judicata*. Similarly, in section 9 and 10 besides updation of the case law several new headings have been added.

The last edition of the book just preceded the amendments incorporated in the Code vide Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) and Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002) wherein the amendments became effective from 1/7/2002. Varied changes were made in several sections of this Volume I by the above said amending Acts with the purpose of speedy disposal of the civil cases. The amendments in the relevant Sections and the case law on them are incorporated under proper headings of the relevant sections.

The second appeal in civil cases, which is filed before High Courts by eminent lawyers, is dealt with exhaustively, based upon extensive legal research. The term 'substantial question of law' and its different aspects are now part of several headings of section 100 to give a

wholesome view of different aspects of this term. In separate headings, formulation of substantial question of law and the relative scope of terms 'point in law', 'proposition of law' and substantial question of law' and other relevant new headings are incorporated in this section for the benefit of the readers.

Like Section 100 CPC a large number of judgments handed down since the last edition by the Apex Court and different High Courts are now made a part of Section 96 pertaining to first appeal and section 115 pertaining to revision and other Sections, by us.

Myriad changes have been incorporated in this edition keeping in view, the practical utility of this important procedural law, to make it convenient, meaningful and purposeful for Judges, lawyers, law officers, law professors and teachers, researchers and students.

We believe that our endeavours in this work would serve the cause of justice and those associated with the justice delivery system, alike.

Delhi
15 March 2007

S K Sarvaria
Snigdha Sarvaria

PREFACE TO THE SEVENTEENTH EDITION

Volumes 2 to 4

The two adages associated with administration of justice are "justice delayed is justice denied" and "justice hurried is justice buried". In the field of civil litigation, the Code of Civil Procedure seeks to affect a balance between the two. Three earlier attempts were made to codify laws relating to civil procedure – first in 1859, second in 1877 and the third in 1882. Lastly, the Code of Civil Procedure, 1908 (5 of 1908) was born which received the assent of the Governor General of India on 21st March, 1908.

Primarily, the Code is divided into two parts, the one containing the Sections which are substantive provisions conferring power on Courts and the other containing Orders, which are detailed procedures for dealing with those powers.

After observing the provisions of the Code at work for over half a century, the first serious attempt was made in 1976 to tackle the growing number of arrears of cases with an eye on to its functional efficacy. However, when these amendments did not bring about the desired results, the Government introduced a set of major amendments in the Code in 1999, based on the 129th and 163rd Reports of the Law Commission of India and the recommendations of Justice Malimath Committee and the Committee on Sub-ordinate Legislations of the 11th Lok Sabha. But before the Amendment Act of 1999 could be implemented from 1.7.2002, the Bar Council of India and various Bar Associations of the country sent Memoranda to the Government to reconsider the amendments in the light of the hardships that may be caused to the litigants. Then after discussing the subject with legal experts, the Government introduced the Code of Civil Procedure (Amendment) Act, 2002.

The amendments of 1999 and 2002, aimed at streamlining the provisions of the Code, have been incorporated in the present Edition in the light of the decisions of the Apex Court and various High Courts. A few headings and sub-headings have also been added to make the task of searching case-laws easier.

Mulla's Code of Civil Procedure has remained popular with the Bench and the Bar on the strength of its sheer quality and the high standard maintained by legal luminaries associated with its previous Editions. The task of revising a monumental work like Mulla's Code of Civil Procedure casts an added responsibility of retaining the soul of the original work while giving fresh breath to the finished work. In my own humble way, I have tried to see that the quality level does not come down.

I am grateful to Mr. Amarjit Singh Chandhiok, Senior Advocate for having guided me with his practical expertise and vast experience. I am thankful to my son Mr. Manish Mohan, my daughter-in-law Mrs. Anita Mohan, and my daughter Ms. Kaveri Mohan, Advocates,

for helping me with research work. I also express my thanks to Mr. Manmay Prasad and a few young law graduates who helped me in searching case-laws. I am also thankful to the publishers for the excellent production quality.

I hope this work will be useful to the Bench and the Bar.

B M Prasad
Advocate,
Supreme Court of India

New Delhi
15 March 2007

PREFACE TO THE SIXTEENTH EDITION

Once again, dialogue concerning speedy disposal of cases is in the air of late. The Code of Civil Procedure plays a crucial and determining role in expediting the adjudication of civil disputes. However, the amendment to the Code brought about with a focus in cutting down time consumed in disposal of civil matters has been engulfed within clouds of controversy and thus, not yet been notified. This proposed amendment is appended with this volume as an Annexure; commentary to which shall be included in the last volume, where much is to depend upon what shape it takes in the Code finally.

Effort has been made in this edition to make it lawyer-friendly. Special emphasis has been given to frequently required portions of the Code. Parts of the original text that have outlived their utility have been removed without disturbing the originality of the text. Judgments covering a span of about two decades have been thoroughly analysed and those considered important were added to the text while the others find place in the footnotes. The authors seek forgiveness, if due to inadvertence, any important case law has missed mention. Suggestions are invited by the respected persons of the Bench and the Bar for improvements in the book.

We would like to thank Ms Monika A Srivastava, Advocate, who went through the entire text and contributed invaluable improvements. This edition would not have been completed in time without her assistance and help. We would also like to thank Ms Ankur Chandhoke and Mr Awadesh Srivastava, Advocates, for painstakingly going through the judgments.

Members of our firm, The Chambers of Law, deserve a special mention for relieving us from the routine work so as to enable us to concentrate on the book. Mr Dinesh Chopra, our typesetter, deserves a special mention for keeping up with the stiff schedules.

New Delhi
31 July 2001

Solil Paul
Anupam Srivastava

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THE CODE OF CIVIL PROCEDURE

(5 of 1908)[1]

[21 March, 1908]

An Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; it is hereby enacted as follows:—

PRELIMINARY

[S 1] Short Title, commencement and extent.—(1) This Act may be cited as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

---

1. This Act has been amended in its application to Assam by Assam Acts 2 of 1941 and 8 of 1953; to Tamil Nadu by Madras Act 34 of 1950, Madras A.O. 1950, and Tamil Nadu Act 15 of 1970; to Punjab by Punjab Act 7 of 1934; to Uttar Pradesh by U.P. Acts 4 of 1925, 35 of 1948, 24 of 1954, 17 of 1970, 57 of 1976 and 31 of 1978; to Karnataka by Mysore Act 14 of 1955; to Kerala by Kerala Act 13 of 1957; to Rajasthan by Rajasthan Act 19 of 1958; to Maharashtra by Maharashtra Acts 22 of 1960 and 25 of 1970. It has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941) and, by Notification under sections 5 and 5A of the Scheduled Districts Act, 1874 (14 of 1874), also to the following Scheduled Districts:—

(1) The Districts of Jalpaiguri, Cachar (excluding the North Cachar Hills), Goalpara (including the Eastern Duars), Kamrup, Darrang, Nowgong (excluding the Mikir Hill Tracts), Sibsagar (excluding the Mikir Hill Tracts) and Lakhimpur (excluding the Dibrugarh Frontier Tracts), Gazette of India, 1909, Pt I, p 5 and Gazette of India, 1914, Pt I, p 1690.

(2) The District of Darjeeling and the District of Hazaribagh, Ranchi, Palamau and Manbhum in Chota Nagpur, Calcutta Gazette, 1909, Pt I, p 25 and Gazette of India, 1909, Pt I, p 33.

(3) The Province of Kumaon and Garhwal and the Tarai Parganas (with modifications), U.P. Gazette, 1909, Pt I, p 3 and Gazette of India, 1909, Pt I, p 31.

(4) The Pargana of Jaunsar-Bawar in Dehradun and the Scheduled portion of the Mirzapur District, U.P. Gazette, 1909, Pt. I, p. 4 and Gazette of India, 1909, Pt I, p 32.

(5) Coorg, Gazette of India, 1909, Pt I, p 32.

(6) Scheduled Districts in the Punjab, Gazette of India, 1909, Pt I, p 33.

(7) Sections 36 to 43 to all the Scheduled Districts in Madras, Gazette of India, 1909, Pt I, p 152.

(8) Scheduled Districts in the C.P., except so much as is already in force and so much authorizes the attachment and sale of immovable property in execution of a decree, not being a decree directing the sale of such property, Gazette of India, 1909, Pt I, p 239.

(9) Ajmer-Merwara except sections 1 and 155 to 158, Gazette of India, 1909, Pt II, p 480.

(10) Pargana Dhalbhum, the Municipality of Chaibasa in the Kolhan and the Porahat Estate in the District of Singhbhum, Calcutta Gazette, 1909, Pt I, p 453 and Gazette of India, 1909, Pt I, p 443.

Under section 3(3)(a) of the Santhal Parganas Settlement Regulation (3 of 1872), sections 38 to 42 and 156 and rules 4 to 9 in Order XXI in the First Schedule have been declared to be in force in the Santhal Parganas and the rest of the Code for the trial of suits referred to in section 10 of the Santhal Parganas Justice Regulation, 1893 (5 of 1893), Calcutta Gazette, 1909, Pt I, p 45.

It has been declared to be in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 of 1929), section 2; in the Khondmals District by the Khondmals Laws.

[2][(3) It extends to the whole of India except—

(*a*) [3][***];

(*b*) the State of Nagaland and the tribal areas:

Provided that the State Government concerned may, by notification in the Official Gazette, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such other tribal areas, as the case may be, with such supplemental, incidental or consequential modifications as may be specified in the notification.

Explanation.—In this clause, "tribal areas" means the territories which, immediately before the 21st day of January, 1972, were included in the tribal areas of Assam as referred to in paragraph 20 of the Sixth Schedule to the Constitution.

(4) In relation to the Amindivi Islands, and the East Godavari, West Godavari and Vishakhapatnam Agencies in the State of Andhra Pradesh and the Union territory of Lakshadweep, the application of this Code shall be without prejudice to the application of any rule or regulation for the time being in force in such Islands, Agencies or such Union Territory, as the case may be, relating to the application of this Code].

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[s 1.1] Previous Procedure

The first Code of Civil Procedure was Act 8 of 1859. Prior to that, the procedure of the *mofussil* courts was regulated by special Acts and Regulations repealed by Act 10 of 1861: and the procedure of the Supreme Courts was under their own rules and orders and certain Acts, for example Act 17 of 1852 and Act 6 of 1854. The Code of 1859 applied to *mofussil* courts only. In 1862, the Supreme Court and the Courts of Sadder Diwani Adalat in the Presidency towns were abolished by the Indian High Courts Act, 1861 (24 and 25 Vic C 104) and the powers of those courts were vested in the chartered high courts. The Letters Patent of 1862 establishing the high courts extended to them the procedure of the Code of Civil

2. Substituted by Act 104 of 1976, section 2, for sub-section (3) (w.e.f. 1-2-1977).
3. Clause (a) omitted by the Jammu and Kashmir Reorganisation Act, 2019 (34 of 2019), sections 95, 96 and Fifth Schedule, Table-1 (w.e.f. 31-10-2019). Clause (a), before omission stood as under:
"(a) the State of Jammu and Kashmir;".

Procedure, 1859. The Charters of 1865, which empowered the high courts to make rules and orders regulating proceedings in civil cases required them to be guided as far as possible by the provisions of the Code of 1859 and subsequent Amending Acts.

Such Amending Acts were: Act 4 of 1860; 43 of 1860; 23 of 1861; 9 of 1863; 20 of 1867; 7 of 1870; 14 of 1870; 9 of 1871; 32 of 1871; and 7 of 1872.

The next Code was Act 10 of 1877, which repealed that of 1859. This was amended by Acts 18 of 1878 and 12 of 1879; then superseded by the Code of 1882 (Act 14 of 1882). This was amended by Acts 15 of 1882; 14 of 1885; 4 of 1886; 10 of 1886; 7 of 1887; 8 of 1887; 7 of 1888; 10 of 1888; 13 of 1889; 8 of 1890; 6 of 1892; 5 of 1894; 7 of 1895 and 13 of 1895, and then superseded by the present Code of Civil Procedure, 1908 (CPC).

After that, there have been two important Amending Acts, Act 2 of 1951 and Act 66 of 1956 which mainly carried out certain changes necessitated by certain provisions of the Constitution of India and the reorganisation of certain States. In 1976, the Parliament enacted the Civil Procedure (Amendment) Act 104 of 1976, which has carried out drastic changes both in the sections and the rules. The Act received the assent of the President on the 9 September 1976. In exercise of powers conferred by sub-section (2) of section 1, the Central Government issued a Notification, GSR 15 (E) dated the 14 January 1977, which appointed 1 February 1977 as the date on which the provisions of the new Act except sections 12, 13 and 50 would come into force and 1 May 1977, as the date when sections 12 and 50 would come into force. A notification GSR 416 (E) dated 27 June 1977, fixed 1 July 1977 as the date when section 13 would come into force.

Since then, there have been two very important Amending Acts, the Code of Civil Procedure (Amendment) Act, 1999 and the Code of Civil Procedure (Amendment) Act, 2002. In fact, the Code of Civil Procedure (Amendment) Act, 1999 was passed by the Parliament inserting various amendments for speedy disposal and curtailing delays at various stages of the suit and appeals. These drastic changes made did not find favour with majority of bar associations who were of the opinion that due to these rigorous changes, the litigants would suffer injustice. Before the action for enforcement of Code of Civil Procedure (Amendment) Act, 1999 could be taken, various representations were received and the Bar Council of India and various bar associations requested the government to reconsider the provisions of the Code of Civil Procedure (Amendment) Act, 1999. The matter was reconsidered and after consulting all concerned, the Code of Civil Procedure was further amended *vide* Code of Civil Procedure (Amendment) Act, 2002 and the effects of drastic changes made in the Code of Civil Procedure (Amendment) Act, 1999 were diluted.

In exercise of the powers conferred by sub-section (2) of section 1 of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), the Central Government appointed 1 July 2002, as the date on which all provisions [except clause (iii) of section 16, clause (iii) of section 18 so far as it relates to rules 9 and 10 of O VIII of the First Schedule to the CPC and section 30] of the said Act came into force *vide* SO 603(E), dated 6 June 2002, published in the Gazette of India, Pt II, section 3(ii), dated 6 June 2002. Further, *vide* SO 604(E), dated 6 June 2002, published in the Gazette of India, Pt II, section 3(ii), dated 6 June 2002, in exercise of the powers conferred by sub-section (2) of section 1 of the Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002), the Central Government appointed 1 July 2002, as the date on which the provisions of the said Act came into force.

[s 1.2] Consolidate and Amend

Since the object of the Act, as stated in the preamble is both to consolidate and amend, the Act has to be construed as forming a Code, exhaustive of the matters dealt with therein.[4] To consolidate a law means to collect the statutory law relating to a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidation Act is enacted.[5] The provisions of the Act have accordingly to be construed with reference to the circumstances existing at the time of its enactment.[6] If the language is plain and unambiguous, resort need not be had to the earlier law; but if it is capable of more than one meaning, it is permissible to refer to the previous state of law to fix the meaning of the provision under construction.[7] This is so because a consolidating Act raises the presumption that it does not intend to alter the earlier law.[8] Yet, the House of Lords spelt out a change in the law from the Companies Consolidation Act, 1908 and one of the Law Lords refused to look into the history of the clauses of the Act.[9] The better view, however, seems to be that when substantial changes have been made, the previous Acts may be looked into in order to find out whether a different construction is required on the same word in different provisions.[10] Since the CPC is both, a consolidating and an amending enactment, where it plainly amends, resort cannot be had to the earlier law.

It has been observed by the Patna High Court that CPC is a complete code in itself. Once proceedings are initiated under the Code, rights and remedies have to be looked thereunder. All other manner and/or procedure are impliedly prohibited.[11]

[s 1.3] Interpretation of the Act

A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislature must be found in the words used by the Legislature itself.[12] In *RMD Chamarbaugwala v UOI*,[13] the Supreme Court observed that a statute is to be construed according "to the intention of them that make it". The duty of the judicature is "to act upon the true intention of the Legislature — the *mens or sententia legis*.[14]

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4. *Ravula Subba Rao v CIT*, AIR 1956 SC 604 : (1956) 2 Mad LJ 43 : (1956) 1 SCR 577 : (1956) SCJ 591 : (1956) SCA 1025 : (1956) 30 ITR 163 (SC).
5. *Premlal Mullick v The Administrator-General of Bengal*, (1895) ILR 22 Cal 788 (PC); *Shantha Nand Gir Chela v Basudevanand*, AIR 1930 All 225, 230 (FB).
6. *Premlal Mullick v The Administrator-General of Bengal*, (1895) ILR 22 Cal 788 (PC); *Gulabchand Gambhirmal v Kudilal Govindram Seksaria*, AIR 1951 MB 1, 5.
7. *Venkateswara Sarma v SN Venkatesa Aiyar*, AIR 1941 Mad 449 : (1941) ILR Mad 599; *Jiban Krishna Dutta v Sailendra Nath Shee*, AIR 1946 Cal 272 : (1946) ILR Cal 250 : (1945-46) 50 Cal WN 129 : (1945) 81 Cal LJ 216; *SD Krishna Ayyangar v SV Nallaperumal Pillai*, AIR 1920 PC 56 : (1920) ILR 43 Mad 550, pp 559, 565 : (1919-20) 47 IA 33, p 42 : (1895) ILR 22 Cal 788 : 22 IA 107 : (1920) Mad WN 419; *Narendra v Kamal Basini*, (1896) ILR 23 Cal 563 : 23 IA 18; *Kondayya Chetti v Narasimhulu Chetti*, (1897) ILR 20 Mad 97, p 103; *Lala Suraj Prosad v Golab Chand*, (1901) ILR 28 Cal 517; *Gulabchand Gambhirmal v Kudilal Govindram*, AIR 1952 MB 149 (FB) : (1952) ILR MB 15; *Harcharan Karanjai v Ulipur Bank Ltd*, AIR 1942 Cal 442 : (1941-42) 46 Cal WN 634 : (1942) 75 Cal LJ 203.
8. *Gilbert v Gilbert and Boucher*, (1928) p 1; Re *Turner's Will Trusts*, (1937) 1 Ch 15; *Poonamchand v Municipal Board, Jhalawar*, AIR 1965 Raj 98, p 102 : (1964) Raj LR 620 : (1964) Raj LW 620.
9. *Food Controller v Cork*, (1923) AC 647.
10. *R v Burt, Ex Parte Presburg*, (1960) 1 QB 625.
11. *Kapildeo Prasad v Ramanand Prasad*, AIR 2007 Pat 1 : 2007 (2) AIR Jhar. 231.
12. *Padmasundara Rao v State of Tamil Nadu*, AIR 2002 SC 1334, p 1340 : (2002) 3 SCC 533.
13. *RMD Chamarbaugwala v UOI*, AIR 1957 SC 628, p 631 : (1957) 1 SCR 930.
14. Salmond, *Jurisprudence*, 11th Edn, p 152.

If a statutory provision is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the Legislature.[15]

The task is often not an easy one and the difficulties arise because of various reasons. To mention a few of them: words in any language are not scientific symbols having any precise or definite meaning, and language is but an imperfect medium to convey one's thought, much less of a large assembly consisting of various shades of opinion.[16]

The Supreme Court explained it thus:

> The tragedy is that although in the matter of correspondence or conversation the person who has spoken the words or used the language can be approached for clarification, the legislature cannot be approached as the Legislature, after enacting a law or Act, becomes functus officio so far as that particular Act is concerned and it cannot itself interpret it.[17]

Quoting Frankfurther with approval, Pasayat, J, observed in *State of Jharkhand v Govind Singh*,[18] as follows:

> Where, however, the words were clear, there is no ambiguity and the intention of the Legislature is clearly conveyed, there is no scope for the Court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by 'an alert recognition of the necessity not to cross it an instinctive, as well as trained reluctance to do so.
>
> The courts are therefore, held as "finishers, refiners, and polishers of legislatures which give them in a state requiring varying degrees of further processing".[19] However, it must be borne in mind that "it is impossible even for the most imaginative legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for. It is in such a situation the Courts' duty to expound arises with a caution that the Court should not try to legislate".[20]

The process of construction, therefore, combines both literal and purposive approaches. In other words, the legislative intention, i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of the discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.[21]

The following are some of the leading rules for the construction of statutes:

[s 1.3.1] Literal and Grammatical Construction

The golden rule for the interpretation of this as well as other Acts is to consider the plain meaning of the words used.[22] The court's function is not to say what the Legislature meant but to ascertain what the Legislature has said it meant.[23]

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15. *District Mining Officer v Tata Iron and Steel Co*, AIR 2001 SC 3134, p 3152 : (2001) 7 SCC 358.
16. Justice GP Singh, *Principles of Statutory Interpretation*, 12th Edn, 2010, p 3.
17. *JP Bansal v State of Rajasthan*, AIR 2003 SC 1405, p 1409 : (2003) 45 SCC 134.
18. *State of Jharkhand v Govind Singh*, AIR 2005 SC 294, p 297 : (2005) 10 SCC 437 (See: Frankfurther, Some Reflections on the Reading of Statutes in "Essays on Jurisprudence", Columbia Law Review, p 51).
19. See *Corrocraft Ltd v Pan American Airways*, (1968) 3 WLR 714, p 732.
20. *Bhatia International v Bulk Trading S.A.*, AIR 2002 SC 1432, p 1437 : (2002) 4 SCC 105.
21. Justice GP Singh, *Principles of Statutory Interpretation* (12th Edn, 2010), p 12.
22. *Udebhan v Kapoor Chand*, AIR 1967 P&H 53, 59 : (1966) 68 Punj LR 591; *Moolji Jaitha v Khandesh Spinning and Weaving Mills*, AIR 1950 FC 83, 116; *Om Prakash v Emperor*, AIR 1948 Ngp 199 : (1947) ILR Nag 579; *Joseph D'Silva v Emperor*, AIR 1947 Bom 310 : (1946) ILR Bom 1069; *Sales-tax Officer v Kanhayalal*, AIR 1959 SC 135 : (1959) 1 SCR 1350 : (1959) SCJ 53.
23. *Tukino v Actea District Mooriland Board*, AIR 1941 PC 109; *Salish v Sudhir*, AIR 1942 Cal 429 : (1942) 46 Cal WN 541, p 543; *Lala Suraj v Golab Chand*, (1900) ILR 27 Cal 724.

The court cannot proceed on the assumption that the Legislature has made a mistake. Even if there is a defect, it is not for the court to add to or amend the words of a statute or to supply a *causus omissus*. That is for the Legislature.[24] It is always dangerous to paraphrase an Act.[25] When the language is clear, it is the duty of the court to give effect to it[26] without calling in aid outside considerations to ascertain the intentions of the Legislature.[27] Statutory provisions cannot be whittled down by general principles of equity, justice and good conscience.[28] Nor can they be avoided on the ground of hardship or inconvenience when the meaning is clear on the face of the statute;[29] nor is the court concerned with the motive of Parliament in enacting the statute[30] or its wisdom.[31] It is also well-settled that the true import of provisions which are explicit cannot be limited or controlled by recourse to what is said to be the spirit of the legislation.[32]

Where, however, the language of a provision is of doubtful import, that which advances the object of the statute[33] or its validity has to be preferred.[34] It is then permissible to call in aid the well-settled rules of construction and in particular, the history of the legislation, the mischief intended to be remedied, the scheme of the Act and the consequences which may flow from accepting one or the other of the interpretations, since no legislative body is presumed to confer a power which is capable of misuse.[35] When two constructions are possible, the one which makes the provision legal[36] or which avoids injustice,[37] or absurdity,[38] is to be preferred. In interpreting the provision of a statute, that construction should be adopted which would give effect to all parts thereof and would not render any of them meaningless or inoperative.[39] It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage if they can have appropriate application in circumstances conceivably within the statute.[40]

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24. *Nalinkya v Sham Sundar*, AIR 1953 SC 148 : (1953) 4 SCR 533; *British India General Insurance Co Ltd v Itbar Singh*, AIR 1959 SC 1331 : (1960 1 SCR 168.
25. *Durga Chowdhrani v Jawahar Singh*, (1890) ILR 18 Cal 23.
26. *Sales-tax Officer v Kanhaya Lal*, AIR 1959 SC 135; *KM Viswanatha Pillai v KMS Pillai*, AIR 1969 SC 493 : (1969) 1 SCC 88; *Nandlal More v Ramchandran Mirchandani*, AIR 1968 Bom 208 : (1966) 68 Bom LR 871; *Bharat Sarvodaya Mills Co Ltd v Mohata Bros*, AIR 1969 Guj 178, 186 : (1969) 10 Guj LR 457; *Gram Panchayat, Murthal v Land Acquisition Collector*, AIR 1972 Punj 36; *UOI v Authority under the Minimum Wages Act*, AIR 1969 Bom 310; *Khusilal v Board of Revenue*, AIR 1967 MP 201.
27. *New Piece Goods Bazaar Co Ltd, Bombay v CIT, Bombay*, AIR 1950 SC 115 : (1950) SCR 513 : (1950) SCJ 437.
28. *Jayachand v Doli Govinda*, AIR 1944 Cal 272 : (1944) 48 Cal WN 454.
29. *CIT, West Bengal v Sri Kishab Chandra Mandal*, AIR 1950 SC 265 : (1950) SCR 435 : (1950) SCJ 364.
30. *RMDC v State of Mysore*, AIR 1962 SC 594; *Gajapati Narayan Deo v State of Orissa*, AIR 1953 SC 375 : (1954) SCR 1 : (1953) SCJ 592.
31. *Srinivasamurthy v State of Mysore*, AIR 1959 SC 894.
32. *Kesavan Madhava Menon v State of Bombay*, AIR 1951 SC 128 : (1951) SCR 228 : (1951) SCJ 182; *Rananjaya Singh v Baijnath Singh*, AIR 1954 SC 749 : (1955) 1 SCR 671 : (1954) SCJ 838.
33. *Kanai Lal v Parammidhi*, AIR 1957 SC 907 : (1958) SCR 360; *Ganpat Ragho v Maharashtra Revenue Tribunal*, AIR 1970 Bom 86 : (1970) ILR Bom 626 : (1969) 71 Bom LR 815.
34. *State of Rajasthan v Mewar Sugar Mills Ltd*, AIR 1969 SC 880; *Corp of Calcutta v Liberty Cinema*, AIR 1965 SC 1107.
35. *Keshavananda v State of Kerala*, AIR 1973 SC 1461, pp 1619, 1934 : (1973) 4 SCC 225.
36. *Sushil v Emperor*, AIR 1943 Cal 489 : (1943) 47 Cal WN 757.
37. *Manindra v Gopi Ballav*, AIR 1941 Cal 353 : (1941) 45 Cal WN 44, p 48.
38. *Parulekar v District Magistrate, Thane*, AIR 1952 SC 324 : (1952) SCR 683 : (1952) SCJ 476; *State of Punjab v Ajaib Singh*, AIR 1953 SC 10 : (1953) SCR 204 : (1952) SCJ 664.
39. *Shiv Bahadur Singh v State of Vindhya Pradesh*, AIR 1953 SC 394 : (1953) SCR 1189 : (1953) SCJ 563; *Venkataramana v State of Mysore*, AIR 1958 SC 255 : (1958) SCR 895 : (1958) SCJ 382; *Sirajul Haq v SC Board of Wakf*, AIR 1959 SC 198 : (1959) SCR 1287 : (1959) SCJ 367.
40. *Aswini Kumar v Arabinda Bose*, AIR 1952 SC 369 : (1953) SCR 1 : (1952) SCJ 568.

[s 1.3.2] Logical Construction

While the duty of the court is to ascertain the intention of the legislature from the words actually used, it does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials, to arrive at the real meaning. It would be legitimate to consider what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, and what remedy the Parliament had appointed, and the reasons for the remedy.[41] The grammatical construction of the words cannot always be treated as invariable, and it must yield to the context when that is required.[42]

[s 1.3.3] Harmonious Construction

The CPC is one continuous whole, the sections being enacted simultaneously;[43] and therefore, in order to ascertain the true legislative intent, the words and phrases are to be taken, not in an isolated and detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself.[44] Hence, when two procedures or two remedies are provided, one of them is not to be construed as in derogation of the other,[45] and that construction should be adopted which would give effect to all the provisions.[46] The sub-sections of a section must be read as parts of an integral whole and as interdependent, and that construction should be adopted which would reconcile them and avoid repugnancy.[47]

As aptly observed, it should not be lightly assumed that "Parliament had given with one hand what it took away with the other".[48] Venkatarama Aiyar, J, put it thus:

> The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is known as the rule of harmonious construction.[49]

It is a cardinal principle of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given.[50]

[s 1.3.4] Liberal Construction of Procedure Codes

Procedure is mere machinery and its object is to facilitate and not to obstruct the administration of justice.[51] The CPC should therefore be considered liberally and, as far as

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41. *RMDC v UOI*, (1957) SCR 930 : (1957) SCJ 593 : (1957) SCA 912; *Bipal Beni v Sawarkar*, AIR 1962 Bom 167.
42. *Regional Provident Fund Commr v Sri Krishna Metal Mfg Co*, AIR 1962 SC 1536.
43. *Arjun Rantara v Krishna Chandra*, AIR 1942 Pat 1; *Janardhan v Ramdhone*, (1896) ILR 23 Cal 738, 743.
44. *Dharshan Singh v State of Punjab*, AIR 1953 SC 83 : (1953) SCR 319 : (1953) SCJ 48; *Poppatlal Shaw v State of Madras*, AIR 1953 SC 274 : (1953) SCR 677 : (1953) SCJ 369.
45. *Gaur Chand v Pradyamma*, AIR 1945 Cal 6 : (1943) ILR 2 Cal 485; *Ram Lakan v Bisweswar*, AIR 1948 Nag 214 : (1948) ILR Nag 85; *Kishan v Habibullah*, AIR 1946 All 448 : (1947) ILR All 63; *Ayodhya Prasad v Bala Mukund*, (1886) ILR 8 All 354.
46. *CV Rama Rao v E Narayana*, AIR 1963 AP 168 (FB).
47. *Madan Lal v Shree Changdeo Sugar Mills*, AIR 1962 SC 1543; *Turabuddin v Commr, Meerut Division*, AIR 1972 All 146.
48. *Dormer v Newcastle-on-Tyne Corp*, (1940) 2 All ER 521 p 527 (CA) [Goddard, LJ].
49. *Venkataramana Devaru v State of Mysore*, AIR 1958 SC 255, p 268 : (1958) SCR 895.
50. *British Airways Plc v UOI*, AIR 2002 SC 391 p 393 : (2002) 2 SCC 95.
51. *Indrajit Pratap v Amar Singh*, (1923) ILR Pat 676, p 684 : 50 IA 183, p 191; *Jobnram Bibi v Howrah Jute Mills*, AIR 1948 Cal 134 : (1948) ILR 2 Cal 1; *Jyoti Bhusan v BN Sarkar*, AIR 1945 All 311 : (1945) ILR All 165; *Sangram Singh v Election Tribunal, Kotah*, AIR 1955 SC 425, p 429 : (1955) 2 SCR 1.

possible, technical objections should not be allowed to defeat substantial justice.[52] A technical construction of sections that leaves no room for reasonable elasticity of interpretation should be guarded against.[53] No defence should be excluded except where to do so would be to negative the provision of a rule of procedure. It is no longer the province of procedure to exclude defences.[54] The CPC is a body of general law, designed to facilitate justice. It should not be treated as an enactment providing for punishment and penalties. The law of justice should be so constructed as to render justice where reasonably possible.[55]

A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*, i.e., a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.[56]

[s 1.3.5] Associated Words

When one or more words which are susceptible of analogous meaning are coupled together *noscitur a sociis*, they are understood to be used in their cognate sense and accordingly, the more general is restricted to a sense analogous to the less general;[57] but this rule of construction cannot be invoked where the intention of the legislature is clear and unambiguous.[58] Where general words follow particular and specific words of the same nature, the general words must be confined to things of the same kind as those specified.[59]

[s 1.3.6] Legal Fiction

Legal fiction is a statutory creation which helps assume the existence of a fact or taking place of an event which neither exists in reality nor has actually happened. According to dictionary meaning, a legal fiction presupposes the correctness of the state of facts on which it is based and all the consequences which flow from that state of facts have to be worked out to their logical conclusion.[60] When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what person the statutory fiction is to be resorted to.[61] Further, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction.[62] The Supreme Court has held that the Legislature is

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52. *Jyoti Bhusan v BN Sarkar*, AIR 1945 All 311; *Bhala v Ranrati*, AIR 1946 All 425 : (1946) ILR All 615; *Ashraj v Karim Bux*, AIR 1949 All 198; *Punjab Co-op Bank Ltd v Bikram Lal*, AIR 1959 Punj 71.
53. *Sangram Singh v Election Tribunal*, AIR 1955 SC 425 : (1955) 2 SCR 1 : (1955) SCJ 431 : (1955) SCA 545; *Ramachandra v Gopi Krishna*, AIR 1957 Pat 260; *Binda Prasad v United Bank Ltd*, AIR 1961 Pat 152.
54. *Chhatto Lal v Narayan Das*, AIR 1930 Cal 53 : (1929) ILR 56 Cal 704.
55. *Chinnammal v P Arumugham*, (1990) 1 SCC 513.
56. *CIT v Hindustan Bulk Carriers*, AIR 2003 SC 3942 : (2003) 3 SCC 57.
57. *Chana Lal v State of Gujarat*, AIR 1961 Guj 27.
58. *Nagpur Corp v Its Employees*, AIR 1960 SC 675 : (1960) 2 SCR 942 : (1961) 2 SCJ 134 : (1960) 1 SCA 596.
59. *Kochunni v States of Madras and Kerala*, AIR 1960 SC 1080 : (1960) 3 SCR 887 : (1961) 2 SCJ 443 : (1960) 2 SCA 412.
60. P Ramanatha Aiyar's Law Lexicon, (2nd Edn, 1997), p 1099.
61. *Ex parte, Walton*, Re *Ley*, (1881) 17 Ch D 746, p 756.
62. *East End Dwelling Co Ltd v Finbury Borough Council*, (1951) 2 All ER 587, p 599.

quite competent to create a legal fiction, in other words, to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist.[63]

In *State of Travancore-Cochin v Shanmugha Vilas Cashewnut Factory*,[64] SR.Das, J, (as he then was) expressed the view that a thoughtful effect must be given to the legal fiction, it should not be extended beyond the purpose for which it is created. Later on he re-affirmed the above view, as Acting CJ, in *Bengal Immunity Co Ltd v State of Bihar*,[65] wherein he stated that "legal fictions are created only for some definite purpose", and proceeded to add that a "legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field".

The general rule is that a legal fiction cannot be extended beyond the specific purpose for which it is enacted; but in construing its scope, it will be proper and even necessary to assume all those facts on which alone the legal fiction can operate.[66]

[s 1.3.7] Judicial Precedents

In procedure, uniformity of decision is important,[67] and if a judge finds a principle laid down by competent authority, it is better to apply it even if his own mind is not satisfied, than to fritter it away in its application to cases which manifestly come within it.[68] This rule, however, will not apply in case of conflicting decision of Benches of equal jurisdiction.[69] It has been observed by the Supreme Court that in cases of conflict among Bench decisions of the same court, the better course for the Bench hearing the case is to refer the question to a Full Bench.[70]

[s 1.3.8] Proceedings of the Legislature

The proceedings of the Legislature in passing an Act are to be excluded in the consideration of the judicial construction of the Act. That was laid down by the Privy Council in *Administrator General v Premlal Mullick*,[71] and also by the Supreme Court in *Aswini Kumar*'s case.[72] These proceedings include reports of the select committee, statements of objects and reasons attached to bills and debates of the legislature.[73] Thus, the report of the Law Commissioner on which the Indian Penal Code, 1860 was based was held to be inadmissible for construing its provisions, though valuable as a piece of history.[74] It has, however, been held by the federal court that the

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63. *JK Cotton Spinning & Weaving Mills Ltd v UOI*, AIR 1988 SC 191, p 202 : (1987) Supp SCC 350.
64. *State of Travancore-Cochin v Shanmugha Vilas Cashewnut Factory*, AIR 1953 SC 333, p 343 : (1954) SCR 53.
65. *Bengal Immunity Co Ltd v State of Bihar*, AIR 1955 SC 661, p 680.
66. *CIT v Teja Singh*, AIR 1959 SC 352 : (1959) Supp 1 SCR 394 : (1959) SCJ 425; *Jumrati v Bannerjee*, AIR 1962 Cal 525 (FB).
67. *Sadasivan v Ramalinga*, 2 IA 219 : 15 Beng LR 383; *Ful Kumari v Ghanshyam*, (1903) ILR 31 Cal 511.
68. *Usil v Hailes*, (1877) 3 CPD 327; *Harrow Chander v Surodhoni*, (1868) 9 WR 402.
69. *Peramanayagam v Sivaraman*, AIR 1952 Mad 419.
70. *Jaisri Sahu v Raj Dewan Debey*, (1962) 1 SCJ 578.
71. *Administrator General v Premlal Mullick*, 22 IA 107.
72. *Aswini Kumar Ghose v Arabinda Bose*, AIR 1952 SC 369 : (1953) SCR 1 : (1952) SCJ 568.
73. *Administrator General v Premlal Mullick*, (1895) ILR 22 Cal 788 : 22 IA 107; *Krishna Ayyangar v Nallaperumal*, 47 IA 33; *Midnapur Zamindary v Chandra Singh Dhudhuia*, AIR 1943 Cal 544 : (1943) ILR 2 Cal 245 : (1943) 47 Cal WN 733; *Queen Empress v Shri Churn*, (1895) ILR 22 Cal 1017; *Queen Empress v Tilak*, (1898) ILR 22 Bom 112; *Maharaj Tewari v Har Charan*, (1903) ILR 26 All 144.
74. *Mobarik Ali v State of Bombay*, AIR 1957 SC 857 : (1958) SCR 328 : (1958) SCJ 111 : (1958) SCA 665.

White Paper and the report of the joint select committee on which the Government of India Act, 1935, was based could be referred to as the historical facts in construing Item 48 of List II of the said Act.[75] It has likewise been held that the report of the drafting committee of the Constituent Assembly may be referred to when there is ambiguity in the meaning of the article in the Constitution of India, but it cannot be read so as to control its meaning.[76]

Statements of Objects and Reasons are inadmissible for construing the plain words of a statute;[77] but it has been observed that they may be used for the limited purpose of ascertaining the conditions which prevailed at the time of passing the legislation.[78] Speeches made by members in the course of debates cannot be used for interpreting a statute.[79] Acceptance or rejection of amendments to a Bill is not admissible as forming history of legislation[80] nor can the fact of deletion of a word from the provisions of the Bill in the course of the debates be relied on as an aid in the construction of the statute as enacted.[81]

[s 1.3.9] Parts of the Statute — Preamble

The preamble of a statute serves as "a key to open the minds of its makers" and shows the general purposes for which they enacted its several provisions.[82] It can be properly resorted to where doubts and ambiguities arise upon the words of the enacting part[83] and to expound in such a case, the nature, extent and application of powers actually conferred, though it cannot be construed as substantively creating them.[84] But, where the language of the enactment is clear, the preamble cannot be used to cut down or limit its operation.[85] Likewise, the long title of an enactment cannot be used for restricting the plain terms of an enactment,[86] though it might throw light on the intent and design of the Legislature and the scope and purpose of the Legislation.[87] Headings prefixed to sections are regarded as preambles to those sections and

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75. *Re CP and Berar Motor Spirit Taxation Act*, (1939) 1 FCR 18.
76. *AK Gopalan v State of Madras*, AIR 1950 SC 27 : (1950) SCR 88 : (1950) SCJ 174.
77. *Ashvini Kumar v Arvind Bose*, AIR 1952 SC 369.
78. *State of West Bengal v Subodh Gopal Bose*, AIR 1954 SC 92 : (1954) SCR 587 : (1954) SCJ 127; *Ranganathan v Govt of Madras*, AIR 1955 SC 604 : (1955) 2 SCR 374 : (1955) SCJ 515 : (1955) SCA 841; *Kanga Valley State Co v Kidarnath*, AIR 1961 P&H 540 (FB); *Re Oriental Gas Co*, AIR 1961 Cal 267; *Jai Lal v Delhi Administration*, AIR 1962 SC 1781.
79. *State of Travancore Cochin v Bombay Co Ltd*, AIR 1952 SC 366 : (1952) SCR 1112 : (1952) SCJ 527; *AG of Bengal v Premnath Mullick*, 22 IA 107, p 118; *Gopalan v State of Madras*, AIR 1950 SC 27 : (1950) SCR 88; *Keshavananda v State of Kerala*, AIR 1973 SC 1461, p 1633; *US v Trans-Missouri Freight Assn.* (1897) 109 US 290, 318.
80. *Aswini Kumar v Arvind Bose*, AIR 1952 SC 369.
81. *Express Newspapers v UOI*, AIR 1958 SC 578 : (1959) SCR 12 : (1958) SCJ 1113 : (1958) SCA 952.
82. Re *Berubari Union and Exchange of Enclaves*, AIR 1960 SC 845 : (1960) 3 SCR 250.
83. *Attorney General v Prince Ernest Augustus of Honover*, (1957) 1 All ER 49 : (1957) AC 436 (HL).
84. *Keshavananda v State of Kerala*, AIR 1973 SC 1461 : (1973) 4 SCC 225.
85. *Burrakur Cool Co v UOI*, AIR 1961 SC 954 : (1961) 2 SCA 523; *Kochunni v States of Kerala and Madras*, AIR 1960 SC 1080; Re *Kerala Education Bill*, AIR 1958 SC 956 : (1959) SCJ 321; *Thangal Kunju Musaliar v Venkatachalam*, AIR 1956 SC 246 : (1955) 2 SCR 1196 : (1956) SCJ 323 : (1956) SCA 259; *Biswambhar Singh v State of Orissa*, AIR 1954 SC 139 : (1954) SCR 842 : (1954) SCJ 219; *Aswini Kumar v Arvind Bose*, AIR 1952 SC 369; *Siddhi Vinappa v Sivalingappa*, AIR 1951 Bom 137 (FB); *CIT v Ahmed Bhai Umar Bhai and Co*, AIR 1950 SC 134 : (1950) SCR 333 : (1950) SCJ 374; *Harishankar v State of Madhya Pradesh*, AIR 1954 SC 465 : (1955) 1 SCR 380 : (1954) SCJ 637; *Bhatnagors v UOI*, AIR 1957 SC 478 : (1957) SCR 700 : (1957) SCJ 546 : (1957) SCA 810; *Motipur Zamindary Co v State of Bihar*, AIR 1962 SC 660; *Venkataswami v Narasram*, AIR 1966 SC 361, 365.
86. *Manoharlal v State of Punjab*, AIR 1961 SC 418 : (1961) 2 SCR 343 : (1961) 2 SCJ 17.
87. *Poppatlal Shah v State of Madras*, AIR 1953 SC 274 : (1953) SCR 677 : (1953) SCJ 369.

cannot control the plain words of the statute, but they can be referred to for resolving doubts where the words of the enactment are ambiguous.[88]

According to Sir John Nicholl:

> It is to preamble more specially that we are to look for the reason or spirit of every statute, rehearsing this, as it ordinarily does, the evil sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the Legislature in making or passing the statute itself.[89]

In the *Sussex Peerage* case,[90] Tindal, CJ, while delivering the opinion of the Judicial Committee of the House of Lords, stated as follows:

> "If any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble. . ."

In the well-known case of *Smith v Hughes*,[91] Lord Parker, CJ, held that prostitutes who attracted the attention of passers-by from balconies or windows were soliciting "in a street" within the meaning of the Street Offences Act, 1959. It was stated (at p 832):

> For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes.

It was pointed out that if the Act was intended to clean up the streets, the precise place from which a prostitute addressed her solicitations to somebody walking in the street became irrelevant.

The words of a statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment. According to Maxwell, "their meaning is found not so much in a strict grammatical or etymological propriety of language, nor even in its popular use, as in the subject, or in the occasion on which they are used and the object to be attained".[92]

Referring to the question as to how far the enacting provisions are controlled or restricted by the Preamble, Lord Normand observed:

> There may be no exact correspondence between preamble and the enactment, and the enactment may go beyond, or it may fall short of, the indications that may be gathered from the preamble. Again the preamble cannot be of much, or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail.[93]

N Rajagopala Ayyangar, J, speaking for the three-judge bench of the Supreme Court observed as follows:

> The preamble may, no doubt, be used to solve any ambiguity or to fix the meaning of words which may have more than one meaning, but it can, however, not be used to eliminate as redundant or unintended, the operative provisions of a statute.[94]

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88. *Bhinks v Charan Singh*, AIR 1959 SC 960 : (1960) SCJ 892.
89. *Brett v Brett*, (1826) 3 Adams 210 : (1826) 162 ER 456.
90. *Sussex Peerage* case, (1844) 11 Cl & F 85 : 8 ER 1034 (HL).
91. *Smith v Hughes*, (1960) 1 WLR 830.
92. Maxwell, *Interpretation of Statutes*, 12th Edn, p 76.
93. *AG v HRH Prince Ernest Augustus of Hanover*, (1957) 1 All ER 49, p 57, 58 : (1957) AC 436 (HL).
94. *State of Rajasthan v Leela Jain*, AIR 1965 SC 1296 : (1965) 1 SCR 276, p 282.

[s 1.3.9.1] Marginal Notes

Marginal notes to the sections of an Act are not to be referred to for the purpose of construing the Act.[95]

[s 1.3.9.2] Illustrations

Illustrations in Acts of Legislature, although not part of the sections, are helpful in the working and application of the Acts, and it is the duty of the court of law to accept them, if they can be done as being both relevant and of value in the construction of the text. The illustrations should, in no case, be rejected because they do not square with the ideas possibly derived from another system of jurisprudence as to the law with which the sections deal; and it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It is not to be readily assumed that an illustration to a section is repugnant to it and rejected.[96] In fact, it would be the very last resort of construction to make any such assumption.[97] An illustration can be used, unless it goes beyond the clear language of the section, as an explanation of it;[98] but, it cannot be allowed to control the plain meaning of a section.[99] An illustration does not exhaust the full content of the section nor does it curtail or expand its ambit.[100]

[s 1.3.9.3] Explanation

The true purpose of an explanation is to clarify the section. It should not be construed so as to destroy the meaning of or render nugatory the section of law, which it seeks to explain.[101] Though the description of a provision as an explanation may not be decisive of its true meaning, where two interpretations are possible, that should be adopted which will fit in with the description of the provision as an explanation.[102]

[s 1.3.9.4] Proviso

The proper function of a proviso is to except and deal with a case which would otherwise fall within the language of the main enactment.[103] It cannot be construed as excluding from it by implication whatever clearly falls within its express terms. It is a cardinal rule of interpretation that a proviso to a particular provision of statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted

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95. *CIT v Ahmedbhai Umarbhai*, AIR 1950 SC 134; *Bengal Immunity Co v State of Bihar*, AIR 1955 SC 661 : (1955) 2 SCR 603 : (1955) SCJ 672 : (1955) SCA 1140; *WI Theatres v Municipal Corp, Poona*, AIR 1959 SC 586 : (1959) SCJ 390 : (1959) 2 SCA 145; *Nalinakya v Shyam Sundar*, AIR 1953 SC 148; *Balraj Kanwar v Jagatpal Singh*, (1904) ILR 26 All 393 : 31 IA 132; *Dukkimala v Halway*, (1896) ILR 23 Cal 55; *Punardeo v Ram Sarup*, ILR 25 Cal 858; *Haridas Mundra v National and Grindlays Bank Ltd*, AIR 1963 Cal 132 : (1963) 67 Cal WN 58.
96. *Jumma Masjid v Kodimaniandra Deviah*, AIR 1962 SC 847; *Mahomed Syedol Ariffin v Yeoh Ooi Gark*, AIR 1916 PC 242 : 43 IA 256 : (1916) 2 AC 275.
97. *Jadarkumar v Pushpabai*, AIR 1944 Bom 29 : 45 Beng LR 924; *Mahomed v Yeoh*, 43 IA 256, p 263; *Mulraj Khatau v Vishvanath Prabhuram*, (1913) 37 Bom 198 : 40 IA 24, p 30.
98. *Ramaswami v Lakshmi*, AIR 1962 Ker 313 : (1962) ILR Ker 130.
99. *Jadarkumar v Pushpabai, supra*; *Koylesh Chundar v Sonatun*, (1880) ILR 7 Cal 132.
100. *Shambunath v State of Ajmer*, AIR 1956 SC 404, 406 : (1956) SCR 199.
101. *South India Co-op Insurance Society v Bapiraju*, AIR 1955 Mad 694 : (1956) ILR Mad 547.
102. *State of Bombay v United Motors Ltd*, AIR 1953 SC 252 : (1953) SCR 1069 : (1953) SCJ 373.
103. *MSM Rly Co v Bezwada Municipality*, AIR 1944 PC 71 : (1945) ILR Mad 91 : 71 IA 18; *Kedarnath Jute Mfg Co v CTO*, AIR 1966 SC 12.

as a proviso.[104] It is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment.[105] A proviso may be construed in the light of the section but not a section in the light of a proviso[106] for, a proviso is subservient to the main provision.[107] However, a proviso need not necessarily be read as a limitation. The clear language of the substantive provision as well as the proviso may establish that the proviso is not a limitation but a substantive provision.[108]

A proviso "is of necessity...limited in the scope to the ambit of the section which it qualifies".[109]

According to Lord Russel, although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of the possible two meanings is the right one to attribute to them. One must, however, read the whole clause before attempting to construe any portion of it and a perusal of the proviso fixes the meaning of the words which precede it.[110] However, Lord Watson cautioned that it is "a very dangerous and certainly unusual course to import legislation from a proviso wholesale into the body of the statute".[111]

Ayyangar, J, speaking for the Bench, observed in the case of *State of Rajasthan v Leela Jain*,[112] as follows:

> So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part.

In *S Sundaram Pillai v VR Pattabhiraman*,[113] Fazal Ali, J, observed as follows:

> ...the well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.
>
> However, if a proviso cannot reasonably be construed otherwise than as contradicting the main enactment, then the proviso will prevail on the principle that it speaks the last intention of the makers.[114]

[s 1.3.9.5] Punctuation

Punctuation in a statute cannot invariably be relied on in construing its provision[115] and should not be used for controlling the plain meaning of the enactment.[116]

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104. *Ram Narain Sons Ltd v Asst Commr of Sales-tax*, AIR 1955 SC 765 : (1955) SCR 483 : (1955) SCJ 808 : (1955) SCA 111.
105. *CIT v Indo Mercantile Bank Ltd*, AIR 1959 SC 713 : (1959) SCJ 655 : (1960) 1 SCA 12.
106. *Shankar Iranna v CIT*, AIR 1956 Bom 280.
107. *South Asia Industries v Sarup Singh*, AIR 1966 SC 346, p 350.
108. *CIT, Kerala v P Krishna*, AIR 1965 SC 59.
109. *Lloyds & Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd*, (1966) 1 QB 764 : (1964) 2 All ER 732 per Edmund Davies J.
110. *Jennings v Kelly*, (1939) 4 All ER 464.
111. *West Derby v Metropolitan Life Assurance*, 1897 AC 647.
112. *State of Rajasthan v Leela Jain*, AIR 1965 SC 1296 : (1965) 1 SCR 276, p 283. See also *Nagar Palika Nigam v Krishi Upaj Mandi Samiti*, AIR 2009 SC 187, para 8 : (2008) 12 SCC 364.
113. *S Sundaram Pillai v VR Pattabhiraman*, AIR 1985 SC 582 : (1985) 1 SCC 591.
114. Maxwell on Interpretation of Statutes, 12th Edn, pp 190–191.
115. *Maharani of Burdwan v Krishna Kamini Dasi*, (1887) ILR 14 Cal 365; *Louis Pugh v Asitosh Sen*, AIR 1929 PC 69 : (1929) ILR 8 Pat 516 : 56 IA 93.
116. *Mukherjee and Dass JJ. in Aswini Kumar Ghose v Arabinda Bose*, AIR 1952 SC 369.

[s 1.3.10] Code Exhaustive

The essence of a Code is to be exhaustive of the matters in respect of which it declares the law and it is not the province of the judge to disregard or go outside the letter of the enactment according to its true construction.[117] Where there is no specific provision in the Code, the court has the power, and it would seem it is its duty to act according to justice, equity and good conscience.[118]

[s 1.3.11] Retrospective Operation

Every statute which takes away or impairs vested rights acquired under the existing law must be presumed to be intended not to have retrospective operation,[119] but this presumption does not apply to enactments affecting procedure or practice, such as the CPC. The reason is that no person has a vested right in any course of procedure. The general principle indeed seems to be that alterations in the procedure are always retrospective unless there be some good reasons against it,[120] but an appellate court cannot reverse an order made under an old Code on the ground that the new Code has enacted a different rule.[121] The right of appeal however, is in the nature of a vested right.[122] Hence, the provision in section 154 of the CPC declares that nothing in this Code shall affect "any present right of appeal which shall have accrued to any party at its commencement". Thus, the amendment of a statutory rule made by a high court giving a right of appeal to a bench of two judges cannot take away a vested right of appeal to the Supreme Court.[123] Though matters relating to limitation and forum are regarded as matters relating to procedure and are governed by the law in force at the date of the institution of the action, where limitation prescribed by a statute makes it impossible to enforce a claim which has arisen prior to the coming into force of the statute, the statute must be construed as inapplicable to such an action.[124] The CPC is thus not retrospective so as to affect vested rights, except where the amendment has been expressly or by necessary implication been made retrospective.[125]

A thing for which provision is made in the CPC must be done in the prescribed way or not at all.[126]

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117. *Gupteswara Missir v Chaturnand Missir*, AIR 1950 Pat 309 : (1950) ILR 29 Pat 381; *Gokul Mandar v Pundmanund*, (1902) 29 ILR Cal 707, p 715 : 29 IA 196, p 202; *Shibo v Baban*, (1908) 35 ILR Cal 353.
118. *Gupteswar Missir v Chaturnand Missir*, AIR 1950 Pat 309; *Hukumchand v Kamalanand*, (1906) 33 ILR Cal 927, pp 931–32, 948; *Abdul Rahman v Shana*, (1920) ILR 1 Lah 339, 341; *Rasik Lall v Bidhu Mukt*, (1906) ILR 33 Cal 1094; *Panchanan v Dwarkanath*, (1905) 3 Cal LJ 29; *Murahari v Bapayya*, AIR 1949 Mad 743. See section 151.
119. *Keshavan Madhava Menon v State of Bombay*, AIR 1951 SC 128 : (1951) 2 SCR 228 : (1951) SCJ 182; *Madhavalal v Administrator of West Bengal*, AIR 1960 SC 936 : (1960) 3 SCR 578 : (1960) 1 SCJ 15; *ITO, Tuticorin v TS Devinatha Nadar*, AIR 1968 SC 623, p 628 : (1967) 1 SCJ 733.
120. *Saratchandra v Santosh Kumar*, AIR 1944 Cal 145 : (1943) 47 Cal WN 544; *Hajrat Akrammisa v Valiunnisa*, (1894) ILR 18 Bom 429; *Balakrishna v Bapu*, (1895) ILR 19 Bom 204; *Girish Chandra v Apurba*, (1894) ILR 21 Cal 940, 955; *Bisweswar v Jasoda Lal*, (1913) ILR 40 Cal 704.
121. *Shyam Sundar v Ramdas*, AIR 1951 Pat 52 (FB); *Gurumurthi Naidu v Varadappa Chetti*, (1911) 2 Mad WN 386; *Nani Gopal Mitra v State of Bihar*, AIR 1970 SC 1636.
122. See commentary under section 96.
123. *Gordhan Das v Governor-General in Council*, AIR 1952 Punj 103; *Mahendra v Daisen*, AIR 1952 Pat 341.
124. *Natwarlal B Shah v Thakorda Khodaji*, (1967) ILR Guj 495.
125. *Chhabildas v Luhar Kohan*, AIR 1967 Guj 7; *Mohanlal v Sawai Mansinghji*, AIR 1962 SC 73, 76; *Gokaldas v Parmanand*, AIR 1967 MP 265.
126. *Nazir Ahmed v King Emperor*, 63 IA 372; *Ballabhdas Agarwala v JC Chakravarty*, AIR 1960 SC 576; *Shri Krishna Gupta v Ram Babu*, AIR 1967 All 136, 140 : (1966) All LJ 990.

The statement of law given by Maxwell in this regard is stated thus:

> Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.[127]

As laid down by the Supreme Court, "the golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed".[128] In another case, the Supreme Court held that courts have looked with disfavour upon laws which take away vested rights or affect pending cases. Matters of procedure are, however, different, and the law affecting procedure is always retrospective.[129]

In *Hitendra Vishnu Thakur v State of Maharashtra*,[130] the Supreme Court laid down the ambit and scope of an amending Act and its retrospective operation and gave five broad guidelines for construing a statute one way or the other.

While dealing with the Punjab Pre-emption Act, 1913, the Supreme Court held that the new provision substituted by an amending Act was not retrospective.[131]

The Halsbury's Law of England states the law on retrospective operation of statutes thus:

> "The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. Similarly, the courts will construe a provision as conferring power to act retrospectively only when clear words are used."[132]

Francis Bennion states thus:

> The true principle is that *lex prospicit non respicit* (law looks forward not back). Retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'. The basis of the principle against retrospectivity 'is no more than simple fairness, which ought to be the basis of every legal rule'.[133]

[s 1.4] Courts of Civil Judicature

The CPC applies to all the proceedings in courts of civil judicature, except that it does not affect any special or local law; or any special jurisdiction or power conferred; or any special form of procedure prescribed by or under any other law for the time being in force.[134] It applies to high courts except where otherwise provided by Letters Patent or the rules for the exercise of original jurisdiction.[135] Insolvency courts are courts of civil judicature, but their procedure

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127. Maxwell, *Interpretation of Statutes,* 12th Edn, p 216.
128. *Garikapati Veeraya v N Subbiah Choudhry*, AIR 1957 SC 540 : 1957 SCR 488.
129. *Dayawati v Inderjit*, AIR 1966 SC 1423 : (1966) 3 SCR 275.
130. *Hitendra Vishnu Thakur v State of Maharashtra*, AIR 1994 SC 2623 : (1994) 4 SCC 602.
131. *Shyam Sundar v Ram Kumar*, AIR 2001 SC 2472 : (2001) 8 SCC 24.
132. *Halsbury's Laws of England*, 4th Edn, vol 44, para 922.
133. *Bennion on Statutory Interpretation*, 5th Edn, p 316.
134. *Savitri Thakurani v Savi*, AIR 1921 PC 80.
135. *Ashoka Marketing v Rothas Kumar*, AIR 1966 Cal 591, p 594; *Kamalamma v Ismail Ispahani*, AIR 1951 Mad 895.

both in the *mofussil* and in presidency towns is regulated by special Acts.[136] The CPC applies to proceedings on the admiralty side of the high court.[137] It also applies to proceedings in the testamentary and intestate jurisdiction of the high courts and *mofussil* courts, except as otherwise provided by the Indian Succession Act, 1925[138] and, subject to the provisions of the Divorce Act, 1869, to proceedings under it. It applies to proceedings under the Hindu Marriage Act, 1955, subject to the other provisions of that Act and to such rules as may be made by the high courts.[139] As to small cause courts, there is a special provision in sections 7 and 8. Revenue Courts are civil courts and it has been held that they are governed by the CPC except in matters where a special procedure is enacted by a local Act.[140] Special provision is made in section 5 for such courts in order to preserve the summary character of rent litigation under local laws. The controller of patents is not a court, and the CPC is not applicable to proceedings before him.[141] Income-tax proceedings are not civil proceedings. Hence, rules relating to suits and appeals are not applicable to those proceedings.[142] The CPC also does not apply to proceedings under the Commissions of Inquiry Act, 1952,[143] nor to proceedings before the rent controller under the rent Acts.[144]

The State Legislature of Maharashtra, by amending section 34(1) of the Maharashtra Industrial Development Act, 1961 (the Amendment Act of 1974), made its intention clear that the provisions of Part III of the Land Acquisition Act shall *mutatis mutandis* apply to the proceedings of reference to district courts under section 34(1). The state legislature was fully conscious that the decision of the court would be a "decree" under the CPC and that the grounds for the award would be a "judgment" under the CPC. Such award for judgment would be appealable under section 96 of the CPC, if delivered by a district court. It would fall under clause 15 of the Letters Patent (if delivered by a single judge of the high court). The reference under section 34(1) was to be made to the "court", as defined in the Land Acquisition Act, and that meant a principal civil court of original jurisdiction. The expression "decision of the court" in section 34(2) cannot be restricted only to the principal civil court of original jurisdiction but must be extended to the decision of the court in accordance with the hierarchy of courts.[145]

[s 1.5] Extent Clause

Prior to its amendment by Act II of 1951, section 1, clause 3, stood as follows:

> (3) This section and sections 155 to 158 extend to the whole of British India, the rest of the Code extends to the whole of British India except the Scheduled Districts.

Under this section, the CPC was applicable to the whole of British India, except the Scheduled Districts to which area sections 155–158 were made applicable.

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136. See section 5 of the Provincial Insolvency Act 1920, and section 90 of the Presidency-towns Insolvency Act 1909.
137. *Bombay and Persia SN Co v Shepphard*, (1887) 12 ILR Bom 237, p 240.
138. *Raoji Ranchod v Vishnu*, (1884) ILR 9 Bom 241; *Esoof Hasshim v Fatima*, (1896) ILR 24 Cal 30.
139. Section 21 of the Hindu Marriage Act, 1955.
140. *Nilmoni v Taranath*, (1883) ILR 9 Cal 295.
141. Re *National Carbon Co*, AIR 1934 Cal 725 : (1935) ILR 61 Cal 450.
142. *Amalgamated Commercial Traders Pvt Ltd v ACK Krishnaswami*, AIR 1965 Mad 337, p 340 : (1965) 2 Mad LJ 275.
143. *Allem Berry and Co v Vivian Bose*, AIR 1960 P&H 86, p 94.
144. *Rayala Corp v Syed Bawkar and Co*, AIR 1957 Mad 385 : (1975) ILR Mad 856.
145. *State of Maharashtra v Chandrakant Pomaji Vasudev Somshelli*, AIR 1991 Bom 245 (DB).

By the Adaptation of Laws Order, 1950, the following was substituted for section 1(3):

> (3) This section and sections 155 to 158 extend to the whole of India except Part B States; the rest of the Code extends to the whole of India except Part B States and the Scheduled Districts.

The change introduced by this section was formal. The word "India" was substituted for "British India", but the operation of the Act was limited to Part A and Part C States which correspond to British India, and the Scheduled Districts were as before, outside the CPC, excepting sections 155–158.

Then came the Amendment Act II of 1951, which repealed section 1(3) and substituted the following:

> (3) It extends to the whole of India except—
>
> (a) the tribal Areas in the State of Assam,
>
> (b) save as hereinafter provided, the Scheduled areas in the State of Madras,
>
> (c) the State of Jammu and Kashmir,
>
> (d) the State of Manipur.
>
> *Provided* that sections 36 to 43 and O 34 in the First Schedule shall extend also to the Amindivi Islands and the East Godavari, West Godavari and Vishakapatnam Agencies in the State of Madras, and s 48 shall extend also to the said Agencies.

As a result of this amendment, the CPC came into force over the whole of Indian Union consisting of Part A, Part B and Part C States, excepting Jammu and Kashmir, the State of Manipur, the Tribal Areas in Assam, and Scheduled Areas in Madras.

Section 20 of Act II of 1951 contained a saving as regards—

The previous operation of the law, previously in force in those States or anything duly done or suffered thereunder, or any right, privilege, obligation or liability acquired, accrued, or incurred thereunder.

After the enactment of the States Reorganisation Act, 1956, the words "State of Andhra Pradesh" were introduced by the Adaptation of Laws Order, 1956. By an Amendment Act (68 of 1956), clause "d" excluding the State of Manipur was repealed. In view of section 1(3)(b), it has been held that section 115 has no application to orders passed by the courts in the Agency Tracts in Andhra Pradesh.[146] It has been held that the law in force in the Kolhan Area in Singhbum District, Bihar, is not the CPC but Wilkinson's Rules for Administration of Civil Justice.[147]

The rules of Civil Procedure which were in force in Part B States were repealed with the usual savings mentioned in section 20 of Act II of 1951, that is to say, the previous operation of the law hitherto in force in those States or anything duly done or suffered thereunder or any right, privilege, obligation or liability acquired, accrued, or incurred thereunder have been saved.

The Amendment Act, 1976 has substituted new sub-sections (3) and (4) in place of the old sub-section (3). Sub-section (3) as it stood before its amendment read as follows:

> (3) It (i.e. the Code) extends to the whole of India except—
>
> (a) the tribal areas in the State of Assam;

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146. *Lakshmi Devi v Venkatakrishnan*, (1958) (1) Andh WR 213.
147. *Dulichand v State of Bihar*, 1958 AP 366; *Mahendra Singh v Commr of Chota Nagpur Division*, (1958) AP 603.

(b) save as hereinafter provided, the Scheduled Areas in the State of Andhra as it existed immediately before 1 November 1956, and in the State of Madras;

(c) the State of Jammu and Kashmir;

Provided that sections 36–43 and O 34 in the First Schedule shall extend also to the Amindivi Islands and the East Godavari, West Godavari and Vishakapatnam Agencies in the State of Andhra Pradesh and s 48 shall extend also to the said agencies.

Now the entire CPC has been made applicable to the scheduled areas, *viz;* the Amindivi Islands, the East Godavari, West Godavari and Vishakapatnam agencies. The State of Nagaland includes the Naga Hills District and the Naga Tribal Areas. Administration of civil justice in the Naga Hills District is governed by the rules made by the Governor of Assam. Therefore, it has been provided that the CPC will not initially apply to the state of Nagaland or the tribal areas as defined in para 20 of the Sixth Schedule to the Constitution of India as in force before 21 January 1972. Power has, however, been reserved to the concerned state government to extend the CPC to the state of Nagaland or the tribal areas with such supplemental, incidental and consequential modifications as that government may think fit.

A two-judge bench of the Supreme Court has held that the provisions of the CPC are not applicable to the jurisdiction covered by the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953 (and also other similarly crafted rules) drafted under para 4 of Schedule VI to the Constitution.[148]

There are in force the Laccadive, Minicoy and Amindivi Islands (Laws) Regulation, 1956 and the Laccadive, Minicoy and Amindivi Islands (Civil Courts) Regulation, 1965 promulgated by the President, under which the CPC applies to these islands subject to certain conditions. It has therefore, been made clear that the application of the CPC to these islands shall be without prejudice to the provisions contained in those regulations for the time being in force.

The Andhra Pradesh Agency Rules do not bar jurisdiction of the civil courts in respect of disputes between non-tribals, even though they reside in, or these disputes relate to lands situated in scheduled areas.[149]

Rules for the administration of justice and police in the Nagaland Hills District, 1937, govern civil disputes in Nagaland. Provisions of the CPC are not applicable in all their force and vigour. Provisions in CPC as to the abatement of appeal was not applied to the appeal in question.[150]

[S 2] Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules;

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [151][***] section 144, but shall not include—

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

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148. *Westarly Dkhar v Sehekaya Lyngdoh,* (2015) 4 SCC 292.
149. *Ashifaquddin v Mohd Azizuddin*, AIR 1978 AP 354.
150. *Changki Village v Tibreigba*, AIR 1960 SC 73.
151. The words "section 47 or" omitted by Act 104 of 1976, section 3 (w.e.f. 1-2-1977).

(*b*) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made;

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court;

[152][(5) "foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government;]

(6) "foreign judgment" means the judgment of a foreign Court;

(7) "Government Pleader" includes any officer appointed by the [153]State Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader;

[154][(7A) "High Court", in relation to the Andaman and Nicobar Islands, means the High Court in Calcutta;

(7B) "India", except in sections 1, 29, 43, 44, [155][44A,] 78, 79, 82, 83 and 87A, means the territory of India excluding the State of Jammu & Kashmir;]

(8) "Judge" means the presiding officer of a Civil Court;

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order;

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made;

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;

(13) "moveable property" includes growing crops;

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree;

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152. Substituted by CPC (Amendment) Act 2 of 1951, section 4, for clause (5) (w.e.f. 1-4-1951).
153. Substituted for "Provincial Government" by AO 1950.
154. Inserted by Act 2 of 1951, section 4 (w.e.f. 1-4-1951).
155. Inserted by Act 42 of 1953, section 4 and Sch III (w.e.f. 23-12-1953).

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court;

(16) "prescribed" means prescribed by rules;

(17) "public officer" means a person falling under any of the following descriptions, namely:—

(*a*) every Judge;

(*b*) every member of [156][an All-India Service];

(*c*) every commissioned or gazetted officer in the military, [157][naval or air] forces of [158][the Union] [159][***] while serving under the Government;

(*d*) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties;

(*e*) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(*f*) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

(*g*) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and

(*h*) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty;

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125;

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds; and

(20) "signed", save in the case of a judgement or decree, includes stamped.

[160][* * *]

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156. Substituted for "the Indian Civil Service" by section 3 Act 104 of 1976 (w.e.f. 1-2-1977).
157. Substituted for "or naval" by Act 35 of 1934, section 2 and Schedule.
158. Substituted for "His Majesty" by AO 1950.
159. The words "including His Majesty's Indian Marine Service", omitted by section 2 Act 35 of 1934 and Schedule.
160. Clause (21) inserted by the AO 1950 and omitted by Act 2 of 1951, section 4 (w.e.f. 1-4-1951).

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[s 2.1] Definition Clause: Meaning, Object and Interpretation

It is common for all statutes to contain a small dictionary of their own in the form of a definition clause to endeavour to interpret, define and explain important terms used therein. The definition clause serves two-fold purpose. Firstly, it provides for proper interpretation of an enactment and secondly, it shortens the language of the enacting part and helps avoid repetition of the same words and expressions whenever the Legislature wants to use that term. The object of the definition clause is to declare that the words and expressions used in the Act have the meaning assigned to them by their definition.

According to Craies, there are two modes of defining a word in a statute, restrictive or extensive. Where the word "means" is used, it is in a restrictive way and where the word "includes" is used, it is an extensive way.[161] The Legislature uses the word "means" where it wants to exhaust the significance of the term defined and the word "includes" where it intends that while the term defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise, so as to make the definition enumerative but not exhaustive.[162] Sometimes, it is provided that a word shall "mean" what the definition says it shall mean and in that case, the word is restricted to the scope indicated in the definition section.[163] Sometimes, however, the word "include" is used "in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares they shall include."[164]

Justice GP Singh, in his book on interpretation,[165] has explained it thus:

> A definition section may borrow definitions from an earlier Act and the definition so borrowed may not necessarily be in the definition section but may be in some other provisions of the earlier Act. A definition borrowed by incorporation or reference may be sometimes found in the rules made under the referred statute. For example, Article 366(1) of the Constitution defines 'agricultural income' to mean 'agricultural income as defined for the purpose of enactments relating to Indian Income-tax'.

The Supreme Court, while dealing with a case under the West Bengal Government Premises (Tenancy Regulation) Act, 1976, observed that "any" is a word of very wide meaning, and *prima facie* the use of it in definition clause excludes limitation.[166]

[s 2.2] Code: Section 2(1)

"Code" includes rules

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161. Craies, *Craies on Statute Law*, 6th Edn, Sweet & Maxwell, (1963), p 212.
162. *Province of Bengal v Hingul Kumari*, AIR 1946 Cal 217.
163. *R v Britton*, (1967) 2 QB 51.
164. *Dilworth v Commr of Stamps*, (1899) AC 99 at p 105, 106 (Per Lord Watson).
165. Justice GP Singh, *Principles of Statutory Interpretation*, 12th Edn 2010, p 179.
166. *Associated Indem Mechanical Pvt Ltd v West Bengal Small Scale Industries Development Corp. Ltd.* AIR 2007 SC 788 : (2007) 3 SCC 607.

HIGH COURT AMENDMENT

Calcutta.—In clause (1) after the words "includes rules" add the words "and, in its application to Courts other than the Court of Small Causes of Calcutta, means the Code of Civil Procedure, 1908; and, in its application to that Court, means the provisions of the Code of Civil Procedure, 1908, as adopted, modified and extended by the provisions of notifications issued from time to time under the provisions of Section 8 of that Code" *vide* Cal. Gaz., Pt I, April 20 April 1967.

The chief feature of this Act is its division into two parts on the lines of the Judicature Acts, the body of the CPC and rules framed under the Act. The main body of the CPC is in the sections and the rules refer to matters of mere machinery which the high court may adapt to local conditions.

Explaining the nature and scope of this distinction, it was observed in *Sesha Giridas Sambhog v Sunder*[167] that:

The CPC consists—

(i) of that which is termed the body of the CPC; and

(ii) of the rules.

The body of the CPC is fundamental and is unalterable except by the Legislature, and the rules are concerned with the details and machinery and can be more readily altered. Thus, it will be found that the body of the CPC creates jurisdiction, while the rules indicate the mode in which it is to be exercised.[168] It follows that the body of the CPC is expressed in more general terms, and it has to be read in conjunction with the more particular provisions of the rules.[169] The CPC includes not only the sections of the CPC but also the orders and rules contained in Sch 1 and also the civil rules of practice framed by the high court under section 122 by virtue of the definitions in sections 2(1) and 2(18).[170] The rules should, by reason of this provision, be deemed to be enacted in the body of the CPC itself and that construction should be adopted which would reconcile both, the body of the Act and rules.[171] Section 73 should accordingly be read subject to O XXI, rule 89;[172] but, where there is clear conflict between the body of the CPC and the rules, the former must prevail;[173] and it has likewise been held that the form appended to the CPC should not be allowed to extend the meaning of the sections and the rules in the CPC.[174] The scheme of sections 2(1), 121–22, 126 and 127 make it clear that the alterations by the high court in the rules become part of the CPC.[175]

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167. *Sesha Giridas Sambhog v Sunder,* AIR 1946 Bom 361 : (1946) ILR Bom 756 : (1946) 48 Bom LR 252.
168. *Menkabai Manohar v M Deshpande,* AIR 1971 Bom 21 : (1971) 73 Bom LR 473.
169. *Karam Singh v Kunwar Sen,* AIR 1942 All 387 : (1942) ILR All 862; *Mani Mohan v Ram Taran,* (1916) ILR 43 Cal 148, p 152 per Jenkins CJ; *Nabin Chandra v Pran Krishna De,* (1914) ILR 41 Cal 108; *Ghuznavi v Allahabad Bank Ltd,* AIR 1917 Cal 44 (FB) : (1917) ILR 44 Cal 929; *Satyanarayana v Venkata,* AIR 1957 AP 172 (FB); *Lakshmi Kumar v Krishna Ram,* AIR 1950 MB 156.
170. *Papathi Ammal v Sivagnanam,* AIR 1954 TC 526; *Manikyam v Narasimhan,* AIR 1956 AP 108.
171. *Mani Mohan v Ramanarain,* (1916) ILR 43 Cal 148, p 52; *Ghuznavi v Allahabad Bank Ltd,* (1917) ILR 44 Cal 929 (FB).
172. *Pannalal v Lakshmi Sona,* AIR 1952 Cal 840.
173. *Basavayya v Venkatappiah,* AIR 1926 Mad 676; *Ram Dayal v Shiv Dayal,* AIR 1939 Ngp 186 : (1939) ILR Nag 250 (FB); *Karan v Kanwar,* AIR 1942 All 387.
174. *Somasundaram Chettiar v Arunachalam Chettiar,* AIR 1932 Mad 523 : (1932) ILR 55 Mad 982 : (1932) 63 Mad LJ 28.
175. *State of Uttar Pradesh v Chandra Bhusan Misra,* AIR 1980 SC 591 : (1980) 1 SCC 198 : (1980) 1 SCR 113.

[s 2.3] Decree: Section 2(2)

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [176][* * *] section 144, but shall not include—

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

(*b*) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

HIGH COURT AMENDMENT

Calcutta.—In clause (2) insert a full stop after "matters in controversy in the suit"; substitute. "In Courts other than the Court of Small Causes of Calcutta it" for "and" after "matters in controversy in the suit"; insert a semi-colon and the word "and" in place of the full stop after "preliminary or final" *vide* Cal. Gaz., Pt I, dated 20 April 1967.

[s 2.3.1] Scope

It matters not that the judgment is headed as an order, for, if it in fact fulfils the conditions of the definition under section 2(2), it is a decree and an appeal lies.[177]

In the definition, some orders which otherwise do not constitute decree are also included, and certain orders which constitute decree have been excluded from it. Merely because there exists some order captioned as a decree drawn up even in the form of decree, it would not make such an order "decree" unless the court has satisfied the requirement of section 2(2) of the CPC.[178] A decree or order becomes enforceable from its date, but in appropriate cases, the court passing the decree may prescribe the time wherefrom the decree becomes enforceable on a future date. In a case where the language of the decree is capable of two interpretations, one of which assists the decree-holder to obtain the fruits of the decree, and the other which prevents him from taking the benefits of the decree, the interpretation which assists the decree-holder should be accepted. The policy of law is to give a fair and liberal, and not a technical construction, enabling the decree-holder to reap the fruits of his decree.[179]

Where the question was whether the Award of an Arbitrator tantamounts to a decree or not, it was held that section 36 of the Arbitration and Conciliation Act, 1996 makes it very clear that such an award has to be enforced under the CPC in the same manner as if it were a decree of a court. Accordingly, it was held that the said language leaves no room for doubt as to the manner in which the Award is to be accepted.[180]

[s 2.3.2] Essentials

It is evident from a bare reading of the definition that "decree" has the following essential elements:

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176. The words and figures "section 47 or" omitted by Act 104 of 1976, section 3 (w.e.f. 1-2-1977).
177. *Adinarayan v Narasimha*, AIR 1931 Mad 471 : (1931) ILR 54 Mad 337.
178. *Chelaram v Manak*, AIR 1997 Raj 284.
179. *Deep Chand v Mohal Lal*, [2000] 4 LRI 875.
180. *Leela Hotels Ltd v Housing & Urban Development Corporation Ltd*, AIR 2012 SC 903.

(i) there should be an adjudication;

(ii) the adjudication should determine the rights of parties regarding the matter in controversy;

(iii) the adjudication should be in a suit and the adjudication should be formal and conclusive so far as that court is concerned.[181]

For determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests:

(i) there must be an adjudication;

(ii) such adjudication must have been given in a suit;

(iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(iv) such determination must be of a conclusive nature; and

(v) there must be a formal expression of such adjudication.[182]

In paragraph 14 of the judgment in the above case,[183] SB Sinha J, (speaking for the Bench), observed as follows:

> A decree is defined in section 2(2) of the Code of Civil Procedure to mean the formal expression of an adjudication which, so far as regards, the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matter in controversy in the suit. It may either be preliminary or final. It may be partly preliminary and partly be final. The Court with a view to determine whether an order passed by it is a decree or not must take into consideration the pleadings of the parties and the proceedings leading up to the passing of an order. The circumstances under which an order had been made would also be relevant.

[s 2.3.3] Judgment, Order and Decree

"Judgment" stands on a different footing from the "order" and the "decree". The Legislature has avoided the use of words "formal expression" in the definition of "judgment", though the words "formal expression" have been used in the definition of "order" in section 2(14). Conversely, it is not necessary that in a decree, there should be a statement of reasons given by the judge. Statement of reasons is to be given by the judge, only in the "judgment". The decree is the formal expression of conclusions arrived at in the judgment. So, a formal expression of the order in the judgment is not necessary, though it is desirable.[184]

However, the Supreme Court has laid down that an order admitting a second appeal is neither a final order nor an interlocutory/interim order. It does not amount to a judgment, decree, determination, sentence or even "order" in the traditional sense. It does not decide any issue but merely entertains an appeal for hearing.[185]

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181. *Dewan Brothers v Central Bank of India*, AIR 1976 SC 1503 : (1976) 3 SCC 800; *R Rathinavel Chettiar v V Sivaraman*, (1999) 4 SCC 89; *Ratansingh v Vijaysingh*, AIR 2001 SC 279 : (2001) 1 SCC 469.
182. *S Satnam Singh v Surender Kaur*, AIR 2009 SC 1089 : (2009) 2 SCC 562 : (2009) 1 Civil Court Cases 597 (SC).
183. *S Satnam Singh v Surender Kaur*, AIR 2009 SC 1089 : (2008) 2 SCC 562 : 2009 (1) Civil Court Cases 597 (SC). See also *Parayya Allayya Hittalamani v Sri Parayya Gurulingayya Poojari*, (2007) 14 SCC 318 : 2008 (1) Civil Court Cases 172 (SC) .
184. *Boards & Boards Pvt Ltd, Jaipur v Himalaya Paper Pvt Ltd, New Delhi*, AIR 1990 Raj 120 (DL Mehta, J).
185. *SB Minerals v MSPL Ltd*, AIR 2010 SC 1137 : (2010) 12 SCC 24.

An order disposing of a suit deciding the question of maintainability, hearing only the defendant in absence of the plaintiff is to be treated as dismissal for default and is not a decree.[186]

[s 2.3.4] "Formal Expression"

All requirements of form must be complied with. Accordingly, it was said that if no decree has been drawn up, no appeal will lie from the judgment.[187] It has however, been held that the right of a party to prefer an appeal is not affected by the failure to draw up a decree as that is only formal.[188] In some courts, the practice is not to draw up a decree embodying an adjudication under section 47. In such a case, the decision is both, a judgment and a decree and filing the certified copy of the decision is sufficient compliance of O XLI, rule 1.[189] It has also been held that a party in whose favour a final adjudication has been made is entitled to apply for its enforcement in execution even though no formal decree has been drawn up.[190] Where an order has been made dismissing a suit and a formal decree has been drawn up, it does not cease to be a decree merely because reasons for the dismissal have not been given and the provisions of O XX, rules 4(2) and 4(5) have not been complied with.[191]

An order must satisfy the requirements of section 2(2) in order to become a decree. Merely labelling it as a decree does not make it a decree.[192]

When a decree is challenged in appeal, the appellate hearing is a re-hearing of the subject matter. The lower court decree is merged in the appellate decree.[193]

When an appeal is declared as having abated, there is no question of drawing up a decree. There is no adjudication of any question in such a case.[194]

The concept of "judgment" in section 2(2) of the CPC is narrow and cannot be applied for interpreting the word "judgment" in the Letters Patent.[195]

[s 2.3.5] "Conclusively Determines"

This expression implies that the decision must be one which is complete and final as regards the court which passed it. The decree may conclusively determine the rights of the parties, although it does not completely dispose of the suit.[196]

When any order decides only the question of limitation, such an order will not be a "decree" within the meaning of section 2(2) of the CPC because such an order does not result in

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186. *Smt Purabil Dasgupta (Sarkar) v Arun Kumar*, AIR 2010 Gau 66 (Agartala Bench).
187. *Mt Chauli Subhadra Devi v Mt Meghoo*, AIR 1945 All 268 : (1945) ILR All 798; *Baliram Ganpatrao v Monohar Damodur*, AIR 1943 Ngp 204 : (1943) ILR Nag 241; *Bai Divali v Shah Vishnu*, (1910) ILR 34 Bom 182; *Sakharam v Sadashiv*, (1913) ILR 37 Bom 480; *Jothi Prasad v Ganeshi Lal*, AIR 1961 P&H 120.
188. *Parasuram v Heera Bai*, AIR 1957 Bom 59.
189. *Shakuntala Devi v Kuntal Kumari*, AIR 1969 SC 575 : (1969) 1 SCR 1006.
190. *Rajeswara Rai v Sohanlal*, AIR 1957 Pat 398.
191. *Peethambar v Sohanlal*, AIR 1957 All 107.
192. *Bal Kishan v Tulasi Bai*, AIR 1987 MP 120.
193. *Sadhu Singh v Dharam Dev*, AIR 1980 SC 1654 : (1981) 1 SCC 510.
194. *Madan Naik v Hansubala Devi*, AIR 1983 SC 676 : (1983) 3 SCC 15.
195. *Shah Babulal Khimji v Jayaben D Kania*, AIR 1981 SC 1986 : (1981) 1 SCC 8 : (1982) 1 SCR 87.
196. *Srijib v Dandi Swami Jagganath Asram*, AIR 1941 Cal 618. See note below "Preliminary Decree".

conclusive determination of the right of the parties envisaged by section 2(2) with regard to all or any matter in controversy in a suit.[197]

An order allowing withdrawal of suit, without liberty to file fresh suit and without adjudication, does not constitute a decree.[198]

An order dismissing an application under O XXII of the CPC on the ground that the adoption deed was not executed in accordance with the Hindu Adoption and Maintenance Act, 1956, does not amount to a decree as defined in the CPC, since it does not determine the question finally as to who is the legal representative of the deceased.[199]

In a suit for permanent prohibitory injunction, an order of dismissal directing the plaintiff to remove unauthorised construction on the suit property put up during the pendency of the suit does not amount to a decree, as defined in the Code, but it certainly amounts to an executable order in favour of the defendant.[200]

[s 2.3.6] "Rights of Parties With Regards to All/Any of Matters in Controversy"

There must have been an adjudication on the rights of the parties.[201] Any adjudication which conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit, is a decree within the meaning of section 2(2) of the CPC and an appeal lies against it under section 96. The judgment and decree rendered *inter partes* is binding on *inter partes*.[202] The expression "matter in controversy in the suit" means such matter as has been brought up for adjudication by the court through the pleadings. Hence, the conclusive determination, in order to amount to a decree must be on matters in controversy in the suit. A compromise collateral to a suit offered by one party and accepted by the other, where the document of compromise is not recorded through a decree but is merely drawn up, cannot attract the provisions of O XXIII, rule 3 of the CPC and the court should not make a decree. An order refusing to record a compromise cannot be tantamount to a decree within the meaning of section 2(2) and is not therefore, appealable under section 96. The order cannot be held to be an adjudication which conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit.[203]

Where redemption was claimed by certain plaintiffs (as heirs of mortgagors) and others, on the application for substitution by legal representatives of one of the deceased original plaintiffs, the trial court directed that all the other plaintiffs except the sons of the mortgagor were not necessary parties to the suit and, therefore, their names were struck out. After this, the suit proceeded in the absence of those plaintiffs and ended in a decree. The rights of those plaintiffs were not determined. It was held that the order directing striking out the names of parties was not a decree. All that the order means, is that those plaintiffs were improperly joined in the suit and their names were struck out. This order contains a mere finding that those persons were not necessary parties to the suit and hence, is not a decree. Consequently, they could not appeal against it.[204] Thus, a decision on the question of possession as between the landlord and his tenant in a suit under the Rent Act is a decision on the rights of the parties

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197. *Chelaram v Manak*, AIR 1997 Raj 284.
198. *Kandapazha Nadar v Chitraganiammal*, AIR 2007 SC 1575 : (2007) 7 SCC 65.
199. *Ashwani Kumar v Smt Vidya*, AIR 2007 All 105.
200. *KM Basheer v Trie-Tee Trading Co Ltd*, AIR 2007 Ker 291 : 2007 (4) Ker LT 113.
201. *Ma Chon v Maung Myint*, AIR 1927 Rang 148 (PC) : (1927) ILR 5 Rang 838.
202. *MS University v Kumara Gurubara Swamigal Arts College*, AIR 1997 Mad 386.
203. *Gopupeddireddi v Gopu Tirupathy Reddy*, AIR 1981 AP 362.
204. *Anjeeni Prasad v Ishwardin*, AIR 1982 MP 10.

and is a decree.[205] An order of dismissal for default of appearance is no determination of the rights of the parties and, therefore, is not a decree.[206] So also, an order under O IX, rule 2, dismissing a suit when summons is not served in consequence of plaintiff's failure to pay court-fee.[207] Special provision is made in the definition of a decree for orders of dismissal for default, apparently because the previous cases were not uniform. An order rejecting an appeal under O XLI, rule 10 for failure to furnish security is not a decree as it does not determine the rights of the parties in controversy in the appeal.[208] An order granting leave to withdraw a suit with leave to file a fresh suit is not a decree, for the rights of the parties are left open for determination in the subsequent suit.[209] Also, dismissal of a suit as withdrawn under O XXIII, rule 3, is not a decree;[210] but an order dismissing the appeal on a prayer for withdrawal is a decree, for the appeal is brought before the court and finally disposed of.[211] The right in controversy must be a substantive right, and not merely a processual right, for a finding on a processual right is only to enable the court to inquire into the rights in controversy in the suit.[212] Thus, an order that a plaint should be stamped with a higher court-fee is not a decree.[213] It is only an order which may be open to revision.[214] An order directing stay of a suit is not a decree;[215] nor an order refusing stay in an appeal under O XLI, rule 5;[216] nor an order remanding a suit for fresh disposal.[217]

A divorce petition under section 13 of the Hindu Marriage Act, 1955 cannot be treated as a plaint and the proceeding a suit and an order passed thereunder is not a "decree" under the CPC.[218] However, an order dismissing a suit under the Hindu Marriage Act, 1955 on the ground of *res judicata* is a decree and is appealable.[219]

When an application for the grant of probate or letter of administration is contested, such application is automatically converted into a regular suit and a final decision thereon results in the form of a decree.[220]

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205. *Kanji Hirji v Jivraj Dharamshi*, AIR 1976 Guj 152.
206. *Gauhati Bank Ltd v Baliram*, AIR 1950 Assam 169; *Rulaninimayi v Chandra*, (1912) ILR Cal 341; *Shyam Mandal v Satinath*, (1917) ILR 44 Cal 954; *Gajrap Mati v Shami Nath*, (1916) ILR 39 All 13; *Suraj Deo v Pratap Rai*, AIR 1923 Pat 514 : (1923) 2 Pat 739; *Abdul Majid v Jawahir*, (1914) ILR 36 All 350. *contra Balaramdas v Harak Chand*, AIR 1949 All 754.
207. *Lachmi Narain v Darbari Lal*, (1916) ILR 38 All 357; *Lucky Chum v Budurunnissa*, (1883) ILR 9 Cal 627.
208. *Lekha v Bhauna*, (1896) ILR 18 All 101; *Ramesh v Moindra*, AIR 1922 Cal 246 : (1921) ILR 49 Cal 355; *Nazim v Abdul*, AIR 1922 Lah 87 : (1922) ILR 3 Lah 30.
209. *Genda Mal v Pirbhu Lal*, (1895) ILR 17 All 97; *Jogodindro v Sarup Sundari*, (1801) ILR 18 Cal 322; *Abdul Hossein v Kasi Sahu*, (1900) ILR 27 Cal 362; *Patloji v Ganu*, (1891) ILR 15 Bom 370.
210. *Devenssi v Anthoni*, AIR 1969 Ker 78.
211. *Mahapatrao v Magata Patrao*, AIR 1933 Mad 442 : (1933) ILR 56 Mad 520.
212. *Dattatraya v Radhabai*, AIR 1921 Bom 220 : (1921) ILR 45 Bom 627, 634; *Danduppa v SG Motor Transport Co*, (1966) 1 Mys LJ 786.
213. *Mir Umar Ali v Nasib-un-nissa*, (1911) PR 82.
214. *Murthi Raju v Subbaraju*, (1944) ILR Mad 626.
215. *Narayana v Rama*, AIR 1953 TC 367.
216. *Rangasami Chettiar v Ishwaramurthi Gounder*, AIR 1954 Mad 1053 : (1953) ILR Mad 1104.
217. *Sivalal v Jugal Kishore*, AIR 1940 Ngp 340 : (1940) ILR Nag 538; *Zanab Bi v Wajahat Hussain*, AIR 1959 MB 384; but see *Paras Das v Premchand*, AIR 1935 Pat 456.
218. *Smt Baby Deb v Ajit Deb*, AIR 2008 Gau 49.
219. *Bimalendu Ghose v Smt Mukti Ghosh*, AIR 2008 (NOC) 1461 (Cal).
220. *Miss Pressy Pinto v Rony Maxim Pinto*, AIR 2009 Kant 157 (DB).

Where an attachment of perishable goods was ordered, an order directing the party to furnish security for raising attachment cannot be treated as an order adjudicating rights of the parties and as such cannot be called a decree.[221]

Where in a suit for partition, directions are given for issuance of final decree on production of stamp paper, an adjudication on objections raised in relation to process of engrossment cannot be said to be determination of rights of parties leading to a decree.[222]

Suit for partition was decreed by the high court on second appeal by the plaintiff. The question of arrears of rent and mesne profit was not raised. This question was also not raised in first appeal or before the trial court. It was held that it could not be said that the high court had passed a decree for rent and mesne profits. The trial court could not grant relief in that respect. The high court observed as under:

> I am, therefore, of the opinion that the High Court passed the decree for partition of the two shops only and by implication, the other reliefs were denied. The execution application filed by the decree-holders for arrears of rent and mesne profit was clearly in excess of the decree passed by this court and the trial court could not have granted any relief in this respect.[223]

[s 2.3.7] "In the Suit"

Every suit is commenced by a plaint,[224] and when there is no civil suit there is no decree.[225] Some proceedings commenced by an application are statutory suits so that the decision is a decree, eg a contentious probate proceeding[226] or an application to file an agreement to refer to arbitration.[227] It has been held in *Bewri v Suwalal*[228] that the decision in an application for probate cannot be held to be a decree by virtue of section 295 of the Indian Succession Act, 1925, which enacts that an application for probate is to be regarded, where contested, as a regular suit, as it is only an adjudication given in a suit, commencing with the presentation of a plaint that is a decree under section 2(2). A contrary view has been taken by the Allahabad and Madras High Courts.[229]

[s 2.3.8] Preliminary and Final Decree

The explanation in section 2(2) of the present CPC has been newly added and so also, the provision in the main definition that a decree may be either preliminary or final. In a preliminary decree, certain rights are conclusively determined and unless the preliminary decree is challenged in appeal, the rights so determined become final and conclusive and cannot be questioned in the final decree.[230] A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then,

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221. *Siddaganga Oil Extraction Pvt Ltd, Tumkur v Pioneer Foods and Paultry Products Pvt Ltd*, AIR 2009 (NOC) 344 (Kar).
222. *Arun Kumar Singh v Col Hari Singh*, AIR 2009 Raj 18 : 2009 (1) Raj LW 18.
223. *Ummed Mal v Kundan Mal*, AIR 1981 Raj 202.
224. *Venkata v Venkatarama*, (1899) ILR 22 Mad 256; *Upadhya v Peridh Singh*, (1896) ILR 23 Cal 723; *Ram Kirpal v Rup Kuari*, (1884) ILR 6 All 269, 274 : 11 IA 37; *Jagdishwar Sahai v Surjan Singh Pal*, AIR 1977 All 554.
225. *Minakshi v Subramanaya*, (1888) ILR 11 Mad 26, 35 : 14 IA 160.
226. *Umrao Chand v Bindraban Chand*, (1895) ILR 17 All 475, p 477.
227. *Guru Charan v Uma Charan*, (1921) 26 Cal WN 940; *contra Rajmal v Maruti*, (1920) 22 Bom LR 1377; *Satish Chandra v Pali Ram*, AIR 1921 Pat 161 : (1921) 6 Pat LJ 287 — submitted to be incorrect.
228. *Bewri v Suwalal*, AIR 1951 Raj 1919.
229. *E Moah Stephens v HG Orme*, 35 All 448; *Rodriguez v Mathews*, (1911) 21 Mad LJ 431.
230. *Parvathamma v A Muniyappa*, AIR 1997 Ker 37.

as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined, and a decree is passed in accordance with such determination. That is the final decree. Both the decrees are in the same suit and if the preliminary decree is set aside, the final decree is superseded.[231] Final decree may be said to become final in two ways:

(i) when the time for appeal has expired without any appeal being filed against the preliminary decree or a matter has been decided by the highest court;

(ii) when as regards the court passing the decree, the same stand completely disposed of.

It is in the latter sense that the word "decree" is used in section 2(2) of the CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree.[232] It has been further observed in the above case that final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. In the case of *Hasham Abbas Sayyad v Usman Abbas Sayyad*,[233] the Supreme Court has explained that preliminary decree declares the rights and liabilities of parties; however, in a given case a decree may be both preliminary and final. There can be more than one final decree. A decree may be partly preliminary and party final, but what can be executed is a final decree and not a preliminary decree, unless final decree is a part of the preliminary decree. Preliminary decree is a decree within the meaning of section 2(2) of the CPC, but it is not capable of execution, normally, till a final decree is passed.[234] Order XX enumerates the classes of suits in which preliminary decrees are to be passed but this is not exhaustive and does not preclude the court from passing a preliminary decree in cases not expressly provided for in the CPC.[235] Even in suits of the nature mentioned in O XX, if the matters in dispute are simple and do not involve elaborate scrutiny of accounts, the court is not bound to pass a preliminary decree and may proceed straightaway to pass a decree for the amount determined as due.[236] The question has sometimes arisen for decision whether there can be more than one preliminary decree and one final decree in a suit. On that, judicial opinion was divided; some decisions took the view that there could be only one preliminary decree and one final decree,[237] while others held that there was nothing in the CPC prohibiting the passing of more than one preliminary or final decree.[238]

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231. *S Talabali v Abdul Aziz*, AIR 1920 Cal 689 : (1930) ILR 57 Cal 1013.
232. *S Balwant Lokhande v Chandrakant Shankar Lokhande*, AIR 1995 SC 1211 : (1995) 3 SCC 413.
233. *Hasham Abbas Sayyad v Usman Abbas Sayyad*, AIR 2007 SC 1077 : (2007) 2 SCC 355 : 2007 (3) Civil Court Cases 793.
234. *A Akkukamma v G Papi Reddy*, AIR 1995 AP 166.
235. *Dattatreya v Radhabai*, AIR 1921 Bom 220 : (1921) ILR 45 Bom 627, 633; *Raja Peary Mohan v Manohar*, AIR 1924 Cal 160 : (1923) 27 Cal WN pp 989, 992–93; *Abdul Shukur v Abdul Rehman*, AIR 1923 Mad 284 : (1928) ILR 46 Mad 148; *U Ba Pe v U Pe Seon*, AIR 1928 Rang 168 : (1928) ILR 6 Rang 97; *Narayanan Thampi v Lakshmi Narayana*, AIR 1953 TC 220 : (1953) ILR TC 89 (FB); *UOI v Khetra Mohan*, AIR 1960 Cal 190.
236. *Purushotam Haridas v Amruth Ghee Co Ltd, Guntur*, (1960) Andh LT 524 : (1960) 2 Andh WR 115.
237. *Rudhra Pratap Singh v Sarada Mahesh Prasad Singh*, AIR 1925 All 588 : (1925) 47 All 543; *Bhawar Indo v Yakub Hassan*, (1913) ILR 35 All 159; *Banwarilal v Beni Prasad*, AIR 1937 All 694; *Kedernath v Parsu Lal*, (1945) ILR 20 Luck 557.
238. *Kasi v Ramanathan*, (1947) 2 Mad LJ 523; *Basavayya v Gunnayya*, AIR 1951 Mad 938 : (1952) ILR Mad 173; overruling *Ghulsuma Bibi v Ahmeda Rowther*, (1919) ILR 42 Mad 296; *Virayya v Viswanathayya*, AIR 1957 Pat 25; *Nallaswami v Avadayammal*, AIR 1958 Mad 462; *Raja Peary Mohan Mookerjee v Manohar Mookerjee*, (1923) 27 Cal WN 989.

In accordance with this view, where the plaintiff was found to be entitled to contribution, but the amount was left to be determined later on, it was held that the order was a preliminary decree.[239]

[s 2.3.9] Preliminary Decree in Partition Suit

Where the preliminary decree in a suit for partition, while declaring the shares to which the parties were entitled, failed to give any direction as to profits after the institution of the suit, it was held that it was competent for the court in a subsequent application to pass an order directing inquiry into such profits and that it was, in substance, a preliminary decree.[240] Likewise, a supplemental order determining the period for which the party is liable for *mesne* profits was held to be a preliminary decree.[241] In a suit for partition, a preliminary decree was passed declaring the plaintiff entitled to one-eighth share and thereafter, one of the parties having died, an application was put in by the plaintiff claiming that his share had become thereby augmented to one-seventh. An adjudication of that question was held to be a further preliminary decree.[242] It has also been held that whether an order is a preliminary decree or is merely an interlocutory order, must depend upon its substance and not the form.[243]

SB Sinha, J, speaking for the Supreme Court Bench observed as follows:

> A decree therefore may denote final adjudication between the parties and against which an appeal lies, but only when a suit is completely disposed of thereby a final decree would come into being. There cannot be any doubt whatsoever that a decree may be partly preliminary and partly final.[244]

The bench went on to observe further as follows:

> It is now well settled that for the purposes of construing the nature of the decree one has to look to the terms thereof rather than speculate upon the Court's intentions.[245]

The conflict of view has been set at rest by the Supreme Court at least as regards partition suits. The court has observed that there is nothing in the CPC prohibiting the passing of more than one preliminary decree, if circumstances so justify. In some cases, it may even be necessary so to do, particularly in partition suits where after a preliminary decree has been passed, some parties die resulting in the shares of the other parties being augmented. In such an event, the court can and indeed should pass a second preliminary decree correcting the shares. If there is a dispute in that regard, the order of the court deciding that dispute and altering the shares set out in the previously passed preliminary decree is a decree in itself which is subject to an appeal.[246]

See also notes under O XX, rule 18.

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239. *Nawab Mirza Md Sadiq Ali Khan v Nawab Fakir Jahan Begum*, 9 Luck 701: PC Appeal No. 131 and 132 of 1929, decided on 19 October 1931 (PC).
240. *Basavayya v Guruvayya*, (1952) ILR Mad 173.
241. *Pulwa v Brijnandan Prasad*, AIR 1959 Pat 397.
242. *Parasuram v Heera Bai*, AIR 1957 Bom 59.
243. *Kasi v Ramanathan*, (1947) 2 Mad LJ 523.
244. *Bikoba Deora Gaikwad v Hirabai Marutirao Ghorgare*, AIR 2009 SC (Supp) 454 : (2008) 8 SCC 198 : (2008) 3 Civil Court Cases 310 (SC).
245. *Bikoba Deora Gaikwad v Hirabai Marutirao Ghorgare*, (2008) 8 SCC 198, para 11 : 2008 (3) Civil Court Cases 310 (SC).
246. *Phoolchand v Gopal Lal*, AIR 1967 SC 1470 : (1967) 3 SCC 153; *Mayimu v Chariya Malayammal Mayimu*, AIR 1968 Ker 282; *Ram Kishore v Kesho Ram*, AIR 1972 All 336. See also O XX, rule 18.

[s 2.3.10] Partly Preliminary/Final decree and More Than One Preliminary/Final Decrees

The explanation to the sub-section makes it clear that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. A decree may be partly preliminary and partly final.

It is settled law that there can be more than one preliminary decrees in a suit. Similarly, there can be more than one final decree in a suit.[247]

[s 2.3.11] Order of Company Law Board as Preliminary Decree

Where the dispute between parties was resolved with the persuasion of company law board and a family settlement was executed by parties, terms of which were set down in Memorandum of Family Arrangement and transfer document which provided for transfer of some of properties of company to one of the groups on its paying certain amount and that the other group would retain remaining assets and the order of the company law board which was passed on consent of parties, recorded that the said Memorandum of Family arrangement and transfer document would form integral part of the order, the order could not be refused to be executed on application by one of parties under section 634A. It was not an interim order but a final one because operative portion of the order directed the execution of the Memorandum and transfer document by the parties after completion of the schedules thereto. Moreover, the word "any order" used in the opening of section 634A, indicates that all orders made by the company law board on an application under sections 397 and 398 of the Companies Act, 1956 are enforceable like decrees without any limit on the nature of the order passed by the company law board. Moreover, the order was in fact a preliminary decree. Final disposal of the matter or the final decree would be after full implementation of the terms of the Memorandum and transfer document. Further, since the company law board when it deals with an application under section 634A sits as an executing court it is subject to all the limitations to which a court executing a decree is subject.[248]

[s 2.3.12] Deemed Decree

Order made under rule 58(2) of O XXI of the amended CPC adjudicating the claim made against attachment of property in execution, therefore, has only the status of "deemed decree" and not a "decree" by itself. Such orders are not covered by the definition under section 2(2) namely, of "decree" so as to attract the provisions of section 96 of the CPC. Only a "miscellaneous appeal" lies against such "order" and not a "regular appeal".[249]

Where, in a case under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002, the borrower approached the Lok Adalat and an award was passed with the consent of the Bank, no further action under the Act can be taken as the award is a deemed decree.[250]

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247. *Rachakonda Venkat Rao v R Satya Bai*, AIR 2003 SC 3322 : (2003) 7 SCC 452.
248. *Manish Mohan Sharma v Ram Bahadur Thakur Ltd*, AIR 2006 SC 1690.
249. *B Nookaraju v MSN Charities*, AIR 1994 AP 334.
250. *Rajan Kakar v Vijaya Bank*, AIR 2008 Del 17. See also *United India Insurance Co Ltd v Master Jaseem Khan*, AIR 2008 Del 26 : (2007) 144 DLT 406.

Award of the Lok Adalat was deemed to be decree of a civil court and executable as a legally enforceable debt when the decree is for recovery of money or repayment of debt.[251]

In an interesting case, the high court held that for dismissal of a suit, framing of the issues is necessary, whereas for rejection of a plaint, it is not necessary, and it can be done at any stage. It was further held that the order rejecting the plaint is appealable, but dismissal of a suit, without framing an issue and before trial as not maintainable, is not appealable. The Supreme Court[252] setting it aside held that in terms of section 2(2), in case, the court adjudicating the case, conclusively determines the rights of the parties with regard to any one or more or all of the matters in controversy in the suit, the requirement of the decree is satisfied. It was further held by the Supreme Court that such determination can be preliminary or final.

In the instant case,[253] it was found that the order had conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, *viz.*, *res judicata*. Although it was not an order passed on framing an issue, but at the same time, there was adjudication on the controversy as to whether the suit was barred by *res judicata* in the sense that there was a judicial determination of the controversy after referring to the materials on record and after hearing both sides. The court held that the impugned order dismissing the suit on the ground of *res judicata* did not cease to be a decree on account of a procedural irregularity of non-framing an issue. Courts ought to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. Therefore, even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under section 115 of the CPC in view of the specific bar under sub-section (2) thereof. It is only appealable under section 96 read with O XLI of the CPC. The order passed by the trial court was found to be a composite order on rejection of the plaint by the Supreme Court as there was no cause of action and dismissal of the suit was not maintainable on the ground of *res judicata*. Both aspects were held to be covered by the definition of decree under section 2(2) of the CPC and, therefore, it was concluded that the remedy was only appeal and not revision even if there was any irregularity in passing the order.

An award rendered under the Arbitration and Conciliation Act, 1996, is a deemed decree only for the purpose of enforcement under section 36 of the Act. The enforcement is done by taking steps under CPC for the realisation of money. The use of the words "as if" in section 36 of the Act demonstrates that it is a decree only by a legal fiction and the said legal fiction is created only for the purpose of its enforcement as decree cannot be extended beyond the purpose for which it was created.[254]

By virtue of the deeming provision in section 26(2) of the Land Acquisition Act, an award made either under sections 18, 28A or 30 is deemed to be a decree as defined in the CPC and the reasons for such decree constitute "judgment" for the purpose of section 2(9) of the CPC.[255]

A division bench of the Andhra Pradesh High Court has held that an arbitral award is not a decree within the meaning of section 2(2) of the CPC, but for the purpose of execution/ enforcement it shall be deemed to be decree.[256] When in a case of theft of electrical energy, civil liability against the consumer is determined by the Special Court, that by itself is not a

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251. *Arun Kumar v Anita Mishra*, AIR 2019 SC 5745 : (2020) 16 SCC 118 : ICL 2019 SC 1217;.
252. *Rishabh Chand Jain v Ginesh Chand Jain*, AIR 2016 SC 2143 : (2016) 6 SCC 675.
253. Supra Note 62.
254. *Paramjeet Singh Patheja v ICDS Ltd*, AIR 2009 SC 168.
255. *Fertilisers and Chemical Travancore Ltd v Kumaran*, AIR 2009 Ker 182 : (2009) 2 Ker LT 936.
256. *Lakhamraju Sujatha v Yuvraj Finance Pvt Ltd*, AIR 2010 (NOC) 276 (AP—DB).

decree and it is only by a fiction of law that such a liability would be recovered as if it were a decree of civil court.[257]

A full bench of the Patna High Court has held that appeals filed under section 19 of the Family Courts Act, 1984 cannot be treated as appeals against a decree having been passed in exercise of original jurisdiction as the omission of the word "decree" in section 19 is deliberate and intention.[258] Speaking for the full bench, Shiva Kirti Singh, Acting CJ, in the above case, explained it as follows:

> The word decree is conspicuous by its absence in Section 19(1) of the Act and the *non obstante* clause noticed above clearly means that the distinction made in the Code of Civil Procedure between appeals from original and those from Orders have been done away with. As a result, the provision for appeal under Section 19 of the Act is meant to take care of all kinds of judgments and orders of the Family Courts, not being interlocutory in nature, regardless of the fact whether such judgments and orders amount to a decree as defined under the Code of Civil Procedure or not.

[s 2.3.13] Orders Which Are Decree

The following have been held to be decrees within this sub-section:

(a) An order under section 24 of the Bombay Money Lenders Act, 1946 granting or refusing to grant instalments for payment of the decretal amount;[259]

(b) an order rejecting the application of tenants under section 6 of the West Bengal Premises Rent Control (Amendment) Act, 1950, for rescission of a decree in ejectment;[260]

(c) an order under section 14 of the Religious and Charitable Endowments Act, 1863;[261]

(d) an order transmitting a decree to the collector for execution under section 19 of the UP Encumbered Estates Act, 1934 with the information that the debt is reduced;[262]

(e) an order declaring the defendant a debtor under section 3(c) of the Karnataka Debt Relief Act, 1976, with the consequence that the debt advanced to him stood discharged under section 4(a) of the Act is a decree.[263]

(f) a modification in a decree is also a "decree".[264]

(g) An award under Pt III of the Land Acquisition Act by a civil court is by reason of section 26 of that Act, a decree.[265]

(h) An order made in winding up proceedings under the Indian Companies Act, 1956;[266]

(i) An order setting aside an *ex parte* decree is a decree and the plaintiff aggrieved by such an order can appeal against it.[267]

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257. *BSES Rajdhani Power Ltd v State, NCT of Delhi*, AIR 2010 Del 91 : (2011) 121 DRJ 34.
258. *Sunita Kumari v Prem Kumar*, AIR 2009 Pat 183 : (2010) 2 DMC 264 (FB).
259. *State of Bombay v Narayan Pure*, AIR 1960 Bom 334; *Mohan Lal v Bunshi Lal*, AIR 1961 Raj 13; dissenting from *Danuk Dhari Singh v Ram Ratan Singh*, AIR 1941 Pat 1 : (1940) ILR 8 Pat 862.
260. *Gobardan Dutta v Pramoda*, AIR 1953 Cal 412; *Radharani v Sisir Kumar*, AIR 1953 Cal 524.
261. *Ram Narain v Jai Narain*, AIR 1961 All 125.
262. *Chief Inspector of Stamps v Uggar Sen*, AIR 1965 All 298 : (1964) All LJ 977.
263. *Kariyaiah v Puttathayamma*, AIR 1977 Kant 32 : (1976) ILR Kant 1294.
264. *Panneshwar Lal v Gokula Nandan Prasad*, AIR 1984 Pat 344, pp 346–47.
265. *Louis Pascal v Spl Land Acq Officer*, (1970) 72 Bom LR 703.
266. *Pushpabai v Offl Liquidator*, AIR 1970 Bom 271, 274 : (1969) 71 Bom LR 372.
267. *Bhim Rao v Laxmibai*, AIR 1966 Mys 112 : (1965) 1 Mys LJ 786.

(j) The determination of a question under section 47 was expressly included in the definition of a decree, although such determination was not made in a suit and sometimes not drawn up in the form of a decree.[268]

(k) It is no longer so in view of deletion of the words "section 47 or". A right of appeal had been provided to a party litigant to go up in appeal against an order passed under section 47, before the Amending Act of 1976, by virtue of the legal fiction introduced in the definition of the term "decree" as including any order passed in the execution proceedings. This right had been taken away by a valid enactment and it no longer survived after the execution was levied on 4 January 1979, as the Amending Act had already come into force with effect from 1 February 1977. No appeal would lie against any order passed under section 47 of the CPC.[269]

(l) An order modifying a scheme under section 92 of the CPC, which is part of a decree, constitutes an amendment in decree against which an appeal would lie;[270]

(m) An order rejecting an application for modification of such a scheme.[271]

(n) An adjudication under section 5(2) of the Malabar Tenancy Amendment Act, 1956, is in substance the final adjudication of a matter in controversy and is a decree, although the proceedings thereunder were initiated by an application.[272]

(o) The High Courts of Gujarat and Punjab have taken the view, that adjudications under sections 9–11 and 13 of the Hindu Marriage Act, 1955, are decrees for the purposes of those provisions only, but are not decrees within the meaning of this sub-section as they are not passed in a suit.[273] But, a contrary view was earlier taken by the High Court of Allahabad.[274]

The Jammu and Kashmir High Court has held that where the husband's petition for divorce is dismissed for default, it will not amount to a decree and hence no independent application under section 33 of the J&K Hindu Marriage Act is maintainable for recovering "*Streedhan*".[275]

(p) An order rejecting a plaint is a decree and is not revisable under section 115 of the CPC but appealable under section 96 of CPC.[276]

(q) When a criminal case is referred by a criminal court and is settled by the Lok Adalat, its award cannot be executed as a decree passed by a civil court. The reason behind this view is that when a reference is made to Lok Adalat, that authority is exercising the powers enjoyed by the reference court and can only pass such order which the reference court was competent to pass.[277]

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268. *Shakuntala Devi v Kantal Kumar*, AIR 1969 SC 575 : (1969) 1 SCR 1006.
269. *Babulal v Ramesh Babu Gupta*, AIR 1990 MP 317 (FB).
270. *Bhogaraju v J Rama Rao v Board of Commrs for Hindu Religious Endowments*, AIR 1965 SC 231 : (1964) 5 SCR 270.
271. *Shree Kalimata v RC Chatterjee*, AIR 1970 Cal 373, 376 : (1971) 75 Cal WN 1.
272. *Vamanan Nambudiri v Narayan*, AIR 1965 Ker 1 : (1964) Ker LT 516.
273. *Bai Umiyaben v Ambalal*, AIR 1966 Guj 139; *Daljit Singh v Shamsher Kaur*, AIR 1969 P&H 69; *Gurbachan Kaur v Swaran Singh*, AIR 1978 All 255.
274. *Kusumlata v Kamta Prasad*, AIR 1965 All 280, p 283.
275. *Jai Krishna Pandita v Nana Kumari*, AIR 2008 J&K 21.
276. *Meera Sinha v Girja Sinha*, AIR 2009 Pat 19 (DB); *Sonama Devi v Urmila Devi*, AIR 2009 Pat 71.
277. *KN Govindan Kutty Menon v CD Shaji*, AIR 2010 Ker 97.

[s 2.3.14] Orders Which Are Not Decree

The following are instances of orders which are not decrees:

(a) An order rejecting an application for leave to sue *in forma pauperis* for no suit has till then been filed;[278]

(b) An order refusing leave to institute a suit for accounts of religious endowments;[279]

(c) An order on a petition to appoint a new member on the committee of a religious endowment;[280]

(d) An order under the Indian Trusts Act, 1882 dismissing an application for the removal of a trustee;[281]

(e) An order on a settlement case under section 104(2) of the Bengal Tenancy Act, 3 of 1898 as the proceeding is instituted not by a plaint but by an application;[282]

(f) An order made on an application to the District Court under section 84(2) of the Madras Hindu Religious Endowments Act 2 of 1927;[283]

(g) An order for ejectment in a proceeding under Chapter VII of the Presidency Small Cause Court Act, 1882;[284]

(h) An Award by the Calcutta Improvement Trust Tribunal;[285]

(i) An order rejecting a petition on the ground that the Madras Act IV of 1938 is not appealable;[286]

(j) An order under section 7 of the Guardian and Wards Act, 1890 on an application under section 10 of that Act;[287]

(k) An order under section 10 of the Disabled Persons Act, 1951;[288]

(l) An order passed on an application made to the Insolvency Court under sections 53 and 54 of the Provincial Insolvency Act, 1920;[289]

(m) An order granting interim relief under section 24 of the Hindu Marriage Act, 1955;[290]

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278. *Secretary of State v Jillo*, (1899) ILR 21 All 133; *Narasinga Das v Ratiram Gupta*, AIR 1965 Hyd 41.
279. *Mozaffer Ali v Hedayet*, (1907) ILR 34 Cal 584; *Kazem Ali v Azim Ali*, (1891) ILR 18 Cal 382: *Protab v Brojanath*, (1892) ILR 19 Cal 275, p 288; *Re Venkateswara*, (1886) ILR 10 Mad 98.
280. *Minakshi v Subramanya*, (1888) ILR 11 Mad 26, p 35 : 14 IA 160; *Somasundara v Vythilinga*, (1896) ILR 19 Mad 285; *Habibun Rahman v Saideursa*, (1923) 38 Cal LJ 358; *Santappa v Gobinda Swamy*, (1916) ILR 40 Mad 791; *Srijib v Dandi Swami Jagganath Asram*, AIR 1941 Cal 618 : (1941) 73 Cal LJ 532, p 536.
281. *Nathu Wilson v McAfee*, (1897) ILR 19 All 131.
282. *Upadhya Thakur v Persidh Singh*, (1896) ILR 23 Cal 723, p 729; *Lala Kirut v Palukdhari*, (1890) ILR 17 Cal 326.
283. *Rajagopala v Hindu Religious Endowments Board*, AIR 1934 Mad 103 (FB) : (1934) ILR 57 Mad 271.
284. *Madhav Prasad v SG Chandravarkar*, AIR 1949 Bom 104 : (1950) ILR Bom 326 : (1948) 50 Bom LR 747.
285. *AK Hossain v Province of Bengal*, AIR 1942 Cal 569 : (1942) ILR 2 Cal 528 : (1942) 46 Cal WN 927.
286. *Lakshmi Devi v Raja Rao*, (1954) 2 Mad LJ 192.
287. *Wahid v Jabida Begum*, AIR 1952 Ngp 190 : (1951) ILR Nag 780.
288. *Punjab National Bank v Firm of Iswardas Kaluram*, AIR 1957 Raj 146.
289. *Lakshmi Devi v Varada Reddi*, 1958 Andh LT 896.
290. *Mansingh v Siva Prabakumari*, AIR 1960 Bom 315.

(n) An order passed on an application for restitution of conjugal rights, judicial separation, declaration of nullity of marriage or divorce under sections 9– 12 respectively of the said Act;[291]

(o) An order under section 34 of the Malabar Tenancy Act;[292]

(p) An order under section 17(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, directing the landlord to restore possession of the premises to the tenant;[293]

(q) An order passed under section 52 of the Malabar Tenancy Act 33 of 1951 for restoration of a holding;[294]

(r) An award by the Debt Board under the Hyderabad Agricultural Debtors Relief Act, 1956;[295]

(s) An order passed in proceedings under section 25 of the Guardian and Wards Act;[296]

(t) The award given by the motor accident claim tribunal does not have the status of a "judgment", "decree" or "order" as contemplated by the CPC;[297]

(u) An order refusing to wind up a company is not decree, since such an order does not adjudicate upon any right of a party;[298]

(v) A decision on a reference under section 49(1) of the Land Acquisition Act;[299]

(w) Rejection of application for condonation of delay and consequent dismissal of appeal as time barred;[300]

(x) Decision of water disputes tribunal as notified;[301]

(y) Order passed by high court under contempt proceedings on consent terms;[302]

(z) Order of dismissal of suit for default or non-prosecution is not appealable as a decree;[303]

[s 2.3.15] Order As to Costs

It has been held in some cases that an order for costs is not a decree as defined in section 2(2). It is said in support of this view that an order involves no adjudication of any of the matters in controversy in the suit and that further, no party has a vested right to costs.[304] As a broad statement of the law, this proposition is open to question. A suit for costs alone, it is true, is not maintainable, but a claim for costs is incidental to the enforcement of substantive claims

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291. *Varalakshmi v Veera Reddy*, AIR 1961 AP 359.
292. *Nicholas v Yasamma*, AIR 1961 AP 359.
293. *Vishnumurthi v Lakshminarayana*, (1961) 63 Bom LR 106.
294. *Choyikutty v Vasu*, (1962) Ker LJ 517.
295. *Dattu Apparao v DG Shengde*, AIR 1968 Bom 361.
296. *Kiran Devi v Abdul Wahid*, AIR 1996 All 105.
297. *Oriental Insurance Co Ltd v Sardar Sadhu Singh*, AIR 1994 Raj 44.
298. *Dundappa v SG Motor Transport Co*, (1966) 1 Mys LJ 786.
299. *Deepchand v LA Officer*, AIR 1975 MP 55.
300. *Ratansingh v Vijaysingh*, AIR 2001 SC 279 : (2000) 1 SCC 469.
301. *State of Andhra Pradesh v State of Karnataka*, AIR 2001 SC 1560.
302. *Re Siddharth Srivastava*, AIR 2002 Bom 494.
303. *Firdous Omer v Bankim Chandra Daw*, AIR 2006 SC 2759.
304. *Dhudhewala and Co Ltd v Govindram Rameswarlal*, AIR 1953 Cal 13 : (1954) ILR 1 Cal 438; *Golab v Janki Kuer*, AIR 1920 Pat 622 : (1920) 5 Pat LJ 472 (FB).

in a suit and therefore, an adjudication as to costs must stand in the same position as a decision on those claims. If the adjudication in a suit is a decree within section 2(2), the order for costs being part of the same, must likewise be a decree; but, if the adjudication is an order not amounting to a decree, the order for costs comprised therein must also amount to an order. This is so for the purpose of appeal — *vide* commentary under section 35. Therefore, whether an order for costs is a decree must depend upon whether the adjudication of which it is a part is a decree or not. Reviewing the authorities in the light of the above, an order directing the defendants to pay the costs of the day in a pending suit was rightly held to be not a decree.[305] Where the court granted permission to the plaintiffs to withdraw a suit with liberty to file a fresh one and as a part of the same order directed their costs to come out of the temple funds, the order as to costs would not amount to a decree and so, it was held.[306] Likewise, when an order was made permitting the appellants to withdraw the appeal, the order for costs which was incidental to that order was held to be not a decree;[307] but, where an order in appeal was not one of withdrawal but of dismissal, the order for costs made therein would amount to a decree.[308] In *Rustomji v Fezel Rahim*,[309] it was held that a provision for costs embodied in a consent decree was itself a decree. In *Dhudhewala Co v Govindram Rameswarlal*,[310] the order for costs was part of the order disposing off the revision petition itself and it is submitted that on the principles stated above, there is no reason why that portion of the order should be treated differently from the rest of the order. Again, the fact that no party has a vested right to costs is not a ground for holding that what would otherwise be a decree is not a decree. On this reasoning, an adjudication in a suit for specific relief must be held not to be a decree. It is indeed well-settled that a party is entitled to file an appeal against a decree for costs even though the superior court might be slow to interfere with the exercise of discretion by the lower court.[311]

An application in the civil court for executing an order of costs passed by the high court in a writ petition is not maintainable because such order is neither a decree under section 2(2) nor an order under section 2(14).[312] Similarly, an order dismissing a suit for non-payment of costs is essentially an order of dismissal for non-prosecution and as such it would not amount to a decree.[313]

[s 2.3.16] Finding On Issue

It was at one time held by the High Court of Bombay that a finding on a preliminary issue that a suit was not bad for misjoinder or that it was not barred by limitation or that the court had jurisdiction to entertain a suit was in the nature of a preliminary decree and appealable as such.[314] These decisions have since been overruled by a full bench of the same high court, and it has been held that a finding on an issue cannot be the subject of an appeal until it has been embodied in the judgment and decree. It was accordingly held in that case that a

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305. *Shanks v Secy of State for India in Council*, ILR 12 Mad 120.
306. *Ramakissor Dossji v Srirangacharlu*, (1898) ILR 21 Mad 421.
307. *Mathura Lal v Chiranji Lal*, AIR 1962 Raj 109 : (1962) ILR Raj 933.
308. *Jujitsu Mahapatrao v Kora Magatapatro*, AIR 1933 Mad 442 : (1933) ILR 56 Mad 520 : (1933) 64 Mad LJ 695.
309. *Rustomji v Fezel Rahim*, AIR 1932 Bom 378.
310. *Dhudhewala Co v Govindram Rameswarlal*, AIR 1953 Cal 13 : (1954) ILR 1 Cal 438.
311. See commentary under section 35.
312. *Manoj Pandarakathil v Kollamthodi Narayanan*, AIR 2008 Ker 132 : (2008) 1 Ker LT 810.
313. *Piaro Devi v Anant Ram*, AIR 2008 HP 107.
314. *Sidhnath v Ganesh*, (1913) ILR 37 Bom 60; *Narayan v Gopal*, (1914) ILR 38 Bom 392.

finding that the questions in dispute were not caste related questions and were not, therefore, outside the jurisdiction of civil courts, and did not amount to a preliminary decree and that no appeal lay from such a finding.[315] It has similarly been held that a finding that the matter is not *res judicata*,[316] or that the plaintiff can maintain the suit[317] or that the defendant is not an agriculturist under the Deccan Agriculturist Relief Act, 1879,[318] and that the trial can proceed, or that the court has jurisdiction to try the suit,[319] is not a preliminary decree. A finding that the defendant is an agriculturist under that Act is not by itself an adjudication, and so not a decree, though it may result in the plaint being returned for presentation to the proper court under O VII, rule 10.[320]

Again, no appeal lies from a finding that an execution application is not barred by limitation and the execution proceedings are to go on till the final determination.[321] Where it was found on a preliminary issue that some defendants were not liable for the plaintiff's claim and upon this finding the court discharged those defendants from the suit, and the suit proceeded against the remaining defendants alone, it was held that the order was a decree.[322]

[s 2.3.17] Rejection of Plaint

The definition of "decree" provides that the rejection of a plaint shall be deemed to be a decree. Such adjudication, therefore, is appealable as a decree.[323] An order rejecting a plaint for failure to pay additional court fee as required by the court, is a decree[324] and the court has no power to set it aside except on review or under section 152 of the CPC.[325] Where a plaintiff was dispaupered and ordered to pay court fees and on failure to comply with the order, the suit was dismissed, it was held that the order was one of dismissal for default under section 2(2)(b) and therefore, not a decree.[326] The ground of this decision is that there is a distinction under the CPC between rejection of a plaint and dismissal of a suit and that while the rejection of a plaint for non-payment of additional court fees falls under O VII, rule 11, and would be a decree, the dismissal of a suit under O XXII, rule 11, would not be covered by it and would be an order within section 2(2)(b). It is submitted that there is on principle, no distinction between rejection of a plaint for non-payment of additional court fee under O VII, rule 11, and dismissal of a suit under O XXXIII, rule 11 for non-payment of court-fees, and that the

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315. *Chanmalswari v Gangadharappa*, (1915) ILR 39 Bom 339; *Mst Chauli v Mst Meghoo*, AIR 1945 All 268.
316. *Bhama v Bhimagavda*, (1915) ILR 39 Bom 421.
317. *Kamini Devi v Promotha*, (1914) 19 Cal WN 751.
318. *Rupchand v Bhogilal*, AIR 1926 Bom 237 : (1926) 28 Bom LR 307.
319. *Manash Ranjan v Tropical Accumulations Ltd*, AIR 1957 Cal 135.
320. *Dattatraya v Radhabai*, AIR 1921 Bom 220 : (1921) ILR 45 Bom 627; *Gulab v Baliram*, (1915) ILR 39 Bom 423; *Vamanacharya v Govind*, AIR 1924 Bom 33 : (1923) 25 Bom LR 826, 834; *Murali Panda v Khoshi Naiko*, AIR 1947 Pat 255 : (1946) 12 Cut LT 85.
321. *Barkat Ram v Bhagwan Singh*, AIR 1949 EP 222; *Kamaraja Pandia v Kamaraja Pandia*, AIR 1933 Mad 500 : (1933) 64 Mad LJ 735.
322. *Nand Kumar v Parupati*, AIR 1941 Pat 385 : (1940) ILR 20 Pat 417; *Chitanlal Purshottam v GS Gupta*, AIR 1938 Nag 233; *Mt Phool Sundri v Gurban Singh*, AIR 1957 Raj 97 : (1956) ILR Raj 1104.
323. *Nand Kumar v Pashupati*, AIR 1941 Pat 385 : (1940) ILR 20 Pat 417; *Sada Kaur v Buta Singh*, (1914) PR 80; *Saratchandra v Murtyunjay*, AIR 1935 Cal 336 : (1935) ILR 62 Cal 61; *Puranmasi Yadav v Narbadeshwar Tripathi*, AIR 1998 All 260.
324. *Shamrao Janrao v Amolak*, AIR 1949 Ngp 373 : (1949) ILR Nag 391; *Ganpathi v Venkatesh*, AIR 1938 Ngp 83 (FB); *Satyanarayana v Ramalinga*, AIR 1952 Mad 86 : (1952) ILR Mad 77 : (1951) 2 Mad LJ 74; *Re Ramayamma*, AIR 1954 Mad 888 : (1953) 1 Mad LJ 544; *Kamalamma v Batchi Marianna*, AIR 1960 Mys 140; *Bilas Mohan v Haricharan*, AIR 1961 Cal 491; *Kadar Bai v Husenali*, AIR 1962 Guj 59.
325. *Kishorelal v Surajmal*, AIR 1956 Raj 164 : (1956) ILR Raj 736; *Md Yunus v Sangra Begum*, AIR 1955 Hyd 156 : (1956) ILR Hyd 56.
326. *Re Subrahmanyam*, AIR 1955 AP 75.

rejection of a plaint will be a decree even though it is not under O VII, rule 11, provided it is authorised by the CPC[327] and that the decision aforesaid, requires reconsideration.

[s 2.3.18] Order Returning Plaint

A plaint may be returned for amendment (O VI, rule 17) or for presentation to the proper court (O VII, rule 10). In either case, the decision returning the plaint is an order as distinguished from a decree. An order returning a plaint is appealable under CPC (O XLIII, rule 1, clause (a)). An order returning a plaint for amendment was appealable under the Code of Civil Procedure, 1882; it is no longer appealable under this CPC.[328]

[s 2.3.19] Rejection of Memorandum of Appeal

On the question whether an order rejecting a Memorandum of Appeal is a decree, the decisions are conflicting. The controversy centres around the express inclusion of rejection of plaint in the definition of "decree". One view is that on a reading of O VII, rule 11, with section 107(2), an order rejecting a plaint must include an order rejecting an appeal; and, that further, the latter order would be a decree on the terms of the definition, for it has the effect of finally disposing off the proceedings.[329] As against this, it is said that an order rejecting a plaint will not, but for its inclusion in the definition, be a decree and that the words "shall be deemed to include rejection of plaint" imports a legal fiction which could not be extended to an order rejecting the appeal.[330] The Calcutta High Court has held that an order rejecting a Memorandum of Appeal as insufficiently stamped, is not appealable as a decree, and that the effect of O VII, rule 13 read with section 107(2) is that the appellant may present a fresh Memorandum of Appeal.[331] An order rejecting a Memorandum of Appeal or dismissing an appeal following the rejection of an application under section 5 of the Limitation Act, 1963 (for condonation of delay in preferring the appeal) is not a "decree" within the meaning of section 2(2) of the CPC. It is only an order against which an application in revision under section 115 of the CPC may lie.[332] The Allahabad High Court has held that an order rejecting a Memorandum of Appeal for reasons for which rejection is not prescribed by the CPC, is not a decree;[333] but, there have been decisions allowing an appeal when the Memorandum of Appeal was rejected as not duly presented,[334] or as scandalous,[335] or as insufficiently stamped.[336] A Memorandum of Appeal which is time-barred is dismissed under the Limitation Act, 1963

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327. *Harihar Baksh Singh v Jagannath Singh*, AIR 1924 Oudh 413; *Badrinath v State of Pepsu*, AIR 1957 Pepsu 14.
328. *Gurdas v Bhag*, (1911) PR 96.
329. *Kanthimathi v Ganesa Iyer*, AIR 1936 Mad 101; *Ram Savari Jovar v Dulecm Muthuraj Kovar*, AIR 1939 Pat 83 : 17 Pat 687; *Mt Burket v Nasseer* 1942 Lah 64; *Lachayya v Veeriah*, AIR 1961 AP 112; *Raghunath v Nilkantji* , 9 Bom 453; *Ramdhari v Khader*, AIR 1938 Pat 461 : (1938) 17 Pat 245.
330. *Lekha v Bowna*, (1896) 18 All 111 (FB); *Chausila v Abhiles*, AIR 1936 Cal 804 : (1937) ILR 1 Cal 103; *Balaji Dhumraji v Muktha Bai*, AIR 1938 Ngp 122 : (1938) ILR Nag 106; *Re Kayambu Pillai*, AIR 1941 Mad 836 : (1941) ILR Mad 954; *Gyasiram v Brij Bhushan Das*, AIR 1962 MP 237.
331. *Jnanasundari v Madhab Chandra*, AIR 1932 Cal 482 : (1932) ILR 59 Cal 388; dissenting from *Rupsing v Mukhraj Singh*, (1885) ILR 7 All 887.
332. *Ainthu Charan Parida v Sitaram Jayanarayan*, AIR 1984 Ori 230 (FB).
333. *Amba Shankar v Mt Sheoti*, AIR 1937 All 280 : (1937) All LJ 171; *Rajballam Singh v Madhu Sudan*, AIR 1950 Pat 443.
334. *Ayyanna v Nagabhooshanam*, (1893) ILR 16 Mad 285.
335. *Zamindar of Tuni v Bennayya*, (1899) ILR 22 Mad 155.
336. *Abdul Majid v Amina Khatun*, AIR 1942 Cal 539 : (1942) ILR 2 Cal 253 : (1942) 75 Cal LJ 393 : (1942) 46 Cal WN 697; *Rupsing v Mukhraj Singh*, (1885) ILR 7 All 887; *Mela Mal v Hardeo*, (1884) PR 115

and such dismissal disposes off the appeal and is appealable as a decree.[337] When an appeal is rejected under O XLI, rule 10(2) for failure to furnish security for costs, there is no appeal, the order does not determine the rights of the parties.[338] An order dismissing an appeal on the ground that it is barred by limitation is a decree;[339] so also, an order dismissing an appeal *in limine* under O XLI, rule 11.[340] An order that a suit abates, is a decree. Similarly, an order directing that an appeal or a cross-objection abates is also a decree.[341]

[s 2.3.20] Order Returning Memorandum of Appeal

No appeal lies from an order returning a Memorandum of Appeal to be presented to the proper court.[342] Nor does an appeal lie from an order returning a Memorandum of Appeal for amendment.

[s 2.3.21] Omission of the Words "Section 47 or" Effect of

An execution proceeding, though a proceeding in a suit, is not a suit.[343] Therefore, an order passed in such a proceeding was treated as a decree from which an appeal would lie; but, under the definition of "decree" as it stood when this sub-section contained the words "under section 47 or", the expression "decree" included an order passed in execution proceedings under section 47 if : (i) the executing court therein conclusively determined a question; (ii) it arose between the parties to the suit in which the decree was passed, or their representatives; and (iii) it related to the execution of the decree.[344] If it decided a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, it fell within the scope of section 47 and was tantamount to a decree; but orders which were merely incidental and referred to the conduct of the proceedings were held not to be within the section.[345] Thus, a decision refusing to recognise the transferee of a decree,[346] or on the question whether a person was a representative of a party under section 47(1),[347] or to record an adjustment of a

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337. *Gulab Rai v Mangli Lal*, (1885) ILR 7 All 42; *Raghunath v Nilo*, (1885) ILR 9 Bom 52; *Ganga Dass v Ramjoy*, (1880) ILR 12 Cal 30; *Saminatha v Venkatasubha*, (1903) ILR 27 Mad 21; *Rakhal v Ashutosh*, (1913) 17 Cal WN 807.
338. *Rakhal v Ashutosh*, (1913) 17 Cal WN 807; *Lekha v Bhauna*, (1896) ILR 18 All 101; *Romesh v Monindra*, AIR 1922 Cal 246 : (1921) ILR 49 Cal 355.
339. *Somba Keshao v Rodrigues*, AIR 1938 Ngp 322.
340. *Hakam Singh v Jaswant Singh*, AIR 1974 P&H 235.
341. *Purushottamdas v Devkaran Keshaoji*, AIR 1939 Ngp 39.
342. *Raghunath v Shamo Joeri*, (1904) ILR 31 Cal 344; *Mahabir v Behari*, (1891) ILR 13 All 320.
343. *Venkata v Venkatarama*, (1898) ILR 22 Mad 256, 258.
344. *RMARA Adaikappa Chettiar v R Chandra Sekhara*, AIR 1948 PC 12 : (1948) ILR Mad 505 : 74 IA 264; *Mst Durga Devi v Hansraj*, AIR 1930 Lah 187 : (1930) ILR 11 Lah 402; *Sarasvati v Moti*, (1913) ILR 41 Cal 160.
345. *Kedarnath v Pattu Lal*, AIR 1945 Oudh 312 : (1945) ILR 20 Luck 557; *Jogodishury v Kailash*, (1897) ILR 24 Cal 725, 729; *Sivagami v Subrahmania*, (1904) ILR 27 Mad 259 (FB); *Deoki v Bansi*, (1912) 16 Cal WN 124; *Mukhtar v Muqurrah*, (1912) ILR 34 All 530; *Srinivas v Kesho*, (1911) ILR 38 Cal 160; *Hussain Bhai v Batul Shah*, AIR 1924 All 808 : (1924) ILR 46 All 733, p 737; *Sardarni v Ram Rattan*, (1920) 2 Lah LJ 398; *Surendra Nath v Mritunjay*, (1920) 5 Pat LJ 270; *Tipan Raut v Raj Kumar*, AIR 1977 Pat 53.
346. *Badri Narain v Jai Kishen*, (1894) ILR 16 All 483; *Tameshar v Thakur*, (1903) ILR 25 All 3; *Ganga Das v Yakub*, (1900) ILR 27 Cal 670; *Subbuthayammal v Chidambaram*, (1902) ILR 25 Mad 383; *Hariditta v Nigahia*, AIR 1922 Lah 396 : (1922) 4 Lah LJ 259; *Run Bahadur v Bajrangi*, AIR 1925 Pat 16 : (1924) ILR 3 Pat 344.
347. *Ghanshiam Singh v Har Piarey*, AIR 1974 All 229 : (1974) All WR 194.

decree,[348] fell within section 47 and was appealable as a decree. An order directing an execution application to be converted into a suit was held to be in substance an order refusing to execute the decree and therefore, appealable as such a decree;[349] but an order refusing leave to bid at an execution sale was treated as a mere interlocutory order and therefore not appealable.[350] The Bombay High Court accordingly held an order staying execution of a decree on security being furnished to be an interlocutory order.[351] On the other hand, the Lahore High Court after a review of authorities, had found that such an order fell under section 47 and was appealable.[352] An order refusing to stay execution was held to be an interlocutory order;[353] so also, an order refusing execution on the ground that it had been attached.[354] But, an order that certain property was liable to attachment and sold in execution, was held to be a decree.[355]

These controversies, whether an order passed in execution proceedings was tantamount to a decree or was only an interlocutory order, arose by reason of the words "Section 47" occurring in the definition of a decree. The omission of these words by the Amendment Act, 1976, means that such orders, even though they are made under section 47, are not decrees[356] and are therefore, not appealable. A party aggrieved by an order passed in execution proceedings can challenge its correctness only by a revision, provided such an order satisfies the conditions prescribed by section 115.

Where all defendants submit to the jurisdiction of a court, the decree of that court cannot be treated as a nullity.[357]

Order passed under section 47 by the executing court is not appealable as a decree, unless it is expressly provided for in other provisions of the CPC.[358]

A plea that the decree is contrary to law is not the same thing as a decree that is a nullity. To render a decree a nullity, it must be shown that the court lacked inherent jurisdiction in the sense that it was incompetent to try the suit.[359]

Adjudication in execution is not a "decree".[360] The omission of the words "section 47 or" from section 2(2) (in 1976), clearly shows that an order under section 47 is no longer appealable as a decree as held by the Bombay High Court.[361]

The Bombay view points out that but for the words "section 47 or" occurring (prior to 1976) in section 2(2), an order under section 47 would not have been a "decree". These words gave an extended connotation to "decree"; but that extension itself has now been deleted. As a result, orders under section 47 are not "decrees" and are not subject to appeal under section 9.

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348. *Jamna v Mathura*, (1894) ILR 16 All 129; *Ranji v Bhaiji*, (1887) ILR 11 Bom 57; *Guruvayya v Vudayappa*, (1895) ILR 18 Mad 26; *Jadunandan v Sheonandan*, AIR 1922 Pat 276 : (1922) ILR 1 Pat 644.
349. *Mani Shankar v Niranjan Sarup*, AIR 1955 All 686.
350. *Jodoonath v Brojo Mohun*, (1886) ILR 13 Cal 174; *Ko Tha Hayin v Ma Hnin*, (1911) ILR 38 Cal 717 : 38 IA 126.
351. *Janardhan v Martand*, AIR 1921 Bom 208 : (1921) ILR 45 Bom 241.
352. *Mst Durga Devi v Hansraj*, AIR 1939 Lah 187 : (1930) ILR 11 Lah 402; dissenting from *Janardan v Martand*, AIR 1921 Bom 208; distinguishing *Saraswati v Moti*, (1914) ILR 41 Cal 160.
353. *Rajendra Kishore v Mathura Mohan*, (1919) 25 Cal WN 555.
354. *Lala Narotam Dass v Thakurain Sri Ram Kunwar*, AIR 1936 Oudh 272 : (1936) 11 Luck 26.
355. *Bhagwat Prasad v Abdul Basit*, AIR 1962 P&H 379; *S Appanna v R Narsinga Rao*, AIR 1975 AP 304.
356. *Md Khan v State Bank of Travancore*, AIR 1978 Ker 201; *Mohan Das v Kamala Devi*, AIR 1978 Raj 127.
357. *Re Soumitra Kumar De*, AIR 1982 Cal 34, pp 37–38.
358. *Hasumatiben v Ambalal Krishanlal Parikh*, AIR 1982 Guj 324 (DB)
359. *Director, Railway Movement v Akashwani Works*, AIR 1985 All 314, p 320, paras 17–18.
360. *Ramamurthy v P Adinarayanan & Sons*, AIR 1985 AP 42, p 45, paras 7–9 (DB).
361. *RS Sancheti v RV Batwal*, AIR 1983 Bom 378 (DB).

The high courts enumerated hereinafter, have taken the same view, namely, that there is (after 1976), no appeal against an order in execution under section 47:

(i) Allahabad;[362]

(ii) Andhra Pradesh;[363]

(iii) Gauhati;[364]

(iv) Gujarat;[365]

(v) Kerala;[366]

(vi) Orissa;[367] and,

(vii) Rajasthan;[368]

A Patna judgment, however, takes a different view.[369]

[s 2.3.22] Section 144: Restitution

An order passed on an appeal setting aside the sale of a judgment-debtor's property is a decree and section 144 is wide enough to cover such an order.[370] An order for restitution of costs is a decree.[371]

[s 2.3.23] Order of Dismissal for Default

A suit may be dismissed for default of appearance under O IX, rule 8. Such a dismissal is not a decree and is not appealable. Under the Code of Civil Procedure 1882, there was a conflict of decisions. The Madras High Court held that the order was not appealable[372] while the other high courts held that it was appealable.[373] An appeal may be dismissed for default of appearance under O XLI, rules 11(2) or 17. Such an order of dismissal is not a decree and is not appealable.[374]

There may also be a dismissal for default under O IX, rule 3, if neither party appears when the suit is called on for hearing. This is also excluded from the definition of "decree". It has been held that the expression "dismissal for default" includes not only dismissal for default of appearance but also for default in the prosecution of a suit or appeal.[375] An order dismissing a

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362. *Pratap Narain v Ram Narain*, AIR 1980 All 42 (FB).
363. *M Janakiamma v Pardesi Sanna*, AIR 1980 AP 209.
364. *Tapan Chandra v Dulal Chandra*, AIR 1980 Gau 3.
365. *Hasumatiben v Ambalal*, AIR 1982 Guj 324.
366. *Kuraikose v PK Narayana*, AIR 1981 Ker 18.
367. *Sarabai Agarwalla v Haradhan Mohapatra*, AIR 1982 Ori 9.
368. *Mohan Das v Kamla Devi*, AIR 1978 Raj 127.
369. *Parshwa Properties v AK Bose*, AIR 1979 Pat 308.
370. *Baldevdas v Vallabdas*, AIR 1947 Bom 462 : 49 Beng LR 306; *contra* where the order for restitution does not strictly fall within section 144; *Sayyed Usman v Vegisena*, AIR 1950 Mad 463 : (1950) Mad WN 196; *Telu v Raja Ram*, AIR 1938 Lah 456.
371. *Suryanarayana v Lakshminarayana*, AIR 1960 AP 544.
372. *Gilkinson v Subramania*, (1899) ILR 9 All 427.
373. *Gosto Behari v Hari Mohan*, (1903) 8 Cal WN 313; *Ramchandra v Madhav*, (1892) ILR 16 Bom 23; *Ablakh v Bhagirathi*, (1887) ILR 9 All 427.
374. *Rukminimayi v Paran Chandra*, (1912) ILR 39 Cal 341; *Surujdev v Partap*, AIR 1923 Pat 514 : (1923) ILR 2 Pat 739.
375. *Re Subramaniam*, (1955) ILR Andhra 75; *Re Kayambu Pillai*, AIR 1941 Mad 836 : (1941) ILR Mad 954; *Tufasal v Shah Mahamad*, AIR 1949 All 261.

suit for failure by the plaintiff to furnish particulars has been held to amount to dismissal on default and therefore, not a decree.[376]

[s 2.3.24] Non-Appealable Orders

Orders that are not appealable are, generally speaking, orders that are processual; that is, interlocutory or incidental orders regulating procedure but not deciding any of the matters in controversy in the suit. Such orders occur both, in suits and in execution proceedings. Their number is legion, and the following are cited merely by way of illustration:

[s 2.3.24.1] In Suits

Under section 148 for enlargement of time;[377] under section 152 for amendment of a clerical error in a judgment;[378] under O IX, rule 9, granting an application for restoration of a suit;[379] under O IX, rule 13, granting an application to set aside an *ex parte* decree;[380] O XIV, rule 9, refusing to frame an issue.[381]

[s 2.3.24.2] In Execution Proceedings

Under O XXI, rule 40, refusing an application to arrest a judgment-debtor;[382] under O XXI, rule 66, settling the terms of a sale proclamation[383] or declining to set aside an *ex parte* order settling the terms of sale proclamation under O XXI, rule 66,[384] or an order holding on preliminary issues that the execution application was maintainable.[385]

An order passed by the court on an objection to the commissioner's report is not a decree and therefore, not appealable.[386]

[s 2.4] Decree-Holder: Section 2(3)

> "Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.

The definition in the Code of Civil Procedure 1882, included a transferee of a decree: but this was inconsistent with the provisions relating to execution whereby an oral transferee has no *locus standi*; under the present section, a transferee is not a decree-holder unless he has been recognised by the court. A decree for specific performance of an agreement for the sale of immovable property may be executed either by the plaintiff or the defendant, either

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376. *Chamarin v Bhudhiyarin*, AIR 1975 MP 75 : (1975) MP LJ 82. See also "Rights of Parties".
377. *Suranjan v Ram Bahal*, (1913) ILR 35 All 582.
378. *Nalinakshya v Matakshar*, (1900) ILR 28 Cal 177; *Narayanasami v Natesa*, (1892) ILR 16 Mad 424; *Bai Shri Vakuba v Agarsangji*, (1907) ILR 31 Bom 447; *Bava Singh v Lachman Singh*, (1911) PR 24.
379. *Hirdaman v Jinghoo*, (1880) ILR 5 Cal 711; *Fazal v Hashmati*, (1916) PR 40 and under O IX, rule 4: *Alwar v Seshmma*, (1887) ILR 10 Mad 270; *Wahidunnissa v Kundan Lal*, (1913) ILR 35 All 427.
380. *Shama Dass v Hurbuns*, (1889) ILR 16 Cal 426.
381. *Tulijaram v Alagappa*, (1912) ILR 35 Mad 1; *Ebrahim v Fuckrunnissa*, (1879) 4 ILR Cal 531.
382. *Lala Das v Mina Mal*, AIR 1922 Lah 259 : (1922) 4 Lah LJ 266; *Abdul Rahiman v Mahomed*, (1908) 21 ILR Mad 29.
383. *Sivagami v Subramama*, (1904) 27 ILR Mad 259; *Indrani v Babu Bimla*, AIR 1930 Oudh 81 : (1930) ILR 5 Luck 481; *Ramanathan v Venkatachala*, AIR 1923 Mad 619 : (1923) 44 Mad LJ 599; *Panch v Mani*, (1912) 16 Cal WN 970.
384. *Premavathi v Satyavathi*, AIR 1953 Ngp 55.
385. *Sivanarayan v Khemraj*, AIR 1954 Ngp 31.
386. *M Damodaran v M Kesavankutty*, AIR 1975 Ker 16 : ILR 2 Ker 472.

party being a "decree-holder" in such a case.[387] Where the defendant is a public officer and the government undertakes his defence as provided in O XXVII, rule 8(1), a decree for costs passed in his favour might be executed by the government as a decree-holder.[388] In short, a decree-holder is one whose name is inscribed on the decree and in whose favour such decree has been passed.[389]

Where a suit for permanent prohibitory injunction was dismissed directing the plaintiff to remove the unauthorised construction on the property given in plaint put up during the pendency of the suit, the said direction does not amount to a decree as defined in the Code; but it certainly amounts to an executable order in favour of the defendant, who qualifies as a decree-holder within the meaning of the CPC.[390]

[s 2.5] District: Section 2(4)

> "District" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a high court.

Following this definition, the expression "District court", as used in the Inventions and Designs Act 6 of 1888, has been held to include a high court in the exercise of its ordinary original civil jurisdiction;[391] but it has since been held in *Hyath v Shake*,[392] that this is not necessarily so. In a suit for infringement of copyright under the Copyright Act 1957, if the subject matter is valued at less than Rs 50,000, it would be the City Civil Court of Calcutta and not the high court which would have jurisdiction.[393] In the absence of such a court having the jurisdiction, a high court having the ordinary original civil jurisdiction would be deemed to be the district court.[394] If a high court does not possess the ordinary original civil jurisdiction, it would not, though at the apex of the civil courts, be the district court for the purposes of the Trade and Merchandise Marks Act, 1958.[395] The expression "District Court" includes the court of the additional district judge.[396]

The original jurisdiction of the High Court of Madras in matters of appointment of guardian of a child is lost after the establishment of family courts under the Family Courts Act, 1984. Therefore, the petition filed by foreign nationals for appointment of guardian to an Indian female child, is not maintainable before the original side of the high court and has to be transferred to a proper court. Even assuming that the jurisdiction of the high court under clause17 of Letters Patent 1865, still existed, it would be as per the appellants, a jurisdiction of general nature applicable to all, then section 15 of the CPC will come into play, and the appellants should approach the lowest grade court competent, *viz* the family court. The proper forum for the parties in the matter is the family court wherever and whenever it is established

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387. *Bai Karimabibi v Abderehman*, AIR 1923 Bom 26 : (1922) ILR 46 Bom 990; *Heramba Chandra v Jyotish Chandra*, AIR 1932 Cal 579 : (1932) ILR 59 Cal 501.
388. *Ajudhia v Government of Uttar Pradesh*, (1947) ILR All 390.
389. *Bajirao v Kashirao*, AIR 1978 Bom 350.
390. *KM Basheer v Trie-Tee Trading Co Ltd*, AIR 2007 Ker 291 : (2007) 4 Ker LT 113.
391. *Kedarnath v Ganesh*, (1907) 12 Cal WN 446.
392. *Hyath v Shake*, AIR 1927 Cal 290 : (1927) AC 290.
393. *Maheswar Swain v Bidyut Prabha Art Press*, AIR 1971 Cal 455.
394. *Daily Calendar Supplying Bureau v United Concern*, AIR 1967 Mad 381.
395. *Raja Soap Factory v Shantharaj*, AIR 1965 SC 1449.
396. *Bezharva v State of Assam*, AIR 1954 Assam 161; *Munshi v Evankhan*, (1961) Jab LJ 1431.

and till then, the respective District Courts, with, of course, the right of appeal before this court.[397]

[s 2.6] Foreign Court: Section 2(5)

> [398]["Foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government].

This sub-section has been substituted by section 4 of the Code of Civil Procedure (Amendment) Act 2 of 1951, for the old sub-section which, after the Indian Independence (Adaptation of Central Acts and Ordinances) Order, ran as follows:

> 'Foreign Court' means a Court situated beyond the limits of British India which has no authority in British India and is not established or continued by the Central Government.

The Privy Council, which was not within the definition of a foreign court as it stood originally,[399] is now to be regarded so. The High Court of Justice in England, whether it be the Chancery Division[400] or the King's Bench Division,[401] is a foreign court. The Ceylon Court also is a foreign court[402] and so is the Supreme Court of Mauritius.[403]

[s 2.7] Foreign Judgment: Section 2(6)

> "Foreign judgment" means the judgment of a foreign court.

A foreign judgment as defined in this sub-section creates a new right in favour of the creditor and a new obligation imposed by the foreign court on the debtor. A judgment given by a foreign court does not cease to be so, when as a consequence of political change, the territory where the court was situated at the time of the judgment becomes part of India.

An interim order passed by a court in USA directing the mother to hand over the interim custody of minor child to the father until further orders, cannot assume the characteristic of a foreign judgment as it is not a final order. More so, when such order was passed, the wife had left the territorial jurisdiction of the court.[404]

[s 2.8] Government Pleader: Section 2(7)

> "Government Pleader" includes any officer appointed by the [405][State Government] to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader.

A person appointed as a special government pleaders under O XXVII, rule 8(B) to conduct a particular case specified in the notification appointing him does not hold the office of the government pleader.[406]

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397. Re *Patrick Martin*, AIR 1989 Mad 231.
398. Substituted by CPC (Amendment) Act 2 of 1951, section 4(5), for the original clause (w.e.f. 1-4-1951).
399. *Bowles v Bowles*, (1884) ILR 8 Bom 571.
400. *London Bank v Hormasji*, (1871) 8 BHC 200.
401. See *Deep Narain v Dietert*, (1904) ILR 31 Cal 274.
402. *Shaik Atham v Davud*, (1909) ILR 32 Mad 469, p 471.
403. *Kassim v Isuf*, (1904) ILR 29 Cal 509. As to suit on judgments of the High Court of Justice in England, see notes to section 13, "An Indian court will not give effect to a foreign judgment, etc.".
404. *Ramakrishna Balasubramanian v Priya Ganeshan*, AIR 2007 Mad 210 (DB) : (2007) 5 All LJ (NOC) 790.
405. Substituted for "Provincial Government" by AO 1950.
406. *Kanta Kathuria v Manak*, AIR 1970 SC 694, p 700.

Section 2(7) defines "government pleader". According to this provision, "government pleader" includes any officer appointed by the State Government to perform all or any of the functions expressly imposed by the CPC on the government pleader and also any pleader acting under the directions of the government pleader. Section 2(15) defines "pleader" which means any person entitled to appear and plead for another in court, and includes an advocate, a *vakil* and an attorney of a high court. Where Law Officers for Government were Assistant District Attorney, Public Prosecutor and Deputy Advocate General appearing on behalf of their respective States, primarily in criminal/civil cases and their appointments were basically under the CPC or CrPC, the Supreme Court held them eligible for appointment to the office of Additional District and Sessions Judge.[407]

The government can have as many government pleaders as it likes. The definition is inclusive. It must be read with O XXVII, rules 4 and 8B.

It is not obligatory to have only one government pleader. The government is also free to put a particular government pleader in charge of a particular case or cases.[408]

[s 2.9] India: Section 2(7B)

> "India" except in sections 1, 29, 43, [409][44A], 78, 79, 82, 83 and 87A, means the territory of India excluding the State of Jammu and Kashmir.

These two sub-sections namely, (7A) and (7B), were inserted by section 4 of the Code of Civil Procedure (Amendment) Act 2 of 1951.

By the Constitution (Seventh Amendment) Act, 1956, Jammu and Kashmir, is a state and its government, a state government. Therefore, notice under section 80 of the CPC would be necessary if a suit is filed against that state in a place where the Code applies. But, if such a suit is filed within that state, the suit would be governed by the law prevailing there and a notice may not become necessary.[410]

[s 2.10] Judge: Section 2(8)

> "Judge" means the presiding officer of a Civil Court.

No judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias.[411] An arbitrator is neither a judge nor a court.[412]

The members of Administrative Tribunals cannot be considered to be judges and their statement cannot be treated as a decree.[413]

However, it has been held that a tribunal may be termed as a court if it has all the trappings of a court. Every court may be a tribunal, but every tribunal need not necessarily be a court. Once the essential features of "court" are satisfied, then it will have to be termed as a "court". The statutory provisions of the family court squarely satisfy the ingredients of a court and the

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407. *Deepak Aggarwal v Keshav Kaushik*, (2013) 5 SCC 277 : (2013) 1 SCR 402.
408. *Mundrika Prasad Sinha v State of Bihar*, AIR 1979 SC 1871 : (1979) 4 SCC 701 : (1980) 1 SCR 759.
409. Inserted by the Repealing and Amending Act 42 of 1953, Sch III and section 4 (w.e.f. 23-12-1953).
410. *State of Jammu & Kashmir v Lucky Glass Works*, AIR 1969 Cal 11, p 12.
411. *Aloo v Gagubha*, (1895) ILR 19 Bom 608; *Frome United Breweries Co v Borth Justices*, AIR 1926 Cal 596.
412. *Anand Prakash v Asst Registrar Co-op Societies*, AIR 1968 All 22.
413. *State of Tamil Nadu v S Thangavel*, AIR 1997 SC 2283 : (1997) 2 SCC 349.

Presiding Officers of family courts perform judicial and determinative functions and, as such, are judges.[414]

The word "court" is generic term and embraces a judge but the *vice versa* is not true. A "court" is an agency created by the sovereign for the purpose of administrating justice. It is a place where justice is judicially administered. It is tribunal presided over by one or more judges on whom are conferred certain judicial powers for administrating justice in accordance with law. When a judge takes a seat in the court, the court is set to have assembled for administrating justice. Therefore, the word "court" and judge are frequently used interchangeably because a judge is an essential constituent of the court since there can be no dispensation of justice without a judge. But that is not to say that, when a judge demits office, the court ceases to exist. While the word "court" and judge are frequently used interchangeably, they are not *stricto sensu* synonyms for the simple reason that a judge by himself does not constitute a court, being only an essential part of the court.[415]

[s 2.11] Judgment: Section 2(9)

> "Judgment" means the statement given by the judge on the grounds of a decree or order.

[s 2.11.1] Meaning

In England the word "judgment" is generally used in the same sense as a decree in the CPC. A judgment must contain the grounds of the decision.[416]

In the Chambers Dictionary (Deluxe Edition),[417] the meaning of the word "judgment" given is "the act of judging; comparing of ideas to find out the truth, the faculty by which this is done, an opinion formed; a legal verdict or sentence etc". In The New Shorter Oxford English Dictionary,[418] some of the meanings given are; the sentence of court of justice, a judicial decision or order in court. One of the meanings given to the word "judgment" in Webster's Comprehensive Dictionary[419] reads thus: the result of judging, the decision or conclusion reached as after consideration or deliberation.[420] In his concurring judgment, SB Sinha, J, observed:

> We however, need not go into the aforementioned question in view of the order proposed to be passed by us, in our opinion the learned Tribunal failed to assign sufficient or cogent reasons in support of its findings. In relation to some issues, no reason has been assigned. Some issues although noticed have not been adverted to. Some issues have even not been noticed. The impugned order of the TDSAT, therefore, does not fulfil the criteria of a judgment.[421]

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414. *SD Joshi v High Court of Bombay*, (2011) 1 SCC 252.
415. *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v UOI*, (1994) 6 SCC 37.
416. *Vidyacharan v Khulachand*, AIR 1964 SC 1099 : (1964) 6 SCR 129; *Anjan Dass v Jagannath*, AIR 1966 P&H 227.
417. *Chambers Dictionary (Deluxe Edition)*, Sixth reprint, p 905.
418. *New Shorter Oxford English Dictionary*, 1993 Edn, p 1459.
419. *Webster's Comprehensive Dictionary, International Edition*, vol 1, 1984.
420. *Cellular Operators Association of India v UOI*, AIR 2003 SC 899 : AIR 2003 SCW 366.
421. *Cellular Operators Association of India v UOI*, AIR 2003 SC 899, para 21 : AIR 2003 SCW 366.

[s 2.11.2] Every Order not Judgment

An order passed by an appellate court calling for a finding on an issue framed by it in an appeal is not a judgment; nor is a direction to pass a final decree after the deficit court-fees are paid,[422] nor an order summarily dismissing an appeal or a revision.[423]

When a trial judge at the request of the parties sits *extra cursum curiae*, his decision is not an award by an arbitrator but a judgment.[424]

The award given by the motor accident claim tribunal does not have the status of a "judgment", "decree" or "order" as contemplated by the CPC.[425]

[s 2.11.3] Judgment, Order and Decree

"Judgment" stands on a different footing from the "order" and the "decree". The Legislature has avoided the use of words "formal expression" in the definition of "judgment", though the words "formal expression" have been used in the definition of "order" in section 2(14). Conversely, it is not necessary that in a decree, there should be a statement of reasons given by the judge. Statement of reasons is to be given by the judge, only in the "judgment". The decree is the formal expression of conclusions arrived at in the judgment. So, a formal expression of the order in the judgment is not necessary, though it is desirable.[426]

[s 2.11.4] Decision at the Back of a Person

Any decision which has been given by any court or authority behind the back of a person cannot be binding upon him being violative of the principle of natural justice and a person, who has been put in such a disadvantageous position by the judgment passed, beyond his back has a right to ignore the same.[427]

[s 2.11.5] Contradictory Judgments/Decisions

No learned judge would consciously author a judgment which is itself inconsistent or incorporates passages repugnant to each other.[428]

There can be only one judgment in a case. Two contradictory judgments or judgments in variance with each other will not have the effect of deciding any question or issue in the case or of deciding any of the rights of the parties. It is also plain that such judgments can neither be enforced nor be given effect to. Therefore, if two judges constituting a division bench give contradictory decisions or decisions in variance with each other, in law, such decisions cannot be called as judgments as they do not decide any question or issue in the case or proceeding nor do they decide any of the rights of the parties, the real test being what is the effect of the two decisions on the case or proceedings in which it is made, the language or phraseology used being wholly immaterial having no bearing. In such a situation, the decisions so rendered will only amount to opinions of the respective judges. This principle will, however, not apply where on account of some statutory provisions like section 98 of the CPC, contradictory decisions

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422. *Kamala Mining Corp v Rameshwarlal*, AIR 1968 AP 138.
423. *V Gokul v State of Gujarat*, (1966) ILR Guj 1189.
424. *Arati Paul v Registrar, High Court*, AIR 1965 Cal 3.
425. *Oriental Insurance Co Ltd v Sardar Sadhu Singh*, AIR 1994 Raj 44.
426. *Boards & Boards Pvt Ltd, Jaipur v Himalaya Paper Pvt Ltd, New Delhi*, AIR 1990 Raj 120.
427. *Temple of Thakurji v State of Rajasthan*, AIR 1998 Raj 85.
428. *State of West Bengal v Kesoram Industries Ltd*, AIR 2005 SC 1646 : (2004) 10 SCC 201.

by their own force lead to decision of any question or issue in the case or any of the rights of the parties.[429]

[s 2.11.6] Reasoning

What a judgment should contain is indicated in O XX, rule 4 (2) which says that a judgment "shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision." It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment.[430]

Dr. Pasayat J, speaking for the Supreme Court Bench, expressed it in the following way in the case of *KV Rami Reddy v Prema*:[431]

> **11.** The declaration by a Judge of his intention of what his judgment is going to be, or a declaration of his intention of what the final result it is going to embody, is not a judgment until he had crystallised his intentions into a formal shape and pronounced it in open court as the final expression of his mind.
>
> **12.** The CPC does not envisage the writing of a judgment after deciding the case by an oral judgment and it must not be resorted to and it would be against public policy to ascertain by evidence alone what the 'judgment' of the Court was, where the final result was announced orally but the judgment as defined in the CPC embodying a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision, was finalised later on.

The meaning, attributes and contents of a "judgment" have been explained by the Supreme Court in the following words in *Smt Swaran Lata Ghosh v Harendra Kumar Banerjee*:[432]

> Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on question of law as well as fact, ascertainment of facts by means of evidence tendered by the parties and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial, the judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the Court or by law, he must record the ultimate mental process leading from the dispute to its resolution. A judicial determination of a disputed claim where substantial question of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge; a mere order deciding the matter in dispute but not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest, it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate court will then have adequate material on which it may

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429. *Shriram Industrial Enterprise v UOI*, AIR 1996 All 135.
430. *Balraj Taneja v Sunil Madan*, AIR 1999 SC 3381 :: AIR 1999 SCW 3345 : (1999) 8 SCC 396; See also *Cellular Operators Association of India v UOI*, AIR 2003 SC 899 :: AIR 2003 SCW 366 : (2003) 3 SCC 186.
431. *KV Rami Reddy v Prema*, (2009) 17 SCC 308 : 2008 (3) Civil Court Cases 012 (SC). See also *Surendra Singh v State of Uttar Pradesh*, AIR 1954 SC 194.
432. *Smt Swaran Lata Ghosh v Harendra Kumar Banerjee*, AIR 1969 SC 1167 : (1969) 1 SCC 709.

> determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is unfortunate that the learned trial Judge has recorded no reasons in support of his conclusions, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint.

The Bombay High Court has held that a judgment should be reasoned. The facts of the case, the matter in controversy, and the manner in which it was settled by the court must appear from the judgment, notwithstanding whether the case was proceeded *ex parte* or whether written statement therein was filed or not.[433]

[s 2.11.7] Pronouncing Judgment

Before pronouncing judgment, the court has to apply its mind to arrive at the conclusion whether there is any cause to modify or remit the award. Further the phrase "pronounce judgment" would itself indicate judicial determination by reasoned order for arriving at the conclusion that decree in terms of award be passed. One of the meanings given to the word "judgment" in Webster's Comprehensive Dictionary[434] reads thus: "the result of judging; the decision or conclusion reached, as after consideration or deliberation". Further, O XX rule 4 (2) CPC in terms provides that "judgment" shall contain a concise statement of case, the points for determination, the decision thereon, and the reasons for such decision. This is antithesis to pronouncement of non-speaking order.[435]

[s 2.11.8] Order of a Single Judge

Order of single judge is judgment if not decree. Against the judgment of the learned single judge of the high court under section 299 of Indian Succession Act, 1925 a Letters Patent appeal is maintainable. The orders passed under section 299 of the Indian Succession Act, 1925 may be an interlocutory order determining the rights of the parties or a final order. When a final order is passed in a contentious suit, as would be evident from the provisions contained in section 295 of the Indian Succession Act, 1925, the procedures of the CPC are required to be followed. Therefore, a final order passed between the parties adjudicating upon the rights and obligations which are binding between the parties thereto and are enforceable, although may not be, *stricto sensu* a decree within the meaning of section 2(2) of the CPC but it is beyond any cavil that the same would be a judgment within the meaning of section 2(9) thereof.[436]

Order passed by a single judge in an appeal under section 173 of the Motor Vehicles Act, 1988 is a judgment.[437]

[s 2.11.9] Words in Judgment Cannot be Interpreted as Statutes

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to

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433. *Meditronics Corp of India v Salima A Rais*, AIR 2007 (NOC) 735 (Bom).
434. *Webster's Comprehensive Dictionary, International Edition*, vol 1, 1984.
435. *UOI v Manager, Jain & Associates*, AIR 2001 SC 3381: AIR 1999 SCW 3345 : (2001) 3 SCC 277; See also *Cellular Operators Association of India v UOI*, AIR 2003 SC 899 : AIR 2003 SCW 366.
436. *Subal Paul v Malina Paul*, AIR 2003 SC 1928 : (2003) 10 SCC 361 : AIR 2003 SCW 1412.
437. *RSRTC v Vaibhav Kumar*, AIR 2007 Raj 147 : (2007) Raj LW (4) Raj 3022 (DB – Jaipur Bench).

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be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.[438]

In a decision, a division bench of the Jharkhand High Court has observed that judgments should not be couched in a language which the ordinary people would find difficult to comprehend. It was observed:

> A common man cannot and shall not be able to understand the abbreviation and the words used in the impugned judgment. It is well settled that the use of abbreviations or code words should be strictly avoided. It is equally well settled that the judgment should be so precise and so clear that a common man or a litigant must understand the judgment. The language should be sober, temperate and clear.[439]

[s 2.11.10] *Ratio Decidendi*

A judgment, it is trite, is not to be read as a statute. The *ratio decidendi* of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. Answers given in judgment to the question is not the ratio to a judgment. The answers to the questions are merely conclusions. They have to be interpreted, in a case of doubt or dispute with the reasons assigned in support thereof in the body of the judgment, wherefor, it would be essential to read the other paragraphs of the judgment also. It is also permissible for this purpose to look to the pleadings of the parties.[440]

[s 2.11.11] Judgment — Letters Patent

The concept of "judgment" in section 2(2) of the CPC is narrow and cannot be applied for interpreting the word "judgment" in the Letters Patent.[441] Definition of judgment in CPC does not apply to the expression judgment occurring in clause (10) of Letters Patent, Patna.[442] To determine the question as to whether an interlocutory order passed by one judge of a high court falls within the meaning of "judgment" for purposes of Letters Patent, the test is: whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned. This has to be ascertained on the facts of each case. The order passed by the learned single judge determines the entitlement of the workmen to receive benefits and imposes an obligation on the appellant to pay such benefits provided in the said section. That order cannot but be "judgment" within the meaning of clause (10) of Letters Patent, Patna. The order of the learned single judge passed on an application under section 17B of the Industrial Disputes Act, 1947 on 26 April 1999 is a judgment within the meaning of clause 10 of the Letters Patent of Patna and is, therefore, appealable.[443]

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438. *Ashwani Kumar Singh v Uttar Pradesh Public Service Commission*, AIR 2003 SC 2661 (para 11, 13) : (2003) 11 SCC 584.
439. *Smt Hina Singh v Satya Kumar Singth*, AIR 2007 Jhar 34 (DB) : AIR Bom R 370 (NOC) : (2007) 1 JCR 570 Jhr.
440. *Islamic Academy of Education v State of Karnataka*, AIR 2003 SC 3724 : (2003) 6 SCC 69.
441. *Shah Babulal Khimji v Jayaben D Kaine*, AIR 1981 SC 1986 : (1981) 1 SCC 8 : (1982) 1 SCR 87.
442. *Mine Planning & Design Institute Ltd v UOI*, AIR 2001 SC 883 : (2001) 2 SCC 588.
443. *Mine Planning & Design Institute Ltd v UOI*, AIR 2001 SC 883 : (2001) 2 SCC 588.

[s 2.12] Judgment-Debtor: Section 2(10)

> "Judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made.

The word "judgment-debtor" as used in this rule has been held not to include the legal representative of a deceased judgment-debtor.[444] A surety of a judgment-debtor is not himself a judgment-debtor.[445]

[s 2.13] Legal Representative: Section 2(11)

> "Legal representative" means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

[s 2.13.1] Scope

The definition of "legal representative" is inclusive in character and its scope is wide. It is not confined to legal heirs only. It stipulates a person who may or may not be an heir if he is competent to inherit the property of the deceased, but he should represent the estate of the deceased person. It includes heirs, those in possession *bona fide*, without there being any fraud or collusion and are also entitled to represent the estate. Under the Portuguese law of inheritance, the wife represents the estate of her deceased husband. When a suit is filed against the husband of such Portuguese widow and after the death of the husband, wherein the name of the widow is brought on the record within time, the abatement of the suit would be liable to be set aside, and the suit would proceed on the merits, notwithstanding the fact that the remaining legal representatives of the deceased were brought on record at a subsequent stage.[446]

Where a person severed all connections with his natural family and became disciple of a Guru, other disciples of the said Guru would be his spiritual brothers. Therefore, on his death one of the spiritual brothers can maintain an application as his legal representative.[447]

The Supreme Court has held that in the case of death of a person due to motor vehicle accident, a legal representative is a person who suffers on account of death of that person and need not be a wife, husband, parent and child.[448] The Madhya Pradesh High Court has held that the brother of the deceased, who was a handicapped person and was dependent on him can be considered as a "legal representative".[449]

The adjudication contemplated under O XXII of the CPC does not finally determine the question as to who is the legal representative of the deceased. This determination is only for the purpose of continuing the proceeding that had already begun.[450] While dealing with an application under O XXII of the CPC, the courts are not required to delve into the question of title. The court is only required to see whether the person sought to be substituted has any

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444. *Iaq v Ramji*, (1952) ILR All 618.
445. *Vijay Raj v Lal Chand*, (1966) ILR Raj 194.
446. *Custodian of Branches of BANCO National Ultramarino v Nalini Bai Naique*, AIR 1989 SC 1589 : 1989 Supp 2 SCC 275; *Indira Vinayak Sawant v Vijayendra Umakan Shety*, AIR 2007 Bom 87.
447. *Mahant Shyamdas Guru Mohandas v Lalaram M. Kori*, AIR 2008 MP 47 (DB).
448. *Gujarat State Road Transport Corp v Ramanbhai Prabhatbhai*, AIR 1987 SC 1690 : (1987) 3 SCC 234.
449. *Smt Amma v Royal Transport Services*, AIR 2008 MP 213.
450. *Ashwani Kumar v Smt. Vidya*, AIR 2007 All 105.

right or whether he is the legal representative of the heirs, as defined in section 2(11) of the CPC. Thus, where a petitioner claimed to be legal representative of the deceased plaintiff on the basis of a registered adoption deed, it was held that for the purposes of O XXII it was sufficient to allow the prayer.[451]

The decision as to who is the legal representative for the purpose of proceedings is necessarily limited for the purpose of carrying on the proceedings and cannot have the effect of conferring of any right of heirship to the estate of the deceased. It is true that all legal heirs are ordinarily also legal representatives, but the converse is not true. All legal representatives are not necessarily legal heirs at will.[452]

A legal representative in a given case need not be a surviving spouse, son, daughter, father or mother of a deceased tenant living with the tenant in the petition schedule property up to the death of the tenant. Legal representative, ordinarily means, a person who in law, represents the estate of the deceased persons or persons on whom the said estate devolves on the death of the individual.[453]

Of many heirs, those in possession *bona fide* without any element of fraud or collusion represent the estate of the deceased.[454] It has been held by the Supreme Court that *legatees* of portions of estate are legal representatives.[455]

In a suit by a *benamidar*, the real owner is not the legal representative on his death.[456] Even if the real owner is in possession, he is not the legal representative of the *benamidar*, as he is in possession in his own right. There is no question of any estate of the *benamidar* devolving upon him or his representing it. A *benamidar*, on the other hand, represents the real owner. During an action between a *benamidar* and a third party, the *benamidar* died and his heirs were brought on record. An application by the real owner for being brought on record was dismissed. The decree passed against the heirs of the *benamidar* was held to be binding on the real owner since the *benamidar*, and after his death, his heirs, represent the real owner.[457] It has been held that to decide whether a person is a legal representative or not, it is not unnecessary to inquire whether the deceased had left the estate.[458] Where the assessee had individual income from business and properties, and on his death, his eldest son voluntarily filed returns on behalf of the deceased assessee, the return filed by the eldest son were scrutinised by the Income-tax officer, who also issued notice to him to appear and produce certain documents and other material. The deceased left behind 10 legal representatives. Except the eldest son who filed the returns, no notices were served on the remaining nine representatives. It was held in the circumstances that it could not be said that the assessment orders are null and void on account of non-service of notice on nine out of 10 legal representatives of the assessee.[459]

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451. *Brijesh Kumar v District Judge, Azamgarh*, 2010 (1) Civil Court Cases 072 (All).
452. *Kaluram v Chaman Singh*, AIR 1994 Raj 31.
453. *Vrishendramani v K Venugopal Rai*, AIR 1995 Kant 230; *Sarada v Chakunny*, AIR 1992 Ker 249.
454. *Manranjan v Rani Brigaraj*, AIR 1947 Pat 365 : (1946) ILR Pat 550.
455. *Andhra Bank v Srinivasan*, AIR 1962 SC 232; overruling *Natesa v Alamelu*, AIR 1950 Mad 541; *Natesa v Sundaram*, AIR 1953 Mad 622; where *Natesa v Alamelu*, AIR 1950 Mad 541 is discussed.
456. *Shakuntala Bai v Shankar Rao*, AIR 1949 Ngp 176; *Navaneetham v Gangan*, AIR 1961 Mad 376.
457. *Ragho Prasad Gupta v Krishna*, AIR 1969 SC 316 : (1969) 1 SCR 884.
458. *Dhool Chand v Ganpat Lal*, AIR 1957 Raj 283 : (1957) ILR Raj 543 : (1957) Raj LW 187.
459. *CIT, Shillong v Jai Prakash Singh*, AIR 1996 SC 1303. See also notes to sections 50, 52 and O XXII rule 3.

[s 2.13.2] Strictest Sense

The expression "legal representative" in its strictest sense was limited to executors and administrators only,[460] and in cases under the Indian Succession Act, 1925 that is still the case.[461] But, its meaning was extended after many conflicting decisions to include heirs and also persons who, without title either as executors, administrators or heirs, were in possession of the estate of the deceased. All these earlier cases are reviewed in *Dinamoni v Elahadut Khan*,[462] and the definition settles the meaning of the term as explained there.[463] Universal *legatee* under a will executed by the deceased is his legal representative.[464] Under the Portuguese law of inheritance, the widow acquires *meeira* rights, according to which she gets one-half share in the estate left by her deceased husband. She therefore represents her husband's estate. If, in a suit against a male governed by Portuguese law, on his death, his widow is substituted within time, the suit can proceed on the merits, even if other representatives are brought later.[465] A suit was filed for declaration of title and recovery of possession. The defendants constituted a joint Hindu family. One minor defendant died, leaving his mother and father. The father was already on record as *Karta*, but the mother was not substituted. It was held that by virtue of section 6, Hindu Succession Act, 1956, the minor's interest in the joint family property devolved on his mother. If a person is survived by a female relative specified in the Sch 1 to the Hindu Succession Act, 1956, (the mother, in this case), then the coparcenary, to the extent of the interest of the deceased minor, ceased to exist immediately upon his death. Hence, the minor's interest devolved upon his mother. If the mother is not substituted, the suit would abate.[466]

The Gauhati High Court has held that brothers of a deceased in a motor accident are entitled to share in compensation along with widow of the deceased, irrespective of the fact that they are not dependent on the deceased.[467] This point has been clarified by the Supreme Court in *Manjuri Bera's* case,[468] that a claim petition filed by a married daughter of a motor accident victim is maintainable regardless of the fact that she is not dependent on him.

Where the husband and wife along with their son died simultaneously in a motor accident, it was held by the Himachal Pradesh High Court that the son being the youngest of all, by virtue of the presumption under section 21 of the Hindu Succession Act, 1956, would be deemed to survive his parents on the principles of *Commorientes*. Thus, the son being the only legal heir, his maternal grandmother would be the legal representative.[469]

A *legatee* under a Will executed by a deceased landlord is competent to maintain an application for execution of a decree as he is covered under the definition of "legal representative" of the deceased decree-holder. It is not mandatory for him to obtain a probate certificate before enabling him to file an execution petition.[470]

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460. *Price v Strange*, (1882) ILR 6 Mad 159.
461. *Framji v Adarji*, (1894) ILR 18 Bom 377; *Barnett Bros v Fowle*, AIR 1925 Rang 186 : (1925) 3 Rang 46.
462. *Dinamoni v Elahadut Khan*, (1904) 8 Cal WN 843.
463. *Shakuntala Bai v Shanker Rao*, AIR 1949 Ngp 176 : (1904) 8 Cal WN 843, p 858; *Abdul Jabbar v Manomani Pictures*, AIR 1976 Mad 368.
464. *Shantha v Natarajan*, (1960) 1 Mad LJ 318; *L Sreenivasulu v D Muniratnam*, AIR 1978 AP 173.
465. *Custodian of Branches of BANCO National Ultramarino v Walini Bai Naique*, AIR 1989 SC 1589.
466. *Jiba Devi v Satya Nand Roy*, AIR 1982 Pat 177 (DB).
467. *Hafizun Begum v Member, Motor Vehicle Claim Tribunal*, AIR 2009 Gau 4 (DB) : (2009) 5 Gau LR 823.
468. *Manjuri Bera v Oriental Insurance Co Ltd*, AIR 2007 SC 1474 : (2007) 10 SCC 643.
469. *Raman Khanna v Sham Kishore Khanna*, AIR 2009 HP 42 : (2009) 1 Shim LC 200.
470. *Smt. Gauri Bahu v Gopaldas Potoram Jaiswani*, AIR 2008 (NOC) 1708 (MP).

This view has been approved and confirmed by a recent decision of the Supreme Court. It has been held that in an eviction proceeding, when a *legatee* under a Will intends to represent the interests of the estate of the deceased, he will be a legal representative within the meaning of section 2(11) of the CPC for which it is not necessary to decide whether the Will is genuine or not.[471]

[s 2.13.3] Finding of Fact

Finding of fact as to whether property is or is not ancestral, is essentially a question of fact. It cannot be interfered with in second appeal.[472] A person on whom the estate of the deceased devolves would be his legal representative even if he is not in actual possession of the estate.[473]

[s 2.13.4] Persons not Legal Representatives

A mere trespasser, however, cannot be said to be the legal representative of the deceased as he holds adversely to him and does not intermeddle with the intention of representing the estate.[474]

In case of a joint family property, a minor's interest, who was survived by mother (female relatives) specified in Sch I to Hindu Succession Act, 1956, if the mother is not substituted, the suit would abate.[475] The father is not an "intermeddler" and cannot be regarded as a legal representative.

The expression "legal representative" has not been defined in the Motor Vehicles Act, 1988 but in ordinary parlance it is understood in the same way it has been defined in the CPC. Ordinarily, heirs of the deceased are the persons who represent the estate of the deceased, but where parents of the deceased, who are preferential heirs, are alive, brothers and sisters of the deceased cannot be considered as legal representatives.[476]

The Andhra Pradesh High Court has held that though the married sister may be the legal representative of the deceased/injured, she is not entitled to claim compensation in terms of rule 2(g) of the Andhra Pradesh Motor Vehicle Rules.[477]

The matters in relation to tenancy and rent control are different as cases relating to tenancy and eviction are governed by special enactments and the rules framed thereunder. Even though tenancy rights are heritable, unless the person claiming to be legal representative of a deceased tenant was carrying on business with the deceased tenant, he cannot fall within the definition of tenant.[478]

This issue has been further clarified by the Supreme Court. It was held that for substitution as legal representative it is not enough that the persons seeking impleadment are legal heirs

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471. *Suresh Kumar Bansal v Krishna Bansal*, AIR 2010 SC 344 : (2010) 2 SCC 162. See also *Jaladi Suguna deceased through LRs v Satya Central Trust*, AIR 2008 SC 2866 : (2008) 8 SCC 521.
472. *Ram Sarup v Patto*, AIR 1981 P&H 68.
473. *Javarimal v Mangilal*, (1961) Raj LW 132.
474. *Satyanarayana v Sarat Chandra*, AIR 1926 Cal 825 : (1926) 30 Cal WN 565; *Nagendranath v Hyat*, AIR 1933 Cal 865 : (1933) 37 Cal WN 758.
475. *Jiba Devi v Satya Nand Roy*, AIR 1982 Pat 177 (DB).
476. *PN Unni v Baby John*, AIR 2008 Ker 157 : (2008) 2 Ker LT 78 (DB).
477. *Seshapu Ramulamma v Doppalapudi Raju*, AIR 2009 (NOC) 1336 (AP).
478. *LRs of Tribuvan Dutt v Jai Narayan*, AIR 2009 Raj 174.

of the deceased tenant, but it has to be seen whether they were carrying on business with the deceased tenant till the time of his death or had separated from the joint family.[479]

The Karnataka High Court held that when the sole plaintiff or sole surviving plaintiff dies and the "right to sue" survives on class I legal heirs, the action brought about by the deceased plaintiff devolves on them when they acquire that "right to sue" and it is this right which clothes them with the power to continue the suit/appeal which the plaintiff/appellant possessed against the defendant respondent. Where it was brought on record that one of the legal representatives was acting against the interests of other legal representatives, it was held that she does not possess a "right to sue" or the right to prosecute the claim of the plaintiff.[480]

[s 2.13.5] Deceased Parties Name Cannot be Washed Off

The judgment should contain full particulars of the parties and decree has to follow the judgment. In case name of a deceased party (originally impleaded) is washed off while substituting legal representatives it is likely to mislead as it shall not be possible in future to ascertain extent of rights to be determined with respect to the estate of a deceased party. It may be reiterated that when a person dies, right of substitution is not on the basis of succession, but a person, who is competent to represent the estate of a deceased party and has no interest adverse to the deceased's estate will be permitted to be substituted as his legal representative.[481]

To keep the record straight and to avoid misconception and/or ambiguity in future, statutory provisions specifically provide that when a party to a suit/ proceeding dies, a note be made to that effect against said party and "legal representatives" be brought on record as per rule 37, general rules (civil) and Allahabad High Court Rules.[482]

It therefore, naturally follows that in an application for substitution of legal representatives prayer for deletion/striking off/or washing off/to erase/removal of the name of "deceased party" on record, is misconceived, untenable and not approved in law, prayer to the above effect in the amendment application for substitution of legal representatives is totally misconceived and cannot be legally allowed. It is not permissible in law to erase the name of original deceased party and to do the contrary is also being uncalled for.[483]

Once a party is impleaded and/or brought on record, proceedings started must be concluded with their names and continue till perpetuity. In the matter of death of any such party, in case of substitution of legal representative "on an application made in that behalf, court shall cause legal representative of the deceased, plaintiff/defendant to be made a party to proceed with the suit" and if legal representatives are not be substituted, then a note shall be made against a party of his death, but in no case name of deceased party shall be deleted or removed or struck-off.[484]

[s 2.13.6] Party in a Representative Character

Where a person is a party in a representative character, the legal representative is the person who, after his death, represents the estate that is the subject matter of the suit.[485] Thus, where

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479. *Kanhiya Singh Santok Singh v Kartar Singh*, AIR 2009 SC 1600 : (2009) 4 SCC 155.
480. *Chandralekha v BV Sujatha*, AIR 2010 Kant 104.
481. *New Okhla Industrial Development Authority v Pooran Singh*, AIR 2004 All 218.
482. *New Okhla Industrial Development Authority v Pooran Singh*, AIR 2004 All 218.
483. *New Okhla Industrial Development Authority v Pooran Singh*, AIR 2004 All 218.
484. *New Okhla Industrial Development Authority v Pooran Singh*, AIR 2004 All 218.
485. *Rao Bhimsingh v Sher Singh*, AIR 1948 PC 1 : (1947) ILR Nag 820 : 74 IA 247 : (1948) 52 Cal WN 109; *Lala Radharaman v Anant Singh*, AIR 1945 Oudh 196 : (1945) ILR 20 Luck 305.

the owner of an ancestral impartible estate is sued as representing the estate, his successor taking by survivorship is his legal representative; so also, where the manager of a joint Hindu family dies, the next manager is his legal representative and where there is no such manager, all the coparceners are his legal representatives.[486] Thus, on the death of a trustee, or of a *shebait* of a *muth*, his successor in office and not his executor or heir is the legal representative, and the suit would be continued by or against the successor under O XXII, rule 3 or rule 4. A reversioner sues in a representative character as representing the reversionary right to the estate of the last male owner. The legal representative of such a reversioner is the next reversioner; and a suit by a reversioner to set aside an adoption by widow may be continued on his death by the next reversioner.[487] Where pending a suit for specific performance of an agreement to sell by a party, the latter died and the reversioner sought to raise the question of the binding character of the agreement, it was held that he was entitled to do so as he was the legal representative of the last full owner and not of the limited owner.[488] A suit by a Hindu daughter,[489] or by a Hindu widow[490] to recover the father's or husband's estate is continued after her death by the next heirs entitled to come in after her, except in Bombay where the daughter takes an absolute estate. It has been held that a coparcener leaves no estate in the coparcenary property at his death and so, the surviving coparcener is not his legal representative with reference to that property;[491] but, a son who has inherited the property of his father is his legal representative against whom the decree can be executed under section 50 of the CPC.[492] The correctness of the decision that a surviving coparcener is not a legal representative has been doubted and it has been said that the son who takes the joint family estate by survivorship should be regarded as a person who in law represents the estate of the deceased person.[493] The widow of a coparcener is also his legal representative under the Hindu Women's Right to Property Act, 1937,[494] and that would also be the position under Hindu Succession Act, 1956.[495] The official assignee has been held to be the legal representative of the insolvent judgment-debtor within the meaning of O XXI, rule 22 of the CPC.[496] Where a lunatic whose estate had been taken over by the court of wards died, it was held that the person competent to represent the estate thereafter was not the manager appointed previously but the court of wards.[497]

[s 2.13.7] Intermeddles with the Estate

One who intermeddles with the estate of a deceased person, even though it may be with part thereof, is a "legal representative" within the meaning of this clause and is liable to the extent of

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486. *Alek Chandra v Krishna Chandra*, AIR 1941 Pat 596 : (1941) ILR 20 Pat 755, p 763.
487. *Venkatanarayana v Subhammal*, (1915) ILR 38 Mad 406 : 42 IA 125.
488. *Kailas v Sheo Pujan*, AIR 1952 Pat 380.
489. *Mahadeo v Sheo Karan*, (1913) ILR 35 All 481; *Jadubansi v Mahpal Singh*, (1916) ILR 38 All 111; *Rama Swami v Podamunayya*, (1916) ILR 39 Mad 382.
490. *Premmoyi v Preonath*, (1896) ILR 23 Cal 636; *Tribhuwan v Sri Narain*, (1898) ILR 20 All 341; *Rikhai Rai v Sheo Pujan*, (1910) ILR 33 All 15.
491. *Chunilal v Bai Mani*, (1918) ILR 42 Bom 504; *Dwarka Das v Krishnan*, AIR 1921 Lah 34 : (1921) 2 Lah 114.
492. *Jambirao v Annapa*, AIR 1941 Bom 23 : (1941) ILR Bom 177 (FB); *Sakarlal v Parvatibai*, (1902) ILR 26 Bom 283.
493. *Alekh Chandra v Krishna Chandra*, AIR 1941 Pat 596 : (1941) ILR 20 Pat 755; *Ganesh v Narayan*, AIR 1931 Bom 484 : (1931) ILR 55 Bom 709.
494. *Bishan Narayan v Om Prakash*, AIR 1952 Punj 167.
495. See note "Legal Representative" under O XXII, rule 3.
496. *Raghunath Das v Sundar Das*, AIR 1914 PC 129 : (1915) ILR 42 Cal 72, p 88 : (1914) 41 IA 251, p 257.
497. *Kutty Kunhunniraja v Kuthiravattathu Nair's Estate*, AIR 1960 Ker 288.

the property taken in possession by him.[498] He would, however, not be a legal representative in respect of properties not in his possession.[499] However, it has been held that a mere trespasser is not a legal representative as he has not intermeddled with the intention of representing the estate.[500] If a person, who is not the heir, wrongly brings himself on the record of a suit after the death of a party, he does not become a legal representative, unless he in fact takes possession and so, intermeddles with the estate of the deceased.[501]

The averment in a plaint filed by a bank for the recovery of a loan advanced to a sole proprietary concern was that certain relations of the proprietor (since deceased) were intermeddling with the estate of the deceased, and that is why the intermeddlers were made parties. It was held that their names could not be struck off.[502]

In a suit for partition filed by the father and a minor, the suit was decreed, but during the pendency of the appeal by defendants, the minor died and his mother, who was a class I heir was not brought on the record within time. A Full Bench of Patna High Court held that the appeal did not abate as father became his legal representative as intermeddler on the minor's death and as such the mother was allowed to be brought on the record.[503] Where, in an appeal arising out of a decree passed in a suit for obtaining possession by ejecting trespassers, one of the co-owners died during pendency of the appeal, another Full Bench of the same high court reiterated the above view and held that since other co-owners, apart from being brothers were intermeddlers to the estate, the whole appeal would not abate. It was observed that the definition of "legal representative" in section 2(11) of the CPC includes intermeddlers.[504]

In a case before the Karnataka High Court, where on the death of the plaintiff the suit had abated, some person claiming to be trustees of a trust constituted through a Will executed by the deceased plaintiff moved for substitution as legal representatives and for setting aside abatement. The high court held that the definition in section 2(11) of the CPC includes intermeddlers and the prayer of substitution cannot be refused simply because they were strangers.[505]

The Supreme Court has held that the term "legal representative" is wide and inclusive of not only the heirs but also intermeddlers of the estate of the deceased as well as the persons who in law represent the estate of the deceased. The executor, administrators, assignees or persons acquiring interest by devolution under O XXII, rule 10 or *legatees* under a Will are legal representatives.[506]

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498. *Woomesh v Jabed Ali*, AIR 1944 Cal 42 : (1950) ILR Cut 413 : (1943) 77 Cal LJ 155; *Daropdi v Sada Kuar*, (1913) PR No 115, p 436; *Ram Singh v Saryan Singh*, AIR 1924 Lah 251 : (1923) 5 Lah LJ 459, (no intermeddling); *Chacko v Iype*, AIR 1956 TC 147; *Andhra Bank Ltd v Srinivasan*, AIR 1962 SC 232 : (1962) 2 SCR 391.
499. *Ram Prasad v Jumna Prasad*, AIR 1952 MB 153.
500. *Chockalingam v Karuppan*, AIR 1948 Mad 386; *Satya Ranjan v Sarat Chandra*, AIR 1926 Cal 825 (1926) 30 Cal WN 565; *Nagendra Nath v Haran Chandra*, AIR 1933 Cal 865 : (1933) 37 Cal WN 758; *Ram Prasad v Jumna Prasad*, AIR 1952 MB 153; *Kalyanmal Mills Ltd v Volimohammad*, AIR 1965 MP 72 : (1965) MPLJ 452.
501. *Natesa Sastrigal v Alamemachi*, AIR 1951 Mad 541; *Baliram v Mukinda*, AIR 1951 Ngp 145; *Manikya v Lakshminarasimha*, AIR 1933 Mad 43.
502. *State Bank of India v Indian Apparel Industries*, AIR 1989 Del 299–300.
503. *Sudama Devi v Jogendra Chaudhary*, AIR 1987 Pat 239 : 1987 BLJR 724 (FB).
504. *Yogendra Bhagata v Pritlal Yadava*, AIR 2009 Pat 168 (FB).
505. *K Shankarappa v KG Gangadharaiah*, AIR 2001 Kant 203 : (2001) (3) Kant LJ 647. See also *Baikunth Nath Das v VII ADJ, Gorakhpur*, AIR 2004 All 382 : 2004 All LJ 3288.
506. *Chiranjilal Shrilal Goenka v Jasjit Singh*, (1993) 2 SCC 507 : (1993) 50 Del LT 266.

The Supreme Court has permitted borrowing of definition of "Legal Representative" from section 2(11) of the Code to MACT claims and also affirmed the decision in *Sudama Devi*[507] approving inclusion of even "intermeddlers" in the definition of "Legal Representatives".[508]

In a recent decision, the Supreme Court has confirmed the above view. It has been observed by Raveendran J, as follows:

> **8.** 'Legal representative' according to its definition in section 2(11) of the CPC, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased person. Thus a legatee under a Will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative.[509]

[s 2.14] *Mesne* Profits: Section 2(12)

"Mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

The Code of Civil Procedure 1882, for the first time, included interest in the definition of mesne profits. It was rightly done because interest is an integral part of mesne profits and has therefore, to be allowed while computing items.[510]

The main object of awarding mesne profits is to compensate the person entitled to be in possession of the property. The very foundation of a cause of action for mesne profits is the wrongful possession of the defendant. *Mesne* profits are actually in the nature of damages which can be claimed by a landlord at reasonable letting out value of suit premises.[511]

The expression "mesne profits" as defined in section 2(12) of the CPC means those profits which a person in wrongful possession of such property either actually received or might have received with due diligence. It is not always necessary that there should be proof of actual receipt.[512]

For entitling him to grant of mesne profits, the plaintiff must lead evidence to prove what would be the compensation the defendant might have received with due diligence for his wrongful possession. Where the plaintiff did not lead any evidence, it was held that he was not entitled to claim *mesne* profits.[513]

The observations made in the above case,[514] are worth nothing:

> However, the concept of mesne profits appear to be different. Section 2(12) of Civil Procedure Code, defines mesne profits to mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. The words 'Mesne Profits' suggest value of house for occupation of land during the time it was held by one in

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507. *Sudama Devi v Jogendra Choudhary*, AIR 1987 Pat 239.
508. *Montford Brothers of St Gabriel v United India Insurance*, AIR 2014 SC 1550 : (2014) 3 SCC 394.
509. *Jaladi Suguna (Dead) through I Rs v Satya Sai Central Trust*, AIR 2008 SC 2866 : (2008) 8 SCC 521.
510. *N Dasji v Tirupathi Devasthanam*, AIR 1965 SC 1231.
511. *Kamakhya Singhdeo v Modula India*, AIR 2008 (NOC) 2582 (Cal).
512. *Mohadei v Kaliji Birajman*, 1969 All LJ 896.
513. *Kishen Kumar Navandas Jobanputra v Purushottam Mathuradas Ratbatba*, 2006 (2) Civil Court Cases 600 (Bom).
514. *Kishen Kumar Navandas Jobanputra v Purushottam Mathuradas Ratbatba*, 2006 (2) Civil Court Cases 600 (Bom), p 603.

wrongful possession and is commonly measured in terms of rent and profits (See Black's Law Dictionary). The Apex Court in the case of *Fateh Chand v Balkrishna Dass*, AIR 1963 SC 1405 observed that the normal measure of mesne profits is the value of the user of the land to the person in wrongful possession.

The criteria for calculation of *mesne* profits is not what the owner loses by reason of deprivation from possession but what the trespasser received or might have received with ordinary diligence.[515] Where sale deed in respect of half portion of a property was declared void, the vendee cannot be said to be in wrongful or unlawful possession and as such mesne profits cannot be claimed.[516]

In *Thammana Nukiah Shetti v Velapa Appalaraju,*[517] a Division Bench of the Andhra Pradesh High Court, relying on the decision of the Supreme Court in *Siddeshwar Mukherjee v Bhubaneshwar Prasad Narain,*[518] observed as follows:

Going by the principle, a purchaser of an undivided share will not be entitled to possession until he is allotted a specific share in the property. Mesne profits can be claimed by him only from the date when he is deprived of his lawful possession. Section 2(12) of CPC defines mesne profits of property as profits which the person in wrongful possession of such property actually received or might have received with ordinary diligence from it. A person is said to be in wrongful possession when he enjoys such possession despite, another person is entitled to it under law. A purchaser is entitled to lawful possession only when allotment of a specified portion is made to him. In this case, the finding is that there was a division in status, but there was no division by metes and bounds. A mere division in status does not bring about the consequences of the different sharers being entitled to specific portion of property. The only legal consequence of a division in status of a joint Hindu family is that the erstwhile coparceners become 'tenants in common' without any member becoming entitled to a specific portion or item of the properties that belonged to the joint family. In the absence of a specified allotment, no member is entitled to claim possession of any item of the property or any specified portion of the property of the joint family. He will have to file a suit to enforce that right, a purchaser from such a member cannot have a higher right than the member of such a family.

Where in a suit for declaration of title and recovery of possession of immovable properties, the plaintiff did not claim either past or future *mesne* profits or rent, but the preliminary decree directed an enquiry to be made under O XX, rule 12, the Supreme court held that the high court was in error in awarding mesne profits when they had not been claimed in the plaint.[519]

In a later decision, the Supreme Court clarified that though the plaintiff must plead in order to enable him to get a decree for past *mesne* profits, with regard to future mesne profits, since the plaintiff would have no cause of action on the date of the institution of the suit it was not necessary for him to plead in the plaint and in all cases where there is a prayer for past mesne profits, the court had ample jurisdiction to direct an enquiry to be made into future mesne profits in the preliminary decree.[520]

The possession of a co-sharer can never be wrongful within the meaning of section 2(12) as he has a right and interest in every inch of the undivided property. Therefore, one co-sharer cannot claim mesne profits against the other, on the ground that the latter was in wrongful possession.[521]

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515. *PL Kapur v Jia Rani*, AIR 1973 Del 186; *Dwaraka Rai v Lakshmi Narayan*, AIR 1979 Pat 11.
516. *Neeraj Lunawat v Gyanchand Chawrdia*, 2007 (3) Civil Court Cases 340 (Raj).
517. *Thammana Nukiah Shetti v Velapa Appalaraju*, AIR 1975 AP 208 (DB).
518. *Siddeshwar Mukherjee v Bhubaneshwar Prasad Narain*, AIR 1953 SC 487 : (1954) SCR 177.
519. *Md Amin v Vakil Ahmad*, AIR 1952 SC 358 : (1952) SCR 1133.
520. *Gopal Krishna Pillai v Meenakshi Aval*, AIR 1967 SC 155 : (1966) Supp SCR 128.
521. *Shambhu Dayal Khetan v Motilal Murarka*, AIR 1980 Pat 106.

Having regard to the definition of "mesne profits" in section 2(12), the grant of interest is implicit in *mesne* profits. Where the court did not grant interest while passing the order for payment of *mesne* profits and did not take into consideration the question of ordering payment of interest at all, a review petition for the grant of interest on *mesne* profits would be maintainable. Non-award of interest is a patent and glaring mistake. That the applicant did not make a claim for interest or did not agitate the point during the course of the hearing, is not a valid argument against review.[522]

The criterion for assessing mesne profits is not what the plaintiff might have got had he been in possession, but the value of the user of the tenement to the defendant after termination of his tenancy.[523]

Wherein partition suit was filed where the co-sharer was admittedly in possession of disputed premises, he is accountable for the receipt of profits during the disputed period. Claim for profits in that period by other co-sharers cannot be regarded as a claim for *mesne* profits as defined in section 2(12) or O XX, rule 12. Possession by the co-owner cannot be termed as unlawful possession and therefore, section 2(12) of the CPC, can have no application. So understood, future *mesne* profits mentioned in the preliminary decree could only mean the actual profits received by the person in possession.[524]

It cannot be said that *mesne* profits can be calculated only on the basis of the maximum rent that the premises could have fetched if let out.[525]

Mesne profits can be claimed only when there is wrongful possession of the defendant. But, where dispossession is a joint or concerted act of several persons, each of them who participates in the commission of that act would be liable for mesne profits even though he was not in possession and the profits were received not by him but by some of his confederates.[526]

Measure of *mesne* profits is the value of wrongful possession. Rent could be a relevant factor for considering such a value, but not a decisive matter.[527] In terms of the definition of mesne profits under section 2(12) of the CPC, the question of proprietary of the valuation on account of the same can be decided at the time of trial on evidence where the court can pass a decree for *mesne* profits or can direct the inquiry, or, can reject a prayer of *mesne* profits.[528]

The reservation as to profits due to improvements made by the person in wrongful possession is new.[529]

[s 2.15] Movable property: Growing Crops: Section 2(13)

Movable property includes growing crops.

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522. *Tarquino Raul Henriques v Damodar Mongalji & Co Pvt Ltd*, AIR 1989 Bom 309.
523. *Kesardeo v Nathmal*, AIR 1966 Bom 226.
524. *Muhammed Hanifa Rowther v Sara Umma*, AIR 1991 Ker 94.
525. *Purificacao v Hugo*, AIR 1985 Bom 202.
526. *Luaj Kochuvareed v P Mariappa Govinder*, AIR 1979 SC 1214 : (1979) 3 SCC 150 : (1979) 3 Mah LR 229.
527. *Ratilal v Vithaldas*, AIR 1985 Bom 134, p 136, para 8.
528. *Surender Kumar Grover v Jayanta Roy*, AIR 1996 Cal 88.
529. See section 144 and notes to O XX, rule 12.

HIGH COURT AMENDMENT

Calcutta.—In clause (13) insert the words "except in suits or proceedings in the Court of Small Causes of Calcutta" after the words "growing crops" *vide* Cal. Gaz. Pt I, dated 20 April 1967.

Growing crops are now movable property and cases in which crops were held to be immovable property until reaped, are obsolete. The definition must be limited to the CPC, for under section 3(26) of the General Clauses Act, 1897, standing crops are immovable property.

[s 2.16] Order: Section 2(14)

"Order" means the formal expression of any decision of a civil court which is not a decree.

Order in contempt proceedings is an order within the meaning of this section.[530] But it may be noted that contempt is a matter essentially between the court and condemner. The party filing an application seeking action against the contemnor is only informant. Once the court admits the contempt petition, then the petitioner really has no effective role to play, though usually he is given a hearing in such a petition. The contempt alleged may be a contempt of civil nature, but by exercising its jurisdiction to deal with the alleged contempt, the court does not become a civil court within the meaning of section 2(2) and section 2(14) of the CPC. It remains as a court exercising contempt jurisdiction. The court either punishes the condemner or discharges him or remedies punishment of apology being made to its satisfaction. No other order is contemplated in such a proceeding. If, in such a proceeding, the parties file certain consent terms, they do not form the part of the final order which is contemplated in contempt proceedings. Filing of the consent terms by the parties is only a consideration which prompts the court not to proceed further in the matter and terminate the proceedings by disposing of the petition. Therefore, it can hardly be said that the consent terms in terms of which the petition is "disposed of" form the part of the final order of the couart. The court, in exercise of its contempt jurisdiction, does not decide any issue or question much less on merits. Therefore, the consent terms incorporated in the final order passed in contempt petition do not amount to a decision within the meaning of the term as used in section 2(14) of the CPC and therefore, it is not an order within the meaning of that section. Consequently, such an order cannot be said to be executable under O XXI read with section 36 of the CPC.[531] The award given by the motor accident claims tribunal does not have the status of a "judgment", "decree" or "order" as contemplated by the CPC.[532]

[s 2.17] Pleader: Section 2(15)

"Pleader" means any person entitled to appear and plead for another in court and includes an advocate, a vakil and an attorney of a High Court.

[s 2.17.1] Advocate

An advocate is defined in section 22(a) of the Bar Councils Act, 1926, as one whose name is "entered on the rolls of an advocate of the high court". An advocate whose name has been

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530. *Onkermull v Padampat*, AIR 1994 Raj 44 : (1944) 53 Cal WN 310. See notes under clause (3) of this section.
531. *Re Siddharth Srivastava*, AIR 2002 Bom 494.
532. *Re Siddharth Srivastava*, AIR 2002 Bom 494.

removed from the roll is not within this definition.[533] The position would be the same under section 2 of the Advocates Act, 1961, wherein an "advocate" is defined as one whose name is "entered in any roll under the provisions of this Act".

[s 2.17.2] "Pleader"

The term "pleader" is, here, used in a much larger sense than its ordinary signification as a convenient term to designate all persons who are entitled to plead for others in court. "Pleader", in its ordinary sense, is synonymous with *vakil*.[534]

[s 2.17.3] Authority to Compromise

The extent of the implied authority to compromise varies with the different grades of legal practitioners.

[s 2.17.3.1] Counsel and Advocate

Counsel and advocates have an implied authority to compromise in all matters connected with the action and not merely collateral to it.[535] In *Sourendra Nath v Tarubala*,[536] the Privy Council said that "their Lordships regard the power to compromise a suit as inherent in the position of an advocate in India". The Rangoon High Court has, however, held that a barrister in Burma has no power to compromise without the express consent of his client;[537] but, the correct view is that counsel and advocates derive their authority from their retainer by reason of being briefed in the suit.[538] Therefore, the consent of a client is not needed for a matter which is within the implied authority of his counsel or advocate.[539] The authority of counsel or advocate may, however, be expressly limited by the client. If such limitation is communicated to the other side, the consent of counsel outside the limits of his authority is of no effect.[540]

Difficult questions, however, arise if the limitation has not been communicated to the other side and counsel consents in spite of dissent or on terms different from those his client authorised.[541]

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533. *Jethanand v Hon'ble Judges of the Punjab High Court*, AIR 1962 SC 742.
534. *Re Pleaders of the High Court*, (1884) ILR 8 Bom 145.
535. *Jivibai v Ram Kumar*, AIR 1947 Ngp 17 : (1946) ILR Nag 824; *Sourendra Nath v Tarubala*, AIR 1930 PC 158 : (1930) ILR 57 Cal 1311 : (1930) 57 IA 133; reversing *Taru Bala v Sourendra Nath*, AIR 1925 Cal 866 : (1925) 41 Cal LJ 213; *Shepherd v Robinson*, (1919) 1 KB 474; *Jang Bahadur v Shankar*, (1891) ILR 13 All 272; *Nundo Lal v Nistarini*, (1900) ILR 27 Cal 428; *Nilmoni v Kedar Nath*, AIR 1922 Pat 232 : (1922) ILR 1 Pat 489.
536. *Sourendra Nath v Tarubala*, AIR 1930 PC 158 : (1930) 57 IA 133, p 139 : (1930) ILR 57 Cal 1311.
537. *Desram v Baswa*, AIR 1930 Rang 313 : (1930) 8 Rang 290.
538. *Sourendra Nath v Tarubala*, AIR 1930 PC 158 : (1930) ILR 57 Cal 1311 : (1930) 57 IA 133; *Matthews v Munster*, (1888) 20 QBD 141; *Surendra v Lakshmia Singh*, AIR 1960 Bom 20; *Lakshmi Das v Savitha Bai*, AIR 1956 Bom 54.
539. *Jivabai v Ram Kumar*, AIR 1947 Ngp 17 : (1946) ILR Nag 824; *Bholanath v Pannalal*, AIR 1947 All 382 : (1947) ILR All 706; *Matthews v Munster*, (1888) 20 QBD 141; *Jang Bahadur v Shankar*, (1891) ILR 13 All 272; *Carrison v Rodrigues*, (1886) ILR 14 Cal 115; *BN Sen & Sons v Chunilal*, AIR 1924 Cal 651 : (1924) ILR 51 Cal 385; *Muthiah Chettiar v Karuppan Chetti*, AIR 1927 Mad 852 : (1927) ILR 50 Mad 786.
540. *Jivabai v Ram Kumar*, AIR 1947 Ngp 17 : (1946) ILR Nag 824; *Ramappayya v Subbamma*, (1948) ILR Mad 647; *Strauss v Francis*, (1866) LR 1 QB 379, p 382.
541. *Shepherd v Robinson*, (1919) 1 KB 474.

In some cases, courts have refused to inquire if there is such a limitation,[542] and have refused to set aside a compromise entered into by counsel;[543] but, the true rule seems to be that the court has power to interfere, and the House of Lords has held that the court is not prevented by agreement of counsel from setting aside or refusing to enforce a compromise, that it is a matter for the discretion of the court and that, when in the particular circumstances of the case grave injustice would be done by allowing the compromise to stand, the compromise may be set aside even though the limitation of counsel's authority was unknown to the other side.[544] Similarly, if the consent is given under a misapprehension or mistake and the other party acts on the ostensible authority of counsel, the client will be bound; but in such a case the consent given under a misapprehension may be withdrawn and the compromise set aside if the application is made before the order is actually drawn up and perfected.[545] The application to have the suit restored to the list should be made before the decree is sealed.[546] If the client is present in court at the time of the compromise, it is not open to him to say that he did not consent; for if he desires the case to go on and the counsel refuses, and if after that, he does not withdraw his authority from counsel to act for him, he must be taken to have agreed.[547]

The implied authority of counsel is limited to the issues in the suit. A compromise will not, therefore, be binding, if it extends to matters outside the scope of the suit.[548] The appointment of a receiver of debtor's property in a partition suit is a collateral matter and not within the scope of counsel's authority; and an arrangement for the appointment of a party's attorney as receiver interrupts the relationship of attorney and client and will be set aside.[549]

The implied authority of counsel is limited to acts and admissions *coram judice* or in court, and a compromise effected out of court is not binding upon a client;[550] but a compromise is not vitiated merely because counsel considered the matter in the corridor of the court or in the Bar library.[551]

[s 2.17.3.2] Attorney or Solicitor

An attorney or solicitor is entitled in the exercise of his discretion, to enter into a compromise on behalf of his client, if he does so in a *bona fide* manner.[552] A solicitor has implied authority by virtue of his position as agent in relation to his client,[553] and his authority is limited to the issues in the suit.

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542. *Re Hobler*, (1844) Beav 101; *Mole v Smith*, (1820) 1 Jac & W per Lord Eldon, LC at p 673.
543. *Strauss v Francis*, (1866) LR 1 QB 379; *Rumsey v King*, (1876) 33 LT 728.
544. *Neale v Gordon Lennox*, (1902) AC 465, p 470; *Chunilal v Hiralal*, AIR 1928 Cal 378 : (1927) 32 Cal WN 44.
545. *Hickman v Berens*, (1895) 2 Ch 638; *Wilding v Sanderson*, (1897) 2 Ch 534; *Huddersfield Banking Co v Lister*, (1895) 2 Ch 273; *Bibee Solomon v Abdool Azeez*, (1881) ILR 6 Cal 687, p 706; *Kyone Hoe Twee v Kyon Soon Sun*, AIR 1925 Rang 314 : (1925) 3 Rang 261.
546. *Berry v Mullen*, (1971) 5 Ir Rep 368; *Jang Bahadur v Shankar*, (1891) ILR 13 All 272; *Carrison v Rodrigues*, (1886) ILR 13 Cal 115.
547. *Berry v Mullen*, (1971) 5 Ir Rep 368; *Jang Bahadur v Shankar*, (1891) ILR 13 All 272; *Carrison v Rodrigues*, (1886) ILR 13 Cal 115.
548. *Ambalal v Somabhai*, AIR 1944 Bom 46 : (1943) 45 Bom LR 1045; *Nundo Lal v Nistarini*, (1800) ILR 27 Cal 428; *Swinfein v Lord Chelmsford*, (1859) 29 LJ (Ex) 382.
549. *Johurmull v Kedar Nath*, AIR 1927 Cal 714 : (1927) ILR 55 Cal 113.
550. *Askaram v EI Rly Co*, AIR 1925 Cal 696 : (1925) ILR 52 Cal 386.
551. *Johurmull v Kedar Nath*, AIR 1927 Cal 714 : (1927) ILR 55 Cal 113.
552. *Fray v Voules*, (1859) 1 E&E 839; *Jaganathdas v Ramdas*, (1870) 7 HCOC 79; *Re Newen*, (1903) 1 Ch 812; *Little v Spreadburg*, (1910) 2 KB 658 (apparent authority but misunderstanding on part of client as to terms of compromise).
553. *Matthews v Munster*, (1888) 20 QBD 141; *Jang Bahadur v Shankar*, (1891) ILR 13 All 272.

[s 2.17.3.3] Pleader

Different considerations apply in the case of a pleader who derives his authority from an express writing, the *vakalatnama*.[554] A pleader cannot enter into a compromise on behalf of his client without his client's express authority.[555]

[s 2.17.4] Power to Refer to Arbitration

The law is the same as regards reference to arbitration. Counsel has an implied power to consent to a reference and so has a solicitor on the record,[556] but, the authority does not extend to referring the case to arbitration on terms different from those which the client has authorised.[557] A pleader or *vakil* has no power to refer a case without the express authority of his client;[558] nor to settle a case by the oath of the opposite party.[559] It has however, been held by the Allahabad High Court that a power to settle the case by oath can be implied when the *vakalat* is in wide and general terms.[560]

[s 2.17.5] Authority to Withdraw Suit

Counsel has an implied power to withdraw an action.[561] As regards *vakils* or pleaders, it has been held that a *vakalatnama* couched in general terms suffices *prima facie* to authorise him to apply on behalf of his client for leave to withdraw a suit, and in the absence of anything to show that the *vakil* had acted contrary to the client's instructions, or otherwise was guilty of misconduct in making the application, the client is bound by the act of his *vakil*.[562] Neither an advocate nor an attorney who has entered appearance on behalf of a client in a cause is entitled to withdraw from it on the ground that he had not been put in possession of funds by the client unless the warrant of authority authorises him to do so. In the absence of such authorisation, the attorney or advocate can only move to get himself discharged and until that is done, he is bound to appear for the client and to take the necessary steps to protect his interests.[563]

[s 2.17.6] Power to Bind Client by Admission

Counsel,[564] solicitors,[565] and pleaders or *vakils*,[566] have an implied authority to bind their clients by admissions of fact, provided such admissions are made during the actual progress of

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554. *Sourendra Nath v Tarubala*, AIR 1930 PC 158 : (1930) 57 Cal 1311 : (1930) 57 IA 133.
555. *Ramappayya v Subbamma*, AIR 1949 Mad 98 : (1948) ILR Mad 647; *contra Jiwabai v Ram Kumar*, AIR 1947 Ngp 17 : (1946) ILR Nag 824; *Jagapati v Ekambara*, (1898) ILR 21 Mad 274; *Thenal v Sokkammal*, (1918) ILR 41 Mad 223; *Ramasamy Chettiar v Jai Hind Talkies*, AIR 1956 Mad 596; *Govindammal v Marimuthu*, AIR 1959 Mad 7.
556. *Jiwibai v Ram Kumar*, AIR 1947 Ngp 17 : (1946) ILR Nag 824; *Smith v Tromp*, (1849) 7 CB 757; *Faviell v Eastern Countries Ry Co*, (1848) 2 Ex 344.
557. *Neale v Gordon Lennox*, AIR 1902 Cal 465.
558. *Thekur Persad v Kalka*, (1874) 6 NWP 210; *contra Jiwibai v Ram Kumar*, AIR 1947 Ngp 17 : (1946) ILR Nag 824.
559. *Sadashiv v Maruti*, (1890) ILR 14 Bom 455; *contra Jiwibai v Ram Kumar*, AIR 1947 Ngp 17 : (1946) ILR Nag 824; *Bunzi Lal v Jasraj*, AIR 1961 Raj 209.
560. *Hemalatha v Jambu Prasad*, AIR 1959 All 383.
561. *Chambers v Mason*, (1858) 5 CBNS 59; *Strauss v Francis* (1866) LR 1 QB 379.
562. *Ram Coomar v Collector of Beerbhoom*, (1866) 5 WR 80.
563. *Re An Attorney*, AIR 1955 Cal 113; *Re Mahboob Ali Khan*, AIR 1958 AP 116; *Ali Mahomed v An Advocate*, AIR 1960 All 660.
564. *Haller v Worman*, (1860) 2 F&F 165; *Stracy v Blake*, (1836) 1 M & W 168.
565. *Wagstaff v Watson*, (1883) 4 B&Ad 339; *Patch v Lyon* (1846) 9 QB 147.
566. *Kower Narain v Sreenath*, (1868) 9 WR 485; *Rajunder v Bijai*, (1839) 2 Moo Ind App 253; *Hingan Lan v Mansa Ram*, (1896) ILR 18 All 384; *Venkata v Bhashyakarlu*, (1899) ILR 22 Mad 538.

the litigation and not in mere conversation.[567] A verbal admission by a pleader must be taken as a whole and must not be unduly pressed;[568] but an admission of liability by a *vakil* is sufficient to warrant a decree against his client in the suit.[569] The result is that the client will be bound by the admission even though it may be erroneous; but, counsel, solicitor, or *vakil* cannot bind his client by an admission on a point of law. Hence, if the admission be erroneous, the client is free to repudiate it.[570] It may here be observed that the omission of a pleader or counsel to argue a question of law, or his abandoning a question of law, does not preclude the court from dealing with the question.[571]

[s 2.17.7] Power to Abandon Issue

A pleader's general powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press.[572]

[s 2.18] Prescribed: Section 2(16)

"Prescribed" means prescribed by rules.

[s 2.19] Public Officer: Section 2(17)

"Public officer" means a person falling under any of the following descriptions, namely:—

(*a*) every Judge;

(*b*) every member of [573][an All India Service];

(*c*) every commissioned or gazetted officer in the military, [574][naval or air] forces of [575][the Union], [576][***] while serving under the Government;

(*d*) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties;

(*e*) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(*f*) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

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567. *Markanda v Varada Kameshwar*, AIR 1949 Pat 197 : (1947) ILR 26 Pat 717; *Young v Wright*, (1807) 1 Cam 139; *Parkins v Hawkshaw*, (1817) 2 St 239; *Patch v Lyon* (1846) 9 QB 147.
568. *Natha v Jodha*, (1884) ILR 6 All 406.
569. *Sreemutty Dossee v Pitamber*, (1874) 21 WR 332.
570. *Markanda v Varada Kameshwar*, AIR 1949 Pat 197 : (1947) ILR 26 Pat 717; *Pearylal v Bhaman Lal*, AIR 1950 All 433; *Dwar Bux v Fatik*, (1898) 3 Cal WN 222 (pleader); *Beni Pershad v Dudhnath*, (1900) ILR 27 Cal 156 : 26 IA 216 (counsel); *Krishnaji v Rajmal*, (1899) ILR 24 Bom 360, p 363; *Narayan v Venkatacharya*, (1904) ILR 28 Bom 408; *Morannar Basilias Catholicas v Most Rev Pulerus*, AIR 1954 SC 526.
571. *Beni Pershad v Dudhnath*, (1900) ILR 27 Cal 156.
572. *Venkata v Bhashyakarlu*, (1902) ILR 25 Mad 367, p 377 (PC); *Mallapa v Shivappa*, AIR 1962 Mys 140.
573. Substituted for "the Indian Civil Service" by section 3, Act 104 of 1976 (w.e.f. 1-2-1977).
574. Substituted for "or naval" by section 2 and Schedule by Act 35 of 1934.
575. Substituted for "His Majesty" by AO 1950.
576. The words "including His Majesty's Indian Marine Service", omitted by Act 35 of 1934, section 2 and Schedule.

(*g*) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and

(*h*) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty.

The definition very nearly corresponds to that of a public servant in the Indian Penal Code 1860, but a person may be a public servant and not a public officer, eg, a municipal commissioner and engineer.[577] The following have been held to be public officers: a collector and agent for the court of wards;[578] the Official Trustee of Bengal;[579] an officer of the Indian Staff Corps;[580] an officer in the Indian Army;[581] an Official Assignee;[582] the Administrator-General of Bengal;[583] a cantonment committee;[584] a receiver in insolvency;[585] a receiver appointed in a suit;[586] a Wakf Commissioner of Bengal;[587] a village *panchayat* for a limited purpose,[588] a manager of the estate of a deceased in an administration suit,[589] but a liquidator appointed by registrar of a co-operative society is not a public officer.[590] A public officer on deputation to other work does not cease to be a public officer.[591] The commissioner of the corporation under the Calcutta Municipal Act, 1951 (33 of 1951), is a public officer,[592] and so also an officer constituting the Board under section 18 of the Bihar Land Reforms Act, 1950.[593] A *sarpanch* of a *mandal panchayat* is not a public officer.[594]

The definition of Government does not include Bihar State Electricity Board. Its officers also cannot be considered as "Public Officers" for the purposes of section 80. Accordingly, in a suit against the Electricity Board, the service of notice as contemplated under section 80 upon its officers was held to be not necessary.[595]

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577. *Narendra v Jankikuer*, AIR 1947 Pat 385 : (1946) ILR 25 Pat 739, p 741; *Reg v Nantamram*, (1869) 6 Bom HCR 64 (Cr Cas).
578. *Gokulchandra v Manager, Baniachong Mozumdari Estate*, AIR 1939 Cal 720 : (1940) ILR 1 Cal 73 : (1939) 43 Cal WN 1212 : (1942) 76 Cal LJ 11; *Charu Chandra v Snigdhendra*, AIR 1948 Cal 150 : (1948) ILR 2 Cal 77 : (1930) 52 Cal WN 212; *Collector of Bijnor v Munuwar*, (1880) ILR 3 All 20; *Narsingrav v Lakshmanrao*, (1876) ILR 1 Bom 318; *Bhau v Nana*, (1888) ILR 13 Bom 343.
579. *Shahebzadde v Ferguson*, (1881) ILR 7 Cal 499; *Abdul v Doutre*, (1889) 12 ILR Mad 250; *Muthu Ramalinga v Shanmuga*, AIR 1928 Mad 175 : (1928) ILR 51 Mad 242.
580. *Watson v Lloyd*, (1901) ILR 25 Mad 402.
581. *Shingarao v Callaghan*, AIR 1946 Lah 247 : (1947) ILR Lah 22 (FB); *Kering v Murray*, (1919) ILR 42 Bom 716; *Husain Baksh v Brigen Shaw*, AIR 1933 All 597 : (1933) ILR 55 All 648.
582. *Joosub v Kemp*, (1902) ILR 26 Bom 809.
583. *Bholaram v Administrator-General*, (1904) 8 Cal WN 913.
584. *Cecil Gray v Cantonment Committee*, (1910) ILR 34 Bom 583.
585. *De Silva v Govind*, (1920) ILR 44 Bom 895.
586. *Prasaddas v KS Bannerjee*, AIR 1931 Cal 61 : (1930) ILR 57 Cal 1127; *Radharam v Purna Chandra*, AIR 1930 Cal 737 : (1930) 34 Cal WN 671.
587. *Commr of Wakf, Bengal v Shaheb Zada Md Zahangir Shah*, AIR 1944 Cal 206 : (1928) 48 Cal WN 157.
588. *Mukunda Rao Ganpat Rao v Durga Prasad*, AIR 1944 Nag 130 : (1944) ILR Nag 687.
589. *Hiralal v Mangtulal*, AIR 1947 Cal 221 : (1944) ILR 2 Cal 513.
590. *Abdul Ghani v Imdad*, AIR 1942 Lah 287 : (1943) ILR Lah 389.
591. *Vishnu Wasudeo v TLH Smith Pearse*, AIR 1949 Ngp 362 : (1949) ILR Nag 232.
592. *Sivanandam v Corp of Calcutta*, (1960) 64 Cal WN 60.
593. *Re Court-fee Matter under BLR Act*, AIR 1958 Pat 235.
594. *Mata Prasad v Mandal Panchayat*, AIR 1959 MP 342.
595. *Chairman, Electricity Board, Bihar v Binay Kumar Jha*, AIR 2011 Pat 187.

The word "service" in section 2(17)(h) must necessarily mean something more than being merely subject to the orders of the government or control of the government. To serve means "to perform function; do what is required for". The coal mines provident fund commissioner appointed by the government performs the functions as envisaged in the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 and the scheme thereunder. When he is actually acting in the capacity of provident fund commissioner, he does not cease to be an officer in the service of the government. The coal mines provident fund commissioner is a public officer. A suit filed against such officer without notice under section 80 of the CPC is not maintainable.[596]

[s 2.20] Rules: Section 2(18)

"Rules" means rules and forms contained in the First Schedule or made under section 122 or section 125.

HIGH COURT AMENDMENT

Calcutta.— In clause (18) insert the words "in its application to courts other than the Court of Small Causes of Calcutta" after the word "rules" and before the words "means rules and forms"; and the words "of the Code of Civil Procedure, 1908, and, in its application to that court means the Rules of Practice and Procedure of that court made under section 9 of the Presidency Small Cause Courts Act, 1882, and includes the rules and forms contained in the First Schedule of that Code which are made applicable to that court by virtue of the provisions of Order LI of that schedule" after the words "Section 122 or Section 125" *vide* Cal. Gaz., Pt I, dated 20 April 1967.

The civil rules of practice framed under sections 122 or 125 would by reason of this provision read along with section 2(1) fall within the definition of the CPC.[597] Not only rules in First Schedule but also the rules made by the high court amending rules in the First Schedule.[598]

On the question that the Letters Patent, and the rules made thereunder by the high court for regulating its procedure on the original side, were subordinate legislation and, therefore, must give way to the superior legislation, namely, the substantive provisions of the CPC. There are two difficulties in accepting this argument. In the first place, section 2(18) of the CPC defines "rules" to mean "rules and forms contained in the First Schedule or made under section 122 or section 125". The conspicuous absence of reference to the rules regulating the procedure to be followed on the original side of a Chartered High Court makes it clear that those rules are not "rules" as defined in the CPC. Secondly, it is not possible to accept that the Letters Patent and rules made thereunder, which are recognised and specifically protected by section 129, are relegated to a subordinate status.[599]

[s 2.21] Share in a Corporation: Section 2(19)

"Share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds.

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596. *Coal Mines Provident Fund Commr v Ramesh Chander Jha*, AIR 1990 SC 648 : (1990) 1 SCC 589.
597. *Manickam v Narasimhan*, AIR 1956 AP 108; *Menkabai v MM Deshpande*, AIR 1971 Bom 21 : (1971) 73 Bom LR 473. As to the relation of the body of the Code of Civil Procedure to the rules, see notes to section 2(1).
598. *State of Uttar Pradesh v Chander Bhushan Mishra*, (1980) 1 SCC 198.
599. *Iridium India Telecom Ltd v Motorola Incorporated*, AIR 2005 SC 514 : AIR 2005 SCW 138 : (2005) 2 SCC 145.

[s 2.22] Signed: Section 2(20)

"Signed", save in the case of a judgment or decree, includes stamped.

The definition is wider than in the General Clauses Act, 1897. Indians of rank sometimes use a stamp instead of signing, and the inability to write is not a condition precedent to the use of a stamp.[600] The Madras High Court has observed that there is no provision that initials may be made by a stamp.[601]

[S 3] Subordination of Courts.—For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

SYNOPSIS

[s 3.1]	High Court Amendment	70	[s 3.4]	Supreme Court	71
[s 3.2]	Subordination of Courts	70	[s 3.5]	Courts and Tribunals — Distinction	72
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[s 3.1] High Court Amendment

Calcutta.— Insert the words "and the Court of Small Causes of Calcutta" after the words "District Court" and before the words "are subordinate to"; and the words "other than the court of Small Causes of Calcutta" after the words "Court of Small Causes" and before the words "is subordinate"; substitute "are" for the word "is" before the words "subordinate to the High Court, and every Civil Court; *vide* Cal. Gaz. Pt I, April 20 April 1967.

[s 3.2] Subordination of Courts

The high court with reference to civil proceedings is the highest court of appeal in the part of India in which the Act or regulation containing the expression operates.[602] The enumeration of subordinate courts is not exhaustive and a collector exercising judicial functions under the Mamlatdars' Courts Act, 1906 is subject to the superintendence and control of the high court.[603] The expression "civil court" includes revenue courts.[604] A collector acting under section 18 of the Land Acquisition Act, 1894, is not a civil court;[605] nor a tribunal constituted under the Displaced Persons Debt Adjustment Act 70 of 1951.[606] An arbitrator for settling compensation payable under section 19 of the Defence of India Act, 1962 is not a civil court, although he is deemed to be a court and a decree passed by him is enforceable in the same manner as a decree of a civil court.[607] The court of additional district judge cannot be said to be subordinate to the district court under this section.[608]

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600. *Maharaja of Benaras v Debi Dayal*, (1881) ILR 3 All 575; *Nirmal v Savathamani*, (1898) ILR 25 Cal 911.
601. *Venkanna v Parasuram*, AIR 1929 Mad 522 : (1929) 56 Mad LJ 633, p 720.
602. See section 3(25) of the General Clauses Act, 1897.
603. *Purshottam v Mahadu*, (1912) ILR 37 Bom 114; *Narayan N Hegde v Shankar Narasimha Bhatt*, AIR 1966 Mys 5.
604. *Raja of Venkatagiri v Sheik*, AIR 1944 Mad 139 : (1944) ILR Mad 595.
605. Re *Kosi Prasad*, (1932) ILR 54 All 282 (FB).
606. *Sundara Das v Lachman*, AIR 1957 All 352.
607. *Sailaja Kanta v State of West Bengal*, AIR 1971 Cal 137.
608. *Gauri Shankar v Firm Dulichand*, AIR 1959 MP 188.

The subordination of courts as specified in section 3 is only for the purpose of the CPC and not for the purpose of a special Act. A court of Subordinate Judge in relation to a proceeding under the Land Acquisition Act is not subordinate to the district judge. Therefore, an inquiry conducted by the district judge under section 340 of the Criminal Procedure Code, 1973 for offences under section 195 in relation to payment of compensation under the Land Acquisition Act, was held to be impermissible.[609]

A full bench of the Calcutta High Court has held that section 20 of the Civil Courts Act makes it clear that if a decree or order of a district judge is not appealable to the high court then from a decree and/or order of Additional District Judge no appeal would lie to the high court, which makes it abundantly clear that for the purpose of exercising judicial power, the Additional District Judge is equivalent and/or equated to a district judge. However, the General Administrative Power rests with the district judge in terms of section 9 of the Civil Courts Act as also the general power and jurisdiction of withdrawal under section 24 of the CPC. It was also held that if Additional District Judges were to be deemed subordinate to the district court for all purposes, it would not have been necessary to insert section 24(3) in the CPC.[610]

[s 3.3] Different Rulings of Different High Courts

Where there are different rulings of different high courts on a particular point, a subordinate judge should follow the decision in law of a bench of the high court to which he is subordinate unless the decision of the bench has been overruled by a decision of a full bench of that court or unless it has been over-ruled expressly or impliedly on an appeal to his majesty in council, or by the Federal or the Supreme Court or unless the law has been altered by a subsequent Act of the legislature.[611]

[s 3.4] Supreme Court

Article 141 of the Constitution of India enacts that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The courts of India are therefore bound to follow the decisions of the Supreme Court even though they are opposed to the decisions of the Privy Council or the House of Lords.[612] The Supreme Court is not bound by the decisions of the Privy Council or the Federal Court.[613] It is also free to reconsider its own decisions;[614] but, before a previous decision is pronounced to be erroneous, the court would satisfy itself with a fair amount of unanimity among its members that a revision of its view is necessary. Such satisfaction would be firstly, as to the error in the earlier decision and secondly of its baneful effect on the general interest of the public.[615]

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609. *State of Andhra Pradesh v V Sarma Rao*, AIR 2007 SC 137 : (2007) 5 SCC 510 : (2007) 1 Mad LJ (Cri) 591 (SC).
610. *West Bengal Housing Infrastructure Development Corp v Impression*, AIR 2016 Cal 236 : (2016) 4 ALR 435 (Cal).
611. *Puttu Lal v Parbati*, (1915) ILR 37 All 359, p 366 : (1915) 42 IA 155, p 160; *Korban Ally v Sharoda Proshad*, (1884) ILR 10 Cal 82; *Swamirao v Kashinath*, (1891) ILR 15 Bom 419; *Balaji v Sakharam*, (1893) ILR 17 Bom 555; *Kamla Prasad v Pandey Ram*, (1919) 4 Pat LJ 565.
612. *Punjabi v Shama Rao*, AIR 1955 Ngp 293; *ITC v Shirinibai*, AIR 1956 Bom 586.
613. *Srinivasa v Narain*, AIR 1954 SC 379 : (1955) 1 SCR 1 : (1954) SCJ 408 .
614. *Bengal Immunity Co v State of Bihar*, AIR 1955 SC 661 : (1955) 2 SCR 603 : (1955) SCJ 672 : (1955) SCA 1140.
615. *Keshav Mills Co Ltd v CIT*, AIR 1965 SC 1636 : (1965) 2 SCR 908; *Supdt and Legal Remembrancer, State of West Bengal v Corp of Calcutta*, AIR 1967 SC 997; *Golak Nath v State of Punjab*, AIR 1967 SC 1643, p 1670.

[s 3.5] Courts and Tribunals — Distinction

According to the decision in *Associated Cement Companies Ltd's* case,[616] the word "court" and "tribunal" are not synonymous. It is well settled that the word "court" is used to designate those forums which are set up in an organised state to exercise judicial powers of the state to maintain and uphold rights and punish wrongs that is for administration of justice and the word "court" would denote "ordinary courts of civil judicature". The judicial power of the government is exercised by establishment of hierarchy of courts, to decide disputes between its subjects and the subjects and state. The powers, which these courts exercise, are judicial powers; the functions, which they discharge, are the judicial functions; and the decision, which they reach and pronounce, are judicial decisions. However, with the growth of civilisation and problems of modern life and to avoid delay caused in disposal of cases by ordinary courts due to heavy pendency and wrangles of procedure in the CPC and provision for appeals and revision under the CPC and to decide disputes requiring specialised justice several tribunals have been established under various Acts, to implement administrative policy or determine controversies arising out of some administrative law. These tribunals have also been invested with judicial power of state by divesting ordinary civil courts of the power to decide these matters which are required to be decided by the tribunal. The distinction between court and tribunal is well known and their composition and formation is distinct and separate, though both of them have similar functions to perform as tribunals are clothed with trappings of the court. Though all the "courts" are tribunals all the "tribunals" are not courts. The distinguishing feature between the courts and tribunal or special forum is that the court is constituted by a state as a part of the normal hierarchy of courts of civil judicature maintained by the state under its constitution exercising judicial power of the state except those which are excluded by law from their jurisdiction, whereas tribunal is constituted under the special Act to exercise special jurisdiction in order to decide certain controversy arising under special laws.[617]

The district judge who functions as a Claims Tribunal is not only within the administrative control of the high court, but also subordinate to it under section 115 of the CPC. Therefore, the order passed by the tribunal is revisable under section 115.[618]

It follows from the above that wherever special statute confers or clothes any authority with powers of a civil court for decision of civil disputes in general, the orders passed by such authorities would be revisable in the absence of any provision for appeal against the same. What is important is that the authority exercising the power must be constituted as a civil court for decision of civil disputes in general and not for decision of only special category of civil disputes. The tribunals in the instant case are meant to deal with only specific class of cases arising out of special enactments. They do not and cannot exercise powers vested in a civil court for decision of civil disputes in general within the meaning of section 9 of the CPC. Such tribunals cannot therefore be termed as civil courts subordinate to the high court within the meaning of section 115 of CPC.[619]

[S 4] Savings.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local

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616. *Associated Cement Co Ltd v PN Sharma*, AIR 1965 SC 1595.
617. *UOI v Mysore Paper Mills Ltd*, AIR 2004 Kant 1.
618. *Darshan Singh v Ghevarchand*, AIR 1993 Raj 126 (DB); see also *Noreen v L Dasaiah*, AIR 1985 Kant 208 : (1985) 1 Kar LJ 278 (DB).
619. *UOI v Mysore Paper Mills Ltd*, AIR 2004 Kant 1.

law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

SYNOPSIS

[s 4.1] Special or Local Law 73
[s 4.2] Any Special Form of Procedure..... 74

[s 4.1] Special or Local Law

The section does not mean that the CPC does not apply to proceedings under special or local laws, but only enacts that where there is an inconsistency, the rules of the CPC do not prevail.[620] There is no inconsistency between the CPC and section 77 of the Railways Act 9 of 1890; and if a railway is owned by the secretary of state in council, notice of a claim to the railway administration under section 77 of the Railways Act 1890 will not dispense with the necessity of a notice under section 80 of the CPC.[621] The same rule will apply when the railway is owned by the government. For instances of such inconsistencies, the undermentioned cases[622] may be referred to. The Mamlatdars' Courts Act, 1906 enacts its own special procedure which excludes that of the CPC.[623]

The provisions of the CPC will apply to all matters on which the special or local law is silent. Therefore, O IX, rule 13, is applicable to proceedings under the Bengal Premises Rent Act 17 of 1950, and an order passed on such an application is appealable under section 104(1) of the CPC.[624]

The Arbitration and Conciliation Act (26 of 1996) is a special statute, and it provides for a complete machinery for the resolution of disputes. Therefore, provisions of the CPC would not apply to any proceeding under the Act. When the remedy of appeal is provided under the Act, revision under the CPC would not be maintainable.[625]

Rules framed by the Supreme Court with reference to appeals to it are a special law within this section and should take precedence over section 114 or O XLVII of the CPC.[626]

The section gives a local Act local validity and the special procedure therein prescribed validity within its own sphere. By virtue of sub-section (1), the provisions of the Punjab

620. *Abdul Alim v Mohd Saeed*, AIR 1951 P&H 43; *Aga Mahomed v Cohen*, (1887) ILR 13 Cal 221, 223.
621. *Ali Asmat v GIP Railway*, AIR 1930 All 476 : (1930) ILR 52 All 837; *Hirachand v GIP Railway*, AIR 1928 Bom 421 : (1928) ILR 52 Bom 548.
622. *Velli v Moidin*, (1886) ILR 9 Mad 332; *Appandai v Srihari*, (1890) ILR 16 Mad 451; *Venkatanarasimha v Suranna*, (1891) ILR 17 Mad 298; *Gadhavi v Shivuba*, AIR 1956 Sau 29; *Allen Berry & Co v Vivian Bose*, AIR 1960 P&H 86 : (1960) ILR 1 Punj 416; *Seetharam Rao v Raj Kumar*, AIR 1961 AP 399; *Chaboo Devi v Ram Sarup*, AIR 1965 All 79; *Ram Abhilakh v Ram Jas*, AIR 1966 All 218, p 220; *Chandmal v State of Rajasthan*, AIR 1968 Raj 20.
623. *Kasam v Maruti*, (1889) ILR 13 Bom 552.
624. *Sahadat Khan v Md Husain*, AIR 1954 Cal 347 : (1953) 57 Cal WN 948; *Sunanda v Gundapart*, AIR 1961 Bom 225; *Ram Singh v State*, AIR 1969 Raj 41, p 48; *Sardar Begum v JC Bhandari*, AIR 1967 Del 61.
625. *Ashok Kumar Singh v Shanti Devi*, AIR 2010 Pat 1.
626. *Deities v Hanumanthacharlu*, AIR 1962 AP 245; *Abdul Aleem v Sheikh Mahomed*, AIR 1951 P&H 42.

Courts Act, 1918, are saved and are not affected by the CPC. Therefore, the provisions as to second appeal in section 41 of the Punjab Courts Act, 1918 are not affected by section 100 as now amended.[627] No local legislature can prescribe procedure for any court beyond its own jurisdiction.[628]

Letters Patent as applicable to the High Court of Gujarat is a special law in force which confers special jurisdiction or power and lays down special form of procedure prescribed therein for governing the cases where the two judges forming the division bench of the high court deferred on a question of law or fact. In view of the provisions of section 4(1) of the CPC, therefore, clause 36 of the Letters Patent laying down the special procedure for meeting such a contingency was required to be followed without in any way being impeded or restricted or being cut across by the procedural requirement laid down by O XLVII, rule 6 of the CPC.[629] On the question that the Letters Patent, and the rules made thereunder by the high court for regulating its procedure on the original side, were subordinate legislation and, therefore, must give way to the superior legislation, namely, the substantive provisions of the CPC. There are two difficulties in accepting this argument.

In the first place, section 2(18) of the CPC defines "rules" to mean "rules and forms contained in the First Schedule or made under section 122 or section 125". The conspicuous absence of reference to the rules regulating the procedure to be followed on the original side of a Chartered High Court makes it clear that those rules are not "rules" as defined in the CPC. Secondly, it is not possible to accept that the Letters Patent and rules made thereunder, which are recognised and specifically protected by section 129, are relegated to a subordinate status.[630]

Even if section 46(B) of the State Financial Corporation Act, 1951 was not there, the provisions of CPC for the execution of a decree against a surety who had given only personal guarantee would, in the absence of any provision to the contrary in the State Financial Corporation Act, 1951, be applicable. Since the term used in section 31(1) of the State Financial Corporation Act, 1951 Act, that is, "District Judge", is not a *persona designata* but a court of ordinary civil jurisdiction, while exercising jurisdiction under sections 31 and 32, therefore, the ordinary rules of procedure, orders and decrees under CPC will apply to such court.[631]

It is for the party who asserts that the procedural law applicable to a particular proceeding as something different from that contained in the CPC to affirmatively establish it.[632] When the special or local law is not in force at the relevant time, this section cannot apply.[633]

[s 4.2] Any Special Form of Procedure

It has been held, having regard to these words, that where two judges differ in an appeal from the original side of the high court, the special procedure laid down in clause 36 of the Letters Patent should be followed, and not the rule laid down in section 98 of the CPC.[634] Section 98(3) was added by the Act 18 of 1929, and gives effect to these decisions.

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627. *Ganpat v Rama Devi*, AIR 1978 P&H 137 (FB).
628. *Chhatto Lal v Naraindas*, AIR 1930 Cal 53 : (1929) ILR 56 Cal 704.
629. *Reliance Industries Ltd v Praveen Bhai Jas Bhai Patel*, (1997) 7 SCC 300.
630. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : AIR 2005 SCW 139 : (2005) 2 SCC 145
631. *Maharashtra State Financial Corp v Jaycee Drugs and Pharmaceuticals Pvt Ltd*, (1991) 2 SCC 637.
632. *Girdharlal v Krishna Dutt*, AIR 1960 P&H 575.
633. *Jalejr Hormasji v State of Andhra Pradesh*, AIR 1965 AP 288.
634. *Bhaidas v Bai Gulab*, AIR 1921 PC 6 : (1921) ILR 45 Bom 718 : (1921) 48 IA 181; *Surajmal v Hiralal*, supra, (1918) 20 Bom LR 185, p 217; *Empress v Protab Chandra*, AIR 1924 Cal 668 : (1924) ILR 51 Cal 504.

[S 5] Application of the Code to Revenue Courts.—(1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the [635]State Government [636][***] may, by notification in the official Gazette declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the [637]State Government [638][***] may prescribe.

(2) "Revenue Court" in sub-section (*1*) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

[s 5.1] Object of the Section

The object of this section is to preserve the summary character of rent litigation under local laws.

[S 6] Pecuniary jurisdiction.—Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

SYNOPSIS

[s 6.1]	"Otherwise expressly provided".....	75	[s 6.4]	*Mesne* profits After Suit do not Affect Pecuniary Jurisdiction.....	77
[s 6.2]	Pecuniary Limits of Jurisdiction.....	76	[s 6.5]	Section Applicable only to Suits.....	77
[s 6.3]	Court May Pass a Decree in Excess of its Pecuniary Jurisdiction	76			

[s 6.1] "Otherwise expressly provided"

The expression "subject matter" means not the property involved in the suit but the relief claimed and it is its value that determines the jurisdiction.[639] The Suits Valuation Act 7 of 1887, prescribes the mode of valuing certain suits for purposes of determining jurisdiction and the present section must be read subject to its provisions. Under section 8 of Suits Valuation Act, 1887 the valuation for court fees and the valuation for jurisdiction in certain suits is the same. Under section 7 clause (iv)(f) of the Court Fees Act, 1870, the valuation for purposes of court fees in a suit for accounts lies in the discretion of the plaintiff. Therefore, in a suit for accounts, the plaintiff's valuation in the plaint fixes the jurisdiction of the court.[640] In a suit for unsettled accounts, fixed court fee is payable and for jurisdictional purposes, such a suit can

635. Substituted for "Provincial Government" by AO 1950.
636. The words "with the previous sanction of the G.G. in C", omitted by Act 38 of 1920, section 2 and Sch I.
637. Substituted for "Provincial Government" by AO 1950.
638. The words "with the sanction aforesaid" omitted by Act 38 of 1920, section 2 and Sch I.
639. *Chandi Charan Das v Susila Bala Dasi*, AIR 1955 Cal 144 : (1955) 59 Cal WN 606.
640. *Ganpatrao v Sham Rao*, AIR 1941 Ngp 138 : (1941) ILR Nag 194; *Ishwarappa v Dhanji*, AIR 1932 Bom 111 : (1932) ILR 56 Bom 23.

be valued in terms of valuation as fixed by the plaintiff.[641] In a suit for partition, the value for the purpose of jurisdiction is the value of the share claimed by the plaintiff and not the value of the entire estate in which the partition is sought.[642] In a suit for recovery of property from the tenant whose tenancy has been terminated, the valuation of suit for jurisdictional purposes should be on the basis of annual rent or profit. Suit so valued along with the claim of damage exceeding pecuniary jurisdiction of the court is liable to be returned for prosecution before the proper court.[643]

[s 6.2] Pecuniary Limits of Jurisdiction

Pecuniary jurisdiction of a court-suit valued less than Rs 50,000 is to be instituted before the court of the lowest grade competent to try, that is, additional district judge. The subsequent amendment increasing pecuniary jurisdiction of civil judge (class I) from Rs 20,000–Rs 50,000. It cannot be said that the additional district judge who discharges powers of district court are not varied, and pecuniary jurisdiction of the district judge was not registered.[644]

The exercise of option by a plaintiff to value his claim for the purpose of court-fees, determines the value for the purpose of pecuniary jurisdiction.[645]

A subsequent increase in the value of the property takes away the pecuniary jurisdiction of the court.[646]

[s 6.3] Court May Pass a Decree in Excess of its Pecuniary Jurisdiction

Section 6 refers to the court's power to entertain a suit. It is the plaintiff's valuation in his plaint which *prima facie* determines the jurisdiction of the court and not the amount which may be found or decreed by the court.[647] If the plaintiff's valuation in his plaint in a suit for accounts is within the pecuniary limits of the court's jurisdiction, the court may pass a decree for the sum in excess of the pecuniary limits of its jurisdiction.[648] The court has no jurisdiction to grant reliefs not claimed in the plaint if by reason of their inclusion, the suit would be beyond the pecuniary jurisdiction of the court.[649] Where different suits which are severally within the jurisdiction of the court are consolidated for hearing, the court does not lose its jurisdiction to hear it by reason of the value of all the suits exceeding its jurisdiction if taken together.[650]

The Bombay High Court has held that in a case of damages, the amount of damage which the court can award is limited to the pecuniary jurisdiction of the court.[651]

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641. *PM Diesels Ltd v Patel Field Marshal Industries*, AIR 1998 Del 225.
642. *Bhairab v Narain*, AIR 1953 Pat 342.
643. *Narender Kumar Soni v Sunshine Roadways*, AIR 1999 Del 189.
644. *Gopalkrishna Sharma v Bhagirath Prasad Sharma*, AIR 1998 MP 264. See note to section 15 under the head "Court of Lowest Grade Competent to Try a Suit".
645. *Jhari Mahto v Sagar Mahto*, AIR 2009 (NOC) 913 (Jhar).
646. *Ramesh Goel . Dwinderpal Singh*, AIR 2008 (NOC) 889 (Cal).
647. *Lakshman v Babaji*, (1883) ILR 8 Bom 31; *Mahabir Singh v Behari Lal*, (1891) ILR 13 All 320; *Madho Das v Ramji*, (1894) 16 ILR All 286; *Ishwarappa v Dhamji*, AIR 1932 Bom 111 : (1932) ILR 56 Bom 23.
648. *Ishwarappa v Dhamji*, AIR 1932 Bom 111 : (1932) ILR 56 Bom 23; *Kalyan Das v Ganga Bai*, AIR 1961 MP 67.
649. *Nain Singh v Mahendra*, AIR 1952 All 196.
650. *Jaya Krishna v Bajrang Lal*, (1961) ILR Raj 1173.
651. *Shaikh Gafoor v State of Maharashtra*, AIR 2008 (NOC) 1637 (Bom — Aurangabad Bench).

ILLUSTRATION

A sues *B* in the court of second-class subordinate judge for an account and values his suit for a court fee at Rs 130. Under section 8 of the Suits Valuation Act, 1887, the value of the subject matter of the suit is Rs 130. The parties arrive at a compromise whereby the first defendant is to pay Rs 6,000 and the second defendant Rs 5,000 to the plaintiff. The court may pass a decree in terms of the compromise, although it has jurisdiction limited to suits of which the value of the subject matter does not exceed Rs 5,000.[652]

The forum of appeal also is determined by the value of the suit and not by the amount decreed.[653]

[s 6.4] *Mesne* profits After Suit do not Affect Pecuniary Jurisdiction

The value of a suit for the recovery of possession and *mesne* profits is the value of the immovable property plus *mesne* profits up to the date of the suit. *Mesne* profits after suit do not form part of the cause of action even though there be a prayer in the plaint for *mesne* profits after suit. If the suit is properly brought in the court of a *munsiff* for the recovery of possession of land and *mesne* profits prior to the date of the suit, and there is also a prayer for mesne profits from the date of the institution of the suit, which are claimed or assessed at a sum beyond the pecuniary jurisdiction of the *munsiff*, the *munsiff* has jurisdiction to fix the *mesne* profits from and after the date of the institution of the suit and to pass a decree therefore although the amount may be beyond his pecuniary jurisdiction.[654]

A sues *B* for possession of land valued at Rs 686 and for the *mesne* profits up to the date of the suit valued approximately at Rs 200 and for *mesne* profits subsequent to the date of the suit not valued at all. The suit is brought in the court of a munsiff whose pecuniary jurisdiction is limited to Rs 1,000. A decree is passed in the suit for the plaintiff for possession and for mesne profits upto the date of the suit. Subsequently, the plaintiff applies to the *munsiff* for assessment of mesne profits after the date of the suit claiming Rs 60,000 for such profits. The *munsiff* can pass a decree for Rs 60,000 though the amount exceeds his pecuniary jurisdiction.

[s 6.5] Section Applicable only to Suits

This section has no application to proceedings other than suits.[655] But proceedings in execution are included in the word "suit" and will be governed by the provisions of the CPC.

[S 7] Provincial Small Cause Courts.—The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887 (9 of 1887), [656][or under the Berar Small Cause Courts Law, 1905], or to Courts exercising the jurisdiction of a Court of Small Causes [657][under the said Act or Law], [658][or to

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652. *Ishwarappa v Dhanji*, AIR 1932 Bom 111 : (1932) ILR 56 Bom 23 : 137 IC 702.
653. See notes to section 38, "Jurisdiction of court executing decree" and notes to section 96, "Forum of Appeal".
654. *Ganeshilal v Snehalata*, AIR 1947 Cal 68 : (1947) 51 Cal WN 136; *Bidyadhar v Manindra Nath*, AIR 1925 Cal 1076 : (1926) ILR 53 Cal 14; *Sundarshan Das v Ram Prasad*, (1911) ILR 33 All 97; *Madho Das v Ramji*, (1894) ILR 16 All 286; *Arogya v Appachi*, (1902) ILR 25 Mad 543; *Kannayya v Venkata*, (1917) ILR 40 Mad 1, pp 7–8; *Sheikh Mohammad v Mahtab*, (1917) 2 Pat LJ 394; *Dinanath v Mayawati*, AIR 1921 Pat 118 : (1921) 6 Pat LJ 54.
655. *Nandlal v Nritya Kali*, (1927) 31 Cal WN 142.
656. Inserted by Act 4 of 1941, section 2 and Sch III.
657. Substituted by Act 4 of 1941, section 2 and Sch III for "under that Act".
658. Inserted by Act 2 of 1951, section 5 (w.e.f. 1-4-1951).

Courts in] [659][any part of India to which the said Act does not extend] exercising a corresponding jurisdiction] that is to say.—

(*a*) so much of the body of the Code as relates to—

(*i*) suits excepted from the cognizance of a Court of Small Causes;

(*ii*) the execution of decrees in such suits;

(*iii*) the execution of decrees against immovable property; and

(*b*) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 [660][so far as they authorize or relate to—

(*i*) orders for the attachment of immovable property,

(*ii*) injunctions,

(*iii*) the appointment of a receiver of immovable property, or

(*iv*) the interlocutory orders referred to in clause (e) of section 94],

and sections 96 to 112 and 115.

SYNOPSIS

[s 7.1] Changes in the Section 78
[s 7.2] Attachment Before Judgment by Small Cause Court..... 78

[s 7.1] Changes in the Section

The words "or under the Berar Small Cause Courts Law 1905", were inserted after 1887 and the words "the said Act or Law" were substituted in place of the words "that Act" by the Act 4 of 1941, Sch 3. The words "or to courts in Part B States exercising a corresponding jurisdiction" have been inserted after the words "the said Act or law" by the Code of Civil Procedure Amendment Act, 2 of 1951. The words in sub-clause (b) from "so far as they authorize or relate to" upto the words "of section 94" were substituted by Act 1 of 1926, for the words "so far as they relate to injunctions and interlocutory orders" which occurred in clause (b) of the original section after the words and figures "sections 94 and 95". Act 1 of 1926 is the Small Cause Courts (Attachment of immovable property) Act, 1926, but Adaptation Laws Order No 2 of 1956, the words "any part of India to which the said Act does not extend" were substituted for the words "Part B States".

[s 7.2] Attachment Before Judgment by Small Cause Court

By reason of clause (a)(iii) of this section read with O L. rule 1, clause (a)(ii), the small cause courts do not have the power to execute decrees against immovable property in accordance with the provisions of the CPC and the rules.[661] A provincial small cause court has, however, jurisdiction to attach movable property before judgment. An attachment before judgment is not one of the interlocutory orders referred to in clause (b) of the section.[662]

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659. Substituted by the Adaptation of Laws (No. 2) Order, 1956, for "Part B States".
660. Substituted by Act 1 of 1926, section 3, for "so far as they relate to injunctions and interlocutory orders".
661. *Sarjoo Prasad v Second Addl District Judge, Kanpur*, AIR 1975 All 13.
662. *Kumud v Hari*, (1919) ILR 46 Cal 717.

As regards immovable property, there were conflicting decisions of the Calcutta High Court on the question whether a provincial small cause court had jurisdiction to order an attachment of such property before judgment. The whole question was considered by a full bench of that high court in the undermentioned case,[663] and it was held by a majority that a court of small causes has such jurisdiction but expressed a doubt as to the intention of the legislature in the matter when the CPC was passed in 1908. To resolve that doubt, the above stated words were substituted by Act 1 of 1926, for the words "so far as they relate to injunctions and interlocutory orders", which occurred in clause (b) of the original section after the words "sections 94 and 95". To make the matter clearer, a new rule, being rule 13, was added to O XXXVIII by the same Act.

Under section 37(2) of the Delhi Rent Control Act, 1958, the rent controller appointed under that Act has to follow the practice and procedure of a court of small causes as prescribed by the CPC and the Provincial Small Cause Courts Act, 1887. Therefore, if any of the provisions of the CPC are not applicable to a court of small causes, the same will not be applicable to proceedings before the rent controller. Under section 15(1) of the Provincial Small Cause Courts Act, 1887 read with Article 4 of Sch 2 thereto, a suit for possession of immovable property or for recovery of an interest in such property is excepted from the cognisance of a court of small causes. An application under section 14 of the Delhi Rent Control Act, 1958 is in the nature of a suit for possession of immovable property. Therefore, O XXIII, rule 3 of the CPC, providing for recording a compromise in so far as it relates to a suit for possession of immovable property, cannot apply to an application under the proviso to section 14 of the Delhi Rent Control Act, 1958. Such an application is not maintainable.[664]

A suit instituted on the original side and subsequently transferred to the small cause court retains its character as an original suit and it is competent to the court to order attachment before judgment of immovable property.[665]

The provisions of O XXIII, rule 3 of the CPC are applicable to revisions under section 25 of the Presidency Small Causes Courts Act, 1887, also. The court must see that if the parties have entered into a lawful compromise which is not otherwise forbidden by any law, the case is decided in terms of the compromise.[666]

A final decree was passed in a suit for partition. Subsequently, there was interference with the plaintiff's possession over the allotted portion. It was held that the suit filed by the plaintiff for injunction to restrain the defendant from interference with possession was not barred. Subsequent acts of the defendant give rise to a fresh cause of action.[667]

[S 8] Presidency Small Cause Courts.—Save as provided in sections 24, 38 to 41, 75, clauses (*a*), (*b*) and (*c*), 76, [668][77, 157 and 158], and by the Presidency Small Cause Courts Act, 1882 (15 of 1882), the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay:

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663. *Barada Kanta Saha Roy v Sheikh Moijuddin*, AIR 1925 Cal 1 : (1925) ILR 52 Cal 275 (FB); approving *Sadek Ali v Samad Ali*, AIR 1924 Cal 193 : (1923) 28 Cal WN 16; overruling *Kararnath v Hem Nath*, AIR 1923 Cal 176 : (1922) ILR 49 Cal 994.
664. *Springdales School v S Tahilramani*, AIR 1969 Del 7, p 10.
665. *Venkateswara v Sriramamurtho* 1952 AP LT 558.
666. *Naresh Kumar Gupta v Third Addl. District Judge, Bulundshahar*, AIR 1990 All 23.
667. *Ramlakhan Tewari v Ram Samju Tewari*, AIR 1981 All 211.
668. Substituted by Act 104 of 1976, section 4, for "77 and 155 to 158" (w.e.f. 1-2-1977).

[669][Provided that—

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, from time to time, by notification in the Official Gazette, direct[670] that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882 (15 of 1882), and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court;

(2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882 (15 of 1882), shall be deemed to have been validly made.]

[s 8.1] State Amendment

Gujarat.—In section 8, in the opening para, after the words "Calcutta, Madras and Bombay", insert the words "and in the city of Ahmedabad"—Gujarat Act XIX of 1961 as amended by Gujarat Act XXXII of 1961, section 21 and Schedule (w.e.f. 1-11-1961).

The Gujarat Act 19 of 1961 as amended by Gujarat Act 32 of 1961, has inserted the words "and in the City of Ahmedabad" after the words "Calcutta, Madras and Bombay".

The proviso was inserted in the section by section 2 of the Code of Civil Procedure Amendment Act 1 of 1914. The words "official gazette", were substituted for the words "local official gazette" by the Government of India (Adaptation of Indian Laws) Order 1937.

The word "suit" in the expression "shall not extend to any suit or proceeding" includes any decree that may be passed in such a suit.[671] The court of small causes has jurisdiction to pass a garnishee order and to set it aside when passed *ex parte* of proper reasons,[672] but such an order would not be appealable.[673] The presidency small cause court has no jurisdiction to execute the decree of a foreign court.[674] The period of 12 years prescribed in section 48 for execution of a decree has no application to a decree passed by the presidency small cause court.[675] Section 48 has been deleted by the Limitation Act, 1963.

On account of extension by the high court of certain provisions of the CPC to the Small Causes Court of Bombay, O IX with certain modifications is applicable to that court but not section 104 or O XLIII, rule 1 of the CPC. An appeal against an order refusing to set aside an *ex parte* decree against a tenant for possession passed under section 28 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, is not maintainable under O XLIII, rule 1 of the CPC; but such an appeal is maintainable under section 29 of the Rent Act as the impugned order was passed under section 28 of the Act.[676] Similarly, the small causes court at Calcutta can grant interim injunction in cases provided by the rules framed by the high court empowering it to do so, but not under O XXXIX, rule 2 of the CPC, which does not apply.[677]

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669. Added by Act 1 of 1914, section 2.
670. For instance of such direction, *see* Calcutta Gazette, 1910, Pt I, p 814.
671. *Ranganathan v Poonacharamma*, AIR 1942 Pat 128.
672. *Bank of Jeypore v Davey*, AIR 1957 Mad 353.
673. *Sankaran Nair v Krishna Pillai*, AIR 1962 Ker 233.
674. *Subramanyam v Srinivasan*, AIR 1951 Mad 289.
675. *Bava C Gopalaswamy v Abhisheka Kattalai*, AIR 1950 Mad 504 : (1951) ILR Mad 1.
676. *Hemchand v Subhkaran*, AIR 1967 Bom 361 : (1966) 68 Bom LR 857.
677. *Rameshwar Dubey v Jogindra Lal Saha*, AIR 1968 Cal 234, p 237.

PART I

SUITS IN GENERAL

Jurisdiction of the Courts and Res Judicata

[S 9] Courts to try all civil suits unless barred.—The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

[1][*Explanation I.*]—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

[2][*Explanation II.*—For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in *Explanation I* or whether or not such office is attached to a particular place.]

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1. *Explanation* re-numbered as *Explanation I* thereof by Act 104 of 1976, section 5 (w.e.f. 1-2-1977).
2. Inserted by CPC (Amendment) Act 104 of 1976, section 5 (w.e.f. 1-2-1977).

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[s 9.1] State Amendment

Maharashtra.—Section 9 has been inserted by Maharashtra Act 65 of 1977. For text of Amendment and Commentary thereon, see Notes at the end of commentary of section 9, *post*.

[s 9.2] Alterations in the Section

The words "either expressly or impliedly barred" were substituted in 1908 for the words "barred by any enactment for the time being in force" which occurred in section 11 of the Code of Civil Procedure 1882. The latter words were held to mean *expressly* barred.[3] The Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), has re-numbered the existing explanation as Explanation I and added a new explanation as Explanation II.

[s 9.3] Scope

The test of jurisdiction over the subject matter is whether the court or tribunal can decide the case at all and not whether the court has authority to issue a particular kind of order in the course of deciding the same. A court is said to have jurisdiction of the subject matter of a particular controversy if the court has authority to hear and decide causes of a class to which

3. *Kishori Mohun v Chundra Nath*, (1887) ILR 14 Cal 644, 648.

the particular controversy belongs. In defining jurisdiction of the subject matter in these terms, the courts have emphasised that the jurisdiction of a court depends upon the right to decide the case and not upon the merits of its decision.[4] It is well-settled law that jurisdiction of the court is to be determined on the basis of allegations made in the plaint. The pith and substance of the plaint allegations have to be kept in mind; so also, the pith and substance of the relief sought. It is the choice of the plaintiff to choose his forum. It is another thing that the plaintiff fails to establish his case before such forum. The plea of lack of jurisdiction can be raised at any time even in second appeal, so also on the execution side.[5] There is no denying the fact that the allegations made in the plaint decide the forum. The jurisdiction does not depend upon the defence taken by the defendants in the written statement.[6] A litigant having a grievance of civil nature has, independently of any statute, a right to institute a suit in the civil court unless its cognizance is either expressly or impliedly barred. Exclusion of jurisdiction of civil court is not to be readily inferred and such exclusion must be either express or implied.[7] In all types of civil disputes, civil court has inherent jurisdiction as per section 9, unless a part of that jurisdiction is curbed out from such jurisdiction, expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority.[8] It is no doubt true that the jurisdiction of the civil court cannot be easily excluded in every case, but the jurisdiction of the civil court is excluded where the statute gives finality to the orders and to find the same, the scheme of the Act has to be necessarily taken into consideration. The second thing to be considered is, if under the statute a liability is created, then it is necessary to find out as to whether the statute creates an effective machinery for the redressal of the grievances pertaining to any law and facts arising therein.[9] Section 9 of the Code of Civil Procedure, 1908 (CPC) provides that whenever a question arises before the civil court whether its jurisdiction is excluded expressly or by necessary implication, the court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases, where inclusion of civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or sufficiency of the remedy provided for by it, may be relevant, but it cannot be decisive. Where exclusion is pleaded as a matter of necessary implication, such consideration would be very important and inconceivable and it might become even decisive.[10]

The Andhra Pradesh High Court took a contrary view in *Yadamma v K Mallesh*,[11] wherein it was held that when on the date of filing of the suit, particular right which is available to a party would be continued to be available till the disposal of the suit, though such benefits are taken away later, hence, it was held that the civil court shall have the jurisdiction to entertain the suit for eviction.[12]

A suit for declaration that they were tenants in respect of the suit property and for recovery of possession of the suit property from the defendants and mesne profit was not barred either expressly or impliedly by section 13-A of the Kerala Land Reforms Act, 1963. Under the scheme of the Act, any suit regarding the rights of a tenant including the question, whether a

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4. *Pankaj Bhargav v Mohinder Nath*, (1991) 1 SCC 556.
5. *Bharvad Chotta Bhaga v Bharvad Jagadahya*, AIR 1999 Guj 17.
6. *Abdullah Bin Ali v Galappa*, (1985) 2 SCC 54.
7. *Nagri Pracharini Sabha v Fifth Addl District and Sessions Judge, Varanasi*, (1991) Supp 2 SCC 36.
8. *Sanker Naryan Potti v K Sreedevi*, (1998) 3 SCC 751.
9. *Dr. Devidas Lotu Bhirud v Pachora Municipal Council*, AIR 1998 Bom 363.
10. *Vatticherukuru Village Panchayat v Nori Venkatarama Deekshithulu*, (1991) Supp 2 SCC 228.
11. *Yadamma v K Mallesh*, AIR 1994 AP 272.
12. *Jaya P Hemarajani v Rose Elvina D'souza*, AIR 1995 AP 189.

person is a tenant, will have to be referred by the civil court to the Land Tribunal and after the Land Tribunal decides the question, the civil court will decide the suit in accordance with the decision of the Land Tribunal. Therefore, a civil court has jurisdiction to entertain such a suit filed by a tenant.[13]

Where a suit was filed by a minor against his father for restraining the father from alienating family property and other reliefs and a question arose whether the mother of the minor act as his guardian without the permission of the court, it was held by Delhi High Court that there was no clash of interest between the minor and his mother and she can become next friend of minor by virtue of O XXXII, rule 4 of CPC. It was also held that the provisions of section 50(4) of the Delhi Rent Control Act, 1958 does not bar the jurisdiction of civil court.[14]

The Supreme Court has reiterated that maintainability of a suit is a question of law. As per section 9, civil courts have jurisdiction to try all suits of civil nature unless barred by law either expressly or impliedly. Thus, in a case, when a specific stand was taken that in view of the provisions of the Companies Act, 1956 the suit was not maintainable, it shall be a question of law.[15]

Where the subscriber under the Telecom Department did not raise any objection to bills issued by the Telecom Department and the bills remained unpaid for nearly two years, it was held that the civil suit for recovery of amount covered under the bills of the Department would not be barred. The Department would have referred the matter for arbitration under section 7-B of the Telegraph Act, 1885 only if the consumer had objected to the bills.[16]

Where the sum in respect of which the Zila Panchayat issued a recovery certificate to the collector, was not a tax or rent as referred to in section 158(2) or section 159 of the CPC nor it was a sum of the nature mentioned in section 148(1)(a)(b), such sum could not be recovered as land revenue by resorting to a term in agreement between the parties, especially when there was dispute between the parties as to question whether infact there was such agreement between the parties. Filing of a civil suit in such cases, for recovery of the sum due, is the only remedy.[17] Intricate questions of cancellation of sale deed are to be decided by judicially trained minds of civil courts, it cannot be left to be decided by the revenue courts which are obviously not well-acquainted to try such intricate questions of law.[18] If the document is treated as void, the suit for cancellation of such deed will lie in a civil court and the civil court will have jurisdiction to try the suit.[19] A suit for declaration on grounds that the sale deed of the agricultural land was *non est* was instituted before the civil court. In the suit no relief other than declaration was sought. It was held that the civil court and not the revenue court has the jurisdiction to try the suit.[20] In this case, an earlier judgment of the high court, that the jurisdiction of the civil court to decide disputed question of title was not barred under sections 163 and 171 of the Himachal Pradesh Land Revenue Act, 1953, was challenged. It was held that the jurisdiction of the civil court cannot be challenged in the subsequent proceedings on the same ground.[21] In this case, a suit for recovery of arrears of land revenue was filed. In the suit, no declaration

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13. *Amina Beevi v Thachi*, (2010) 12 SCC 679.
14. *Rajendra Kumar v Deepak Makwana*, AIR 2008 Del 92.
15. *Jyoti Ltd v Bharat J Patel*, (2015) 14 SCC 566 : (2015) 191 CC 343 : (2015) 4 Comp LJ 199 : (2015) 128 CLA 248.
16. *Smt. Tulasi Yellappa Pawaskar v Deptt. of Telecommunication*, AIR 2008 Kant 3 : (2008) 1 Kar LJ 582.
17. *Mahesh Chandra v Zila Panchayat, Mainpuri*, AIR 1997 All 248 (DB).
18. *Khema v Shri Bhagwan*, AIR 1995 Raj 94.
19. *Vishram Singh v District Judge, Etawah*, AIR 1996 All 90.
20. *Dwarika Singh v District Judge*, AIR 1996 All 325.
21. *Hari Nath v Raghu Nath*, AIR 1998 HP 28.

was claimed in respect of land, that it be declared as *bhumidhari* land or *abadi* land. It was held that the civil court should have the jurisdiction to try this suit and the bar of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 shall not be applicable.[22] Sometimes, it does happen that an application is filed under a particular provision of a statute and it is found to be non-maintainable thereunder, or the court or tribunal has no power to grant the relief asked for thereunder, but the said application is maintainable under some other provisions of the statute before the same court or tribunal and it has power to grant the relief asked for. In such cases, it has always been held that the "label" or the "nomenclature" of the application or petition should not matter and after seeing the substance or content of the application, if it is possible to grant the relief under some other provisions of the statute, such a relief should not be denied to a party. Such a recourse can be taken only when it is found that the relief asked for cannot be granted under the provision under which the jurisdiction of the court or tribunal is invoked, much less when the result would be to deprive the party of a right of an appeal provided against the order passed under such a provision.[23] The Code of Civil Procedure is not applicable under Bombay Public Trusts Act, 1950. Reference of CPC in section 6 of Presidency Small Cause Courts Act, 1882 is also for limited purpose of indicating that a small cause court is to be a court within the meaning of the CPC.[24] In view of sections 11 and 17 of the Hindu Marriage Act, 1955, there is no remedy in case a husband marries another woman. However, in common law, a wife has a right to file a suit for declaration that the marriage of her husband with the second wife is illegal and void.[25]

A suit for land is a suit in which the relief claimed relates to the title or delivery of possession of land or immovable property. In determining whether a suit is a "suit for land", the court shall look into the plaint only and will not consider any other evidence. It is an established rule. If the averments in the plaint and prayers therein indicate that the suit is one for land, it shall be so held. As far as the suit for specific performance of an agreement to sell the land is concerned, in view of section 22 of the Specific Relief Act, 1963, it cannot be considered as a "suit for land" unless such suit contains a prayer for delivery of possession. But such a prayer need not be explicit. Even if the prayer for delivery of possession is implicit in a suit for specific performance, such suit can be considered as "suit for land".[26]

The appellant had filed a suit seeking a declaration that the decree passed by the Assistant Collector, Class I, in a suit under sections 176, 178 and 182 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 was fraudulent, inoperative and not binding upon him, on the ground that the defendants had instituted the suit before the Assistant Collector in which his father was made an opposite party and a compromise petition was filed with the fake signature his father, on the basis of which, a compromise decree was passed. It was the case of appellant that no notice of the suit was ever served upon his father, he never appeared in the proceeding, he was not even aware of it, he did not sign any compromise petition and his alleged signature on the compromise petition was faked. The appellant claimed that his father had passed away much earlier and was not even alive in 1979 when the decree was passed. The appellant, accordingly, sought a declaration that the decree passed by the Assistant Collector be cancelled or it may be declared as *void ab initio*, inoperative and not binding upon him. The defendants filed a written statement in which they questioned the maintainability of the suit.

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22. *Jyoti Ram v District Judge, Saharanpur*, AIR 1996 All 28. See also *Horil v Keshav*, (2012) 5 SCC 525.
23. *Jagdish Balwant Rao v State of Maharashtra*, AIR 1994 Bom 141 (FB).
24. *Saiyad Mohmed Bakar El. Edroos v Abdulhabib Hassan Arab*, (1988) 4 SCC 343.
25. *Birendra Bikram Singh v Kamala Devi*, AIR 1995 All 243.
26. *Excel Dealcomm Pvt Ltd v Asset Reconstruction Co (India) Ltd*, (2015) 8 SCC 219 : (2015) 4 Scale 403.

It was contended on their behalf that as the suit related to agricultural lands; it was beyond the jurisdiction and competence of the civil court and could only be tried by the Revenue Authorities. It was held by the Supreme Court that the bar against filing of suit for setting aside compromise decree on the ground of its being unlawful does not apply to a civil court. A civil court has inherent jurisdiction to try all types of suits. Accordingly, the suit challenging compromise decree was restored with direction to the civil court to expedite the hearing. It was observed by Aftab Alam J as follows:[27]

> 15. We are of the view that the Revenue Courts are neither equipped nor competent to effectively adjudicate on allegations of fraud that have overtones of criminality and the courts really skilled and experienced to try such issues are the courts constituted under the Code of Civil Procedure.
>
> 16. It is also well settled that under Section 9 of the Civil Procedure Code, the civil court has inherent jurisdiction to try all types of civil disputes unless its jurisdiction is barred expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority. We find nothing in Order XXIII Rule 3-A to bar the institution of a suit before the civil court even in regard to decrees or orders passed in suits and/or proceedings under different statutes before a court, tribunal or authority of limited and restricted jurisdiction.

In a suit for declaring Marriage Certificate under the Special Marriage Act, 1954 as null and void, the marriage itself was denied and the Marriage Certificate was challenged on the ground of being obtained by practicing fraud. It was held by the Orissa High Court that there being no provision on the Act to decide such dispute, the civil court's jurisdiction cannot be ousted. The question of applicability of section 24 of the Act dealing with grounds for declaring the marriage void arises only if the solemnisation of marriage is admitted.[28]

[s 9.4] Section 9 and Section 115

A revision petition under section 115 of the Civil Procedure Code lies to the high court as against an order made by a civil court in an appeal preferred under section 37 of the Arbitration and Conciliation Act 26 of 1996. The fact that a second appeal is statutorily barred under the Act and the CPC is not specifically made applicable, notwithstanding.[29] However, the Supreme Court has recently held that the analysis made in *ITI Ltd*[30] (because the 1996 Act does not provide the CPC to be applicable, it should not be inferred that the Code is inapplicable) seems to be incorrect, as the scheme of the 1996 Act envisages otherwise and the legislative intendment also postulates similarly and has referred the same to a larger bench for reconsideration.[31]

[s 9.5] Bar of Jurisdiction — Ascertainment

The question as regards ouster of a jurisdiction of a civil court must be construed having regard to the scheme of the Act as also the object it seeks to achieve. The law in this regard is no longer *res integra*. Wherever there is a complete and express bar on the jurisdiction of the civil

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27. *Horil v Keshav*, (2012) 5 SCC 525.
28. *Suresh Chandra Nayak v Shantilata Bhoi*, AIR 2009 Ori 14.
29. *ITI Ltd v Siemens Public Communications Network Ltd*, AIR 2002 SC 2308 : (2002) 5 SCC 510 : (2002) 4 Andh LD 47.
30. Supra note 27.
31. *MTNL v Applied Electronics Ltd*, (2017) 2 SCC 37 : (2016) 8 Supreme 693.

court, an examination of the nature of the act and the provisions of the adequate remedies can be relevant but cannot be considered as a sole ground to withstand the jurisdiction of civil court.[32]

Any order passed by the revenue authority is passed in violation of the principle of natural justice, section 9 of the Code will be attracted and the bar imposed by section 158 of the Land Revenue Act will not applicable.[33]

A plea of bar to jurisdiction of a civil court must be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety. The court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed *de hors* the factual averments made in the plaint. The rules of pleadings postulate that a plaint must contain material facts.[34]

In a suit, where there are several reliefs claimed in the plaint. If the main relief is cognizable by civil court, the suit would be maintainable. Thus, where the main relief of the plaintiff of injunction and protection against demolition, it was held that such relief can be granted only by civil court, the relief of possession being merely ancillary relief which civil court could grant after taking cognizance of the suit for injunction and demolition.[35] Where the property in suit is situated within the limits of the city and the land was not agricultural land which required to be declared *abadi* land, it was held that civil court will have jurisdiction to grant relief of possession in respect of suit property.[36]

In a suit for declaration and injunction and for other incidental relief, issue was framed as to whether the jurisdiction of civil court to entertain the suit was barred under the Delhi Land Reforms Act, 1954. The high court found that section 185 of the Act could not be applied to the suit in view of the nature of relief claimed in the plaint and therefore, the suit should be heard on merit. On appeal the Supreme Court held that considering the facts and circumstances and allegations in the plaint, the trial court should decide the suit not only on other issues on merits but also on issue regarding jurisdiction of civil court to entertain the suit in view of section 185 of the Delhi Land Reforms Act.[37]

It has been held by the Supreme Court that it is a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it by law.[38]

Hon'ble Supreme Court while interpreting the word "jurisdiction" under the purview of section 9 *inter alia* noted that section 9 of the CPC deals with jurisdiction and empowers the courts to try all civil suits unless barred. The words used in section 9 of the CPC "barred by any enactment for the time being in force" are substituted by "either expressly or impliedly barred", Thus, the word jurisdiction under section 9 of the CPC correlated with the cognizance, i.e., is not barred either expressly or impliedly.[39]

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32. *M Hariharasudhan v R Karmegam*, Civil Appeal No. 8069 of 2019, decided on 17 October 2019 (SC).
33. *Om Singh v Kamlesh Singh*, Civil Revision No.8280 of 2018, decided on 25 November 2019 (Punjab and Haryana HC).
34. *Church of North India v Lavajibhai Ratanjibhai*, AIR 2005 SC 2544 : (2005) 10 SCC 760 : (2005) 2 UJ 945 (SC).
35. *Shankar v Surendra Singh Rawat*, AIR 2007 Uttr 15 : (2007) 1 All WC 125.
36. *Chandra Shekhar Joshi v Chandra Ballabh Pant*, AIR 2007 Uttr 25 : (2007) 3 All LJ 624.
37. *Rajender Singh v Vijay Pal alias Jai Pal*, AIR 2008 SC 1691 : (2008) 4 SCC 36.
38. *J Kumaradasan Nair v IRTC Sohan*, AIR 2009 SC 1333 : (2009) 12 SCC 175.
39. *Nusli Neville Wadia v Ivory Properties*, (2020) 6 SCC 557.

Section 9 of the CPC provides that a civil court shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. It is no doubt true that ordinarily the averments in the plaint will have to be taken into consideration to find out that the suit is cognizable by a regular civil court.[40] The plaint cannot be rejected on the grounds that suit is barred, the provisions of sections 17 and 18 of the Recovery of Debts and Bankruptcy Act, 1993 (DRT Act) as jurisdiction of civil court is not barred in following events[41]—

1. To pass declaratory order as the DRT has no jurisdiction to issue declaration in respect of title.
2. Where a question of fraud or misrepresentation is involved in the case.
3. Where the case would be resolved on the basis of extravagant evidence or trial.

Wherever there is no explicit exclusion of jurisdiction of civil court, the examination of the scheme of act in order to relegate the intention behind such non-exclusion is *sine qua non* and the conclusion of such examination may be pivotal. Only where sufficient remedy is provided to the aggrieved party and proper procedure has been prescribed to determine the right and liability of the parties, the jurisdiction of civil court is barred.[42]

[s 9.6] Choice of Forum

We have to keep in mind that there is difference between inherent lack of jurisdiction of any court on account of some statute and the other where parties through agreement bind themselves to have their dispute decided by any one of the courts having jurisdiction. Thus, the question is not whether the Odisha courts have the jurisdiction to decide respondent's suit but whether the respondent could have invoked the jurisdiction of that court in view of the aforesaid clause 34. A party is bound either by the provisions of the Constitution of India, statutory provisions or any rule or under terms of any contract which is not against the public policy. It is open for a party for his convenience to fix the jurisdiction of any competent court to have their dispute adjudicated by that court alone. In other words, if one or more court has the jurisdiction to try any suit, it is open for the parties to choose any one of the two competent courts to decide their disputes. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them then the party can only file the suit in that court alone to which they have so agreed. Once parties bound themselves as such it is not open for them to choose a different jurisdiction. Such a suit if filed would be in violation of the said agreement.[43]

[s 9.7] Order of Court Lacking Jurisdiction to Be Respected till Set Aside

A judicial order, not invalid on its face, must be given effect entailing all consequences, till it is declared void in a duly constituted judicial proceedings. It cannot be said that a civil court cannot under any circumstances entertain a civil suit in respect of proceedings pending before the registrar, co-operative society. Even where exclusion of jurisdiction of the civil court is statutorily provided still on availability of requisite grounds, the civil court can entertain a civil

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40. *Laxminarayana Rao, Mangalore v Janardhana Shettigara*, AIR 1994 Kant 105.
41. *Prime Cottex Pvt Ltd v Bank of Baroda*, R/First Appeal No. 5349 of 2019, decided on 18 December 2019 (Gujarat HC).
42. *M Harihavasudhan v R Karmegam*, Civil Appeal No. 8069 of 2019, decided on 17 October 2019 (SC).
43. *Shriram City Union Finance Corp Ltd v Rama Mishra*, AIR 2002 SC 2402 : (2002) 9 SCC 613.

suit on well-defined parameters settled by Constitution Bench of the Supreme Court in *Dhula Bhai v State of Madhya Pradesh.*[44] The registrar of co-operative society should not ignore the order of the civil court as not binding on him in view of the provisions contained in sections 93(3), 93(1)(c) and 60 of the Delhi Co-operative Societies Act, 1972 (35 of 1972). It will be a dangerous proposition to be laid down as one of the laws that any individual or authority can ignore the order of the civil court by assuming authority upon itself to decide that the order of civil court is one by *coram non-judice*. The appropriate course in such cases for the person aggrieved is first to approach the civil court inviting its attention to the relevant provisions of law and call it to adjudicate upon the question of its own jurisdiction and to vacate or recall its order if it be one which it did not have jurisdiction in law to make. So long as this is not done, the order of competent court must be obeyed and respected by all concerned.[45]

[s 9.8] Suits of a Civil Nature

Suits fall under two categories: those which are of a civil nature and those which are not. Suits falling under the first category only can be entertained by civil courts. Explanation I clarifies as to what a suit of a civil nature is. If the principal or the only question in the suit is a question relating to a caste or one relating to religious rites or ceremonies, the suits does not deal with the rights of the citizen but with matters which are either social or religious. On the other hand, if: (i) the question relating to a caste or religious rites or ceremonies is not the principal question in the suit but only a subsidiary or an incidental one; (ii) the principal question is one relating to a right to property or office or any other civil right; and (iii) such a question cannot be decided without determining the question relating to the caste or religious rites or ceremonies, the court can decide the question as to the caste, religious rites or ceremonies to enable it to adjudicate the principal question.[46] Accordingly, a suit is of a civil nature if the principal question therein relates to a civil right. The fact that the determination of such a question depends upon the decision of a caste question or a question as regards religious rites or ceremonies, does not take out the suit from the category of civil suits. Thus, where one sect of a religious community alleged certain acts of the other sect of the same community as acts of desecration, it was held that whether such acts were sacrilegious or not was a matter for the community to decide and that a court would only be concerned with such a question to the extent only of its being relevant to questions of a civil right, eg, the right of worship. The issue would be not whether the alleged acts were in accordance with the orthodox tenets or with the previous practice, but whether they interfered with the plaintiff's right of practice.[47] Courts will refuse to try suits where the main question is a caste question or one relating to religious rites or ceremonies. An apprehension that exhibition of a film certified by the board of censors will hurt the religious feelings of the plaintiff and his co-religionists, does not give rise to a legal right.[48]

Where no customary right or easement of privacy is pleaded or proved, the plaintiff cannot get an injunction against the opening of a window by the defendant in the latter's wall, on the basis of a natural right of privacy. There is no natural right of privacy. The further fact that a

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44. *Dhula Bhai v State of Madhya Pradesh,* AIR 1969 SC 78.
45. *Prakash Narain Sharma v Burmah Shell CHS Ltd,* AIR 2002 SC 3062 : (2002) 7 SCC 46.
46. *Sarda Kunwar v Gajanand,* AIR 1942 All 320 : (1942) ILR All 821; *Thiruvenkata Ramanuja v Venkatacharlu,* AIR 1947 PC 53 : (1947) ILR Mad 436 : 73 IA 156; *Lalji v Walji,* (1895) ILR 19 Bom 507; *Pragji v Govind,* (1887) ILR 11 Bom 534; *Ramakrishna v Gangadhar,* AIR 1958 Ori 26; *PN Nair v EA Nair,* AIR 1974 Ker 51 : (1972) Ker LJ 769 : (1973) Ker LT 297.
47. *Hukumchand v Maharaj Bhadur,* AIR 1933 PC 193 : (1933) ILR 12 Pat 681 : 60 IA 313.
48. *Ushaben v Bhagyalaxmi Chitra Mandir,* AIR 1978 Guj 13.

municipal bye-law is violated, does not give a cause of action, where there is no right of the plaintiff infringed.[49]

Where the high court in a writ petition transferred two suits and appeals involving similar issues, to itself and application for recall of the said order of transfer was made by the appellant pointing out that in appeals arguments had been heard and order was to be pronounced therein, however, in the meantime the high court withdrew the appeal to itself and then without passing any order on the recall application, dismissed the suits on the ground that the issues raised in the suits were being examined in the writ petition, it was held by the Supreme Court that the procedure adopted by the high court was unknown to law.[50] DK Jain J, speaking for the Bench in the above case, observed as follows:

> We are conscious of the fact that the object of filing of the suits could be a dubious and indirect attempt on the part of Tekchand, respondent No. 4, to derive some undue advantage in connivance with the plaintiffs, yet that was no ground to dismiss the suits summarily in the aforenoted manner. It must be kept in mind that one of the fundamental norms of judicial process is that arguable questions either legal or factual, should not be summarily dismissed without recording a reasoned order. A mere entertainment of the Writ Petition, to which appellants herein were not parties, even if it involved determination of similar issues, in our opinion, was not a good ground to dismiss the two suits without granting opportunity to the parties to prove their respective stands. Moreover, the scope of the writ petition and the two suits also seem to be different.[51]

In the above case, the Supreme Court quoted its observation from an earlier decision in *Smt. Ganga Bai's* case,[52] wherein it was observed as follows:

> There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at ones peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.

In another earlier decision quoted by the Division Bench, Lahoti J, (as he then was), observed as follows:

> Plaintiff is *dominus litis*, that is, master of, or having dominion over, the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law.[53]

Where a suit was filed for compensation for breach of contract and a contract had been entered into in Tamil Nadu, it was held that the same is enforceable in Tamil Nadu. Provisions relating to arbitration in section 69, Kerala Co-operative Societies Act, 1969, are not attracted. Suit filed in Tamil Nadu was not without jurisdiction.[54] In a contract, there is offer and acceptance. If offer and acceptance were complete earlier and placing of order is only a formality, jurisdiction of courts would be where the agreement was complete by acceptance. Offer having been sent by post, place of acceptance is the place of contract. Court at the place of contract, can entertain a suit for recovery of consideration money.[55]

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49. *IC Krishnamurthy v U Rajlingam*, AIR 1980 AP 69.
50. *Abdul Gafur v State of Uttarakhand*, AIR 2009 SC 413 : (2008) 10 SCC 97.
51. *Abdul Gafur v State of Uttarakhand*, AIR 2009 SC 413, p 417, para 18 : (2008) 10 SCC 97.
52. *Smt. Ganga Bai v Vijay Kumar*, AIR 1974 SC 1126 : (1974) 2 SCC 393.
53. *Dhannalal v Kalawatibai*, AIR 2002 SC 2572, p 2580, para 23 : (2002) 6 SCC 16.
54. *ITK Sundaram v Co-op Sugars Ltd, Chittor*, AIR 1988 Mad 167.
55. *State of Orissa v Prathiba Prakash Bhavan*, AIR 1995 Ori 62.

In *KA Annamma v Cochin Co-op Hospital Society Ltd,*[56] the Supreme Court considered the question as to whether a service dispute between a co-operative society and its employee is triable by the labour court established under the Industrial Disputes Act, 1947 or by an authority under the Kerala Co-operative Societies Act, 1969 or do both have concurrent jurisdiction leaving the choice with an aggrieved person to select which forum to be approached? Interestingly, this was a question on which different benches of the High Court of Kerala had expressed different opinions in the past. Even the five-judge bench of the High Court of Kerala did not render a unanimous verdict on this question. The majority had held that such service dispute is triable only by the forum established under the Kerala Co-operative Societies Act, 1969 (KCS Act) and not under the Industrial Disputes Act, 1947 (ID Act), whereas the minority had held that both have concurrent jurisdiction.

The Supreme Court did not agree with the above majority view. Agreeing with the minority, it ruled that, "*the KCS Act and the ID Act both possess and enjoy the concurrent jurisdiction to decide any service dispute arising between the cooperative society's employee and his/her employer (cooperative society)*". The court also ruled that it is the choice of the employee to choose any one of the two forums available under the two Acts. However, approaching the forum under the ID Act is subject to the tests laid down therein i.e., "*the employee concerned is a 'workman', the dispute raised by him/her is an 'industrial dispute' and the cooperative society (employer) is an 'industry' as defined under the ID Act*".

A suit for correcting the date of birth in the record would be maintainable in a civil court. In fact, asking for a correction of that type may be for various purposes and need not be confined to the question of claiming the relief (superannuation as per corrected date of birth in the instant case) available under the Industrial Disputes Act, 1947. Where the suit for correction of date of birth filed before an employee is superannuated on the basis of the date of birth on record, one of the situations contemplated under section 2A of the Industrial Disputes Act, 1947 gives the employee a cause of action to approach the industrial court. The maintainability of the suit has to be decided with reference to the date of institution of the proceedings; and since, on the date when the civil suit was filed, none of the eventualities covered by section 2A of the Industrial Disputes Act, 1947 had happened, he could not have approached the forum under the Industrial Disputes Act, 1947 for relief. Thus, the civil suit would not be barred by section 2A of the Industrial Disputes Act, 1947.[57]

When the suit for maintenance is not filed under any provision of Hindu Marriage Act, 1955, it is a suit of a civil nature. The civil court has jurisdiction to entertain and try the suit under section 9. The prayer for interim maintenance in such a suit cannot be one under section 24 of the Hindu Marriage Act, 1955.[58] Since no forum is prescribed under the Hindu Adoption and Maintenance Act, 1956 to enforce the right recognised under section 18 of the said Act, the only forum available to enforce the said right is the civil court, where a suit cannot as such be instituted for enforcement of the said right, though the civil court in exercise of its inherent powers can grant interim maintenance.[59] The provisions of section 19 of the Family Courts Act, 1984, provides specific remedy by way of appeal from every judgment or order to the high court, both on facts and law, and without exhausting the remedy as provided under the statute, the proceedings instituted challenging the order passed by the family court, *ipso facto* the proceedings are not tenable. The petitioner is not entitled to file a civil suit for

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56. *KA Annamma v Cochin Co-op Hospital Society Ltd,* (2018) 2 SCC 729 : LNIND 2018 SC 10.
57. *Ishar Singh v National Fertilizer,* AIR 1991 SC 1546 : (1991) 2 SCC 649.
58. *Khadal Penthi v Hulash Dei,* AIR 1989 Ori 137 (FB).
59. *Purusottam Mahakud v Annapurna Mahakud,* AIR 1997 Ori 73.

declaration without setting aside the decree or order passed by the family court. Similarly, the petitioner cannot bring any hurdle or raise any objection to the execution of the decree, which is in force.[60]

Civil courts cannot issue injunction order in respect of the action already taken in the matter of grant of permit by the regional transport authority or preventive orders in connection therewith. The only situation in which the civil court can interfere in the matter of grant of such permission is when the transport authorities, which had granted the permit or likely to grant permit are not duly constituted. If the decree of the civil court is implemented despite the express provisions of the Motor Vehicles Act, 1988, the transport authorities can never grant permanent and temporary permit in future till eternity. Such a decree is absolutely without jurisdiction and outside the scope of the powers of the civil court.[61] Where facts on record, clearly demonstrate that a *prima facie* case has been made out which requires investigation and consideration towards jurisdictional issue on the question of competence of the committee to decide the question of expulsion of members. The question of *mala fide* and violation and natural justice were also there. Therefore, at the stage of decision of application under O XXXIX, rules 1 and 2, it cannot be said that the court has no jurisdiction to interfere in the case of expulsion of the appellant.[62]

The ouster of jurisdiction of civil court under section 125(1) of the Kerala Land Reforms Act, 1963 (No 1 of 1964) does not extend to the question relating to fraud or/and collusion. It is limited only to matters which are by or under the Act required to be settled, decided or dealt with by the land tribunal or the appellate authority. Those questions which fall outside the same, naturally should be decided by civil court as section 9 of the CPC. In other words, civil court will be competent to decide disputes which cannot be decided by the statutory tribunals.[63] Where the extent of shares of evacuee and non-evacuee property in a composite property were specified and the property was sold, the jurisdiction of civil court would not be barred to decide the question as to what was the extent of property that was sold. This question was not one to be determined by any of the authorities under Evacuee Property Act, 1950. Moreover, rule 92 also cannot be invoked in such a case to challenge the jurisdiction of civil court.[64]

In *Madhavi Amma v S Prasannakumari,*[65] the Supreme Court examined the question as to the extent to which section 125 of the Kerala Land Reforms Act, 1963 barred the jurisdiction of the civil courts both at the initial stage as well as at the appellate stage. It was held that:

> Section 125 stands apart from the above provisions which creates a bar of jurisdiction of civil court to settle, decide or deal with any question or to determine any matter which is by or under the 1963 Act required to be settled, decided or dealt with or to be determined by the Land Tribunal or the Appellate Authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government. Further the proviso to section 1 to section 125 excludes such a bar of civil court jurisdiction in respect of proceedings pending in any court at the commencement of the Kerala Land Reforms Amendment Act, 1969. Even while creating such a bar of jurisdiction of civil courts, the law makers wanted to ensure that no person is allowed to abuse or misuse the benefits conferred under 1963 Act while claiming rights as a "kudikidappukaran" and with that laudable object engraved sub-section (3) in section 125 itself by which any civil court or authority before whom

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60. *Shahnaz Shaharyari v Dr. Vijay Yashwant Gawande*, AIR 1995 Bom 30.
61. *Omkar Singh v Regional Transport Authority, Bareilly*, AIR 1991 All 239.
62. *Kalyan Kumar Dutta Gupta v BM Verma*, AIR 1995 Cal 140 (DB).
63. *Maickan v Kanakam*, AIR 1991 Ker 316.
64. *Jamil Ahmed v Kumud Rajdeo Singh*, AIR 1997 All 374.
65. *Madhavi Amma v S Prasannakumari*, AIR 2013 SC 1384 : (2013) 4 SCC 77 : JT 2013 (8) SC 85.

any other proceedings regarding rights of a tenant or of a 'kudikidappukaran' arise for consideration, enjoins upon such civil court or other authority to stay the proceedings temporarily and also simultaneously make a reference to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate along with the relevant records for the decision of the question as to whether a person is a tenant or a "kudikidappukaran". Sub-section (8) of section 125 which was introduced in the statute book w.e.f. 2.11.1972 made it clear that civil court would include a Rent Control Court as defined in the 1965 Act. Sub-section (4) enjoins upon the Land Tribunal to decide the question referred to it under sub-section (3) and return the records together with his decision back to the civil court/rent control court. Under sub-section (5) of section 125 the civil court/rent control court should then proceed to decide the suit or other proceedings by accepting the decision of the Land Tribunal on the question referred to it. Sub-section (6) of section 125 makes the position clear that while the decision of the Land Tribunal on the question referred to it should be accepted by the concerned civil court/rent control court which refers the question, the further determination as to the correctness or otherwise of such decision by the Land Tribunal can be examined in the channel of appeal provided in the respective jurisdictional appellate court of the civil court/rent control court.

Thus, the Supreme Court held that the bar of jurisdiction under section 125 operates only at the first instance and not at the appellate stage.

Application was made by the creditor for attachment, before judgment, or movable property (car, in the instant case). An undertaking was given by the judgment-debtor, that he would not alienate it. Conditional order to furnish security and to produce the car was passed. Evidence disclosed that the judgment-debtor had sold the car prior to the passing of attachment order to another person, who, in turn, had sold it to a third party. Application was made by the third party to raise the attachment. It was held that the application should be allowed, since the third party had no knowledge of the undertaking given by the judgment-debtor and was guided by entries in the registration certificate of the car. Course open to the creditor was, to take action against the judgment-debtor for disobedience of the undertaking given by him to the court.[66]

The prayer for disbursal of interest free sales tax loan, either in whole or in part cannot be enforced by issue of a writ of *mandamus* in a proceedings under Article 226 of the Constitution of India. Normally, a civil suit is the remedy in such situation. The purpose of Article 226 of the Constitution of India is not to supersede the normal remedy available under law by way of a suit.[67] Where the dispute between the contractor and a corporation, assumed to be a state within the meaning of Article 12 of the Constitution of India has arisen from general law of contract i.e. where relief is claimed on the basis of general law of contract, and neither any fundamental right of the contractor is claimed to have been violated nor constitutionality of any statute or statutory is involved for determination, the writ court would not be a proper forum for adjudication of the disputes. The dispute between the contractor and the respondent being one arising out of a contract/qua-contract can be adjudicated either in a properly constituted civil suit or by resort to arbitration.[68]

Where it was alleged that the permanent tenant allegedly transferred the land, a controversy involving pretender tenant was not beyond the jurisdiction of the civil court.[69] Where it is only an acquisition of the property by two members of the joint family, certainly the civil court has the jurisdiction to decide the same.[70] In any event, the relief of injunction cannot be granted

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66. *AC Thrugnanamurthy v Jamuna Bail*, AIR 1990 Mad 242.
67. *Shakti Tubes Ltd v State of Bihar*, AIR 1994 Pat 162 (FB).
68. *Padmavathi Constructions v AP Industrial Infrastructure Corp Ltd*, AIR 1997 AP 1.
69. *N Sudershan Reddy v Kannamma*, AIR 1994 AP 116.
70. *Veerabhadrappam v Virupaxappa Totappa Bilebal*, AIR 1998 Kant 346.

by the revenue authority constituted under the record of Tenancy Act and it could be granted only by the civil court.[71]

Civil court has jurisdiction to examine whether action or decision of an administrative authority was *intra vires* the relevant rules even if the rules are in the nature of administrative or departmental instructions.[72] The payment of the money claimed under the insurance policies in a petition filed under Article 226 is not maintainable. The only remedy available in such a case is institution of a suit before civil court.[73] In the light of the constitutional scheme provided in Constitution (Scheduled Caste) Order 1950, the civil court has no jurisdiction under section 9 of CPC, to entertain the suit for declarations.[74] The suit in civil court challenging the order of termination by the services of an employee of a regional rural bank is maintainable.[75]

[s 9.9] Caste Question

A caste is any well-defined community, be it Hindu or Mohammedan, governed for certain internal purposes by its own rules and regulations.[76] A caste question is one which relates to matters affecting the internal autonomy of the caste and its social relations.[77] If a court does not have jurisdiction, it does not have jurisdiction, regardless of the fact that one of the parties involved, is a gram panchayat or the period involved is very short, or the amount involved is very small.[78]

To determine whether a question is a caste question or not, the test is whether its cognizance constitutes interference with the caste's autonomy. In other words, it is a question which the caste as a self-governing body is entitled to decide for itself and not the court.[79]

[s 9.10] Caste Certificate

In view of the legal position emerging from the various judgments, it is clear that the judgment rendered in *Madhuri Patil's* case[80] being the law laid down by the Supreme Court is binding on all the persons under Article 141 of the Constitution of India. In revisional jurisdiction, the Supreme Court may take into consideration any change in law as held in *Gummolapura Taggina Matada Kotturuswami v Selra Veeravva*.[81] In appeal and/or revision, the court can take judicial notice of the law prevailing on the date of the order or judgment and mould the relief accordingly taking judicial notice of change in law during pendency of appeal and/or revision as laid down by the Supreme Court in *Karansing v Bhagwansing*[82] and *P Venkateswarlu v Motor and General Traders*[83] the civil court had no jurisdiction to entertain and try the suit in question.[84]

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71. *Kousalya Ammam v Valliammai Ammal*, AIR 1998 Mad 287.
72. *Anne Besant National Girls' High School v Deputy Director of Public Instruction*, (1983) 1 SCC 200.
73. *LIC of India v Kiran Sinha*, (1986) 2 SCC 553.
74. *S Suvigaradoss v Zonal Manager, FCI*, AIR 1996 SC 1182 : (1996) 3 SCC 100 : (1996) 1 CTC 257.
75. *Prathama Bank, Head Office, Moradabad v Vijay Kumar Goel*, (1989) 4 SCC 441.
76. *Abdul Kadir v Dharma*, (1896) ILR 20 Bom 190.
77. *Appaya v Padappa*, (1899) ILR 23 Bom 122, 130; *Nagindas v Somnath*, AIR 1932 Bom 122 : (1932) ILR 56 Bom 242.
78. *State of Gujarat v Rajesh Kumar*, AIR 1996 SC 2664 : (1996) 5 SCC 477.
79. *Murari v Suba*, (1882) ILR 6 Bom 725, 727.
80. *Kumari Madhuri Patil v Addl. Commr*, AIR 1995 SC 94 : (1994) 6 SCC 241 : JT (1994) 5 SC 488 : (1994) 28 ATC 259.
81. *Gummolapura Taggina Matada Kotturuswami v Selra Veeravva*, AIR 1959 SC 577.
82. *Karansing v Bhagwansing*, (1965) 7 SCC 559.
83. *PVenkateswarlu v Motor and General Traders*, AIR 1975 SC 1409 : (1975) 1 SCC 770 : (1975) SCR 3 958.
84. *Pralhad Banduji Lodhi v Collector & the Disrict Magistrate*, AIR 2001 Bom 416.

The question as to who is a member of the Scheduled Caste or Scheduled Tribe is governed by the President's Order issued under Articles 341 and 342 of the Constitution. A person is a member of the Scheduled Caste if the caste to which he belongs is included in the list contained in the constitution (Scheduled Castes) Order, 1950 as amended from time to time. Similarly, a person is a member of the Scheduled Tribe if the tribe to which he belongs is included in the Constitution (Scheduled Tribes) Order, 1950 as amended from time to time. The Constitution imparts finality and exhaustiveness to these orders and it is the President's notification issued under these Articles which is to determine who is deemed to be a member of a Scheduled Caste or Scheduled Tribe. The courts have no power to go beyond the orders and a three-judge bench of the Supreme Court has held that the courts cannot hold any inquiry or to let in any evidence to determine whether or not any particular community falls within the order or not.[85]

In the undernoted cases,[86] it has been held that such questions do not fall within the domain of civil courts.

[s 9.11] Suits in Which the Principal Question Is a Caste Question, Are Not Suits of a Civil Nature

A resolution by a caste depriving its members of *man-pan* invitation or an invitation to the caste dinner or to *munj* or other ceremonies for an alleged breach of a caste rule does not entitle the excluded member to seek a remedy from a civil court.[87] Neither can a court compel barbers attached to the caste to shave a casteman,[88] nor can it compel other castemen to go to the house of a casteman on the occasion of death in his family and assist him in the removal of the dead body, though in doing so they may break a caste rule;[89] nor can it compel a defaulting member to pay to the caste a contribution levied by a caste resolution on certain auspicious occasions.[90] The reason is that these are social privileges as against legal rights and as such are matters of caste autonomy which the caste can deny or enforce. The question as to the status of a caste also is not one for the court to decide. Hence, the question whether *bhumidars* are brahmins or not is one which has to be decided by the *bhumidars* themselves and relatively by the other sections of the Hindu society and not by the court.[91]

[s 9.12] Expulsion from Caste

Exclusion from social privileges such as caste dinners, etc. and expulsion from the caste are two different concepts and involve different considerations. The former deprives the aggrieved person of a social privilege, the latter a legal right which forms part of his status. Hence, a suit will lie for a declaration that the plaintiff is entitled to be re-admitted into the caste and also for damages for expulsion from the caste.[92] The general principles applicable to the expulsion of members from a club govern cases of expulsion of persons from caste,

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85. *Palghat v State of Kerala*, (1994) 1 SCC 359.
86. *Marimuthu v Savarimuthu*, (1999) 1 Mad LJ 480 (Mad); *UOI v Registrar, CAT, Chennai*, (2001) 2 Mad LJ 110 (Mad); *P Maragathamani v General Manager, BHEL, Tiruchirapalli*, (2006) 1 Mad LJ 480 (Mad) F.B.
87. *Raghunath v Janardan*, (1891) ILR 15 Bom 599; *Mayashankar v Hari Shankar*, (1886) ILR 10 Bom 661.
88. *Raj Kisto v Nobaee*, (1864) 1 WR 351.
89. *Kanji v Arjun*, (1894) ILR 18 Bom 115.
90. *Abdul Kadir v Dharma*, (1896) ILR 20 Bom 190.
91. *Ram Dulari Saran v Yogeshwar*, (1969) Cr LJ 133.
92. *Jagganath v Akali*, (1894) ILR 21 Cal 463.

and those principles, so far as relevant, require that the expulsion must be in accordance with rules of natural justice.[93] The important question is whether there has been due inquiry.[94] A suit for a declaration that the plaintiffs were wrongfully excluded from the membership of a community by the chief priest, and for a declaration of their rights to property and other privileges is a suit of a civil nature;[95] but, to entitle the plaintiff to a decree, it must be shown that his ex-communication was wrongful, and the court will in such cases enquire into the validity of the sentence of ex-communication. Ex-communication is wrongful, if a member is expelled from the caste without opportunity of explanation being offered to him.[96] It is also wrongful if a member is expelled for an alleged breach of a caste rule which, as a matter of fact, he has not broken.[97] In the *mofussil* of Bombay, however, a suit does not lie for restoration to caste, the cognizance of such a suit being expressly barred by Bombay Regulation Act 2 of 1827, section 21;[98] but, a suit is maintainable for "damages" on account of an alleged injury to the caste and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party.[99]

[s 9.13] Suits in Which the Principal Question Relates to Religious Rites or Ceremonies Are Not Suits of a Civil Nature

Accordingly, a suit will not lie to establish a right to parade bullocks on certain days;[100] but, a declaratory suit in respect of a right to run a customary bull race during the *thaimasi* month in front of a temple and for an injunction restraining the defendants from interfering with that right, even though such a right is not one of any office or in relation to the right of worship in the temple has been held to be maintainable on the ground that it deals with a right of a civil nature.[101] A suit to compel *pujaris* to adorn an idol at certain seasons,[102] or to install it in a particular temple instead of in another[103] is not maintainable. There is no right of a civil nature involved in these cases, and the court will not pronounce on any religious doctrine unless it is necessary to do so in order to determine rights of property.[104] Where the right of worship was not in dispute but the area of controversy relates to the rituals of following baptism by immersion on personal confession of faith and breaking of bread on the first day of the week in the commemoration of Lord's death, the dispute related merely to the performance of rituals, and the suit in civil court was not maintainable, as performance of mere rituals is not a civil right enforceable in civil court. The civil court has no jurisdiction to decide the question of rituals in temple except in so far as decision of such question is incidental to decision of civil

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93. *Ratansey v Meghji*, AIR 1934 Bom 43 : (1934) 36 Bom LR 901; *Abdul Razak v Adam Usman*, AIR 1935 Bom 35 : (1935) 37 Bom LR 603.
94. *Ambalal Sarabhai v Phiroz*, AIR 1939 Bom 35 : (1938) 40 Bom LR 1213.
95. *Mansoorali v Taiyabali*, AIR 1935 Ngp 156.
96. *Appaya v Padappa*, (1899) ILR 23 Bom 122; *Keshavlal v Bai Girja*, (1900) ILR 24 Bom 13, pp 22–23; *Vallabha v Madhusudanan*, (1889) ILR 12 Mad 495; *Ganapati v Bharati*, (1894) ILR 17 Mad 222.
97. *Krishnasami v Virasami*, (1887) ILR 10 Mad 133.
98. *Nathu v Keshawji*, (1902) ILR 26 Bom 174.
99. As to defamation for expulsion from caste, see the cases : *Raghunath v Janardan*, (1891) ILR 15 Bom 599; *Nathu v Keshawji*, (1902) ILR 26 Bom 174; *Gobind Das v Bishamber Das*, AIR 1917 PC 203 : (1917) ILR 39 All 561 : 44 IA 192.
100. *Rama v Shivram*, (1882) ILR 6 Bom 116.
101. *Srinivasalu Naidu v K Munnuswami Naidu*, AIR 1967 Mad 451.
102. *Vasudev v Vamanji*, (1881) ILR 5 Bom 80.
103. *Radha Krishna Das v Ramana Swami*, AIR 1949 Ori 1; *Loke Nath v Dasarath*, (1905) ILR 32 Cal 1072.
104. *Advocate-General of Bombay v Yusuf Ali*, AIR 1921 Bom 338 : (1922) 24 Bom LR 1060.

rights.[105] A suit to have it decided whether the *satpanth* cult is within the Vedic religion, or not, or is abhorrent to the feelings of the *leva patidar* community as a whole is not a suit of a civil nature.[106]

[s 9.14] Suits for Vindication of Mere Dignity Attached to an Office Are Not Suits of a Civil Nature

A claim by a *swami* (arch-priest) that he is entitled to be carried on a high road of a town or village in a palanquin on ceremonial occasions will not be entertained by a civil court.[107] What is claimed by the plaintiff in such a case is a mere mark of honour appended to the office of a *swami*. Civil courts should discourage as much as possible claims of so unsubstantial and objectionable a nature and they ought not to get involved in the determination of trivial questions of dignity and privilege although connected with an office. For the same reason, a suit will not lie for a declaration that the plaintiff as *gurukkal* or spiritual leader is entitled to be received at a *pagoda* by the wardens of the *pagoda* with the honours and emoluments due to his rank on the occasion of the annual festival of the *pagoda*. The duty of individuals to submit to and perform certain religious observations in accordance with the ritual or conventional practices of their race or sect is, in the absence of express legal recognition and provisions, an imperfect obligation of a moral and not a civil nature. Of such obligations the present civil court cannot take cognizance.[108] Following this rule, the courts have declined to entertain claims made by holders of religious office to precedence in worship, such as a claim to be the first to worship the deity and to receive gifts of rice and coconuts on certain public religious ceremonies.[109] They have likewise declined to decide disputes as to precedence or privilege between purely religious functionaries.[110] It is important to note that the suit in each of the above cases was not to establish a right to an office, but for a declaration that the plaintiff was, by virtue of his office, entitled to certain tokens of dignity or to votive offerings. In other words, the suit was not for a claim to an office but to vindicate an alleged dignity attached to an office. A suit for an office is of a civil nature, but a suit for vindication of a mere dignity though connected with an office, is not; but, if honours be attached to an office by way of remuneration, in other words, as part of its emoluments, a civil court can entertain a suit for such honours.[111] The expression "right to property" does not only mean right to ownership of property. The right to have the offerings in a *durgah* distributed among certain families, according to custom, is a right to property.[112]

[s 9.15] Office

Suits in which the principal question is as to a civil or legal right are suits of a civil nature. The right to an "office" is a right of a civil nature. Therefore, suits in which the principal question relates to the right to an "office" are suits of a civil nature; and they are not less so

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105. *Koil Pillai v Territorial Commandor, Territorial Head Quarters, Salvation Army*, AIR 1994 Mad 27.
106. *Devchand v Ghanashyam*, AIR 1935 Bom 361 : (1935) 37 Bom LR 417.
107. *Sri Sunkar v Sidha*, (1843) 3 Moo Ind App 198; *Shankara v Hanma*, (1878) ILR 2 Bom 470; *Andaniswami v Todadswami*, AIR 1921 Bom 140 : (1921) ILR 45 Bom 590, pp 595–96.
108. *Striman Sadagopa v Kristna*, (1863) 1 Mad HC 301, p 308.
109. *Narayan v Krishnaji*, (1886) ILR 10 Bom 233; *Karuppa v Kolanthayan*, (1884) ILR 7 Mad 91; *Sangapa v Gangapa*, (1878) ILR 2 Bom 476; *Babu v Thukra*, (1921) 41 Mad LJ 287.
110. *Madhusudan v Shankaracharya*, (1909) ILR 33 Bom 278.
111. *Rungacharyar v Rungasami*, (1909) ILR 32 Mad 291.
112. *Sardruddin v H.P.S.M.S. Durga*, AIR 1977 Bom 38.

because the right claimed may depend on the decision of the caste questions or questions as to religious rites or ceremonies or even religious tenets.[113]

Explanation II makes it clear that a suit to recover an office is maintainable even though no fees are attached to it. It was so held in a number of decisions long before *explanation II* was added to the section.[114] To constitute an office there must be duties attached to it which the holder can be compelled to perform. It has accordingly been held that the right which a person claims to lead a horse in a religious procession was not an office but merely an honour because he could not be compelled to do so.[115] So also, the right to hold a lighted torch inside the chariot during a *rathothsavam* was a mere dignity not attached to an office as there was no obligation to perform the service.[116] A suit for declaration of the right to receive *prasadam* while the image of the deity was taken in procession was held to be barred under this section.[117] The law on the subject was considered by the Supreme Court in *Sri Sinna Ramanuja Jeer v Sri Ranga Ramanuja Jeer*[118] and summed up as below:

(i) A suit for a declaration with respect to religious honours and privileges simpliciter will not lie in a civil court;

(ii) but, a suit to establish one's right to an office in a temple and to honours, privileges, remuneration or perquisites attached to the said office is maintainable in a civil court;

(iii) the essential condition for the existence of an office is that the holder of the alleged office shall be under legal obligation to discharge the duties attached to the said office and for the non-observance of which he may be visited with penalties.

It was accordingly held that a *theerthakar* who had no obligations to perform did not hold an office and a suit by him for honours was not maintainable.

[s 9.16] Suits for Secular Offices

When no remuneration attaches to the office of the secretary of an association (registered under Act 21 of 1860), a suit for a declaration that the plaintiff is the secretary of the association and that his dismissal from the office was not justified by the rules of the association is not maintainable in a civil court, especially if the association has the power to alter its rules from time to time. The reason is that in such a case no decree which a civil court may pass in plaintiff's favour could prevent the association from altering its rules and then dispensing with the plaintiff's services and employing someone else.[119]

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113. *Ramachandra Tripathy v Maguni Tripathy*, AIR 1951 Ori 64; *Krishnasami v Krishnamachariyar*, (1882) ILR 5 Mad 313; *Srinivasa v Thiruvengada*, (1888) ILR 11 Mad 450. See Explanation I to the section.
114. *Mamat Ram v Bapuram*, (1888) ILR 15 Cal 159; *Dinonath v Pratap Choudhry*, (1900) ILR 27 Cal 30; *Debendra v Satyacharan*, AIR 1927 Cal 783 : (1927) ILR 54 Cal 614; *Sayad Hasheem v Husai Sha*, (1889) ILR 13 Bom 429; *Tolapala v Venkata*, (1896) ILR 19 Mad 62; *Subba Raju v Venkatachariar*, (1905) ILR 28 Mad 23; *Hira v Bachu*, AIR 1916 Pat 215; *Luton v Prayag* 4 Pat LJ 531.
115. *Ramaswamy v Lakshman*, AIR 1939 Mad 886 : (1940) ILR Mad 40.
116. *Suryanarayana v Rama Rao*, AIR 1953 Mad 701; *Sarvar Lal v Ram Narain*, AIR 1959 AP 307; *Ramaswamy v Lakshmanan*, AIR 1939 Mad 886.
117. *Sivagnana v Chidambara*, (1954) ILR 1338.
118. *Sri Sinna Ramanuja Jeer v Sri Ranga Ramanuja Jeer*, AIR 1961 SC 1720 : (1962) 2 SCR 509; *G Naik v Hazania Temple of Shri Maya Quelbai*, AIR 1976 Goa 20.
119. *Maharaj Narain v Shashi*, (1915) ILR 37 All 331; *Shridhar Misra v Jaichandra Vidyalankar*, AIR 1959 All 598.

[s 9.17] Suits for Religious Office

Quaere (Query) whether every suit for a religious office is a suit of a civil nature? Explanation I to the section stated that a suit in which the right to an "office" is contested is a suit of a civil nature. A suit for the removal of the defendant as a *de facto mutawalli* and for substitution of the plaintiff in his place and for accounts is clearly one of a civil nature and therefore maintainable.[120] An office may be either secular or religious in its character. The prime concern here is to focus on an office of a religious character, for the question as to religious rites and ceremonies contemplated by Explanation I can only arise when the right to a religious office is contested. Religious offices may be divided into two classes namely *viz*:

(i) Those to which fees are appurtenant as of right; such as the office of the *kazi* of Bombay, or of the *joshi* of a village, or the *upadhyaya* of a caste.

(ii) Those to which no fees are attached, but which entitle the holder thereof to receive such *gratuities* as may be paid to him; such as the office of *pujari* or of an officiating priest in a temple, or of the *aya* of a *math*.

Fees are to be distinguished from gratuities. When fees are attached to an office the holder of the office is entitled on performance of the services to the stipulated or customary fees. Thus, a *kazi* or a *joshi* is entitled on performing a marriage ceremony to the marriage fee, and if the fee is not paid to him, he may enforce payment by a suit. In fact, a fee is a sum which the holder of an office is entitled to demand as payment for the execution of functions attached to the office. Besides, the fee paid to a *kazi* or to a *joshi* on the occasion of a marriage, there may be gratuities paid to him which are entirely voluntary in their character. If a person invites a *joshi* for performing a marriage ceremony at his place and pays him the fee but no gratuity, a suit will not lie at the instance of the *joshi* for payment to him of any sum by way of gratuity though it may be usual to pay gratuities on such occasions. The reason is that there is no obligation in law on the part of the person inviting a *joshi* to make any payment by way of gratuity.[121] The same remark applies to holders of religious offices referred to in class II above.

Before *Explanation II* was added to the section by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), a distinction was sometimes made between an office to which fees were attached and an office to which they were not. As regards offices of class I, there was no doubt that a suit did lie against an intruder disturbing the holder of such office in the exercise of his office for a declaration that he was entitled to the office and the fees attached to it. Such a suit was held to be a suit of a civil nature and therefore maintainable under this section.[122] As regards an office to which fees were not attached, there used to be a difference of opinion between different courts. The Calcutta High Court held that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the right to such office was a suit of a civil nature though no emoluments were attached to it. The reason given for such a conclusion was that a religious office, though no fees were attached to it, was an "office" within the meaning of the *explanation* (now *explanation I*) and that the section assumed that a suit for an "office" was a suit of a civil nature. The office in that case was that of musicians who chanted holy songs in a *satra* at a village.[123] The same high court in another case, where the office was that of a *shebait* and the suit was by a member of the family against another

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120. *Khalil Ahmed v Siddiq Ahmad*, AIR 1974 All 382.
121. *Muhammad v Sayad Ahmed*, (1861) 1 Bomb HC App xviii.
122. *Muhammad v Sayad Ahmed*, (1861) 1 BHC App xviii; *Ghelabhai v Hargowan*, (1912) ILR 36 Bom 94; *Girjashankar v Murlidhar*, AIR 1921 Bom 209 : (1921) ILR 45 Bom 234.
123. *Mamat Ram v Bapu Ram*, (1888) ILR 15 Cal 159.

member for a declaration of a hereditary right to officiate as a *shebait* at the worship performed by the votaries at the foot of a particular tree, held that the suit was of a civil nature within this section and was maintainable. In this case also there were no fees attached to the office but voluntary offerings used to be made by the votaries.[124] In yet another case the right claimed by the plaintiff was one of worship of *Saradiya Haragouri Thakurani* and to make certain offerings to the image installed in the place of worship. It was held that the plaintiff was entitled to maintain the suit against the usurper.[125] In all these cases the office in respect of which the suit was instituted was the office attached to a place as distinguished from an absolutely personal office.

The Madras High Court, on the other hand, took the view that a suit would not lie in respect of a religious office to which no fees were attached and that such an office was not an "office" within the meaning of this section.[126] The office in one of these cases was that of the priest of *samayacharm,* whose duty was to exercise spiritual and moral supervision of a certain class of persons. In a later case, however, the high court followed the Calcutta decisions and held that the right to lead a horse at religious processions was an office and that a suit was maintainable though no fees were attached to it.[127] The Bombay decisions were so conflicting that if an attempt were to be made to reconcile them, it would be necessary to divide them, though no such distinction is made in those decisions, into two categories:

(i) those in which the religious office was attached to a place, such as a temple or a sacred place; and

(ii) those in which the office was entirely personal in character. As regards offices which were attached to a place there was no difficulty or doubt, that a suit would lie though no fees were appurtenant to the office, such as the office of an officiating priest in a temple or of the *aya* of a *math*;[128] but, as regards an office to which no fees were attached and was personal in character, such as the office of *chalwady.*[129] (Bearer of the insignia of a caste on public occasions) or the office of *guru*,[130] the view taken was that it was not an office within this section and a suit in respect of it was not maintainable; but, in a later case such a distinction was in fact approved of where it was held that a right to perform *urus* ceremonies and to collect offerings at the shrine of a saint appertained to a religious office and was enforceable by a suit.[131]

In one case, however, this distinction was not observed by the high court where the office was personal and no fees were attached to it and yet the high court held that a suit would lie in respect of such an office.[132] The question there was whether a suit would lie for the office of *Khatib* (preacher) regard being had to the fact that no fees were attached to it. It was held that such a suit did lie. The high court observed: "Had it been the intention of the Legislature

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124. *Dino Nath v Pratap Chandra*, (1900) ILR 27 Cal 30; *Gadadhar v Puna Bewa*, AIR 1971 Ori 155.
125. *Debendra v Satya Charan*, AIR 1927 Cal 783 : (1927) ILR 54 Cal 614.
126. *Tholappala v Venkata*, (1896) ILR 19 Mad 62; *Subbaraya v Vedantachariar*, (1905) ILR 28 Mad 23.
127. *Ramlingachi v Elayyaperuma*, AIR 1937 Mad 403 : (1937) Mad WN 143.
128. *Lima v Rama*, (1889) ILR 13 Bom 548; *Gursangaya v Tamana*, (1892) ILR 16 Bom 281.
129. *Shankara v Hanma*, (1878) ILR 2 Bom 470.
130. *Murari v Suba*, (1882) ILR 6 Bom 725; *Gadigeya v Basaya*, (1910) ILR 34 Bom 455.
131. *Kasam Khan v Kaji Isub*, AIR 1926 Bom 161 : (1926) ILR 50 Bom 148; *Debendra v Satya Charan*, AIR 1927 Cal 783 : (1927) ILR 54 Cal 614, 623; *Syad Hashim v Husseinsha*, (1889) ILR 13 Bom 429, 433; *Narasimma v Kristna*, (1871) 6 MHC 449; *Krishnama v Krishnasami*, (1879) ILR 2 Mad 62 : 656 IA 120; *Shankar v Malhar*, AIR 1931 Bom 273 : (1931) ILR 33 Bom LR 479; *Chunnu Dat v Babu Nandan*, (1910) ILR 30 All 527; *Hira v Bachu*, (1916) 1 Pat LJ 381; *Lutan v Prayag*, (1919) 4 Pat LJ 53; *Gopal Rao v W Siva Ramiah*, AIR 1953 Hyd 1 : (1952) ILR Hyd 481.
132. *Sayad Hashim v Husseinsha*, (1889) 13 Bom 429, 433.

that such a suit should not lie, the same would have been clearly provided for". But if it was a question of intention of the Legislature, it may be said that the Explanation (now Explanation I), which did not occur in the Code of 1877, appears to have been suggested directly by a passage in a Madras decision decided in 1871,[133] which was approved by the Privy Council in a later decision[134] and the religious office in both the cases was one to which fees were attached. The Bombay High Court also held in another case that a suit would not lie for recovery of monies paid as *haks* or *babs* to watandars on the occasion of a fair and which were not connected with any office or performance of any function at a fair.[135]

The Allahabad High Court took the view that a mere right to perform *Ram Lila* (religious pageants) which did not carry with it any right to emoluments nor was attached to a shrine or temple or a sacred spot was not enforceable at law.[136] A similar view was also taken by the Patna High Court in a case where it held that a right to officiate at funeral ceremonies performed on the banks of the Ganges between certain points but which did not carry any fees with it but only gratuities could not be enforced in a civil suit.[137] The Hyderabad High Court took the view that a suit would not lie for a declaration of the right to perform *Purohit* service in a village to the exclusion of others.[138]

The conflict of opinion between different high courts on the question of religious offices to which fees are attached or not and the distinction amongst them made by the Bombay High Court between offices being attached to a sacred place or not have been done away with by the new explanation II which declares that it is immaterial whether or not any fees are attached to a religious office or whether or not such an office is attached to a particular place or spot.

[s 9.18] Wakf

As per section 85 of the Wakf Act (43 of 1995) no suit or other legal proceedings shall lie in any civil court in respect of any dispute, question or other matter relating to any *Wakf*, *Wakf* property or other matter which is required by or under this Act to be determined by a tribunal. Therefore, it is only to those matters which are required, by or under this Act to be determined by a tribunal that the bar under section 85 applies. It could also be seen from the scheme of the Act that the jurisdiction of the civil court is not completely ousted. Even a matter which may otherwise fall under the purview of any authority other than the tribunal is not taken away from the jurisdiction of the civil court. On a careful analysis of the provisions of the Wakf Act it can be seen that a dispute which relates to the management of the affairs of the mosque is not specifically dealt with in any of the provisions of the Act to be adjudicated upon by the tribunal. Further, an injunction is a relief which can be granted by the civil court and that power is not conferred on the tribunal.[139]

The words used in section 85 of the Wakf Act, "no suit shall lie", means no fresh suit can be filed in the civil court in relation to Wakf property and the pending suits will not be affected, particularly when there is no provision in the Act for transferring existing pending suits to Wakf Tribunal.[140]

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133. *Narasimma v Kristna*, (1871) 6 MHC 449.
134. *Krishnama v Krishnasami*, (1879) ILR 2 Mad 62 : 656 IA 120.
135. *Shankar v Malhar*, (1931) 33 Bom LR 479 : (31) AB 273.
136. *Chumu Dat v Babu Nandan*, (1910) 30 All 527.
137. *Hira v Bachu*, (1916) 1 Pat LJ 381; *Lutan v Prayag*, (1919) 4 Pat LJ 53.
138. *Gopal Rao v W Siva Ramiah*, 1952 Hyd 481 : (1953) A Hyd. 1.
139. *Abdul Rahiman Musaliar v TK Muhammed Sahib*, AIR 2003 Ker 84.
140. *TM Muhammad Sahib v Arakkal Mohammad Ibrahim*, AIR 2007 (NOC) 1104 (Ker) : (2007) 2 Ker LT 56 (DB).

In *Faseela M v Munnerul Islam Madrasa Committee,*[141] the Supreme Court held that a suit for eviction against the tenant relating to a wakf property is exclusively triable by a civil court as such suit is not covered by the disputes specified in sections 6 and 7 of the Wakf Act, 1995. The court relied upon its earlier decision in *Ramesh Gobindram,*[142] to support this view. It was further held that going by the ratio of *Ramesh Gobindram,*[143] suit for possession and rent is to be tried by the civil court. However, suit pertaining to removal of trustees and rendition of accounts would fall within the domain of the tribunal. In so far as relief of cancellation of the sale deed is concerned, it is to be tried by the civil court as it is not covered either by section 6 or 7 of the Wakf Act, 1995. Relief of possession, which can be given by the civil court, depends upon the question as to whether the sale deed is valid or not. Thus, the court held that an issue of the sale deed and possession are inextricably mixed with each other. In the instant case, the suit was filed much before the Act came into force, therefore going by the ratio of *Sardar Khan,*[144] it was held that the civil court where the suit was filed would continue to have the jurisdiction over the issue and it would be competent to decide the same.

Where suit property had been declared to be Wakf property and proceedings in respect of the same were already pending before the Wakf Tribunal, a suit for bare injunction to restrain the defendants from interfering with possession cannot be filed in civil court.[145]

However, it has been held by the Punjab and Haryana High Court that where suit in respect of Wakf property was pending in civil court and the notification constituting the Wakf Tribunal and ousting the jurisdiction of civil court was issued later on, the order of civil court transferring the case to court of competent jurisdiction was proper.[146]

The Allahabad High Court has held that the bar created by section 85 of the Wakf Act, 1995 does not apply to a suit for ejectment of a tenant as tenancy/lease is not covered under the provisions of the Act.[147]

However, a Division Bench of the Kerala High Court has held that the Wakf Tribunal has jurisdiction not only on matters specifically conferred on tribunal by the provisions of the Act but also on matters relating to Wakf or Wakf property[148] The observations of the Division Bench in the above case deserve notice:

> We are therefore, of the considered view that the words any dispute, question or other matters relating to Wakf or Wakf property under section 85 are wide enough to take in within its sweep not only matters which are specifically conferred on the Tribunal by the various provisions of the Act but also any dispute, question or any other matter relating to any Wakf or Wakf property since those powers have also been conferred on the Tribunal by the Wakf Act itself. On examining the scheme of the Act and various provisions we are of the view that the intention of the legislature is to resolve all disputes by one machinery and forum provided in the Act itself, that is, the Wakf Tribunal and not by the civil courts in the State.[149]

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141. *Faseela M v Munnerul Islam Madrasa Committee,* (2014) 16 SCC 38 : (2014) 1 RCR(Rent) 404.
142. *Ramesh Gobindram v Sugra Humayun Mirza Wakf,* (2010) 8 SCC 726 : (2010) 6 Mad LJ 527 (SC) : (2010) 8 Scale 698.
143. *Ramesh Gobindram v Sugra Humayun Mirza Wakf,* (2010) 8 SCC 726 : (2010) 6 Mad LJ 527 (SC) : (2010) 8 Scale 698.
144. *Sardar Khan v Syed Nazmul Hasan (Seth),* AIR 2007 SC 1447 : (2007) 10 SCC 727.
145. *Abdul Suban v Syed Tharu Hussain,* AIR 2007 (NOC) 817 (Mad) (Madurai Bench) : (2007) 1 Mad LJ 138 (Mad).
146. *Punjab Wakf Board v Satish Kumar,* AIR 2007 P&H 141 : (2008) 149 Punj LR 201.
147. *Yashpal Lala Shiv Narain v Allatala Lala Malik Wakf Ajakhan Mus,* AIR 2006 All 115 : (2006) 2 All LJ 204.
148. *Aliyathammada Beethathabiyyapura Pookoya Haji v Pattakkal Cheriyakoya,* AIR 2003 Ker 366 (DB).
149. *Aliyathammada Beethathabiyyapura Pookoya Haji v Pattakkal Cheriyakoya,* AIR 2003 Ker 366 (DB) p 372.

The Division Bench went on to hold that the tribunal was justified in holding that it has got jurisdiction and rightly granted a decree to the plaintiff to evict the defendant.[150]

Similar view has been expressed by a Division Bench of the Madhya Pradesh High Court wherein it has been held that a suit for the ejectment of a tenant from Wakf property is maintainable before the Wakf Tribunal and not the civil court.[151] It has been observed by the Division Bench as follows:

> The Legislative intention is clear from reading of sections 83 and 85 the Tribunal is deemed to be a civil court and exercises similar powers as may be exercised by the civil court under the CPC while trying a suit, execute a decree or order. We cannot confine the bar created by section 85 with respect to dispute as to title of the Wakf property or with respect possession based on title of the Wakf Property as suggested by the learned counsel. The word "any" qualifies the "dispute" which would include suit for ejectment of a tenant from Wakf premises. In any view of the matter such a suit for ejectment would be covered under the phrase 'other matter relating to Wakf property'.[152]

But in a suit where the question was whether the property in dispute was Wakf property or private trust property and whether civil court has jurisdiction to entertain the suit, the Madras High Court held that before settling all other issues, the issue regarding maintainability of the suit should be framed by the court and that issue should be decided by the court as a preliminary issue by allowing the parties to place evidence on record.[153]

Under section 36-B of the Wakf Act, 1952 (as amended by Act 34 of 1964) the jurisdiction of civil court is barred and it provides an alternative remedy providing for Wakf Board to get possession of property unauthorisedly alienated. But the Madras High Court has held that it does not bar the jurisdiction of civil court to entertain suit for possession.[154]

In a case under the Wakf Act, 1995, the Madras High Court held that all the Wakf properties in the State vest with the Wakf Board. It is for the Board to decide as to how the properties should be managed. The civil court has no jurisdiction to entertain and decide disputes relating to Wakf properties. Any person aggrieved by the Order of the Board can approach only the tribunal constituted under the Act and the jurisdiction of civil court in such matters is ousted.[155]

Wakf tribunals are constituted to try the suit and other proceedings relating to the Wakf. Naturally, the bar of jurisdiction provided for under section 84 of the Wakf Act (43 of 1995) will be in respect of such suits and proceedings which are pending. It cannot have any effect on the appellate jurisdiction exercised by the district court in terms of the CPC. The Wakf Act does not in any way affect the appellate jurisdiction exercised by the district court.[156]

Where the dispute between the parties in the suit was whether the property was Wakf property or private trust property as well as with respect to rendition of accounts regarding trust and further as to whether civil court had jurisdiction to entertain the suit, it was held that before settling all other issues the issue regarding maintainability of suits should be framed and decided as preliminary issue.[157]

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150. *Aliyathammada Beethathabiyyapura Pookoya Haji v Pattakkal Cheriyakoya*, AIR 2003 Ker 366 (DB) p 373.
151. *Wakf Imambara Imlipura, Khandwa v Smt. Khursheeda Bi*, AIR 2009 MP 238 (DB).
152. *Wakf Imambara Imlipura, Khandwa v Smt. Khursheeda Bi*, AIR 2009 MP 238 (DB), p 340.
153. *Sheik Mohammed v Shah Abdul Aul Aulad Family Charitable Trust*, AIR 2004 Mad 287 : (2004) 1 Mad LJ 477.
154. *Tamil Nadu Wakf Board v SA Syed Massod*, (1995) 2 Mad LJ 514 : 2 LW 308.
155. *Janab Dr. Hisamuddin Papa Saheb v E. Niyamathulla*, (2007) 2 Mad LJ 1069 (Mad).
156. *Abdul Majeed Musliyar v MT Mammad Koya*, AIR 2002 Ker 71.
157. *S Mohammed v Shah Abdul Anl Anlad Family Charitable Trust*, AIR 2004 Mad 287.

[s 9.19] Suits for Recovery of Fee Attached to an Office Are Suits of a Civil Nature, but Not Suits for Recovery of Gratuities

It is settled law that if a person usurps an office to which another person is entitled and receives the fees of the office, he is bound to account to the rightful owner for them, and the rightful owner may sue the usurper to recover the fees properly payable to him; but, the case is different where the payments are merely voluntary, and a suit will not lie to recover voluntary gratuities that may have been received by the usurper.[158] The reason is that where voluntary offerings are made, they must be taken to have been intended for the very person who was then actually performing the ceremony, whether rightfully or wrongfully, and, further, that it is quite possible that no gratuities would have been given at all if the rightful owner officiated at the ceremony instead of the usurper.[159] The same principles apply when a suit is brought by the lawful holder of an office against a member of the caste for employing the usurper for performing ceremonies which the rightful holder was entitled to perform. Thus, a village priest may be entitled by hereditary right to officiate and take fees in the families of a particular caste in the village, and if a member of the caste employs an intruder in the office to perform the ceremonies, the village priest is entitled to recover from the casteman the fee which would properly be payable to him if he had been employed to perform those ceremonies.[160] On this principle, it has been held that a right to officiate as priest during certain festivals could be enforced in a court, where such services were remunerated from the temple funds but that a claim to be declared *guru* of the *archakas* in the temple could not be entertained;[161] but, a suit will not lie against a casteman for a gratuity which the party might have refused to give.[162] If for determining the plaintiff's right to the fees claimed it becomes necessary to determine incidentally the right to perform the ceremonies, the courts should try and decide that right.[163] The above principles have been held to apply to *vatandar* barbers who are entitled to render services as barbers on ceremonial occasions and to receive the customary fees.[164]

The cases in which a suit by the rightful owner of a religious office against an usurper for recovery of voluntary gratuities has been held not to be maintainable must be distinguished from those where a suit is brought by a sharer in a religious office against his co-sharers for recovery of his share of the voluntary gratuities. In the latter class of cases, it has been held that a suit will lie, for the basis of the claim in such cases in an agreement. Expressed or implied, that all the sharers should have a share in the gratuities.[165] If the sharer is a woman, she is not disqualified from suing to enforce her right to a share of the offerings.[166]

Dues paid by *baqqals* and shopkeepers to *chowdhris* of bazars are in the nature of voluntary payments; hence a suit will not lie to recover such dues or for a declaration of the right to recover them.[167]

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158. *Sitaram Bhat v Sitaram Ganesh*, (1869) 6 BHC 250; *Raja Valad v Krishnabhat*, (1879) ILR 3 Bom 232; *Hira v Bachu*, (1916) 1 Pat LJ 381; *Chunnu v Babu*, (1910) ILR 32 All 527.
159. *Kashi Chandra v Kailash Chandra*, (1899) ILR 26 Cal 356.
160. *Ramchandra Tripathy v Maguni Tripathi*, AIR 1951 Ori 64; *Dinanath v Sadashiv*, (1879) ILR 3 Bom 9; *Ghelabhai v Hargowan*, (1912) ILR 36 Bom 94; *Kali Kanta v Gouri*, (1890) ILR 17 Cal 806.
161. *Tripathy v Tripathy*, (1950) ILR Cut 337.
162. *Murari v Suba*, (1882) ILR 6 Bom 725; *Dhadphale v Gurav*, (1882) ILR 6 Bom 122.
163. *Krishnama v Krishnasami*, (1879) ILR 2 Mad 62 : 6 IA 120.
164. *Bhagoji v Babu*, (1920) ILR 44 Bom 733 : (1920) 22 Bom LR 410; *Chandi v Ramprasad*, (1953) ILR Raj 144; *Khairathi v Devi Sahai*, (1974) ILR Raj 131 : 1974 Raj LW 99.
165. *Dino Nath v Pratap Chandra*, (1900) ILR 27 Cal 30; *Bheema Charyulu v Kothakota*, (1907) 17 Mad LJ 493; *Durga Charn v Rajbala*, (1906) 4 Cal LJ 469; Re *Venkata Rao*, AIR 1954 Mad 346.
166. *Kunj Behari v Mst Naraini*, AIR 1923 All 425 : (1923) ILR 45 All 437.
167. *Barsati v Chamru*, (1907) ILR 29 All 683.

[s 9.20] Suits Relating to Caste Property

Where the question at issue is not a matter relating to the internal administration and affairs of a caste, but to the property of the caste, the civil court has jurisdiction to interfere, although there has been a division of opinion in the caste.[168] Suppose that a caste is divided into two factions, *F1* and *F2*, and that *F1* owns certain property which stands in the names of some of its members. If these members secede from faction *F1* and go over to faction *F2*, a suit will lie to recover the property from them at the instance of faction *F1*.[169] Here, the subject matter of the suit is property belonging to one section of the caste, and the claim is against persons outside that section. Suppose, next, that a caste owns a property purchased out of the caste funds, and that it is subsequently divided into two factions, *F1* and *F2*. If faction *F2* happens at the time of the division to be in possession of the caste property, faction *F1* cannot maintain a suit against faction *F2* for recovery of one half of the caste property or its value.[170] Here, the subject matter of the suit is caste property, and the claim is not against an outsider, but against another section of the caste.

As regards user of caste property, it has been laid down that the majority of a caste has the right to regulate the use of the property, and the minority is bound by the resolution of the majority, provided the resolution is not so subversive of the interests of the minority as to amount to a complete denial of their rights. Thus, if the majority of a caste passes a resolution that the oart should not be used for feasting any *brahmans*, and the minority invites *brahmans* to a feast in the oart, a suit will lie to restrain the minority from using the oart in contravention of the resolution.[171]

[s 9.21] Suits for Inspection of Accounts of Caste Property

Every member of a caste is, at all reasonable times and on proper demand, entitled to full and free inspection of all account books, papers and vouchers relating to the management of a caste property. This is a legal right which does not interfere with the autonomy of the castes. It is preliminary to a right to assert a claim to property and is incidental to the right to recover property which may be lost to the caste by misuse or misappropriation. A suit to enforce such a right is maintainable.[172]

[s 9.22] Insurance

The dispute was in regard to the consent of the deceased for dating back the policy. Such a question cannot be decided by affidavits or the records alone. The same has to depend upon the evidence that has to be let in by the respective parties for the purpose of finding out as to whether there is such a consent. Even the plea that there was no notice as required under section 50 of the Insurance Act could be agitated before the civil court. Simply because a defect is alleged in non-issuance of the notice, the same cannot be a subject matter of writ proceedings under Article 226 of the Constitution of India. Such a question, on the facts and circumstances of the case, can, as well, be agitated before the civil court, when the main issues are contested before the civil court.[173]

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168. *Fulchand v Harilal*, AIR 1926 Bom 69 : (1926) ILR 50 Bom 124.
169. *Mehta Jethalal v Jamiatram*, (1888) ILR 12 Bom 225; *Pragji v Govind*, (1887) ILR 11 Bom 534.
170. *Girdhar v Kalya*, (1881) ILR 5 Bom 83; *Nemchand v Savaichand*, (1866) ILR 5 Bom 84.
171. *Lalji v Walji*, (1895) ILR 19 Bom 507.
172. *Nagindas v Somnath*, AIR 1932 Bom 122 : (1932) ILR 56 Bom 242.
173. *Shardaben Kantilal Panchal v Life Insurance Corp of India*, AIR 1989 Guj 1 (DB); *LIC of India v Kiran Sinha*, (1986) 2 SCC 553.

The claim made by the heir of the deceased for payment of the amount under the life insurance policies taken out by the deceased, after his death, was repudiated or denied by the Life Insurance Corporation of India on the ground that the deceased while filling up the proposal form for the policies was guilty of fraudulent behaviour, misrepresentation and suppression of material facts, with regard to his health. The matter involved serious questions of disputed facts, which cannot be decided in the writ jurisdiction and they have to be examined on the basis of the evidence to be adduced by the parties at a trial. No question of violation of any statutory duty on the part of insurer is involved. It cannot be said that the claim made by the heir of the deceased is either misconceived or untenable, but since it involves disputed questions of facts, writ court cannot go into the question of disputed facts. It could only be decided in a regularly drawn trial between the parties before a competent civil court.[174]

The term "cause of action" used in section 20(c) of the CPC denotes the whole bundle of material facts based on which the plaintiff claims the relief as prayed for. The term "cause of action", therefore, indicates not a piece of evidence on events, but a bundle of events. It has no relation to the evidence set up by the defendant nor does it depend upon the character of the relief prayed for. In the instant case, the first plaintiff entrusted the suit consignment to the defendant, to transport the same from Bangalore to Calicut, only after insuring the same.[175]

That apart, pursuant to the appointment of the surveyor (P-W2) by the second plaintiff and the report of the surveyor (ex A4), a sum of Rs 56,307.55 p was paid by the second plaintiff on 14 March 1983 at Madras, in consideration of which a letter of subrogation (ex A8) was executed by the first plaintiff in favour of the second plaintiff to lay the above suit. It is, therefore, evident that part of the cause of action arose within the jurisdiction of the trial court.[176]

Under such circumstances, the trial court has got jurisdiction to deal with the suit.[177]

[s 9.23] Marine Insurance

Where there was a breach of contract of marine insurance, the suit for damages against Bombay Port Trust and the clearing agent before the Delhi High Court was found maintainable as the contract of insurance was entered at Delhi and the jurisdiction of the Delhi High Court was invoked against two of the defendants solely on the basis of the correspondence made by them with the plaintiff.[178]

[s 9.24] Interference With Temple Property

Removal or alteration of *nemams* or religious marks in a temple, which are recognised as the badges of a particular religious denomination, amounts to an interference with property, and is a ground of action in civil courts.[179]

By sections 5 and 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act 22 of 1959, the jurisdiction which would otherwise have vested in the civil courts to grant relief under section 92 of the CPC in respect of public, religious or charitable trusts

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174. *LIC v Ajit Gangadhar Shanbhag*, AIR 1997 Kant 157 (DB).
175. *Bond Food Products Pvt Ltd v Planters, Airways Ltd*, AIR 2004 Mad 538.
176. *Bond Food Products Pvt Ltd v Planters, Airways Ltd*, AIR 2004 Mad 538.
177. *Bond Food Products Pvt Ltd v Planters, Airways Ltd*, AIR 2004 Mad 538.
178. *General Commerce Ltd. v National Insurance Co Ltd*, AIR 2003 Del 419.
179. *Krishnaswami v Samaram*, (1907) ILR 30 Mad 158.

has been taken away and vested in authorities constituted under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959.[180] Where the properties were recorded in settlement register in the name of temple, the *pattas* were granted under Tamil Nadu Minor Inam (Abolition and Conversion into Ryotwari) Act, 1963 in the name of temple till the year 1968 and thereafter, the *pattas* were granted to the defendants in settlement proceedings on impression that the properties were originally given to them and they were in possession of the same in view of the services rendered, the plea that the proceedings under Tamil Nadu Minor Inam (Abolition and Conversion into Ryotwari) Act, 1963 had become final and civil court had no jurisdiction to go into question of title, cannot be allowed.[181]

[s 9.25] Interference with Right of Worship

Suits for a declaration of the right to worship or to offer prayers at a certain place are suits of a civil nature.[182] It often happens that the members of a particular class are alone entitled to worship in the sanctuary of a temple, and to perform certain portions of the religious worship. Such a right is one of a civil nature, and it may be enforced by a suit in a civil court.[183] It is the right of every citizen to carry on the worship in such methods as he likes so long as he does not invade the rights of other persons. A suit is accordingly maintainable for declaration that plaintiff is entitled to carry on worship bareheaded and for an injunction restraining the authorities of a mandir from interfering with such a right.[184] Where the members of a sect have the right to worship the idol in a particular temple, the members of the rival sect cannot interfere with that right by making alterations or additions to the idol, such as fixing *chakshus* (eyes) on it or by affixing *dwajadand* (flagstaff) or *kalash* over the temple as if the temple was a Swetambari Jain temple.[185] Similarly, members of the *Bees Panthi Amnai*, who constructed a temple and worshipped there according to their mode of worship, can maintain a suit where such right is denied or interfered with, notwithstanding that adjudication of such right involves questions relating to religious rites and ceremonies.[186] The right to worship in a temple includes the right to take assistance of a *panda* or other persons, even if such assistance is given for consideration. However, the temple authorities are at liberty to make proper regulation regarding the exercise of these rights.[187]

Where a suit was filed for declaration that the suit property was an old Hindu Hemadpanthi temple of Shri Mahadeo, i.e., a *shivalaya* which was also known in the past as Siddeshwar temple in which Hindus have right to worship Shri Mahadeo and other deities in that temple, and founded on that relief was the relief claimed against the defendants for not to interfere or disturb Hindus of village in general and the plaintiffs in particular in their *vahivat* and worship of all the deities in the Hindu temple described in the suit, and there was also a prayer for alternative relief to the effect that the Muslims of that village in general and the defendants

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180. *AVGP Chettiar & Sons v T Palanisamy Gounder*, AIR 2002 SC 2171.
181. *Chinnasamy Naidu v KS Sengoda Gounder*, AIR 2004 Mad 370.
182. *Ratan Singh v Bailey Ram*, AIR 1952 P&H 163; *Mana Gobinda v Sachidanandaswami*, AIR 1953 Ori 151, (1953) ILR Cut 423; *Kuber Mohapatra v Nilakantheswar Deb*, AIR 1974 Ori 21; *District Council of UBMC v Salvador N Mathias*, (1988) 2 SCC 31.
183. *Thiruvenkata Ramanuja v Venkatacharlu*, AIR 1947 PC 53 : (1947) ILR Mad 436 : 73 IA 156; *Anandrao v Shankar*, (1883) ILR 7 Bom 323; *Krishnasami v Krishanama*, (1882) ILR 5 Mad 313; *Vengamuthu v Pandaveswara*, (1883) ILR 6 Mad 151; *Venkatachalapat v Subbarayudu*, (1890) ILR 13 Mad 293; *Kalidas v Gor Parjaram*, (1891) ILR 15 Bom 309.
184. *Ratan Singh v Bailey Ram*, AIR 1952 P&H 163.
185. *Ugam Singh v Kesrimal*, AIR 1971 SC 2540 : (1970) 3 SCC 831 : (1971) 2 SCR 2 836.
186. *Dayalal v Pyarchand*, (1972) ILR Raj 149, 151.
187. *Narahari v Badrinath Temple Committee*, AIR 1952 SC 245 : (1952) 1 SCR 849 : (1952) SCJ 310.

in particular be ordered to deliver possession of the said property in suit to the plaintiffs as representatives of deity and of the Hindus of village, in the event, court finds that the plaintiffs were not in possession of the suit property on the date of institution of the suit by virtue of section 19 read with sections 79 and 80 of the Bombay Public Trusts Act (29 of 1950), the suit as filed is clearly barred by law, because the reliefs claimed by the plaintiffs would require the court to examine as to whether the trust exists and whether such trust is a public trust and whether suit property is the property of such trust, and it was not only suit for declaration of title of suit property.[188]

Suit claimed right to appoint competent persons for recitation of *Divya Prabandam* in *Adyabaga Goshti* before the deity. Right was neither attached to any office in temple, nor was its non-performance liable to any punishment. The claim was not for a civil right. The suit was not maintainable.[189] A public mosque belonged to *Sunnis*. Defendants (State and Police Superintendent) restrained the plaintiffs (Muslim members belonging to another community) from entering the mosque through the main gate and offering their prayers, by illegally locking the gate. Infringement of fundamental right to worship was involved. Suit by the plaintiff for restraining the defendants from interfering with their right to enter into the mosque, is maintainable.[190]

[s 9.26] Date of Birth

A suit for declaration of correct date of birth and for rectifying the date of birth, is maintainable, according to a Division Bench of the Karnataka High Court,[191] overruling the single judge ruling in *State of Karnataka v Vishwanath Rao*.[192] The division bench dissented from the contrary view of the Patna High Court.[193] The Patna High Court had held that date of birth was merely an event in a person's life and did not constitute his "legal character" within the meaning of section 34, Specific Relief Act, 1963. Dissenting from this view, the Karnataka High Court further held that in section 9 of CPC, the words "suits of a civil nature" are comprehensive enough to include relief of this nature, since a declaration that a person was born on a particular date, clothes him with various legal rights, immunities, privileges and powers and refusal of such a declaration may visit him with certain duties, liabilities and disabilities. Date of birth is not merely an event. Declaration of date of birth is a declaration of legal status. Whether a person is a major or minor is a matter of status under the Indian Majority Act, 1875. In such a dispute, the incidental question will always be the person's age in relation to his status—whether he is a major or minor under to exclude its jurisdiction for making a declaration as to a person's age with a view seeking other consequential reliefs.

A connected question with the date of birth is the question of registration of birth. Where a suit was filed under the Registration of Births and Deaths Act, 1969 for cancellation of the birth certificate registering the appellant in a particular village, it was held by the Madras High Court that the order of the Magistrate directing registration of birth can bind only the Registrar and not others. Thus, the suit is not maintainable as there is no cause of action.[194]

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188. *Bashir Abbas Kudale v Shri Mahadeo, the main deity in temple*, AIR 2003 Bom 224 : (2003) 2 Mh LJ 246.
189. *Sadhu Sri Vaishnavar Nambi Srinivasa Iyengar v KKV Annah Srinivasachariar*, AIR 1990 Mad 375 (Ratnam J.).
190. *Shah Abdul Bagi v State*, AIR 1988 All 1.
191. *State of Karnataka v T Srinivas*, AIR 1988 Kant 67 (DB); See also *State of Karnataka v Shivanand Fakirappa Naik*, AIR 2003 Kant 185.
192. *State of Karnataka v Vishwanath Rao*, (1985) ILR Kant 2460.
193. *Tata Iron & Steel Co Ltd v Padala Appanna*, (1984) 48 Fac LR 202 : (1984) BLJR 26.
194. *Harikrishan v James Trinite*, (2001) 3 Mad LJ 291 (Mad).

[s 9.27] Rights of Burial

Right of burial is a civil right. Interference with the right of the relatives of a deceased Mohammedan to recite prayers over his body before burial in front of a particular mosque, is an invasion of a civil right and can be enforced by suit.[195] It is not sufficient for the plaintiff to show that the members of their family have always been buried in the first row of the church cemetery but it is also necessary for them to show that search right had been denied to others though not for so long that memory of man runneth not to be contrary but for sufficiently long to prove that same has acquired the force of a custom.[196]

[s 9.28] Deities

Right to take a deity from one temple to another and to worship at the latter temple is a civil right (customary right). The word "ritual" means "pertaining or relating to, connected with rites". The word "rites" is a formal procedure or act, in a religious or other solemn observance. Suits relating to rites or rituals in temple are not of a civil nature. However, a civil right can be agitated in civil court. There is no "ritual" in carrying or taking of a deity from one temple to another.[197]

[s 9.29] Religious and Other Processions

Members of a religious body possess the right to conduct a religious procession with its appropriate observances along a highway and a suit will lie against those who prevent the procession with its observance.[198] The worshippers in a mosque or temple which abuts on a high road cannot compel the processionists to intermit their worship while passing the mosque or temple on the ground that there is continuous worship there; but, no one sect can claim the exclusive use of the highway for their worship.[199] The right to take out a procession along a highway is not limited to religious processions but extends to all processions. A suit, therefore for a declaration of a right to take funeral procession through a public street is maintainable.[200]

[s 9.30] Education

A suit can lie to challenge an appointment in a school (orders of education authorities regarding an aided school), provided it can be established that the orders are unsustainable in law.[201] On the question of jurisdiction, one must give regard to the substance and not to the form.[202]

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195. *Kooni Meera v Mahomed*, (1907) ILR 30 Mad 15; *Ram Rao v Rustumkhan*, (1902) ILR 26 Bom 198.
196. *Varkey v St. Mary's Catholic Church*, AIR 1997 Ker 337.
197. *Muriandikone v Shri Ramatha Sethupathi*, AIR 1982 Mad 170 (Sethuraman J).
198. *Radhamohan v Praharaja*, (1959) ILR Cut 437.
199. *Chandu Sajan Patel v Nyahal Chand*, AIR 1950 Bom 192 : 52 Beng LR 214; *Sangabasavaswami v Mahanta Swami*, AIR 1946 Bom 353 : (1946) ILR Bom 437 : 48 Beng LR 100; *Manzur Hasan v Muhammad Zaman*, AIR 1925 PC 36 : (1925) ILR 47 All 151 : 52 IA 61; in app from, AIR 1921 All 146 : (1921) ILR 43 All 692; *Sundram v The Queen*, (1883) ILR 6 Mad 203 (FB); *Parthasaradi v Chinnakrishna*, (1882) ILR 5 Mad 304; *Sadagopachariar v Rama Rao*, (1903) ILR 26 Mad 376; *Mohamed Abdul Hafiz v Latif Husein*, (1897) ILR 24 Cal 524; *Baslingappa v Dharmappa*, (1910) ILR 34 Bom 571; *Waman v Balu*, (1920) ILR 44 Bom 410.
200. *Palvannam Pillai v Ganapathi Ayyar*, AIR 1954 Mad 179 : (1952) 1 Mad LJ 552.
201. *Anne Besant National Girls' High School v Deputy Director, Public Instruction*, AIR 1983 SC 526, (1983) 1 SCC 200.
202. *Bank of Baroda v Moti Bhai*, AIR 1985 SC 545 : (1985) 1 SCC 475 : (1985) 2 SCR 784.

Appellant appeared at an examination pursuant to an interim order passed by the court in a civil suit. However, interim orders are always subject to final outcome of the suit. Thus, where the suit itself was discussed, no direction can be given by court to the University to publish the result.[203]

[s 9.31] Arbitration

A suit to challenge the validity of a contract is within the cognizance of a civil court. Not being a suit to challenge the arbitration clause as such, it is not barred by section 32 of the Arbitration Act, 1940 (replaced by the Arbitration and Conciliation Act, 1996).[204]

No two parties are bound to provide for arbitration; but, if they choose to provide for the forum of arbitration and, in breach of the arbitration agreement, one party rushes to the court, the court must, if the conditions of sections 34 of the Arbitration Act, 1940 (replaced by the Arbitration and Conciliation Act, 1996), are satisfied, hold the parties to the bargain, unless a clear case is made out to the contrary.[205] Therefore, even a civil suit challenging the correctness of the bills so raised would not be maintainable in a civil court.[206] The civil court has necessarily got the jurisdiction to enforce the right of a subscriber under section 7B of the Indian Telegraph Act, 1885. There is no provision in the Indian Telegraph Act, 1885, which ousts the jurisdiction of the civil court. It may be possible to contend that when an award is passed, the award cannot be questioned in a civil court; but, in case the central government fails to appoint the arbitrator under section 7B of the Indian Telegraph Act, 1885, the civil court does have the jurisdiction to direct appointment of an arbitrator.[207] An arbitrator has no jurisdiction to arbitrate, if there is no written agreement of arbitration as required by section 2(a), Arbitration Act, 1940 (replaced by the Arbitration and Conciliation Act, 1996). Acquiescence or admission of liability by a party cannot confer jurisdiction on the arbitrator. Hence, where the arbitration is invalid for the above reason, a suit can lie.[208]

Where the property of the judgment-debtor is auctioned by the bank in realisation of the debt and is purchased by a stranger auction-purchaser, the dispute between the judgment-debtor on one hand and the bank and the auction-purchaser on the other hand, will be out of the purview of arbitration proceedings under section 70 of the Uttar Pradesh Co-operative Societies Act, 1966, as no dispute between the society and the stranger is referable, nor can it be decided by the registrar or his nominee as arbitrator. Thus, the suit by the judgment-debtor challenging the validity of the auction would be maintainable in the civil court.[209]

The Arbitration and Conciliation Act (26 of 1996) Act, which is a special Act, does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sub-sections 1 and 2 of section 8; that there is also no provision in the Act that the subject-matter of the suit includes the subject-matter of the arbitration agreement as well as other disputes; that the matter is required to be referred to arbitration and there is also no provision for splitting the causes of action or parties and referring the subject-matter of the suit to the arbitrator and that

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203. *M Mohana v Bharathiyar University*, (2000) 3 Mad LJ 536 (Mad).
204. *Orient Transport Co v Bharat Credit & Investment*, AIR 1987 SC 2289 : (1987) 4 SCC 421 : (1988) 1 SCR 147.
205. *Food Corp of India v Yadav Engineer and Contractor*, AIR 1982 SC 1302 : (1982) 2 SCC 499.
206. *Govindbhai Premji Bhai v Chief General Manager, Gujarat Telecome Circle, Ahemdabad*, AIR 1996 Guj 153.
207. *UOI v S. Sasi*, AIR 1999 Ker 336.
208. *Gangaram Ratanlal v Simplex Mills Co Ltd*, AIR 1982 Bom 72, p 73, para 4.
209. *Sripal v UP Rajya Sahkari Vikas Bank*, AIR 1997 All 114.

there is also no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement, as it has been ruled by the Supreme Court in its latest decision.[210]

The Gujarat High Court has held that where there is an arbitration clause in the agreement between the plaintiff and defendant, any dispute and claim between the parties is required to be referred to arbitration and then section 8 of the Arbitration and Conciliation Act, 1996 would be applicable. However, merely because there is an arbitration clause and/or the bye-laws provide for referring the dispute and claim to arbitration, the civil court's jurisdiction is not barred but the same is subject to section 8 of the Act of 1996. Thus, the defendant filed an application for dismissing the suit under O VII, rule 11 (d) of the CPC in view of the arbitration clause, it was held that the court below did not act illegally because reference to arbitration is subject to fulfilment of conditions laid down in section 8 of the Act.[211]

[s 9.32] Societies

Disputes touching the business of a society were, by statute, excluded from the civil court's jurisdiction. Co-operative societies for fisheries were engaged in catching and selling fish. A suit was filed by one such society, for restraining another from catching fish from a particular water reservoir. It was held that the dispute was one "touching the business" of a society. The civil court was not competent to entertain the suit. Dispute "touching the business" need not arise out of a transaction between the parties. It can be even regarding their respective civil rights.[212] Disputes based on a contract entered into by the society with contractor in the course of its essential business of dealing in forest produce is a "dispute" which clearly "touches" the business of the society, which is referrable to registrar of society and jurisdiction of civil court is barred.[213]

It cannot be held that the registrar or the arbitrator is not possessed with the expertise of a civil court to determine complicated questions arising out of a civil claim for specific performance of the contract. When a special statute, i.e., West Bengal Co-operative Societies Act (45 of 1983) provides a bar and creates a special forum for settlement of such matters, in such cases it is in its wisdom that the legislature has provided for such bar. Such wisdom cannot be questioned by the courts. Neither the court is concerned to find out the consequences. It has to leave the matter at that. It is not for the court to determine the inability or incapacity of the registrar or the arbitrator and the court is not concerned with the same. The court cannot presume incapacity or inability.[214] In the *Hebron Housing Co-op Society's* case[215] it was held as under:

In the dispute of alleged sale of plot by a member of a co-operative society to a non-member, it is crystal clear that the dispute raised by the present appellant can be resolved by only the board of nominees which squarely falls under section 96(1)(b) of the Gujarat Co-operative Societies Act (10 of 1962).

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210. *Manoharamma H&I Pvt Ltd v Aruna Hotels Ltd*, AIR 2004 Mad 344. See also *Sukanya Holdings Pvt Ltd v Jayesh H Pandya*, AIR 2003 SC 2252 : (2003) 5 SCC 531.
211. *Marwadi Shares & Finance Pvt Ltd Co v Kishor Kumar Nagji bhai Mavani*, AIR 2009 Guj 81 : (2009) 1 Guj LH 381; see also *Mahesh Kumar v Rajasthan S.R.T.C.*, AIR 2006 Raj 56 : (2006) 1 Arbi LR 615.
212. *Dharoi Jalashya MUS Mandi Ltd v Gujarat KMV Sanstha*, AIR 1988 Guj 193.
213. *Baldeo Kumar Aggarwal v Managing Director, MP Rajya Laghu Upaj Sahkari Sangh*, AIR 1997 MP 147; *Kusum Verma v Pritam Singh Gulati*, AIR 1998 MP 199.
214. *Sisir Kana Guha v Ayakar Grihanirman Samabaya Samity Ltd*, AIR 2002 Cal 247.
215. *Hebron Co-op Housing Society Ltd v MA Macwan*, AIR 2002 Guj 163.

> In the same way, when any dispute is to be decided by the board of nominees, the trial court also has no power to pass any order under application Exh 30 or any application given thereunder. Therefore, I do not find any illegality, perverseness or otherwise in the order passed by the learned trial court judge and both the appeals deserve to be dismissed with cost of Rs. 1,000/- each. Accordingly both the appeals are dismissed. Civil Appeal also stands dismissed. *Ad-interim* relief granted earlier, if any stands vacated. Cost of Rs 4,000/- to be paid in each of the appeals, making a total amount of Rs. 2,000/-.

By operation of the *non obstante* clause in section 60 of the Delhi Co-operative Societies Act, 1972, the bar of the suit is attracted only if the dispute falls within the parameters of clauses (a)–(d) thereof and the bar of the jurisdiction of the court under section 93 gets attracted in respect of the specified subject in sub-section (1) of section 93 thereof, therefore, the plea, of the bar of sections 60 and 93 of Delhi Co-operative Societies Act, 1972, is devoid of substance.[216]

In a case under the Punjab and Haryana Co-operative Societies Act, 1961, where an order passed by Recovery Officer under the Act cancelling auction was challenged, it was held that in view of the specific bar contained in section 82(3) of the Act, the mere fact that the Recovery Officer may have committed an error in the exercise of powers, would not confer jurisdiction on the civil court to scrutinise the legality of the order.[217] The observation of the high court in the above case, is as follows:

> A statutory clause that seeks to oust the jurisdiction of a civil court shall be construed strictly but shall not operate where the authority exercising powers appropriates or assumes to itself jurisdiction where there is none or to put it differently, the order impugned discloses an inherent lack of jurisdiction as opposed to a mere erroneous, incorrect or illegal exercise of jurisdiction. An order that discloses an inherent lack of jurisdiction or an illegal assumption thereof would necessarily be void and therefore, subject to challenge before a civil court.[218]

Where, under the Tamil Nadu Societies Registration Act, 1975, the district registrar set aside the election of office bearers of the petitioner association, it was held by the high court that challenging election to the society is not permitted by any specific provision in the Act and as such the impugned order is illegal and without jurisdiction. The remedy is to file civil suit challenging the validity of the said election.[219]

In a suit for declaration, where the plaintiff claimed that he continued to be the secretary of the society and prayed for injunction, it was contended that the suit was barred under section 36 of the Tamil Nadu Societies Registration Act, 1975. It was held by the high court that the presumption is in favour of civil court's jurisdiction unless specifically barred. However, section 36 of the Act is an enabling provision and there is no express or implied bar to civil court's jurisdiction.[220]

In another case under the Societies Registration Act, 1960, where a suit for permanent injunction against a society registered under the Act had been filed, it was held that section 36 of the Act does not bar institution of such suit before civil court.[221]

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216. See also *Supreme Co-op Group Housing Society v HS Nag and Associates Pvt Ltd*, AIR 1996 SC 2443 : (1996) 9 SCC 492.
217. *Ram Murti v Registrar, Co-operative Societies, Haryana*, AIR 2009 P&H 111 : 2009 (1) Rec Civ R 662 : (2009) 3 PLR 775.
218. *Ram Murti v Registrar, Co-operative Societies, Haryana*, AIR 2009 P&H 111 : 2009 (1) Rec Civ R 662 : (2009) 3 PLR 775.
219. *S Thamil Arasan v R Narayanan*, (2007) 7 Mad LJ (Supp) 425 (Mad).
220. *D Dhanpal v D David Livingstone*, (2003) 3 Mad LJ 668 (Mad).
221. *Victoria Edwar Hall, through Secretary v M Samraj*, (2001) 3 Mad LJ 39 (Mad).

In a case relating to sale of plot by co-operative society, it was held by the Rajasthan High Court that dispute with regard to sale or size of plot amongst members is a dispute which touches the business of a co-operative society and is covered by section 75 of the Rajasthan Co-operative Societies Act, 1965. Such dispute is required to be referred to the Registrar under section 137 of the Act. The Act bars the jurisdiction of civil court to try such disputes.[222]

[s 9.33] Removal of an Executor

A suit will not lie for the removal of an executor. The procedure in such a case is by way of an application to the high court under section 302 of the Indian Succession Act, 1925;[223] but a suit for the administration of the estate of the deceased testator in accordance with the terms of his Will is maintainable as it is of a civil nature and is not barred by any provision of law.[224]

[s 9.34] Election Matters

A person aggrieved in respect of election to the Parliament or to a state legislature can seek remedy provided in the Constitution of India, i.e., before the election tribunal.[225] The same is the position as regards election to local bodies,[226] and *gram panchayats*.[227]

When a district magistrate, acting *ultra vires* sets aside a municipal election, it was held that a suit would lie to declare the election valid.[228]

[s 9.35] Suit to Set Aside Election of Directors

Such a suit is of a civil nature and the court is entitled to take cognizance of it. The matters involved in such a suit are not matters of internal management of the company.[229]

[s 9.36] Tax

For challenging the validity of assessment of profession tax on individual partners, special remedy is provided in section 86, Punjab Municipal Act, 1911. Civil suit is barred.[230] A Division Bench of the Delhi High Court in *Sobha Singh and Sons Pvt Ltd v New Delhi Municipal Committee*,[231] had an occasion to consider the question of maintainability of a civil suit challenging the assessment and levy of property tax by the NDMC. Sections 84 and 86 of the Act came in for consideration. It was held that the provision of appeal contained in section 84(1) of the Act provided a complete remedy to a party aggrieved against the assessment and levy of tax. Section 86 provides that the remedy of appeal is the only remedy to a party to

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222. *Hanuman Meena v Chandra Singh*, AIR 2007 Raj 76 (Jaipur Bench).
223. *Karam Devi v Radha Kishan*, AIR 1935 Lah 406 : (1935) ILR 16 Lah 975.
224. *Goswami Rameshpuri v Madhukar*, AIR 1953 Nag 276.
225. *Ponnusami v Returning Officer*, AIR 1952 SC 64 : (1952) SCR 218; *Durga Shankar Mehta v Raghuraj Singh*, AIR 1954 SC 520 : (1955) 1 SCR 267.
226. *Mahedar Rahaman v Kanti Chandra*, AIR 1935 Cal 10 : (1934) ILR 61 Cal 980; *Ghulam Nazamuddin v Akhtar Hussain*, AIR 1933 All 765 : (1933) ILR 55 All 1008; *Tarachand v Abdul Kasem*, AIR 1938 Cal 359 : (1938) 42 Cal WN 441.
227. *Jodhi Singh v Vedabarat Sarma*, AIR 1956 Pat 205; Re Industrial Disputes see *Premier Automobiles Ltd v Wadke*, AIR 1975 SC 2238.
228. *Maijuddin v Janakiballao*, AIR 1933 Cal 492 : (1933) ILR 60 Cal 438.
229. *Sarat Chandra v Tarak Chandra*, AIR 1924 Cal 982 : (1924) ILR 51 Cal 916.
230. *Munshi Ram v Municipal Committee*, AIR 1979 SC 1250 : (1979) 3 SCR 463 : (1979) 2 SCJ 111.
231. *Sobha Singh and Sons Pvt Ltd v New Delhi Municipal Committee*, (1988) DLT 91.

challenge assessment for purposes of property tax. No other remedy was available to a party in such circumstances. It follows that the remedy of a civil suit is barred.[232]

In view of the aforesaid position in law, it is clear that the civil suit filed, challenging the assessment and demand of property tax by the appellant is clearly barred and not maintainable.[233]

In determining the question of jurisdiction of the civil court, what has to be seen is the substance of the plaint and the true nature of the object of the suit. The case was concerned with the question of whether the revenue court or the civil court would have jurisdiction to determine a suit for declaration and possession.[234]

When the plaintiff was able to get the release of the seized gold ornaments, allegedly belonging to her mother, under the provisions of the Income Tax Act, 1961, she could not, by filing a partition suit indirectly, get a decree to have a finding that the gold ornaments belong to her mother and that she had a right to claim her share therein. If she succeeded in her claim, this would have the effect of getting the order of the Income Tax officer under section 132(5) of the Act set aside or to modify to that extent, which is impermissible under section 293.[235] The proceeding and the orders as contemplated in section 293 of the Income Tax Act, 1961 (Act 43 of 1961) envisages lawful proceedings and orders within the provisions of the Act itself. If such proceedings or orders without any authority or jurisdiction are taken, then the bar to file suit cannot be applicable and in that case the person aggrieved has a right to approach before the appropriate civil court or before the superior court for judicial review of such action.[236]

The law declared by the Supreme Court in *Dhula Bhai's* case[237] shows that if the statute gives finality to the orders of a special tribunal, civil court's jurisdiction is excluded except where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. But if there is an express prohibition in a particular Act, a civil suit challenging the correctness of the orders passed by the authorities does not lie. Therefore, the assessment of the annual value of the property for the purpose of levy of house tax under the *Adhiniyam* cannot be called in question in the civil suit. Since the *Jal Sansthan* has not made any assessment of its own, which it was empowered to do under section 53(2) of Uttar Pradesh Water Supply and Sewerage Act, 1975, it is entitled to levy water tax and sewerage tax on the basis of the assessment of the annual value made by *nagar nigam* by virtue of section 53(4) of the Act. Therefore, the levy of water tax and sewerage tax cannot be challenged in the civil suit.[238]

The question of whether a suit to claim interest on the refunds of excess profit-tax is maintainable was considered by the Supreme Court. It was held that generally speaking, the broad guiding considerations are that wherever a right, not pre-existing in common law, is created by a statute and that statute itself provided a machinery for the enforcement of the right, both the right and the remedy having been created *uno flatu* and a finality is intended to the result of statutory proceedings, then even in the absence of exclusionary provisions, the civil court's jurisdiction is impliedly barred. If, however, a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement is provided without

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232. *NDMC v Satish Chand*, AIR 2003 SC 3187 : (2003) 10 SCC 38 : 2003 SCR 645 : 2003 (7) Scale 425.
233. *NDMC v Satish Chand*, AIR 2003 SC 3187 : (2003) 10 SCC 38 : 2003 SCR 645 : 2003 (7) Scale 425.
234. *Gurcharan Singh v Gurdial Kaur*, AIR 1982 Raj 91, p 93 (DB).
235. *CIT, Bhuvneshwar v Parmeshwari Devi Sultania*, (1998) 3 SCC 481.
236. *Deepak Prakash v Jayanta Kumar Bose*, AIR 2003 Cal 153.
237. *Dhula Bhai v State of Madhya Pradesh*, AIR 1969 SC 78 : (1968) 3 SCR 662.
238. *Som Datta Bukders Ltd v Kanpur Jal Sansthan*, AIR 2002 All 249.

expressly excluding the civil court jurisdiction, then both the common law and the statutory remedy might become concurrent remedies leaving open an element of election to the persons of inherence.[239]

[s 9.37] Suit for Administration of Estate of a Living Hindu Debtor

Such a suit is not cognizable by a civil court not because it is not a suit of a civil nature, but because a suit for administration does not lie in respect of the estate of a living person.[240]

[s 9.38] Suits Expressly Barred

When a legal right and its infringement are alleged, a suit would lie, and unless there is a bar against entertainment of such a suit, civil courts are bound to take cognizance of it.[241] This, in substance, is the rule laid down in this section. The expression "expressly barred" means barred by any enactment for the time being in force. Thus, section 11 of the CPC bars a court from trying a suit in which the matter in issue is *res judicata*. Likewise, section 47 bars a decree-holder from filing a suit when he can file execution proceedings.[242] Section 67 of the Income Tax Act, 1922 (replaced by Income Tax Act, 1961), section 293 of the 1961 Act, provides that "no suit shall be brought in any civil court to set aside or modify any assessment made under that Act".[243] A plea that a transaction assessed to tax under the Madras General Sales Tax Act, 1939, is in contravention of Article 286 of the Constitution of India cannot be the subject matter of a suit.[244] Similarly, section 4 of the Pensions Act, 1871, enacts that except as provided therein, no civil court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former government.[245] The High Court of Madhya Pradesh also has taken the view that claims for pension arising under the Pensions Act, 1871, are not justiciable in civil courts by reason of its section 4.[246] Such a view has also been accepted by the High Court of Allahabad[247] and the High Court of Tamil Nadu.[248] The High Court of Punjab, on the other hand, has ruled that such a claim would no longer be non-justiciable after the commencement of the Constitution of India and rules made under Article 309 thereof, relating to pensions.[249] It is submitted that the Punjab view that pensions are basically statutory and non-gratuitous and form part of the conditions of service, is the better view. The fact that such rules can be unilaterally altered by the government does not make any difference. A suit to set aside an award made under the Bombay Co-operative Societies Act, 1925, is expressly barred by section 57 of that Act;[250] and the validity of an award made under a rule framed under section 43 of the Co-operative

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239. *Raja Ram Kumar Bhargava v UOI*, (1988) 1 SCC 681.
240. *Gangaram v Nagindas*, (1908) ILR 32 Bom 381.
241. *State of Bombay v Adamjee Hajee Dawood*, AIR 1951 Cal 147; *Valli v Corp of Madras*, (1915) ILR 38 Mad 41; *Gangabai v Vijay Kumar*, AIR 1974 SC 1126 : (1974) 2 SCC 393 : (1974) Mah LJ 602; *Gurucharan Singh v Kamla Singh*, AIR 1977 SC 5 : (1976) 2 SCC 152 : (1976) 1 SCR 739.
242. *Sadananda v UOI*, AIR 1956 Cal 317.
243. *Raleigh Investment v GG in Council*, 74 IA 50 : 51 Cal WN 762; *Forbes v Secretary of State*, (1915) ILR 42 Cal 151; *Kamkhya Narain Singh v UOI*, AIR 1966 Pat 305, 312.
244. *State of Madras v Sri Ramakrishna Mills*, AIR 1970 Mad 316.
245. *Balkrishna v Dattaraya*, (1918) ILR 42 Bom 257.
246. *State of Madhya Pradesh v Lalita Shankar*, AIR 1966 MP 327.
247. *Shaukat Hussain Beg v State of Uttar Pradesh*, AIR 1959 All 769.
248. *M Sajjanan v State of Madras*, AIR 1963 Mad 49.
249. *S Gurudip Singh v UOI*, AIR 1962 P&H 8.
250. *Cooverji v Vasant Theosophical Society*, AIR 1935 Bom 91 : (1934) 36 Bom LR 1245.

Societies Act, 1912, cannot also be challenged by a suit.[251] Accordingly, a suit questioning the decision of an arbitrator and the order of the registrar under that Act is barred by rule 134 of the Uttar Pradesh Co-operative Societies Rules, 1936;[252] but the jurisdiction of a civil court is not barred where the appointment of the arbitrator is challenged as illegal or that he had abused his powers.[253] Further, an invalid award does not bar a suit on the original cause of action;[254] but a suit in which the existence or validity of a reference to arbitration and award passed thereon are questioned is barred under section 32 of the Arbitration Act, 1940 (replaced by Arbitration and Conciliation Act, 1996).[255] A suit by one member against another member of a co-operative society is not barred by reason only of its subject matter having referred to an arbitrator so long as no award has been made. The remedy against such a suit is a motion to stay under section 34 of the Arbitration Act, 1940.[256] An action for damages for tort by a member of a co-operative society is not barred as it is not one "touching the business of the society".[257] Illegal seizure of property by officers of a co-operative society is not an act done under the Madras Co-operative Societies Act, 1932. A suit challenging such seizure is not excluded.[258] However, a suit to set aside an order of contribution made by the liquidator under the Bihar and Orissa Co-operative Societies Act, 1935, on the ground that the amount determined is not due, is barred.[259] So also, a suit challenging sale in execution of an award of an arbitrator under a Co-operative Societies Act, 1912, either on the ground of fraud or irregularity in the conduct of such a sale.[260] A suit by a student of the university calling in question an order of the vice-chancellor rusticating him for delinquency is barred under the East Punjab University Act, 1947.[261] So too, a suit challenging the validity of an order with respect to promotion of a student passed by the college authorities.[262]

Section 4 of the Pensions Act, 1871, bars jurisdiction of civil court to entertain any suit relating to pension. It has been held by the Gauhati High Court that section 12 of the Pensions Act, 1871, makes an agreement with regard to pension null and void. A compromise decree obtained in a suit in violation of section 4 of the Act is null and void.[263]

As held by the Patna High Court, the object of section 12 of the Pensions Act, 1871, is to prevent traffic in pension as it is opposed to public policy and if by a compromise decree a division has been made between the parties with respect to the amount of pension, it would amount to traffic in pension and will come under the mischief of section 23 of the Contract Act, 1872.[264]

Regarding the effect of a decree passed by a civil court in the face of statutory bar, a three-judge bench of the Supreme Court has observed as follows:

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251. *Bharmakka v Mallappa*, AIR 1926 Bom 352; *Charan Singh v ICCD Union*, AIR 1975 All 111.
252. *Basti Sahkari Ganna Samiti Ltd v Suraj N Upadhavay*, AIR 1967 All 218.
253. *Decca Co-op v Decca Co-op*, AIR 1934 Cal 23 : (1933) ILR 60 Cal 1207.
254. *Chandra Bhaga v Bhika Chand*, AIR 1959 Bom 549.
255. *Mulchand v Rashid Jamshad*, AIR 1946 Mad 346 : (1946) ILR Mad 840; *Ratanji v Dhiraj Lal*, (1942) ILR Bom 452; but see *V Nanhalal v Singh Gulab*, (1944) ILR Nag 340.
256. *Harnam Singh v Man Singh*, AIR 1961 P&H 133.
257. *Himangshu Bhusan v Nirmal Kumar*, AIR 1962 Cal 488.
258. *Kakinda Co-op Urban Bank v Chunnilal*, AIR 1966 AP 240.
259. *Liquidator of Dauleshwar Co-op Society v Hadibandabehara*, AIR 1953 Ori 300.
260. *Krishnaswami Gounder v JK Co-op, Society*, AIR 1976 Mad 1.
261. *EP University v Trolok Nath*, AIR 1953 P&H 3.
262. *Shanker v Principal, SM College*, AIR 1962 All 207.
263. *Smt. Chongtuokhawi v UOI*, AIR 2008 Gau 6 : 2008 (1) Gau LT 396 (Shillong Bench).
264. *Baldeo Jha v Ganga Prasad*, AIR 1959 Pat 17.

The main question which arises for our consideration is whether the decree passed by the trial court can be said to be "null" and "void". In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, *non est* and *void ab initio*. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.[265]

Under the Administration of Evacuee Property Act, 1950, the custodian has exclusive jurisdiction to decide whether certain property is or is not evacuee property.[266] In view of section 46 of that Act, a civil court has no jurisdiction to decide whether a certain mortgage right is evacuee property;[267] nor can it entertain a suit questioning the validity of an order passed by the custodian.[268] The effect of sections 28, 46 and 7(1) of the Act is that even if the custodian decides wrongly that a property is evacuee property, no suit can lie for a declaration that such a decision is void; but if such a decision is arrived at without the conditions of section 7(1) having been complied with, the decision would be without jurisdiction and can be challenged by means of a suit.[269] In view of section 43(2) of the Act, the custodian's decision can ordinarily be challenged by way of appeal or revision provided by sections 24, 27 and 28.[270] The custodian, however, has no power to decide which of the two sets of heirs is entitled to the property allotted in lieu of property left in West Pakistan, because that is a matter for the civil court to decide.[271]

Section 19 of the Public Debt Act, 1944, bars a suit from questioning the validity of an order passed by the Reserve Bank under section 11(2) of that Act.[272]

Section 26 of the Haryana Ceiling on Land Holdings Act, 1972, bars jurisdiction of civil court. Therefore, the validity of an order declaring surplus area under the Act could be challenged only before the forum provided under the Act. Thus, a suit for declaration that the plaintiffs are owners and in possession of the suit land and the order declaring it as surplus was ineffective, inoperative and violative of natural justice is not maintainable.[273] Arijit Pasayat J, speaking for the division bench in the above case, observed as follows:

> 17. The principles culled out from various decisions of this Court are that even when the statute has given finality to the orders of the special tribunal, the civil court's jurisdiction can be regarded as having been excluded if there is adequate remedy to do what the civil court would normally do in a suit. Section 26(1)(d) on the other hand specifically excludes jurisdiction of the civil court so far as matters which are required to be settled, decided or dealt with by the Financial Commissioner, the Commissioner, Collector or Prescribed

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265. *Balwant N Viswamitra v Yadav Sadashiv*, AIR 2004 SC 4377 : (2004) 8 SCC 706 [CK Thakker J speaking for the bench].
266. *Ram Gopal Reddy v Addl Custodian*, AIR 1966 SC 1438, 1440; *Bibi Abeda Khatoon v Assistant Custodian*, AIR 1966 Pat 29; *Mauji Ram Ram Rikh v UOI*, AIR 1969 P&H 365; *Abdul Satar v Manilal*, AIR 1970 Guj 12, 18; *Nasiban v Managing Officer, Evacuee Property*, AIR 1972 Pat 248.
267. *Custodian General, Delhi v Rakhi Ram*, AIR 1960 P&H 163; *Zakiuddin v Deputy Asst. Custodian*, AIR 1963 Pat 11.
268. *Zakhi v State of Bihar*, AIR 1953 Pat 112.
269. *Bibi Abeda Khatoon v Asst. Custodian*, AIR 1966 Pat 29.
270. *UOI v Raghav Rao*, AIR 1965 AP 337.
271. *Faqir Singh v Gurbachan Kaur*, AIR 1961 P&H 16.
272. *Vasudev v National Savings Bank*, AIR 1953 Bom 209.
273. *Devinder Singh v State of Haryana*, AIR 2006 SC 2850 : (2006) 5 SCC 720.

> Authority. The entitlement, choice of land and the allotment are matters which are to be dealt with specifically by the authorities under the Act. Additionally, Section 18 provides a forum to ventilate the grievances under the Act in respect of several matters. This is a case of exclusion of the remedy in certain contingencies. It is not a case where the controversy cannot be resolved by the forum provided under the Act. Further in case of any grievance, the validity of the order could have been questioned before the forum provided.[274]

A suit under section 70 of the Bombay Tenancy and Agricultural Lands Act, 1948, raising the question of whether a tenant was a protected tenant under the Act is barred.[275] Indeed, section 85A of the Act bars the jurisdiction of civil courts in all matters to be decided by the *mamlatdar* and other authorities under the Act.[276] Sections 3(4) and 16 of the UP (Temporary) Control of Rent and Eviction Act, 1947, bar the jurisdiction of the civil courts in matters dealt with under those provisions.[277] A suit for eviction of a tenant is similarly barred by section 242 read with section 180 of the Uttar Pradesh Tenancy Act, 1939.[278] Section 16 of Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974, bars the jurisdiction of civil court to determine whether there are any unauthorised occupants and as such are not liable to be evicted.[279] Disputes as regards recovery of arrears of rents due from a tenant are, likewise, excluded from the jurisdiction of civil courts by sections 9(1) and (2) of the Orissa Tenants Relief Act, 1955.[280] Section 50 of the Delhi Rent Control Act, 1958, expressly provides that no civil court shall entertain any suit in respect of matters which the controller is empowered by or under the Act to decide. Since the controller can decide the dispute in respect of a claim by a sub-tenant to a statutory tenancy, a suit by such a sub-tenant for injunction restraining the landlord or the tenant from taking possession of the premise in his possession, cannot lie in a civil court.[281] Likewise, a tenant's suit for an injunction restraining the landlord from forcibly taking possession of part of the leased premises is in effect a suit for recovery of possession and is barred under section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.[282] That section infact bars the civil court's jurisdiction in all cases where the dispute is between a landlord and a tenant.[283] Under the Delhi Rent Control Act, 1958, a suit for ejectment of a tenant lies before the controller and not before a civil court.[284] Section 16 of the Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947, bars a suit challenging an order passed under it either by the state government or the district magistrate.[285] A suit for arrears of rent or for sums recoverable under section 14 of the Punjab Tenancy Act, 1887, is exclusively triable by revenue courts under its section 77(3).[286]

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274. *Devinder Singh v State of Haryana*, AIR 2006 SC 2850, para 17, at p 2855 : (2006) 5 SCC 720.
275. *Trimbak v Gangaram*, AIR 1953 Bom 241.
276. *Bhimaji Shankar Kulkarni v Dundappa*, AIR 1966 SC 166; *AAA Dadabhai v Hiralal*, AIR 1965 Guj 131; *Uttamchand v Vishwanath*, AIR 1974 Bom 28 : 75 Bom LR 512; *Noor Mohd. v Fakirappa*, AIR 1978 SC 1217 : (1978) 3 SCC 188 : 1978 SCR (3) 789.
277. *Ram Swarup v Shikar Chand*, AIR 1966 SC 893, 897; *Mangal Prasad v Tara Singh*, AIR 1971 All 378; *Ramji Das v Trilok Chand*, (1970) 1 SCC 566.
278. *Kedarnath v Jamuna*, AIR 1965 All 116, 120.
279. *B Sharma Rao H Ganeshmal v Head Quarters Asst.*, (1998) 9 SCC 577.
280. *Gajendra Kumari Devi v Guru Gadaba*, AIR 1966 Ori 198.
281. *Nand Kishore v Ram Kishan*, AIR 1967 SC 1196.
282. *Bombay Grain Dealers Assn v Lakhmichand Vassanji & Co*, AIR 1969 Bom 342.
283. *Mirabelle Hotel Co v Manu Subedar*, AIR 1971 Bom 38.
284. *Sangat Singh v Perma Nand Bahl*, AIR 1970 SC 812 : (1971) 3 SCC 36.
285. *Munni Devi v Gokal Chand*, AIR 1970 SC 1727 : (1969) 2 SCC 879 : 1970 SCR (2) 363; *Asharafi Lal v Mohan Lal*, AIR 1970 All 125.
286. *Faquir Singh v Gurbachan Singh*, AIR 1971 P&H 399.

The position under the Rajasthan Tenancy Act, 1955 is the same.[287] In view of the Goa, Daman and Diu Agricultural Tenancy (Fifth Amendment) Act, 1976, the civil court's jurisdiction would stand ousted by virtue of section 58(2) and its decree is liable to be set aside.[288] The plaintiff cannot, by drawing their plaint cleverly, by not claiming a declaration that the land in question was not *shamlat deh*, confer jurisdiction on the civil court when by virtue of section 13 of Punjab Village Common Lands (Regulations) Act, 1961, the jurisdiction of the civil court to try such suits had been taken away.[289]

Section 189 of the Madras Estates Land Act, 1908, bars the civil court's jurisdiction in respect of proceedings of the nature specified in Parts A and B of the Schedule to the Act.[290] Similarly, sections 209 and 311 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951, expressly exclude the civil court's jurisdiction in proceedings for possession of land.[291] Section 331 of the Act also bars the civil courts from taking cognizance of proceedings relating to matters set out therein.[292] Under the Orissa Estates Abolition Act, 1952, the collector's finding that an intermediary was in possession at the relevant date, cannot be questioned in a civil court.[293] Section 4(d) of the Bihar Land Reforms Act, 1950, excludes the civil court's jurisdiction in matters relating to properties vested in government under that Act.[294] A suit involving the question as to title to a grove land would not lie since such a suit is barred by section 49 of the Uttar Pradesh Consolidation of Holdings Act, 1954.[295] Similarly, section 3A(4)(b) of the Madras Estates Land (Reduction of Rent) Act, 1947, bars the jurisdiction of the civil courts to decide the question of whether a particular land is private or *ryoti* land and vests exclusive jurisdiction on that question, is a special tribunal.[296] Section 49 of the Uttar Pradesh Consolidation of Holdings Act, 1954, bars the jurisdiction of civil courts to entertain suits in matters in respect of which proceedings can and ought to be taken under the Act.[297] Also, by virtue of section 257 of the Madhya Pradesh Land Revenue Code, 1959, a suit is not maintainable in respect of matters covered by its section 131(1).[298] Section 36A of Bombay Prevention of Fragmentation and Consolidation of Holding Act, 1947, clearly bars jurisdiction of the civil court to settle, decide or deal with any question which is by or under the Act required to be settled, decided or dealt with by the state government or any officer or authority.[299] Section 46 of Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960, creates a bar to any civil suit. The legislative intention is that the proceedings initiated under the provision of the Madhya Pradesh Act shall be pursued only in the manner provided thereunder, namely, right of appeal and right of revision, and the jurisdiction of the civil court has been barred to impugn any question settled or decision made or matter dealt with by the competent authority under the Act.[300] Section 6C of Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960, as amended by the Second Amendment Act of 1972, bars jurisdiction of civil court, where section 6B of the Act applies and mandates that civil court's

287. *Mohanlal v Ratna*, AIR 1971 Raj 164.
288. *Judith Fernandes v Conceicao Antonio Fernandes*, AIR 1996 SC 2821 : (1996) 10 SCC 401.
289. *Ram Singh v Gram Panchayat Mehal Kalan*, (1986) 4 Supp SCC 364.
290. *CV Subbayya v P Anjayya*, AIR 1972 SC 1421, 1427 : (1972) 1 SCC 521 : (1972) 3 SCR 172.
291. *Bankey Singh v Ram Sabad*, AIR 1966 All 367.
292. *Ram Awalamb v Jata Shankar*, AIR 1969 All 526 (FB) : (1968) All LJ 1108.
293. *Krishna Chandra v Hemamani*, AIR 1971 Ori 140.
294. *Raj Kishore Prasad v Ram Pratap Pandey*, AIR 1967 SC 801.
295. *Dalel v Baroo*, AIR 1967 All 59, 61 (FB).
296. *Govindasami Pillai v TM Srinivasa Chettiar*, AIR 1969 Mad 172.
297. *Bikrama Singh v State of Uttar Pradesh*, AIR 1970 All 344 (FB) : (1969) All LJ 748.
298. *Nathuram Arjun v Siyasharan Harprasad*, AIR 1970 MP 79, 81.
299. *Shevantabai Maruti Kalhatkar v Ramu Rakhamaji Kalhatkar*, (1998) 8 SCC 76.
300. *Sooraj v SDO Delhi*, (1995) 2 SCC 45.

jurisdiction could be taken away in respect of title of suit to which section 6B applies. Thus, the jurisdiction of civil court is barred only in respect of those cases where section 6B of the Act applies.[301] Since there is a special procedure provided in the Land Acquisition Act, 1894, by necessary implication, the civil court under section 9 of the CPC has been prohibited to take cognizance of the objections arising under the Act for determination of the compensation for the land acquired under the Act.[302]

Where the plaintiff filed a suit for declaration of his right title over the suit land, recovery of possession after evicting the defendants therefrom and for a declaration that the orders passed by the Tehsildar are illegal and not binding on the plaintiff, a question arose whether the suit is barred in view of section 67 of the Orissa Land Reforms Act, 1960. The Orissa High Court observed in the case as follows:

> **8.** The normal rule of law is that the civil courts have jurisdiction to try all suits of a civil nature except those of which cognizance by them is either expressly or impliedly excluded. Such exclusion is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than the exclusion of jurisdiction of the civil courts. Under that principle the burden to prove exclusion of jurisdiction is on the party who so contends. In the present case, the appellants pleaded that the suit was not maintainable in view of the bar provided under Section 67 of the OLR Act. Orissa Land Reforms Act is a Special Revenue Act where authorities have been contemplated to decide matters relating to the said Act and, therefore, a provision in Section 67 of the OLR Act has been created putting a bar on the jurisdiction of the civil court to try and decide matters, which are within the competency of the OLR courts. However, it has been settled through judicial pronouncements that where only a part of the relief claimed can be granted by the tribunal situated under the Special Act, the civil court would have jurisdiction to entertain the suit for the rest of the reliefs. It has also been settled that even if jurisdiction is excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.[303]

A civil court cannot entertain a suit whereby a person alleging to be the proprietor of land claims *bhumidari* rights therein in view of section 185(1) of the Delhi Land Reforms Act, 1954.[304] Section 21 of the West Bengal Land Reforms Act, 1956, bars the civil court from entertaining suits relating to matters mentioned in sections 17 and 18 of the Act.[305] Suits relating to the administration or management of a religious and charitable trust are barred by sections 93 and 57 of the Madras Hindu Religious and Charitable Endowments Act, 1951;[306] but a suit by the trustees against a stranger to the trust is not.[307] A suit by a trustee against another trustee who has been removed from trusteeship for possession of trust property is not barred under section 93 of the Madras Act.[308] A civil court has no jurisdiction to determine under the Madras Town Planning Act, 1920, the liability of properties to betterment charges.[309] A civil court cannot entertain a suit for setting aside or modifying assessment under the Madras General Sales Tax Act, 1939.[310] A civil court has no jurisdiction to decide under which item

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301. *Kashiram v State of Madhya Pradesh*, AIR 1996 MP 247.
302. *State of Mizoram v Biakchhawna*, (1995) 1 SCC 156.
303. *Raghunath Jena v Adkikanda Panda*, 2008 (4) Civil Court Cases 126 (Orissa).
304. *Hatti v Sunder Singh*, AIR 1971 SC 2320 : (1971) 2 SCC 841.
305. *Laxmi Devi v Akul Mahato*, AIR 1972 Cal 104.
306. *State of Madras v K Melamatam*, AIR 1965 SC 1570.
307. *SNP Nadar v Pillai Yadi Pillavar Temple Charity*, AIR 1971 Mad 253, at p 257; *Gadadhar v Purna Bewa*, AIR 1971 Ori 155.
308. *M Venkata Ramana v Sri Rama Mandiram*, AIR 1966 AP 197.
309. *Bala Krishna Mehta v Corp of Madras*, AIR 1962 Mad 7.
310. *Palanisami v State of Madras*, AIR 1960 Mad 8; see also section 20, Bombay Sales Tax Act, 1946; *Kamala Mills v State of Bombay*, AIR 1965 SC 1942.

in the schedule to the Punjab Municipal Act, 1911, octroi duty is leviable, that power being with the authorities constituted under the Act.[311] A suit for injunction against the municipality praying for restraint from recovering taxes is not maintainable before the civil court, since the special remedy is provided under the Maharashtra Municipalities Act, 1965. The very object of the special machinery or forum in a taxing statute is to have summary and quick disposal of the matters so that the government or local body can collect taxes according to law without being forced to file a suit against the tax-payer.[312] The jurisdiction of civil courts to try matters for which provision is made under the Hindu Marriage Act, 1955, is taken away by sections 4 and 9 of the Act.[313] A civil court also cannot entertain a suit challenging the correctness of the decision of the authority constituted under section 20 of the Minimum Wages Act, 1948.[314] Having regard to sections 22(d) and 15(2) of the Payment of Wages Act, 1936, a civil court cannot entertain a suit by an employee for his wages after expiry of the period of limitation prescribed by section 15(2) or after the authority has declined to condone the delay.[315] Section 110F of the Motor Vehicles Act, 1939, ousts the jurisdiction of civil courts to entertain claims of compensation triable by the tribunals appointed thereunder.[316] Section 19 of the Workmen's Compensation Act, 1923, bars a suit in respect of matters to be dealt with thereunder by the commissioner appointed under the Act.[317]

Under some enactments, the bar imposed on the jurisdiction of civil court is not total but partial. Sub-section (4) of section 3 of the Gujarat Public Moneys (Recovery of Dues) Act, 1979, imposes a bar on civil suits but only to the extent of any dues under the Act. In effect it is an embarge against the creditor rather than the debtor. However, the second part of the above noted sub-section provides that no injunction shall be granted by the civil court to restrain the action taken or intended to be taken under the Act.[318] Explaining the point, RS Garg J observed as follows:

> **8.** The intention of the legislature was not to put an absolute ban on the rights of a debtor to approach to the civil court. This intention of the legislature, from the language employed in the later part of sub-section (4) simply says that a civil court, even if it assumes jurisdiction and the suit is held to be maintainable, then too, such civil court would not be entitled to grant an injunction in favour of such plaintiff. The intention of the legislature behind using such language was that let debtor go to the civil court, have his litigation, enjoy luxury of the litigation, but he shall not be entitled to an injunction. Because of the non-grant of the injunction, the Collector, on the other hand, shall be entitled to proceed with the recovery which is the main object of the Act.[319]

The cognizance of a suit by a civil court may also be impliedly barred. Thus, a suit by a "proclaimed" person, whose property has been attached and sold under sections 87 and 88 of the Code of Criminal Procedure, 1898 (replaced with Civil Procedure Code, 1908), against the auction purchaser for its restoration is impliedly barred by the provisions of that Code, the remedies of such a "proclaimed" person being limited to those provided for in the

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311. *Kalash Nath v Batala Municipality*, AIR 1962 P&H 389 (FB).
312. *Gandhi Agencies v Municipal Council, Barshi*, AIR 1995 Bom 169.
313. *Bootan Bai v Durga Prasad*, AIR 1959 MP 410; *Bharawan Bai v Lila Ram*, AIR 1963 P&H 118; *DCG Mills Co. v Kota Municipality*, AIR 1978 Raj 177.
314. *Pabhajan Tea Co v Dy. Commr*, AIR 1963 Assam 62 (FB).
315. *Kewalram v R Manohardas*, AIR 1965 Bom 185.
316. *Thomas v Hotz Hotels Ltd*, AIR 1969 Del 3.
317. *Trustees of Port of Madras v Bombay Co*, AIR 1967 Mad 318, 325.
318. *Azad Ice Factory v Gujarat Industrial Investment Corp*, AIR 2007 Guj 29 : 2007 (2) Guj LH 243.
319. *Azad Ice Factory v Gujarat Industrial Investment Corp*, AIR 2007 Guj 29, para 8 at pp 31–32 : 2007 (2) Guj LH 243.

Code.[320] The mere fact, however, that an enactment provides a summary remedy in certain cases does not constitute a bar to a regular suit. Thus, the provisions of Act 1 of 1871, do not bar a suit for compensation for wrongful seizure of cattle.[321] Again, a guardian may apply to the court for possession of his ward under section 25 of the Act, but this does not exclude a suit for that purpose.[322] Another instance is O XXI, rule 95 (Code of 1882, section 318). That rule provides a summary remedy to which a purchaser at a sale in execution of a decree may resort to recover possession from a judgment-debtor; but, it does not say that no suit shall lie to recover possession. The purchaser, therefore, may resort to the remedy provided by that section or he may at his option bring a regular suit.[323] Section 92 of the CPC does not bar a suit for a claim for administration of private trusts[324] and the court can interfere in such cases and see that no breaches of trust are committed.[325] A person who claims to be the transferee of a share in a company registered under the Companies Act, 1956 is entitled to file a suit to establish his rights. His remedy is not limited to proceedings under section 38 of the Companies Act, 1913 (replaced with the Companies Act, 1956).[326]

The jurisdiction of the civil court in the matter of cancellation of registration has been impliedly taken away under sections 46 and 47 of the Trade and Merchandise Marks Act, 1958. The forum for relief is the high court or the registrar.[327]

A full bench of the Delhi High Court[328] has held that unlike the pre-existing law, where the high court had the exclusive jurisdiction to pronounce upon issues of trademark validity (by virtue of section 111 of the Trade and Merchandise Marks Act, 1958), that jurisdiction is exclusively confined on another forum, i.e., Intellectual Property Appellate Board (IPAB). It was held that the jurisdiction of the civil court under section 124(1)(ii) of the Trade Marks Act, 1999, extended only to examine the prima facie tenability of the invalidity plea for the limited purpose of examining whether to adjourn the suit, or not, for a period of three months to enable the party setting up the plea of invalidity to prefer rectification proceedings before the IPAB under section 47/57 of the 1958 Act, or while dealing with the aspect of making any interlocutory order in the suit, including on the aspect of injunction, appointment of receiver, or the like. It was further observed that IPAB is not so constrained; rather, it has the duty and the jurisdiction to examine and deal with the merits of the plea of invalidity of the registration (of a trademark) based on all the materials placed before it. The IPAB is a judicial tribunal, which is unconstrained by the provisions of the CPC, and guided by principles of natural justice, but subject to the provisions of the Act and the rules made thereunder, empowered to regulate its own procedure.

It was further held[329] that where special rights are created by a statute, which provides a mechanism for the enforcement of such statutory rights, then, even in the absence of an

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320. *Dewa Singh v Fazal Dad*, AIR 1928 Lah 562 : (1929) 10 Lah 338.
321. *Shuttrughon v Hokna*, (1890) ILR 16 Cal 159.
322. *Sharifa v Munekhan*, (1901) ILR 6 Bom 574.
323. *Kishori v Chunder Nath*, (1887) ILR 14 Cal 644; *Naginlal v Official Assignee*, (1911) ILR 35 Bom 473; *Duni Chand v Muhammad*, (1917) PR No 22 p 83 : 40 IC 220 (suits against official assignee); *Parsha v Lagmya*, (1889) ILR 13 Bom 83; *Bhiva v Vithya*, (1901) ILR 25 Bom 186; *Mahadu v Krishna*, AIR 1922 Bom 410 : (1927) ILR 47 Bom 95.
324. *Sri Mahadev Jew v Balkrishna*, AIR 1952 Cal 763.
325. *Narayyanáswami v Balasundaram*, AIR 1953 Mad 750.
326. *Mahadeolal v New Darjeeling Union Tea Co*, AIR 1952 Cal 58; *Ramachandra v Joshi Mohan*, AIR 1920 Cal 789 : (1920) ILR 47 Cal 901; *Mohinuddin v Tinnevelly Mills Ltd*, AIR 1928 Mad 571.
327. *ITC Ltd v Rakesh Behari Srivastava*, AIR 1997 All 323.
328. *Data Infosys Ltd v Infosys Technologies Ltd*, 2016 (65) PTC 209 (Delhi) (FB).
329. *Data Infosys Ltd v Infosys Technologies Ltd*, 2016 (65) PTC 209 (Delhi) (FB).

express exclusion, the civil court's jurisdiction over those matters is barred. In respect of matters relating to invalidity of registration of a trademark, the jurisdiction to decide the merits of the dispute is exclusively that of the statutory authorities, i.e., the Registrar or the IPAB. The civil court's jurisdiction to go into the merits of the plea of invalidity is therefore barred.

Section 58 of the Water (Prevention and Control of Pollution) Act, 1974, does not bar the jurisdiction of civil courts to entertain a suit for permanent injunction to restrain the defendant from letting noxious fluids into a river. The section reads as under:

> *58. Bar of jurisdiction.* No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an appellate authority constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

The defendant in the instant case did not seek to annul any orders passed by any authority constituted under the Water (Prevention and Control of Pollution) Act, 1974.[330]

The plaintiff purchased some materials from a foreign company situated in West Germany. Consignment was shipped from Germany under a marine insurance policy. The bill of lading was executed in Germany. The insurance company was also situated in Germany. The contract of insurance covered the risk of transit upto place *S*, where the plaintiff resided. The consignment was short of 779 kg. The plaintiff filed suit in the court at *K*, having jurisdiction over the place *S*. It was contended that as per Article 12 of the insurance conditions read with Article 48 of VVC (stated to be law relating to insurance matters), the suit could be filed only in Germany. Shortage in goods was noticed only at the time of delivery. It was held that the court at the place of delivery had jurisdiction in the matter.[331]

A full bench of the Delhi High Court[332] has held that the power to entertain cancellation proceedings exclusively vests with the Controller of Designs which is a specialised tribunal as per section 19 of the Designs Act, 2000, except to the extent it is permissible for the civil court to entertain invalidity under the provision of section 22(3) in an infringement proceedings. Therefore, action against a registered proprietor who did not fit within the ambit of sections 22(1) and 22(2) is implicitly barred as the same is a power vested in the specialised tribunal which is the design office or the controller of design even if tested on the touchstone of the principles of section 9 of the CPC.

In a Gujarat case, plaintiff's case was that government, having acquired land *A*, was (from that land) encroaching upon land *B*, which the plaintiff claimed as his own. The suit was to prevent encroachment upon land *B*, regarding which the plaintiff claimed title. It was objected by the defendant that the civil court cannot entertain a suit regarding acquisition. It was held that the suit was maintainable. Plaintiff was not suing regarding the acquired land, but regarding the adjoining land.[333]

The Industrial Disputes Act, 1947, not only confers on a worker the right to re-instatement and back wages if the order to termination or dismissal is not in accordance with the standing orders, but also provides detailed procedure and machinery for obtaining this relief. Under these circumstances, there is an apparent implied exclusion of the jurisdiction of the civil court to grant such relief. The remedy under the Industrial Disputes Act, 1947, cannot be said to

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330. *Sreenivasa Distilleries v SR Thyagarajan*, AIR 1986 AP 328, at p 329.
331. *Wuwttem Bergische Und Badshee Vereinighe Verisicherung Sgesell Schaften Aktiengeselischaft v Coromandel Crucibles Industry, Samalkota*, AIR 1990 AP 97 (DB).
332. *Micolube India Limited v Rakesh Kumar*, 199 (2013) DLT 740 : 2013 (55) PTC 1 (Del) (FB).
333. *Hiraben v State of Gujarat*, AIR 1987 Guj 225 (DB).

be discretionary. The suit for: (i) a declaration that dismissal of the plaintiff from service was bad and void; (ii) for back wages; and (iii) for injunction preventing the employer from giving effect to the order of dismissal is, in substance, a suit for the relief of re-instatement and back wages and is, therefore, not maintainable before a civil court.[334]

Decree declared that a particular date was the correct date of birth of the plaintiff employee, defendant-employer (public authority), cannot ignore the decree on the ground of absence of direction for rectification of service record. The suit was instituted against the director of Post-Graduate Centre, Anantapur, who was the plaintiff petitioner's employer, for correcting the date of birth of the petitioner. It was held that reasonably and realistically speaking, there could have been no purpose behind the suit, except to bind the respondent with the declaration, and thereby obtain the benefit of extended service. The plaint allegations made the objective clear. So long as the decree stood, the respondent could not say that the petitioner's date of birth was not 29 December 1921, but 1 June 1919. The stand taken by the director, that as there was no further direction to him to correct the service record, therefore he would still act upon the entries in the service record as they stood, and retire the petitioner, was an unjustifiable one, which a public authority could not be permitted to take.[335] The scheme of the Industrial Disputes Act, 1947, clearly excludes the jurisdiction of the civil court by implication in respect of the remedies which are available under this Act and for which a complete procedure and machinery has been provided in the Act.[336]

Difference lies in the nature of jurisdiction, one conferred by section 9 of the CPC and the other by Article 226 of the Constitution of India. Both the jurisdictions are different and are governed by different principles. Article 226 provides a constitutional remedy. It confers the power of judicial review of high courts. The finality clause in a statute is not a bar to the exercise of this constitutional power. Whereas the jurisdiction of civil court arises from section 9 of the CPC. In such a case, the bar arising from an express provision or arising by necessary intendment can be overridden only in cases and situations pointed out in *Dhula Bhai v State of Madhya Pradesh*.[337] It is not correct to say that whatever is good for Article 226 is good for suit as well.[338]

[s 9.39] Exclusion of Jurisdiction of Civil Courts

Under section 9 of the CPC, the court shall subject to provisions contained therein, have jurisdiction to try all suits of civil nature excepting suits, cognizance of which is either expressly or impliedly barred. When a legal right is infringed, a suit would lie, unless there is a bar against entertainment of such civil suit and the civil courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded. The rule of construction being that every presumption would be made in favour of the existence of a right and remedy in a democratic set-up governed by rule of law and jurisdiction of the civil courts is assumed. The exclusion would, therefore, normally be an exception. Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary that the statute creates a

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334. *Jitendra Nath Biswas v Empire of India and Ceylon Tea Co*, AIR 1990 SC 225 : 1989 SCR (3) 640.
335. *K Mahadeva Sastri v Director, Post-Graduate Centre, Anantapur*, AIR 1982 AP 176 (DB).
336. *Jitendra Nath Biswas v Empire of India and Ceylone Tea Co*, (1984) 3 SCC 582.
337. *Dhula Bhai v State of Madhya Pradesh*, AIR 1969 SC 78.
338. *Srikant Kashinath Jituri v Municipal Corp Belgaum*, (1994) 6 SCC 572.

special right or liability and provides procedure for the determination of the right or liability and further lays down that all question about the said right or liability shall be determined by the tribunal so constituted and whether remedies are normally associated with the action in civil courts or prescribed by the statutes or not. Therefore, each case requires examination whether the statute provides right and remedies and whether the scheme of the Act is that the procedure provided will be conclusive and thereby excludes the jurisdiction of the civil court in respect thereof.[339]

The normal rule of law is that civil courts have jurisdiction to try all suits of a civil nature except those of which cognizance by them is either expressly or impliedly excluded.[340] Such exclusion is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than the exclusion of jurisdiction of the civil courts.[341] Consequently, statutes, ousting the jurisdiction of civil courts must be strictly constructed.[342] The burden to prove the exclusion is on the party who so contends.[343] Where such a contention is raised, it has to be determined in the light of the words used in the statute, the scheme of its relevant provisions, their object and purpose.[344] Further, the jurisdiction of the civil court is not excluded unless the cognizance of the entire suit as brought is barred.[345] Where the statute itself does not bar the jurisdiction of civil courts but the rules made thereunder do, the rules are *ultra vires* the statute and cannot by themselves bar the civil court's jurisdiction.[346] In any case, it is the civil court which has the power to decide its jurisdiction to try a suit or a proceeding pending before it is barred or not, although it may turn out on investigation that it has no jurisdiction.[347]

In a suit it was urged before the Bombay High Court that the Mamlatdars' Courts Act, 1906, gives powers to Mamlatdars' Court to adjudicate all disputes as specified thereunder. It was urged the law being a special enactment, the right to adjudicate dispute under common law is barred. Repelling the contention, the High Court observed as follows:

> 11. Court has perused entire Mamlatdars' Courts Act, 1906. It is seen that Mamlatdars' Courts Act presupposes and recognizes the existence and continuation of powers and jurisdiction of civil court. The scheme provides for a summary jurisdiction and powers and a bar of suits to make orders of Mamlatdar or Collector etc., to be immune from scrutiny in a civil suit.

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339. *Vankamamidi Venkata Subbarao v Chatlapalli Seetharamaratna*, (1997) 5 SCC 460; *S Vanathan Muthuraja v Ramalingam*, (1997) 6 SCC 143.
340. *Kamala Mills Ltd v State of Bombay*, AIR 1965 SC 1942 : (1966) 1 SCR 64; *State v Manish Maity*, AIR 1971 Cal 281, 283.
341. *Bharat Kala Bhandar v Muni Committee, Dhamangaon*, AIR 1966 SC 249 : (1965) 3 SCR 199; *Secy of State v Mask & Co*, AIR 1940 PC 105 : 67 IA 222; *Umesh Jha v State*, AIR 1956 Pat 425; *Magiti Sasmal v Pandab Bissori*, AIR 1962 SC 547; *Sudhan Chandra v Kshetra Mohan*, AIR 1958 Cal 65; *Kundan v Sardar Ramji Lal*, AIR 1959 P&H 206; *Lalithamma v Kannan*, AIR 1966 Mys 178; *Tirumalaisami v Villagers of Kadambur*, AIR 1969 Mad 108; *Kul Bhushan v Faquira*, AIR 1976 P&H 341; *CN Co-op HB Society v Ashok*, AIR 1976 Del 299; *MP Electricity Board, Jabalpur v Vijaya Timber Co*, (1997) 1 SCC 68.
342. *Luthra Union v Samua Uraon*, AIR 1948 Pat 49 : (1947) ILR 26 Pat 377; *Manager, Court of Wards v Moolchand*, AIR 1949 Nag 226 : (1941) ILR Nag 279; *Ramkaran v Surajmal*, AIR 1938 Nag 80 : (1938) ILR Nag 268.
343. *Abdul Waheed Khan v Bhawani*, AIR 1966 SC 1718 : (1966) 3 SCR 617.
344. *Kamala Mills Ltd v State of Bombay*, AIR 1965 SC 1942.
345. *Maya Devi v Inder Narain*, AIR 1947 All 118, 120; *Mewa v Baldeo*, AIR 1967 All 358; *Shanti Swarup v Ashrafe*, AIR 1941 All 61 : (1941) ILR All 250; *Parameshari v Krishna Kumar*, AIR 1944 All 1947 : (1944) ILR All 330; *Antu v Ghulam*, (1884) ILR 6 All 110.
346. *Satyanarayana v Narayan*, AIR 1952 Mad 106.
347. *Bhattiya Co Hsg Society v Patel*, AIR 1953 SC 16 : (1953) SCR 185 : (1953) SCJ 642.

> 12. It is seen that there is no express bar of suit. According to Mr. Bhattad, bar is implied. There is no room left by virtue of totality of provisions and scheme as to how implied bar should be inferred. Argument of learned Advocate Mr. Bhattad that implied bar can be read from the provision to clause (b) of sub-section (1) of Section 5 amounts to reading in a provision of legislation, such words and such scheme which is totally non-existent.
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> 13. The court cannot forget the wide compass of Section 9 of Civil Procedure Code. Exclusion and bar of jurisdiction cannot be read or inferred just for the sake of asking in the manner in which present petitioner wants. Existence of jurisdiction has to be presumed and not the bar.[348]

In matter of enforcement of security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002), the jurisdiction of civil court is barred when action under the Act was taken or could be taken in future if notice under section 13(2) and 13(3) of the Act is issued.[349]

In another case relating to the SARFAESI Act, 2002 where the property had been mortgaged in favour of the bank and a suit for partition had been filed in respect of the said property, it was held by the Karnataka High Court that the bank had already taken proceedings in respect of the property under the SARFAESI Act, 2002, and had taken possession of the very property and as such section 34 of the SARFAESI Act, 2002, would not be attracted to oust the jurisdiction of civil court. It was observed that the property remains mortgaged with the bank but the title resides in the plaintiff and even if the plaintiff succeeds in the suit, his share would still be subject to the mortgage in favour of the bank.[350]

Section 34 of the SARFAESI Act, 2002, ousts the jurisdiction of the civil court. Thus, where enforcement proceedings are initiated by bank under section 13 of the Act, no relief of injunction can be granted by civil court. Section 17 of the Act provides that any person (including borrower), aggrieved by any of the measures referred to in section 13(4) by the secured creditor may make an application to the Debt Recovery Tribunal (DRT) having jurisdiction. Section 18 of the Act prescribes right of appeal to the Appellate Tribunal by any person aggrieved by the order of the DRT. It was held by a Division Bench of the Kerala High Court that alternative and efficacious remedy is provided under the Act of 2002.[351]

In *SBI v Allwyn Alloys (Pvt) Ltd*,[352] a decision of the Debt Recovery Appellate Tribunal (DRAT) was challenged before the high court in a writ petition. The high court, without examining the concurrent findings of the DRT and the DRAT, disposed of the writ petition stating that the case involves disputed facts and, thus, it would require production of evidence and full-fledged trial. It gave liberty to the writ petitioners to "approach proper forum" for adjudication of the disputes. The apex court, while setting aside the order of the high court, termed the approach adopted by the high court as "completely fallacious and untenable in law." It held that the mandate of section 13 and, in particular, section 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, clearly barred filing of a civil suit as no civil court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or DRAT is empowered by or under this Act to determine and no injunction can be granted by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

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348. *Rajendra Sheshrao Shengde v Shobhatai S Ravate*, AIR 2007 Bom 90 : 2007 (3) Mah LJ 431 (Nagpur Bench).
349. *Yuth Development Co-op Bank Ltd, Kolhapur v Balasaheb Dinkarrao Salokhe*, AIR 2008 Bom 167 : 2008 (5) Mah LJ 326.
350. *Vysya Co-op Bank Ltd v G Keerthana*, AIR 2008 Kant 25 : 2008 (2) Kant LJ 380.
351. *VP Fakrudheen Haji v State Bank of India*, AIR 2009 Ker 78 : 2009 (1) Ker LT 227 (DB).
352. *SBI v Allwyn Alloys (Pvt) Ltd*, AIR 2018 SC 2721 : (2018) 8 SCC 120 : 2018 (7) Scale 512.

However, the Madras High Court has held that though section 34 of the Securitisation Act, 2002 debars the civil court from entertaining any suit in respect of matters which fall within the jurisdiction of the DRT or the Appellate Tribunal, but as regards the allegation of fraud in obtaining certain orders depriving the valuable right of a third party, it is only the civil court which has jurisdiction to deal with it.[353]

The Rajasthan High Court has held that the bar to the jurisdiction of civil courts contained in section 34 of the SARFAESI Act, 2002, is not absolute. The SARFAESI Act, 2002, does not bar the jurisdiction of civil courts to decide *inter se* rights between third parties, including the borrowers in the cases of partition, cancellation of gift deed and sale deed, right of pre-emption, redemption of mortgage, etc. But no suit or injunction in any civil court can be allowed to prohibit and debar the measures taken by banks and financial institutions under the SARFAESI Act, 2002, or the Recovery of Debts due to Banks and Financial Institutions Act, 1993. However, in cases of partition of joint Hindu family property, coparceners can claim injunction against banks or financial institutions insofar as their share in the property is concerned.[354]

It has been observed in the above case as follows:

> In cases of partition suits of ancestral property owned by a Hindu Undivided Family which has been mortgaged by one or more of the coparceners, without other coparceners being guarantors or borrowers of the bank or financial institution, the Bank, financial institution or Debt Recovery Tribunal cannot proceed to take over and sell, transfer or otherwise alienate the said ancestral undivided property unless and until the share of the particular borrower-coparcener is determined at the instance of such borrower-coparcener or the bank itself.[355]

It has been held by the Orissa High Court that after the formation of the DRT when suits relating to bank dues stand transferred to the tribunals, such tribunals also have jurisdiction to hear and decide petitions for setting aside *ex parte* decree passed by the civil court earlier to the transfer of the suits to tribunals.[356] Explaining the provisions of sections 19, 31 and 22(2)(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and the scheme of the enactment, AK Ganguly J (as he then was), observed as follows:

> 24. This difference in phraseology is of considerable importance. This difference means that after the appointed day and after the establishment of the Tribunal, proceeding by banks/financial institutions for recovery of their debts cannot be termed, as suits, but it will be called an application, which has been defined under Section 2(b) of RDB Act as "an application made to a Tribunal under Section 19". Thus, Section 22 of the RDB Act only refers to those applications under Section 2(b) of RDB Act and it does not refer to any pending case. The entire gamut of procedure referred to Section 22 would therefore apply to the applications, which were filed before the Tribunal after the appointed day and after it was set up. So far as the jurisdiction of the Tribunal over pending cases by transfer is concerned, the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceeding, so far as may be, in the same manner as in the case of an application under Section 19 from the stage which was reached before such transfer or from an earlier stage as the Tribunal may deem fit. This has been made clear in Section 31(2)(b) of the RDB Act. The exercise of jurisdiction by the DRT in pending cases and which have come to it on transfer is not controlled by Section 22 but by Section 19. That is why under Section 19, the Tribunal has been conferred with the authority to "make such orders and give such directions as may be necessary or expedient to give effect to its order or to prevent abuse of its process or to secure the ends of justice". Thus a very wide jurisdiction has been given to

353. *Cambridge Solutions Ltd, Bangalore, v Global Software Ltd*, AIR 2009 Mad 74.
354. *Mohan Lal v Dwarka Prasad*, AIR 2007 Raj 129 : 2007 (3) Raj LW 2656 (Jaipur Bench).
355. *Mohan Lal v Dwarka Prasad*, AIR 2007 Raj 129 : 2007 (3) Raj LW 2656 (per Dr. V Kothari J).
356. *Ch Ranganath Raju v Bank of India*, AIR 2007 Ori 43 (DB).

> the DRT to deal with pending cases which have come to it on transfer. There are very good reasons for conferring such wide powers on the DRT which has to deal with pending cases on transfer. A case which was filed and pending before the civil court may, over the years, have developed unforeseen facets and may be covered with a thicket of controversy which is unknown to the structure of an application filed before the DRT after its establishment. To deal with such contingency, the DRT has been designedly empowered with such broad jurisdiction as has been mandated under Section 19(25) and Section 31(2)(b) of the RDB Act.[357]

The language of section 56 of Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act, 1948, more specially the provisions in sub-section (1) which makes the order of settlement officer final and which cannot be questioned in any court leaves no room for doubt that the issues set out in sub-section (1) of section 56 could be decided by settlement officer only and in respect of them the jurisdiction of the civil court is ousted.[358] Section 13 of Punjab Village Common Lands (Regulation) Act, 1961, takes away the jurisdiction of the civil court to entertain or adjudicate upon any question of whether any land or removable property is or is not *Shamilat deh.*[359] Once the order under the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972, attains finality, section 14 of the said Act ousts the jurisdiction of the civil court to entertain the disputes which can be decided by the estate officer.[360] Section 65 of Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971, bars the jurisdiction of the civil court.[361] The scheme of Maharashtra (Municipal Councils), Nagar Panchayats and Industrial Townships) Act, 1965, provides a complete procedure right from the stage and taking into consideration the basis for the assessment to the stage of appeal and revision. In such circumstances, the jurisdiction of the civil court is barred.[362] A bare reading of section 46 of Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960, indicates that the jurisdiction of the civil court has been expressly barred except with regard to two cases regarding which exception have been carved out.[363] Because of the *non obstante* clause contained in section 19 of Presidency Small Causes Courts Act, 1882, even if a suit may otherwise lie before any other court, if such suits falls within the sweep of section 41(1) it can be entertained only by the court of small causes. For applicability of section 41(1), the following conditions must be satisfied before taking the view that jurisdiction of regular competent civil court like city civil court is ousted:

(i) it must be a suit or proceedings between the licensee and licensor; or

(ii) between a landlord and a tenant;

(iii) such suit or proceedings must relate to the recovery of possession of any property situated in greater Bombay; or

(iv) relating to recovery of the licensee fee or charge or rent thereof.[364]

[s 9.40] Tribunals and Jurisdiction of Civil Courts

Section 9 of the CPC confers jurisdiction upon the civil courts to determine all disputes of a civil nature unless the same is barred under a statute either expressly or by necessary

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357. *Ch Ranganath Raju v Bank of India*, AIR 2007 Ori 43, para 24, at pp 47–48 (DB).
358. *Annamreddi Bodayyar v Lokanarapu Ramaswamy, (deceased)*, (1984) (Supp) SCC 391.
359. *Babu Ram v Gram Sabha Buhavi*, (1988) Supp SCC 485.
360. *Bidyadhar Roul v State*, AIR 1994 Ori 156.
361. *Ponnurangam v Chairman, Slum Clearance Board of Tamil Nadu, Madras*, AIR 1996 Mad 274.
362. *Dr. Devi Dass v Pachora Municipal Council*, AIR 1998 Bom 363 (DB).
363. *Bhaiyalal v State of Madhya Pradesh*, AIR 1998 MP 234.
364. *Mansukh Lal Dhanraj Jain v Eknath Vitthal Ogale*, (1995) 2 SCC 665.

implication. Bar of jurisdiction of a civil court is not to be readily inferred. A provision seeking to bar jurisdiction of civil court requires strict interpretation. The court, it is well-settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil court. The burden of proof in this behalf shall be on the party who asserts that the civil court's jurisdiction is ousted. Even otherwise, the civil court's jurisdiction is not completely ousted under the Companies Act, 1956.[365]

In the *Premier Automobiles* case,[366] NL Untwalia J, speaking for a three-judge bench of the Supreme Court, observed as follows:

> 23. The principles applicable to the jurisdiction of the civil court in relation to an industrial dispute may be stated thus:
>
> (1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.
>
> (2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
>
> (3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.
>
> (4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute, as the case may be.

In *Rajasthan State Road Transport Corporation v Krishna Kant*,[367] Jeevan Reddy J, speaking for a three-judge bench of the Supreme Court, summarised the principles as follows:

> (1) Where the dispute arises from the general law of contract, i.e., where reliefs are claimed on the basis of the general law of contract, a suit filed in civil court cannot be said to be not maintainable, even though such a dispute may also constitute an "industrial dispute" within the meaning of Section 2(k) or Section 2-A of the Industrial Disputes Act, 1947.
>
> (2) Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.
>
> (3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations created by enactments like Industrial Employment (Standing Orders) Act, 1946—which can be called "sister enactments" to Industrial Disputes Act—and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of Section 2(k) and Section 2-A of Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to civil court is open.
>
> (4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one *Ex facie*. The power conferred is the power to refer and not the power to

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365. *Dwarka Prasad Agarwal v Ramesh Chandra Agarwala*, AIR 2003 SC 2696 : (2003) 6 SCC 220; see also *Sahebgonda v Ogeppa*, AIR 2003 SCW 3088.
366. *Premier Automobiles Ltd. v Kamlekar Shantaram Wadke*, AIR 1975 SC 2238 : (1976) 1 SCC 496.
367. *Rajasthan State Road Transport Corp v Krishna Kant*, AIR 1995 SC 1715 : (1995) 5 SCC 75.

decide, though it may be that the Government is entitled to examine whether the dispute is *Ex facie* frivolous, not meriting an adjudication.

(5) Consistent with the policy of law aforesaid, we commend to Parliament and the State Legislatures to make a provision enabling a workman to approach the Labour Court/Industrial Tribunal directly—i.e., without the requirement of a reference by the Government—in case of industrial disputes covered by Section 2-A of the Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

(6) The certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to "statutory provisions". Any violation of these Standing Orders entitles an employee to appropriate relief either before the forums created by the Industrial Disputes Act or the civil court where recourse to civil court is open according to the principles indicated herein.

(7) The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and un-encumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.

Reiterating the law laid down in *Krishna Kant's* case (*supra*), another three-judge bench of the Supreme Court held the jurisdiction of the civil court to be impliedly barred where a workman had challenged the order of dismissal passed by the municipal corporation. It was also held that the appropriate forum for resolution of such disputes is the forum constituted under the Industrial Disputes Act, 1947.[368] Speaking for the bench, Pattanaik J (as he then was) observed as follows:

> It may be borne in mind that the Industrial Disputes Act was enacted by the Parliament to provide speedy, inexpensive and effective forum for resolution of disputes arising between workmen and the employers, the underlying idea being to ensure that the workmen does not get caught in the labyrinth of civil courts which the workmen could ill-afford, as has been stated by this court in *Rajasthan State Road Transport Corp* case (*supra*). It cannot be disputed that the procedure followed by civil courts are too lengthy and consequently, is not an efficacious forum for resolving Industrial Disputes speedily. The power of Industrial Courts also is wide and such forums are empowered to grant adequate relief as they think just and appropriate. It is in the interest of the workmen that their disputes, including the dispute of illegal termination are adjudicated upon by an industrial forum.[369]

Views expressed by Willes J in *Wolverhampton* case,[370] how section 9 of the Code operates is illustrated by referring to the category of cases—

> One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it … The remedy … provided by the statute

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368. *Chandrakant Tukaram Nikam v Municipal Corporation of Ahmadabad*, AIR 2002 SC 997 : (2002) 2 SCC 542 : 2002 (2) Mah LR 823.
369. *Chandrakant Tukaram Nikam v Municipal Corporation of Ahmadabad*, AIR 2002 SC 997, at p 1003 : (2002) 2 SCC 542 : 2002 (2) Mah LR 823.
370. *Wolverhampton New Waterworks Co v Hawkesford*, [1859] 6 CBNS 336 : (1859) 141 ER 486.

> must be followed and it is not competent to the party to pursue the course applicable to cases of the second class.

Another three-judge bench of Supreme Court, in the case of *Balmukund Bairwa*,[371] held that where civil courts' jurisdiction is barred by statute, even then the civil court has jurisdiction when the statutory authority or tribunal acts without jurisdiction. SB Sinha J, speaking for the bench, observed as follows:

> The civil court, furthermore, being a court of plenary jurisdiction has the jurisdiction to determine its jurisdiction upon considering the averments made in the plaint but that would not mean that the plaintiff can circumvent the provisions of law in order to invest jurisdiction on the civil court although it otherwise may not possess. For the said purpose, the court in given cases would be entitled to decide the question of its own jurisdiction upon arriving at a finding in regard to the existence of the jurisdictional fact. It is also well settled that there is a presumption that a civil court will have jurisdiction and the ouster of civil court's jurisdiction is not to be readily inferred. A person taking the plea contra must establish the same.[372]

The question as to what extent the jurisdiction of the civil court is taken away with respect of matters entrusted to tribunals constituted by the legislature has been the subject matter of a number of decisions.[373] Whether a suit is or is not cognizable by a civil court depends on the cause of action pleaded and not on the form in which the relief is prayed for.[374]

A full bench of the Orissa High Court[375] was seized of a question that whether the Central Administrative Tribunal (CAT) constituted under the Administrative Tribunals Act, 1985 has jurisdiction to condone the delay where an application for review is filed beyond the prescribed period of limitation? The court recorded that section 19 of the Act postulates that subject to the other provisions of the Act, a person aggrieved by any order pertaining to any matter within the jurisdiction of CAT may make an application to it for the redressal of his grievance. Section 21 of the Act deals with limitation in filing the original application. Sub-section (3) of section 21 confers power on the CAT to condone the delay in filing the original application, if the applicant satisfies it that he was prevented by sufficient cause in not filing the application within the period of limitation prescribed in the Act. Section 22(3) provides that CAT shall have, for the purposes of discharging its functions under the Act, the same powers as are vested in a civil court under the CPC while trying a suit, in respect of certain matters. It further

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371. *Rajasthan State Road Transport Corp v Bal Mukund Bairwa*, (2010) 4 SCC 299 : 2010 (1) Civil Court Cases 545 (SC).
372. *Rajasthan State Road Transport Corporation v Bal Mukund Bairwa*, (2010) 4 SCC 299 : 2010 (1) Civil Court Cases 545 (SC).
373. *Secretary of State v Mask & Co*, AIR 1940 PC 105 : 67 IA 222; *Brij Raj Krishna v SK Shaw*, AIR 1951 SC 115 : (1951) SCR 145 : 1951 SCJ 238; *Magiti Sasmal v Pandab Bissoi*, AIR 1962 SC 547; *Jagadish v Ganga Prasad*, AIR 1959 SC 492 : (1959) SCJ 495; *Ujjambhai v State of Uttar Pradesh*, AIR 1962 SC 1621; *Wolverhampton New Waterworks Co v Hawkesford*, (1859) 6 CBNS 336 : (1859) 141 ER 486; *Neville v London Express Newspaper Ltd*, AIR 1919 Cal 368; *Liquidator, Janda Rubber Works v Collector of Bombay*, AIR 1950 EP 204; *Municipal Board, Bareilly v Abdul Aziz*, AIR 1934 All 795 : (1934) All LJ 739; *Manager, Court of Wards v Moolchand*, AIR 1949 Nag 226; *State of Bombay v Maharashtra Sugar Mills Ltd*, AIR 1951 Bom 68; *Bhaishankar v Municipal Corp of Bombay*, (1907) ILR 31 Bom 604; *Jyoti Prasad v Amba Prasad*, AIR 1933 All 358 : (1933) 55 All 406; *Mawal Kishore v Municipal Board*, AIR 1937 All 365 : (1937) All LJ 336; *Hamid Baig v Aresh Balda*, AIR 1956 Hyd 10 : (1955) ILR Hyd 737 (FB); *State Medical Faculty v Kshetra Bhusan*, AIR 1961 Cal 31 : (1960) 64 Cal WN 842; *Ranga Singh v Gurban Singh*, AIR 1961 P&H 166 : (1960) ILR 1 Punj 126; *Balakrishna Mehta v Corp of Madras*, AIR 1962 Mad 7 : (1962) ILR Mad 137 : (1962) 1 Mad LJ 92, (FB); *Patna Municipality v Ram Bachan*, AIR 1961 Pat 142 : (1961) ILR 40 Patna 121 : (1960) Pat LR 269 (FB); *Kishun Sah v Harinandan Prasad Sah*, AIR 1963 Pat 79 (FB).
374. *Chhedi v Smt. Indrapati*, AIR 1972 All 446.
375. *Akshaya Kumar Parida v UOI*, AIR 2015 Ori 49 : 2015 (I) Ori LR 544.

recorded that the CAT while entertaining an application for review, is conferred with the same power as are vested in a civil court under the CPC, i.e., for the purpose of entertaining an application for review, CAT acts as a civil court and is conferred to exercise all powers as are vested in a civil court. It was held that neither section 22 of the Act nor rule 17 of the Rules expressly excluded the applicability of section 5 of the Limitation Act, 1963. In the event an application for review is filed beyond the period of limitation along with an application for condonation of delay and the applicant satisfies CAT that he had sufficient cause for not preferring an application within the time, it can condone the delay.

The motor accidents claims tribunal, constituted under the provisions of the Motor Vehicles Act, 1988, is a "Court" for all intents and purposes, including the enforcement of its award, and therefore, it can exercise powers under sections 9, 47 and O XXI, CPC. It cannot be said that since the jurisdiction of civil court is barred by section 75 of the Act, the tribunal would not be justified in assuming and exercising the powers of the civil court by resorting, and applying, the CPC. The Motor Accident Claims Tribunal is vested with jurisdiction over cases of motor accident claims arising out of vehicular accidents. Obviously, no such claim proceedings for which the special motor accident claims tribunals are constituted, can lie before the civil court.[376]

Two tests are applied for the purpose of determining the exclusion of jurisdiction of the civil court:

(i) whether the legislative intent to exclude is expressed explicitly or by necessary implication;[377] and

(ii) whether the statute in question provides for an adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.[378]

Even where these tests are satisfied, a civil court would have jurisdiction to entertain a suit where the statutory provision under which the tribunal acts is challenged as being *ultra vires* the Constitution.[379] The bar created by the statutory provision excluding the civil court's jurisdiction cannot also operate where the plea raised goes to the root of the matter, and if upheld, would render the impugned order a nullity.[380] Where the special tribunal or authority acts *ultra vires* or illegally, the civil court has by virtue of section 9 of the Code, power to infer and set matters right. If the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil court has jurisdiction to examine the case.[381] Likewise, non-compliance by such a tribunal of the provisions of the statute conferring jurisdiction on it would vitiate the entire proceedings as being without jurisdiction;[382] but so long as such a tribunal acts within

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376. *Hirabhai Nanubhai Desai v State of Gujarat*, AIR 1991 Guj 1 (DB).
377. *Dewaji v Ganpatlal*, AIR 1969 SC 560 : (1969) 1 SCR 573.
378. *Ram Swarup v Shikarchand*, AIR 1966 SC 893 : (1966) 2 SCR 553; *State of West Bengal v Indian Iron and Steel Co Ltd*, AIR 1970 SC 1298 : (1970) 2 SCC 39.
379. *Bharat Kala Bhandar v Municipal Committee, Dhamangaon*, AIR 1966 SC 249; *State of Madhya Pradesh v Khoda Bai Patel*, AIR 1971 MP 254.
380. *Ram Swarup v Shikar Chand*, AIR 1966 SC 893; *Kalachand v D Chakraborty*, AIR 1967 Cal 172; *Sahakari Ganna Samiti v Mahendra*, AIR 1967 All 134.
381. *Gurbax Singh Chanda Singh v Financial Commr*, (1991) Supp 1 SCC 167; *Sardara Singh v Sardara Singh*, (1990) 4 SCC 90.
382. *Srinivasa Panthulu v State of Andhra Pradesh*, AIR 1971 SC 71 : (1969) 3 SCC 71 : (1970) SCR 714; *UOI v Tarachand Gupta & Bros.*, AIR 1971 SC 1558 : (1971) 1 SCC 486; *Desika Charryulu v State of Andhra Pradesh*, AIR 1964 SC 807; *Nityanand v Basudeb*, AIR 1971 Ori 80; *Jai Singh v Gram Panchayat*, AIR 1961 P&H 232; *Nani Gopal v State*, AIR 1966 Cal 42; *Vizianagaram Municipality v Bhaskara Rao*, AIR 1965 AP 326; *State of Kerala v Ramaswami Iyer*, AIR 1966 SC 1738; *M Jal v Bhai*, AIR 1975 Ori 219 : (1975) ILR Cut 798; *Hrishikesh v State*, AIR 1978 Cal 556.

and in exercise of jurisdiction conferred on it, its decision, however erroneous, is not a nullity and does not give jurisdiction to a civil court to entertain a suit challenging it. The principle is that whether such a decision is correct or not, it is one arrived at in exercise of the exclusive jurisdiction conferred upon it by the statute which sets it up.[383] Even a writ of *certiorari* would not issue except on the grounds that the impugned order was made without or in excess of jurisdiction or in violation of the principles of natural justice,[384] or that there was an error apparent on the fact of the record.[385]

In *Dhulabhai v State of Madhya Pradesh*,[386] the Supreme Court considered its earlier decisions on that aspect and laid down the following propositions:

(i) Where the statute gives finality to the orders of the special tribunals, the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(ii) Where there is an express bar of jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary if the statute creates a special right or liability and provides for the determination of the right or liability and further lays down that all questions about the said right or liability shall be determined by the tribunals so constituted, and whether remedies normally associated with action in civil courts are prescribed by the said statute or not.

(iii) Challenge to the provisions of the particular Act as *ultra vires* cannot be brought before tribunals constituted under the Act. Even the high court cannot go into that question on a revision or reference from the decision of the tribunals.

(iv) When a provision is already declared unconstitutional or constitutionality of any provision is to be challenged, a suit is open. A writ of *certiorari* may include a direction for refund if the claim is within the time prescribed by the Limitation Act, 1963, but it is not a compulsory remedy to replace a suit.

(v) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(vi) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular

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383. *Firm Illuri Subbayya Chetty & Sons v State of Andhra Pradesh*, AIR 1964 SC 322 : (1964) 1 SCR 752; *Ujjam Bai v State of Uttar Pradesh*, AIR 1962 SC 1621; *Kunheema Umma v Balkrishnan*, AIR 1967 Ker 97.
384. *Ebrahim Aboobakar v Custodian General*, AIR 1952 SC 319.
385. *Ujjam Bai v State of Uttar Pradesh*, AIR 1962 SC 1621; *Thangamani v Govt of Madras*, AIR 1965 Mad 225, 232.
386. *Dhulabhai v State of Madhya Pradesh*, AIR 1969 SC 78 : (1968) 3 SCR 662; *S Venkatramaiah v K Venkataswamy*, AIR 1976 AP 402.

Act. In either case, the scheme of the particular Act must be examined because it is a relevant inquiry.

(vii) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set out apply.

Though the rule generally expressed is that it is only where a tribunal acts without or in excess of its jurisdiction that its decision becomes a nullity, it has to be noted that the word "jurisdiction" has both a wide and a narrow meaning. There would be many cases where although the tribunal had jurisdiction to enter upon an inquiry, it has done or failed to do something in the course of such inquiry which is of such a nature that its decision is a nullity, eg, giving its decision in bad faith, or a decision which it had no power to make, or failing to comply with the principles of natural justice, or failing to decide the question entrusted to it and deciding some other question or refusing to take into account or basing its decision on something it could not take into account, etc. The word "jurisdiction" thus, has to be taken in its narrow and not wide meaning.[387] Determination of a question other than the one which the statute directs the tribunal to decide would be one in excess of or without jurisdiction.[388]

The allegation was that certain action of the electricity board and its officers was *mala fide* and without authority. Suit was for mandatory injunction against it. It was held that such a suit cannot be dismissed at the threshold without considering the merits. A statute can make provision, expressly, or by necessary implication, for barring the jurisdiction of the civil courts in respect of a particular matter. But the mere conferment of special jurisdiction on a tribunal in regard to certain specified matters does not, in itself, exclude the jurisdiction of the civil courts. Thus, when it is alleged that certain action taken by the electricity board and its officers is *mala fide* and without proper authority, a suit for mandatory and prohibitory injunction would be maintainable against the electricity board, in order to restrain it from drawing up an electric line through the plaintiff's property and for removing the pole already fixed.[389] Where the claim of a person to compensation for land acquisition is not adjudicated upon in the land acquisition proceedings, he can sue separately the person who had actually received the compensation to recover his share.[390]

Under section 443 of the Calcutta Municipal Corporation Act, 1951, the corporation is entitled to issue licences against the payment of fees to theatres, circuses, cinema houses, dancing halls and other similar places of public resort, recreation or amusement, but not to other establishments. A restaurant which provides items of amusement occasionally or incidentally in its main business to its customers, is not a "place of public resort, recreation or amusement" similar to a theatre, etc, which form a class by themselves and it does not fall within the mischief of section 443. The mere fact that a person had applied and obtained a licence earlier, will not confer jurisdiction on the authority concerned to require a licence.[391]

R, who had virtually settled in Trivandrum, for over a long time, had a wife (the plaintiff), for whom he had much attachment. He had a friend (defendant) with whom he had extraordinary intimacy. *R* used to make available to the defendant (friend of *R*) substantial amounts from time to time. Under the operative provisions of his will, *R* bequeathed his entire assets in favour of the two, with equal rights of ownership and enforcement. The defendant started harassing

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387. *Anisminic Ltd. v Foreign Compensation Commission*, (1969) 1 All ER 208, 213; *R v Fulham, Hammersmith and Kensington Rent Tribunal*, (1953) 2 All ER 4.
388. *UOI v Tarachand Gupta & Bros.*, AIR 1971 SC 1558 : (1971) 1 SCC 486.
389. *Secretary, K.S.E.B. Trivandrum v M Sainaba*, AIR 1990 Ker 50 (Varghese Kallinath J).
390. *Hira Singh v Saini*, AIR 1987 Del 168.
391. *East India Hotels Ltd v Corp of Calcutta*, AIR 1988 Cal 105.

the plaintiff after *R*'s death. Hence, she filed a suit for accounts. It was held that the background of antecedents conducted between the parties and the intimate relationship between them even during *R's* lifetime, the position of confidence and trust which the defendant had occupied *vis-à-vis R* and the arrangement which *R* made for the right to, and enjoyment of, his assets, showed a clear case of strong fiduciary relationship. In such fiduciary relationship, a right of accounting would certainly arise, as between the defendant and the widow of *R*.[392]

A person aggrieved in respect of election to Parliament or to a state legislature can seek remedy provided in the Constitution, that is before the election tribunal.[393] The same is the position as regards election to local bodies,[394] and gram panchayats.[395] The principles above cited are also applicable when jurisdiction of civil courts is invoked against decision of domestic tribunals.[396]

In the *Mask & Co's* case,[397] the sole question before the Privy Council was the jurisdiction of the civil court to entertain a suit to recover an excess amount of customs duty from the company, and it was dealing with the effect of Sea Customs Act, 1878, section 188. It was held by the Privy Council that it is well-settled law that the exclusion of the jurisdiction of the civil court is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied.[398] Lord THANKERTON, who delivered the opinion of the board, however, proceeded to add that "it is also well settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure".[399]

In *Illury Subbayya Chetty's* case,[400] the Supreme Court accepted the observations made by the Judicial Committee in *Mask's* case (*supra*). In that case, a matter relating to section 18A of the Madras General Sales Tax Act, 1939, was under consideration which provided a bar to civil suits. It was held that the bar to jurisdiction of civil courts under section 18A would apply as an alternative remedy is provided under the Act.[401] However, referring to the observations of the Privy Council in *Mask's* case (*supra*), Gajendragadkar J (as he then was), speaking for the five-judge bench in the above case stated that the own-compliance with the provisions of the statute to which reference was made by the Privy Council, must be meant to be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction.[402]

In another case, *Raleigh Investment Co*,[403] the Privy Council considered the effect of section 67A of the Income Tax Act, 1961, where the words used were exactly similar to the

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392. *A Vasudevan Pillai v K Malathy Amma*, AIR 1988 Ker 300.
393. *Ponnusami v Returning Officer*, AIR 1952 SC 64 : 1952 SCR 218; *Durga Shankar Mehta v Raghuraj Singh*, AIR 1954 SC 520 : (1955) 1 SCR 267.
394. *Mahedar Rahaman v Kanti Chandra*, (1934) 61 Cal 980 : 1935 AC 10; *Ghulam Nazamuddin v Aktar Hussain*, (1933) 55 All 1008 : 1933 AA 765; *Tarachand v Abdul Kasem*, (1938) 42 CWN 441 : 1938 AC 359.
395. *Jodhi Singh v Vedabarat Sarma*, 1956 AP 205, Re industrial disputes see *Premier Automobiles Ltd. v Wadke*, AIR 1975 SC 2238.
396. *State Medical Facility v Kshite Bhusan*, 1961 AC 31.
397. *Secretary of State v Mask & Co*, AIR 1940 PC 105 : (1940) 67 IA 222.
398. *Secretary of State v Mask & Co*, AIR 1940 PC 105 : (1940) 67 IA 222, at p 236.
399. *Secretary of State v Mask & Co*, AIR 1940 PC 105 : (1940) 67 IA 222.
400. *Firm of Illuri Subbayya Chetty & Sons v State of Andhra Pradesh*, AIR 1964 SC 322 : (1964) 1 SCR 752.
401. *Firm of Illuri Subbayya Chetty & Sons v State of Andhra Pradesh*, AIR 1964 SC 322 : (1964) 1 SCR 752.
402. *Firm of Illuri Subbayya Chetty & Sons v State of Andhra Pradesh*, AIR 1964 SC 322 : (1964) 1 SCR 752, at p 763.
403. *Raleigh Investment Co Ltd v Governor-General in Council*, (1947) 74 IA 50.

words used in the Madras General Sales Tax Act, 1939. It was observed that "the phrase 'made under this Act' describes the provenance of the assessment: it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use is the test".

Under the Madhya Bharat Sales Tax Act, 1950, the State Government issued a notification imposing sales-tax and collected it. The assessees filed suits for refund on the ground that the tax was illegal. In the meantime, the notification was declared constitutional. It was held by the Supreme Court in *Dhulabhai v State of Madhya Pradesh*,[404] that when the notifications were declared void, the remedy by way of civil suit was open.

The civil court does not suffer from any inherent lack of jurisdiction. Where there is a special tribunal conferred with jurisdiction or exclusive jurisdiction to try particular class of cases even then the civil court can entertain a civil suit of that class on availability of a few grounds. An exclusion of jurisdiction of civil court is not to be readily inferred. See *Dhulabhai v State of Madhya Pradesh*.[405] An objection as to the exclusion of civil court's jurisdiction for availability of alternative forum should be taken before the trial court and at the earliest failing which the higher court may refuse to entertain the plea in the absence of proof of prejudice.[406]

A Division Bench of the Karnataka High Court has held that Karnataka Public Moneys (Recovery of Dues) Act, 1980, does not oust the jurisdiction of the civil court. The bar created by section 3(5) of the Act is of a very limited nature. The above provision bars suits in civil court for recovery of debt; therefore, the bar is against the creditor and not the borrower. Thus, where a guarantor claimed the declaratory relief and injunction that his guarantee stands extinguished, the jurisdiction of civil court cannot be barred as that question cannot be decided before the special tribunal provided under the Karnataka Public Moneys (Recovery of Dues) Act, 1979.[407]

In a case under the SARFAESI Act, 2002, it was held by the Calcutta High Court that the ouster of the civil court's jurisdiction applies only to matters which either of the tribunals referred to in section 34 of the Act is authorised to entertain and determine. If it is the petitioner's case that in view of the scope of the tribunal's authority under section 17(3) of the Act, the grievance that has been brought here cannot be determined by the tribunal, then section 34 would not come into play and there is nothing to bar the jurisdiction of civil court.[408]

[s 9.41] Tribunals of Limited and Specified Jurisdiction — Jurisdiction of Civil Court Barred

In the following cases, the jurisdiction of civil court was found barred as the subject matter of the dispute was found within the limited jurisdiction of the tribunal concerned:

(a) The motor accidents claims tribunal, constituted under the provisions of the Motor Vehicles Act, 1988, is a "court" for all intents and purposes, including the enforcement of its award, and therefore, it can exercise powers under sections 9, 47 and O XXI of the CPC. It cannot be said that since the jurisdiction of civil court is barred by section 75 of the Act, the tribunal would not be justified in

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404. *Dhulabhai v State of Madhya Pradesh*, AIR 1969 SC 78 : (1968) 3 SCR 662 (five-judge bench).
405. *Dhulabhai v State of Madhya Pradesh*, AIR 1969 SC 78 : (1968) 3 SCR 662.
406. *Ramesh Chand Ardanatiya v Anil Panjwani*, AIR 2003 SC 2508 : (2003) 7 SCC 350.
407. *R Gopalakrishna v Karnataka State Financial Corp, Bangalore*, AIR 2008 Kant 77 : ILR 2008 Kant 2084 (DB).
408. *Smt. Annapurna v State of West Bengal*, AIR 2009 Cal 236.

assuming and exercising the powers of the civil court by resorting, and applying, the CPC. The motor accident claims tribunal is vested with jurisdiction over cases of motor accident claims arising out of vehicular accidents. Obviously, no such claim proceedings for which the special motor accident claims tribunals are constituted, can lie before the civil court.[409]

(b) The "damage to any property of a third party" as contemplated under section 165 of the Motor Vehicles Act, 1988 would mean the direct damage caused to the property of the third party. Where the injury claimed is that sickness has been caused on account of pollution being caused in the water drain, consequent to capsizing of phenol carrying tanker, the injury claimed has no direct or proximate connection with the vehicle involved in the accident, consequently the civil court alone would have jurisdiction to entertain in such case to determine the damages.[410] The claims tribunal under the Railway Claims Tribunal Act, 1987, is a tribunal of limited and specified jurisdiction. It can exercise jurisdiction and power as conferred upon it under the said Act only. Section 13(1) of the Railway Claims Tribunal Act, 1987, provides by jurisdiction, power and authority to the claims tribunal and by virtue of the express provisions contained in section 15 thereof, the jurisdiction of the civil court or any other authority is barred only in regards to the matters specified in section 13(1). Therefore, in regard to matters other than the matters covered under section 13(1) of the said Act, the civil court will have jurisdiction to entertain a civil suit.[411] Where a suit filed by a company to which siding facility was given by railways, on ground that railways were demanding excess transportation charges from the company, for loading wagons and additional charges for empty wagons which was not envisaged by the agreement between the parties and claim also was made for refund for excess charge already made, it was held that it was a subject matter which fell within the exclusive jurisdiction of the tribunal. It could not be held that the suit was founded purely on contract and required to be filed in the civil court to interpret its terms and conditions.[412] Cases claiming compensation on account of non-delivery by the railways will be entertained by the claims tribunal established in view of the provision of Railway Claims Tribunal Act, 1987, and not the civil court.[413]

(c) Section 15 of Haryana Public Premises and Land (Eviction and Rent Recovery) Act, 1972, bars the jurisdiction of the civil court in relation to the proceedings taken under the 1972 Act for eviction of a person in unauthorised occupation of public premises. Whether the premises in question is a public premise or not, is a matter which is required to be determined by the collector while exercising the power conferred on him under section 25 of the Act, the jurisdiction of the civil court in this respect is barred.[414]

(d) The land and acquisition court is a specially constituted court, and if there is any mis-description either in the identity in the property or in its measurement, the

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409. *Hirabhai Nanubhai Desai v State of Gujarat*, AIR 1991 Guj 1 (DB); *Anwar v First Addl District Judge*, (1986) 4 SCC 21.
410. *United India Insurance Co Ltd v PN Thomas*, AIR 1999 Ker 174 (DB).
411. *Ratnakar Tanbaji Itankar v UOI*, AIR 1994 Bom 132.
412. *Gwalior Sugar Co Ltd v UOI*, AIR 1996 MP 219 (DB).
413. *Madhya Pradesh State Co-op Mktg. Federation Ltd v UOI*, AIR 1998 MP 143.
414. *State of Haryana v Khalsa Motors Ltd*, (1990) 4 SCC 659.

plaintiff can get them rectified by approaching that court, which has a special machinery for that purpose.[415]

(e) In cases where the liability of the erstwhile Hindustan Co-operative Insurance Society Limited is alleged, their liability became the liabilities of Central Government and later on of Life Insurance Corporation of India. It being so, only the tribunal created under the Act and not any civil court including the high court, shall have the power to entertain and adjudicate upon the dispute raised by the plaintiff. [416]

(f) In case of eviction of occupants from public premises, the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, provides the mode and forum. The estate officer appointed under the Act, though an executive officer, is required to decide the matter judiciously by reasoned order after giving the person affected reasonable opportunity of presenting his case and an appeal against his order is provided before the district judge. Thus, section 15 of the Act has taken away the complete jurisdiction of the civil court to entertain suit for eviction of any person who is in unauthorised possession of public premises.[417]

(g) The Provincial Insolvency Act, 1920 (5 of 1920) provides for administration of property of the debtor. The court may appoint an interim receiver and/or a receiver. The Insolvency Act also provides for distribution of property of the insolvent. The scheme of the Act shows that it is a complete Code in itself. A complete and effective remedy is provided under the Act. Therefore, the creditor is not entitled to file an administration suit before the civil court.[418]

The question as to whether the Limitation Act, 1963, applies only to courts and not to tribunals arose for consideration before the Supreme Court in *Madhya Pradesh Steel Corp v CCE*.[419] While examining the question, the court observed that a number of precedents have established that the Limitation Act, 1963, applies only to courts and not to tribunals or other quasi-judicial bodies. The court held that the expression "courts" referred to in various provisions of the Limitation Act, 1963, refers only to those courts, which are part of the judicial branch of the state. In the instant case, section 14 of the Limitation Act, 1963, was in question as against appeals under section 128 of the Customs Act, 1962. After holding that section 14 did not apply to tribunals and other quasi-judicial bodies, the Supreme Court further held that nevertheless the general principle underlying section 14 would certainly apply to tribunals and quasi-judicial bodies as well. Conclusively, the Supreme Court ordered that the law, i.e., section 14 as such, does not apply but the underlying principle does. Therefore, an argument that the Limitation Act, 1963, does not apply to tribunals and quasi-judicial bodies can be raised in appropriate cases.

The situation as can be understood is that the applicability of the Limitation Act, 1963, pertaining to tribunals and quasi-judicial bodies is therefore technically inapplicable but virtually applicable. In *Fatehji & Co v LM Nagpal*,[420] the Supreme Court was seized of a question as to the applicability of limitation period prescribed under Article 54 to a suit for specific performance of the agreement to sell immovable property, where the property had

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415. *UOI v Krishnaswamy*, AIR 1996 Mad 238.
416. *Nirupama Sarkar v Life Insurance Corporation of India*, AIR 1996 Cal 417.
417. *Kaikhosrou (Chick) Kavasji Framji of Indian Inhabitant v UOI*, AIR 2009 (NOC) 2981 (Bom) : 2009 (4) AIR Bom R 808 (DB).
418. *K Vijayarajan v DK Kalavathy*, AIR 2007 Ker 25 : 2006 (2) Ker LJ 670 (DB).
419. *Madhya Pradesh Steel Corp v CCE*, (2015) 7 SCC 58.
420. *Fatehji & Co v LM Nagpal*, AIR 2015 SC 2301 : (2015) 8 SCC 390.

been delivered in part-performance of the agreement. The Supreme Court, while holding that Article 54 does not make any difference between a case where possession of the property has been delivered in part-performance of the agreement and a case where it is not, held that "[T]he fact that the plaintiffs were put in possession of the property agreed to be sold on the date of agreement itself would not make any difference with regard to the limitation of filing the suit for specific performance."

[s 9.42] Civil Courts Jurisdiction Not Found Barred — Instances

In the following cases, the jurisdiction of civil court was not found barred despite jurisdiction of special tribunal, empowered to deal with the subject matter of the dispute:—

(a) Appellant insured a consignment of gold with the respondent-insurance company. The delivery of the gold was to be made to a consignee in Kuwait. Due to the invasion of Kuwait by the Iraqi forces, the consignment was lost from the strong room at the Kuwait Airport. The appellant's claim before the National Commission was dismissed as no deficiency in service was found; however, the right of the appellant to approach the civil court remained alive.[421]

(b) Even where finality is accorded to the orders passed by the special tribunal, one will have to see whether such special tribunal has power to grant relief which civil court would normally grant in a suit and if the answer is in negative, it would be difficult to imply or infer the exclusion of civil court's jurisdiction.[422]

(c) The allegation was that certain action of the electricity board and its officers was *mala fide* and without authority. Suit was for mandatory injunction against it. It was held that such a suit cannot be dismissed at the threshold without considering the merits. A statute can make provision, expressly, or by necessary implication, for barring the jurisdiction of the civil courts in respect of a particular matter; but the mere conferment of special jurisdiction on a tribunal in regard to certain specified matters does not, in itself, exclude the jurisdiction of the civil courts. Thus, when it is alleged that certain action taken by the electricity board and its officers is *mala fide* and without proper authority, a suit for mandatory and prohibitory injunction would be maintainable against the electricity board in order to restrain it from drawing up an electric line through the plaintiff's property and for removing the pole already fixed.[423]

(d) Where the claim of a person to compensation for land acquisition is not adjudicated upon in the land acquisition proceedings, he can sue separately the person who had actually received the compensation, to recover his share.[424]

(e) In the absence of assessment, no appeal is provided under section 139 of Rajasthan Municipalities Act, 1959, as there was nothing on record to show that there was an assessment of tax against the company or that there was a notice of demand made under section 149 for payment of octroi duty, remedy is not provided under section 149 of the said Act to oust the jurisdiction of the civil court as barred by necessary implication.[425]

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421. *Jewellers Narandas & Sons v Oriental Insurance Co Ltd*, (1995) Supp 3 SCC 406.
422. *State of Tamil Nadu v Ramalinga Samigal Madam*, (1985) 4 SCC 10.
423. *Secretary, KSEB, Trivandrum v M Sainaba*, AIR 1990 Ker 50.
424. *Hira Singh v Saini*, AIR 1987 Del 168.
425. *JK Industries Ltd, Kankroli v Municipal Board, Rajasthan*, AIR 1997 Raj 42.

(f) Under section 443 of the Calcutta Municipal Corporation Act, 1951, the corporation is entitled to issue licences against the payment of fees to theatres, circuses, cinema houses, dancing halls and other similar places of public resort, recreation or amusement, but not to other establishments. A restaurant which provides items of amusement occasionally or incidentally in its main business to its customers, is not a "place of public resort, recreation or amusement" similar to a theatre, etc, which form a class by themselves and it does not fall within the mischief of section 443. The mere fact that a person had applied and obtained a licence earlier, will not confer jurisdiction on the authority concerned, to require a licence.[426]

(g) Where there was a dispute as to nature of land and board of revenue held it to be grove in appeal, the possession of the land was given to the claimant which affected rights of the village people; subsequent suit for declaration of title, permanent injunction and possession by villagers in representative capacity, by alleging that the land was grazing land and not grove, was found maintainable, since it was the only remedy available to the villagers and not barred by section 257 of the Madhya Pradesh Land Revenue Code, 1959 (20 of 1959).[427]

(h) Right to pre-emption under section 22(2) of the Hindu Succession Act, 1956, can be enforced by filing an application and not by a regular suit. The court before whom the application lies is the one within whose territorial limits the immovable property is situated or business is carried on. However, if the transfer has already taken place, the purchaser acquires joint right in the property subject to the right of pre-emption of other Class-I heirs. Thus, the procedure prescribed in section 22(2) of the Act which is meant for proposed or "intended transfer" would not be applicable and the pre-emptor can enforce the right by filing a suit under section 9 of the Code.[428]

(i) Where under Mysore Religious and Charitable Institutions Act, 1927, suit alleging mismanagement of trust property is filed, the bar to jurisdiction of civil court would not apply in view of serious allegations of fraud/forgery. Such serious allegations can never be inquired into in a summary manner by a Muzrai Officer in the type of enquiry contemplated under section 17 of the Act. Therefore, provisions of section 18 are not meant to be a substitute for judicial proceedings.[429]

(j) When there is a dispute between parties regarding establishment of title over the suit property on the basis of decree of pre-emption, it cannot be said that there was any challenge to the land acquisition proceedings or to the amount of compensation determined under the Land Acquisition Act, 1894. If the plaintiffs succeed in the suit in proving their title over the suit property, they would be entitled to the declaration sought for. The civil court would have jurisdiction to try and entertain suit. The award announced by the collector in respect of acquisition of land is conclusive as between the persons interested and the collector in respect of the amount of compensation. But the jurisdiction of civil court to entertain dispute regarding the entitlement of the said compensation is not barred.[430]

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426. *East India Hotels Ltd v Corp of Calcutta*, AIR 1988 Cal 105.
427. *Madho Singh v Moin Singh*, AIR 2004 SC 4316 : (2004) 12 SCC 214.
428. *Arati Das v Bharati Sarkar*, AIR 2009 Cal 8 : 2008 (3) Cal LT 470 (DB).
429. *Sudhir G Angur v M Sanjeev*, AIR 2006 SC 351 : (2006) 1 SCC 141.
430. *Shyam Lal v Sham Lal*, AIR 2007 P&H 89 : 2007 (2) Rec Civ R 484.

(k) Where a suit is filed against bank for recovery of amount towards damages based on unauthorised deduction of certain amount by bank from the account of the plaintiff, it was held by the Madras High Court that the suit is not barred by the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. In the instant case, the suit was not only against bank but also against third party on whose complaint the deduction was made by the bank. Moreover, the claim in the suit was not a counter-claim against the bank and the cause of action alleged against the third party could not be decided by the DRT.[431]

[s 9.43] Decision of Tribunals on Question of Jurisdiction

When a tribunal has jurisdiction, under a statute, to decide a dispute, if and when certain facts exist, its decision can be attacked in civil courts on the ground that those facts do not exist, the fact that the tribunal has held that they exist would not alter the position, because no tribunal with limited authority can, by its erroneous decision, usurp jurisdiction which it does not possess;[432] but, when the statute has, in addition, conferred on the tribunal authority to decide whether those jurisdictional facts exist, then its decision on that question is final and not open to review by civil courts.[433]

[s 9.44] Bar with Respect to Revenue Matters

There is in general a bar to civil courts dealing with matters affecting government revenue. It is well recognised that where a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all other forums and modes of seeking it are excluded. Construed in the light of this principle, it is clear that sections 84 and 86 of the Punjab Municipal Act, 1911, bar, by inevitable implication, the jurisdiction of the civil court where the grievance of the party relates to an assessment or the principle of assessment under this Act;[434] but the jurisdiction of civil courts to try suits brought by superior holders to recover their dues from inferior holders is not barred by section 85 of the Bombay Land Revenue Code, 1879.[435] Section 4(c) of the Bombay Revenue Jurisdiction Act, 1876, likewise is not a bar to a suit in which there is a claim arising out of the alleged illegality of proceedings taken for the realisation of land revenue.[436] Language of section 56 of Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act, 1948, more specially the provisions of sub-section (1) makes the order of settlement officer final and which cannot be questioned in any court. The jurisdiction of the civil court in this respect is ousted.[437]

The suit of the plaintiffs is not for the partition of the agricultural holding, but the plaintiffs, after getting order of partition from the revenue court under section 178 of the Madhya Pradesh Land Revenue Code, 1959 and also symbolic possession of allotment of

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431. *Bank of Baroda v Mars Overseas Textiles*, (2007) 1 CTC 683 (Madurai Bench).
432. *State of Madhya Pradesh v Shiv Kunwarbai*, AIR 1971 SC 1477 : (1971) 2 SCC 152; *Munni Devi v Gokalchand*, AIR 1970 SC 1727 : (1969) 2 SCC 879; *Srinivasa v State of Andhra Pradesh*, AIR 1971 SC 71 : (1969) 3 SCC 71; *D. Venkata Reddy v B Bushi Reddy*, AIR 1971 AP 87.
433. *Brij Raj Krishna v SK Shaw*, AIR 1951 SC 115; *Chambe Jagadish Prasad v Ganga Prasad*, AIR 1959 SC 492 : (1959) Supp 1 SCR 733; *Zaki v State of Bihar*, AIR 1953 Pat 112; *Babu Rao v Dalsukh*, AIR 1955 Bom 89; *Prakash Textile Mills Ltd v Manilal*, AIR 1955 P&H 197 : (1955) ILR Punj 988.
434. *Munshi Ram v Municipal Committee, Chheharta*, (1980) Supp SCC 781.
435. *Vishwanath v Kondaji*, (1918) ILR 42 Bom 49 : 43 IC 995.
436. *Gangaram v Dinkar*, (1913) ILR 37 Bom 542.
437. *Annamreddi Bodayya v Lokanarapu Ramaswamy, (deceased)*, (1984) Supp SCC 391.

specific area and the defendant in spite of dismissal of his suit, has not handed over the possession and is occupying the field wrongfully and illegally without any interest; therefore, such a suit for possession and *mesne* profits, based on title is under sections 250 and 257 of the CPC. That is the settled view.[438] Where there was a dispute as to nature of land and board of revenue held it to be grove, in appeal, the possession of the land was given to the claimant which affected rights of the village people; subsequent suit for declaration of title, permanent injunction and possession by villagers in representative capacity, by alleging that the land was grazing land and not grove, was found maintainable since it was the only remedy available to the villagers and not barred by section 257 of the Madhya Pradesh Land Revenue Code, 1959 (20 of 1959).[439] The determination of question of *bhumi-swami* rights lies within the province of the civil court except the cases falling within the ambit of those specified under section 257 of the Madhya Pradesh Land Revenue Code, 1959 (20 of 1959). For determination of any dispute in respect of cultivatory right or any other right in respect of the land which stand excluded from the preview of section 57(1) of the CPC, the jurisdiction of the civil court to adjudicate upon the dispute is expressly protected under section 111 of the CPC, subject to the exceptions carved out in section 257 of the CPC. Moreover, although in section 111 of the CPC, it is provided that the civil courts shall have jurisdiction to decide any dispute to which state government is not a party relating to any right which is recorded in the record of rights set by virtue of the provisions contained in O I, rule 3B of the CPC as applicable for the State of Madhya Pradesh (*vide* Madhya Pradesh Act No 15 of 1984), the implement of the same in any proceedings effecting the interest of the state in any manner has been made mandatory.[440] The civil court had jurisdiction to try the suit for injunction when the title arose only incidentally. The objection to the jurisdiction of the civil court to try the suit on the ground that revenue court had exclusive jurisdiction is not sustainable, the suit being one for permanent injunction and the question of title arising only incidentally.[441] Some municipal Acts expressly bar suits relating to the assessment and levy of municipal rates and taxes, but the civil courts have, nevertheless, jurisdiction to entertain such suits if it is shown that the assessment is *mala fide* or perverse[442] or made on a wrong basis and *ultra vires*[443] or that the procedure enjoined by the Act has not been followed.[444] The Privy Council has observed that on principle it is for the civil court to determine in the last resort the limits of the powers of a court of special jurisdiction.[445] In a suit to restrain the municipal authority from recovering the assessed sum on the ground that the assessment was illegal and *ultra vires*, the Lahore High Court held that the suit was not cognizable by the civil courts.[446] This decision, it is submitted, is contrary to the observations of the Privy Council in the case mentioned below.[447]

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438. *Bhagwati Prasad v UOI*, AIR 1995 MP 205.
439. *Madho Singh v Moin Singh*, AIR 2004 SC 4316 : (2004) 12 SCC 214.
440. *State of Madhya Pradesh v Balveer Singh*, AIR 2001 MP 268 (FB). See also *Ram Dayal v State of Madhya Pradesh*, AIR 2006 MP 172.
441. *Hira Lal v Gajjan*, (1990) 3 SCC 285.
442. *Kasandas v Ankleshwar*, (1902) 26 ILR Bom 294.
443. *Manager Court of Wards v Moolchand*, AIR 1949 Nag 226; *Dhuplal v Ramdhani*, AIR 1943 Pat 353; *Chairman, Giridit Municipality v Srish Chandra*, (1910) ILR 35 Cal 859; *Deb Narain v Chairman Banipur*, (1914) ILR 41 Cal 168; *Chairman Municipality, Chapra v Basdeo*, (1912) ILR 37 Cal 374; *Secretary of State v Hughes*, (1914) ILR 38 Bom 293.
444. *Municipal Council of Tanjore v Umanala*, (1900) ILR 23 Mad 523; *Joshi v Dabor*, (1883) ILR 7 Bom 399.
445. *Mohammad Nawaz v Bhagata Nand*, AIR 1938 PC 219 : 65 IA 301.
446. *Nanbahar Hussain v Municipal Committee*, AIR 1935 Lah 970 : (1935) 16 Lah 529.
447. *Mohammad Nawaz v Bhagata Nand*, AIR 1938 PC 219 : (1938) Lah 65 IA 301.

It is settled law that the exclusion of the jurisdiction of the civil court is not to be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. The provisions of law which seek to oust the jurisdiction of civil court need to be strictly construed. It is true that the question of jurisdiction depends upon the allegations in the plaint and not the merits or the result of the suit. However, in order to determine the precise nature of action, the pleadings should be taken as a whole. The real point is not the stray or loose expression which abounds inartistically drafted plaints, but the real substance of the case gathered by confusing pleadings as a whole.[448]

Under the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Holdings Act (10 of 1954), consolidation proceedings remain in operation till the parties are put in possession of the lands which have fallen to their shares under the consolidation scheme. It is the duty of the authorities under the Act to put the parties in the physical possession of the lands in accordance with the Act and Rules. No symbolic possession has been envisaged, nor can the same be inferred, being totally foreign to the object and implementation of the scheme for consolidation of holdings. Therefore, the assertion of the plaintiffs that they were put in possession of the property and immediately dispossessed by the defendants, cannot be considered to be without any substance.[449] In a matter falling within the scope of adjudicatory function assigned to the consolidation authorities under the Uttar Pradesh Consolidation of Holdings Act, 1953, the jurisdiction of the civil court to entertain the suit in respect of said matters was expressly barred by section 49 of the Act.[450] When the appellant and respondent both were allottees under the consolidation scheme, the question as to who should be in possession of any portion of land which is covered by the consolidation scheme is a question which can be only decided by consolidation officer under section 21(3) of Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (62 of 1947). The jurisdiction of civil courts is barred by section 36A of the said Act.[451] The bar to the jurisdiction of the civil court is not applicable to a suit between two contenders to the title of the land, not in any way affecting the scheme of consolidation under the Madhya Pradesh Land Revenue Code, 1959.[452] Section 242 of the Uttar Pradesh Tenancy Act, 1939, prohibits the jurisdiction of civil courts only in respect of the rights given and claims arising under the Tenancy Act. The relief for declaration and the decree granted under section 59 of the Act was vitiated by fraud and collusion. Such a relief cannot be given by a revenue court; hence, the suit became maintainable under section 9 of CPC.[453]

In view of the express bar under section 106 of the Maharashtra Land Revenue Code, 1966, no directions can be given to a collector in a decree to amend the survey records.[454] The civil court has no jurisdiction to go into the question of conferment of proprietary rights under tenancy law. Thus, the question of whether the possession of land by a tenant as tenant at will on payment of rent had been converted into full ownership cannot be decided by civil court because of the ouster of civil court's jurisdiction under section 101 of the Himachal Pradesh Tenancy and Land Reforms Act, 1974.[455]

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448. *Bismillah v Janeshwar Prasad*, (1990) 1 SCC 207.
449. *Bhup Singh v Tulsi Ram*, AIR 1991 HP 29.
450. *Sita Ram v Chhota Bhondey*, (1991) Supp 1 SCC 556.
451. *Yashwant Ramachandra Dhumal v Shri Shanker Maruti Dhumal*, AIR 2001 Bom 384.
452. *Beni Madhav Singh v Ram Naresh*, (1998) 8 SCC 751.
453. *Ram Prasad (deceased) v Assistant Director of Consolidation*, (1994) Supp 2 SCC 228.
454. *Narendra Vaikunt Raikar v Amaral Pareira*, 2007 (2) AIR Bom R 503 (Goa Bench).
455. *Bishan Singh v Smt. Swantantar Devi*, AIR 2007 HP 50 : 2007 (1) Shim LC 404.

The Karnataka High Court has held that the jurisdiction of civil court is not excluded either expressly or impliedly by the provisions of the Karnataka Land Revenue Act, 1964, or by the State Financial Corporations Act, 1951.[456]

In a case under the Mines and Minerals (Development and Regulation) Act, 1967 and Uttar Pradesh Minor Minerals (Concession) Rules, 1963, there was a demand for payment of royalty. The order of demand was not challenged and became final. Under notification issued by the State Government, arrears of are liable to be recovered as arrears of land revenue. Under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951, section 330(c) civil suits in respect of land revenue are barred. Thus, the consequential recovery of the amount of royalty so demanded become recoverable as arrears of land revenue and civil suit in respect of it would be barred.[457]

On the question of whether persons who succeeded the recorded tenants were rightly recorded as tenants or not, the Supreme Court has held that this is a question which is determinable by revenue authority and civil court has no jurisdiction.[458]

In cases where section 331A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951, are applicable, the matter has to be decided by the assistant collector and not the civil court.[459]

Where the tenure holder in possession of land has filed suit for cancellation of the sale deed simpliciter, with no other relief, the civil court's jurisdiction would not be barred by invoking section 331 of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 (1 of 1951). Suit for cancellation of a void document will generally lie in the civil court and party cannot be deprived of his right for getting this relief under the law except when a declaration of title or status of a tenure holder is necessarily involved, where relief of cancellation of sale deed is surplus. Thus, so far as suit for cancellation of void sale deed is concerned, the suit filed before the civil court is legally maintainable specifically in view of section 31 of the Specific Relief Act, 1963, which declares that relief for cancellation of the sale deed can be granted by the civil court only.[460]

A recorded tenure holder can institute suit for cancellation of sale deed, if alleged to be void in view of plaint allegations, in a civil court. An executant of deed or his successor could file suit in civil court for cancellation of void document/instrument. But a third person who is not recorded tenure holder or executant of the sale deed or his predecessor/successor is not competent to institute suit in a civil court in view of the fact that his claim necessarily involves declaration of his right, and the remedy lies in revenue courts only. It is left open to the plaintiff to choose whether his rights would be insulated by seeking cancellation of sale deed in civil court or by filing a suit for declaration of his rights as tenure holders. In case he chooses that due to existence of a registered sale deed which according to the plaint allegations is valid, the hurdles come into play and rights are impugned upon though the document is void, he is fully competent and has every justification to institute a civil suit in a civil court seeking cancellation of document for the relief of adjudging and declaring the document as void. It is consequent upon declaration/cancellation of the document that the correction in the revenue records would be effected accordingly and he would not be subjected to seeking fresh

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456. *R Gopalakrishna v Karnataka State Financial Corp, Bangalore*, AIR 2008 Kant 77 : ILR 2008 Kant 2034 (DB).
457. *Hindalco Industries Ltd v State of Uttar Pradesh*, AIR 2010 All 94 : 2010 (2) All LJ 545.
458. *Azhar Hassan v District Judge, Saharanpur*, AIR 1998 SC 2960 : (1998) 3 SCC 246 : (1998) 2 Mad LJ 126 (SC).
459. *Chandrika Singh v Raja Vishwanath Pratap Singh*, (1992) 3 SCC 90.
460. *Barkhu v Fifth Addl Distt Judge, Basti*, AIR 2004 All 418.

declaration of his rights as bhumidhar in any suit under section 229B/209 of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 and it is the civil court which would be vested with the jurisdiction to entertain the suit. Where the plaintiff is neither executant of the instrument nor successor and happens to be a third party, notwithstanding the fact that a deed is cancelled on the basis of a civil court, the name of the plaintiff cannot be entered in the revenue record unless the plaintiff files a suit for declaration of his *bhumidhari* rights on the basis of so-called sale deed executed by the *bhumidhar* and this necessarily entails declaration of rights by the revenue court and plaintiff cannot claim any relief unless declaration is made in his favour, of his right as *bhumidhar*. Before entering into the question of cancellation of the void document, the civil court has to adjudicate upon and make declaration whether the sale deed in favour of the plaintiff is a valid one and this necessarily entails declaration of the title of the plaintiff as *bhumidhar*. It is not simply a denial of the title of the defendant itself on the basis of the deed but it is a declaration of title in favour of the plaintiff. Therefore, in such a case, it is only the revenue court which has jurisdiction to entertain the suit and the civil court has no jurisdiction.[461]

Declaration and adjudication of rights of tenure holders in respect of land lying in an area for which a notification has been issued under section 4(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953, and adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under the Act, must be done in accordance with the provision of the Act only. In the instant case, the son was claiming an interest in the land lying in the area covered by a notification issued under section 4(2). The claim was made on the basis that he was the son of *C*, brother of *N*, and the lands were recorded in the name of *N* in a representative capacity on behalf of himself and his other brother. The claim was disputed by the appellants and other members of the family. This claim had to be adjudicated by the authorities constituted under the Act, since it was a matter falling within the scope of the adjudicatory functions assigned to the consolidation authorities under the Act. Jurisdiction of the civil court to entertain the suit was barred.[462] When the panchayat does not dispute the title, it will not be open for the respondent to say that the jurisdiction of the civil court is barred in view of section 13 of Punjab Village Common Lands (Regulation) Act, 1961.[463]

Civil court's jurisdiction would not be barred in the following cases:

(i) where the order under rule 18 of the settlement rules is patently illegal or without jurisdiction;

(ii) where the remedy provided by the regulation to adjudge the objection raised is not sufficient;

(iii) where complicated questions relating to title are involved; or

(iv) where the plaintiff seeks declaration of his title over the land from which he is sought to be evicted.

As to points (iii) and (iv) above, the assertion of title must be genuine and must not be a mere pretext. A *bona fide* claim of having title and not having only a husk of title should be made.[464] Kerala Land Reforms Act, 1963 (No 1 of 1964), sections 31 and 32 bar the

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461. *Kishori Prasad v Third Addl. District Judge, Varanasi*, AIR 2003 All 58.
462. *Sita Ram v Chota Bhoudey*, AIR 1991 SC 249 : (1991) 1 Supp SCC 556.
463. *Mohinder Singh v Pirthipal Singh*, AIR 1997 P&H 13.
464. *Daulatram Lakhani v State of Assam*, AIR 1990 Gau 17 (FB).

jurisdiction of the civil court. Application was filed by the tenant under section 31 of the Act before the tribunal, for fixation of fair rent. Suit for his eviction from disputed holding is barred by section 32, during the pendency of the application. When such an application is pending, suit by the landlord for his eviction is not maintainable.[465]

It can be safely said that the legal position is well settled that civil court has the jurisdiction to agitate upon the matter relating to title over the property. It is correct that if any claim is made as regards perfect partition, no civil court shall exercise its jurisdiction as envisaged under section 154(1)(d) of the Assam Land and Revenue Regulations Act, 1886 (1 of 1886). Section 154 of the Regulation provides that except where otherwise expressly provided in this Regulation or in Rule framed thereunder, no civil court shall exercise the jurisdiction in any matter mentioned in the various clauses under the section including clause (d) which relates to claim of person to perfect partition. Revenue court has been vested with the power to effect the partition whether perfect or imperfect, of the revenue paying properties. But at the same time, jurisdiction of the civil court to determine the right of the parties to the properties in dispute as well as the shares of which they are entitled to has not been taken away by the Regulation. In the instant case, though the matter was earlier agitated before the revenue court for effecting perfect partition, the petitioners, having failed to get adequate relief, approached the civil court by filing suit in question for declaration of right, title and interest over the suit land. In such premises, the court did not find any reason how this section 154 could debar the petitioners claiming to the title of the land in question from approaching the civil court. Section 62 also clearly vests a right upon the person to prefer a suit to the civil court for declaration of his right to any property. Therefore, the civil court is the absolute authority to adjudicate a dispute relating to the title and interest over the immovable property.[466]

Under Orissa Land Reforms Act, 1960 (16 of 1960), sections 15 and 67, suit for declaration of Sikmi tenancy falls within jurisdiction of revenue court. Jurisdiction of the civil court to decide the dispute is barred under section 67. Where one party to the dispute claims to be a tenant under the other party and there is a dispute of such relationship, either on account of factual position or on account of legal position, such dispute is to be decided by the revenue officer having exclusive jurisdiction. Jurisdiction of the civil court to try and decide such a matter is barred.[467] A suit for declaration of the title by the land owner, in case where the name of the land owner was deleted and the state had incorporated his own name in the rent abatement proceedings, the civil court shall have the jurisdiction to decide such questions.[468]

When only a part of the relief claimed can be granted by a tenancy court, the civil court has jurisdiction to entertain the suit for the rest of the relief. Hence, where the tenancy court cannot grant relief for damages and can grant only a relief of eviction, the civil court has jurisdiction to entertain the suit for damages.[469] The order passed by the authority under Himachal Pradesh Land Revenue Act, 1954 (6 of 1954) can be challenged before the civil court.[470]

In the light of section 63 of the Karnataka Land Revenue Act, 1964 (12 of 1964) and section 9 of the CPC, the civil court's jurisdiction under section 63 of the Karnataka Land Revenue Act, 1964, is expressly barred in respect of the proceedings against the state government

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465. *Nanu Vasudevan v Kalikarthiayaniamma*, AIR 1991 Ker 253 (DB).
466. *Thanda Bala Choudhury v Birendra Kumar Choudhury*, AIR 2003 Gau 32.
467. *Bhikari Nayak v Brajabandhu Nayak*, AIR 1991 Ori 191 (DB). See also *Champabati Devi v Durgadhar Swain*, AIR 2006 (NOC) 1337 (Ori).
468. *State of Orissa v Bhanu Mali*, AIR 1996 Ori 199.
469. *Satya Pramoda Thirthaswawama Pavaru v Mula Gunnaya*, AIR 1982 AP 24 (DB).
470. *Kashi Ram v Harbhajan Singh Bhajji*, AIR 2002 HP 154.

on account of any act or omission of the state government or any revenue officer. Unless the plaintiff first proves that prior to the institution of the suit he exhausted the remedy of appeal as provided in law for the time being in force, within the period of limitation prescribed in the statute, it is not possible in law for the plaintiff to institute the original suit challenging the orders referred to above passed by the second defendant. Against the orders dated 10 February 1993 and 16 May 1995 of the second defendant, the plaintiff had a right of statutory appeal to the Karnataka Appellate Tribunal under section 49(c) of the Karnataka Land Revenue Act, 1964. Undisputedly, the statutory appeal was not presented by the plaintiff before the Karnataka Appellate Tribunal within the period prescribed under the provisions of section 51 of the Karnataka Land Revenue Act, 1964 against those orders. The plaintiff had the right to urge all the grounds in the appeal, including the ground that the second defendant passed by the orders dated 10 February 1993 and 16 May 1995 against the plaintiff without complying with the mandatory provisions of the Act or rules and in compliance with the principles of natural justice in respect of the land in question. In view of the clear bar under section 63 of Karnataka Land Revenue Act, 1964, suit filed by the plaintiff was not maintainable. It follows that section 9, of the CPC will not come to the rescue of the plaintiff.[471]

In a Gujarat case, a government servant filed a suit challenging his dismissal from service on the plea that finding of the disciplinary authority was based on no evidence. It was held that civil court had jurisdiction to go into the evidence and ascertain whether the decision of disciplinary authority was based on no evidence and if so, to quash order of dismissal.[472]

The Telegraph Act, 1885 (13 of 1885), section 7B, creates a bar regarding civil court's jurisdiction to modify, remit and set aside an award or make it a rule of court. Civil court still has jurisdiction to refer the dispute between the parties to the Central Government for the appointment of an arbitrator. Section 7B does not, in any manner, oust that jurisdiction of the civil court.[473]

Where plaintiff sues on the basis of trespass, civil courts have jurisdiction and revenue courts do not have jurisdiction.[474] The scheme of the Land Acquisition Act, 1894, is complete in itself and thereby the jurisdiction of the civil court to take cognizance of the cases arising under the Land Acquisition Act, by necessary implication stood barred. The civil court thereby is devoid of jurisdiction to give declarations on the invalidity of the procedure contemplated under the Land Acquisition Act.[475] Under the Andhra Pradesh (Andhra Area) Inams (Abolition and Conversion into Ryotwari) Act, 1956, after the Act has come into the force, the jurisdiction of civil court to declare title to the Inam land, by necessary implication stood excluded.[476]

[s 9.45] Title *Watan* Land

When the matter pertaining to title to *watan* lands was pending before competent authority under Bombay Paragana and Kulkarni Watans Abolition Act, 1950 (50 of 1950) which has exclusive jurisdiction to deal with the matter, the civil court has no jurisdiction to decide title to such land.[477]

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471. *State of Karnataka v M Muniraju*, AIR 2002 Kant 287.
472. *Badridan Bheravandan Gadhavi v State of Gujarat*, AIR 1985 NOC 185 (Guj).
473. *Prithvi Raj Kohli v UOI*, AIR 1988 J&K 17.
474. *Abdulla Bin Ali v Galappa*, AIR 1985 SC 571 : (1985) 2 SCC 54.
475. *Laxmichand v Gram Panchayat, Kararia*, AIR 1996 SC 523 : (1996) 7 SCC 218.
476. *Pushpagiri Math v Kopparaju Veerabhadra Rao*, AIR 1996 SC 2225 : (1996) 9 SCC 202.
477. *Subhan Rao v Parvathi Bai*, AIR 2002 Kant 134.

However, in a case relating to the Bombay Hereditary Offices Act, 1874 and Bombay Inferior Village Watan Abolition Act, 1959, the Supreme Court held that claim for hereditary interest or rights in respect of watan property based on adoption cannot be decided by collector and the jurisdiction of civil court is not excluded. Therefore, a suit for declaration before civil court is maintainable, as the question of adoption involves issues regarding the legal status and character of a person which can be decided only by civil court.[478] HL Duttu J, speaking for the bench in the above case, observed as follows:

> As regards whether there is valid adoption or not, that question pertains to the status and legal character of an individual, which falls within the purview of Section 34 of the Specific Relief Act, 1963, and a suit for declaration before a civil court is maintainable. Therefore, the question whether a particular person has been given in adoption or not is different from whether a person has hereditary interest or rights in respect of a Watan property. If this distinction is drawn, there is no exclusion of civil courts jurisdiction under the Act. When a person claims on the basis of adoption, such an adoption cannot be decided by the Collector as the same involves legal status/character of a person which can only be decided by the civil court.[479]

[s 9.46] Trust Matters

The question of whether the suit filed by the appellants is barred by the provisions of section 80 of the Bombay Public Trusts Act, 1950 (29 of 1950) has to be examined in the light of the relevant provisions. Section 9 of CPC clearly lays down that the civil court shall have jurisdiction to try all suits of a civil nature except suits of which their cognizance is either expressly or impliedly barred. It is well settled that the civil court has jurisdiction to try all suits of civil nature and the exclusion of jurisdiction of the civil court is not to be rightly inferred. Such exclusion must be either explicitly expressed or clearly implied. In *Musamia Imam Haider Bax Razvi v Rabri Govindbhai Ratrabhai,*[480] the Supreme Court observed that it is necessary to bear in mind the important principle of construction which is that if a statute purports to exclude the ordinary jurisdiction of a civil court, it must do so either by express terms or by the use of such terms as would necessarily lead to the inference of such exclusion. This principle was reiterated in *Dewaji v Ganpatlal.*[481]

While dealing with a case relating to the bar to the maintainability of suits by section 93 of the Madras Hindu Religious and Charitable Endowments Act, 1951, the Supreme Court held that section 93 is not a bar to the maintainability of civil suit. The section only imposes a restriction on suits, or other legal proceedings in respect of matters for which a provision has been made in the Act.[482] SUBBA RAO, CJ, speaking for the division bench observed as follows:

> Under section 9 of the Code of Civil Procedure, the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. It is a well settled principle that a party seeking to oust the jurisdiction of an ordinary civil court shall establish the right to do so. Section 93 of the Act does not impose a total bar on the maintainability of a suit in a civil court. It states that a suit of the nature mentioned therein can be instituted only in conformity with the provisions of the Act; that is to say, a suit or other legal proceeding in respect of matters not covered by the section can be instituted in the ordinary way. It therefore imposes certain statutory

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478. *Ramchandra Dagdu Sonavane v Vithu Hira Mahar*, AIR 2010 SC 818 : (2009) 10 SCC 273.
479. *Ramchandra Dagdu Sonavane v Vithu Hira Mahar*, AIR 2010 SC 818, para 30, at pp 827–828 : (2009) 10 SCC 273.
480. *Musamia Imam Haider Bax Razvi v Rabri Govindbhai Ratrabhai*, AIR 1969 SC 439 : (1969) 1 SCR 785.
481. *Dewaji v Ganpatlal*, AIR 1969 SC 560 : (1969) 1 SCR 573.
482. *Sri Vedagiri Lakshmi Narasimha Swami Temple v Induru Pattabhirami Reddy*, AIR 1967 SC 781 : (1967) 1 SCR 280.

> restrictions on suits or other legal proceedings relating to matters mentioned therein. Now, what are those matters? They are: (1) administration or management of religious institutions; and (2) any other matter or dispute for determining or deciding which provision, is made in the Act. The clause "determining or deciding which provision is made in this Act", on a reasonable construction, cannot be made to qualify "the administration or management" but must be confined only to any other matter or dispute. Even so, the expression "administration or management" cannot be construed widely so as to take in any matter however remotely connected with the administration or management. The limitation on the said words is found in the phrase "except under and in conformity with the provisions of this Act". To state it differently, the said phrase does not impose a total bar on a suit in a civil court but only imposes a restriction on suits or other legal proceedings in respect of matters for which a provision is made in the Act. Any other construction would lead to an incongruity, namely, there will be a vacuum in many areas not covered by the Act and the general remedies would be displaced without replacing them by new remedies.[483]

A three-judge bench of the Supreme Court while considering section 40 of the Mysore Religious and Charitable Institutions Act, 1927 which barred institution of civil suits in matters relating to religious trusts, held that bar to jurisdiction of civil court does not apply where serious allegations of fraud/forgery are made in the management of the trust.[484] SN Variava J, speaking for the Bench in the above case, observed as follows:

> An enquiry contemplated under Section 17 is a summary enquiry of the type held under the various Land Revenue Codes. That it would be a summary enquiry is clear from section 37 of the Mysore Act. Such summary enquiries do not bar jurisdictions of civil courts. Even otherwise, we are unable to accept the submission that section 18(5) allows the Muzrai Officer to deal with cases where serious allegations of fraud and/or forgery are made. Section 18(5) merely enables the Muzrai Officer to pass ancillary or necessary orders in respect of matters covered by sub-sections (1) to (4) of the Section. The enquiry has to be in respect of matters laid down in sub-sections (1) to (4) of section 18. Further an order under section 18 can only be passed by the Muzrai Officer with previous sanction of the Government. This also shows that these provisions are not meant to be a substitute for judicial proceedings.[485]

In a case relating to the Hindu Religious and Charitable Endowments Act, 1959, where the worshippers filed a suit in representative capacity claiming that suit property belonged to temple and sought permanent injunction, the Madras High Court held that sale in favour of the defendant without the permission of the Commissioner was sham and nominal and the suit filed by worshippers was maintainable.[486]

The Supreme Court noted that under the Indian Trusts Act, 1882, the legislature intended to confer jurisdiction only on civil court for deciding a dispute. It further noted that in *Dhulabhai v State of Madhya Pradesh*,[487] Justice Hidayatullah had examined the question as to how exclusion of jurisdiction of the civil court in context of express or implied bar created in any special law should be decided and laid down seven conditions for determining the question of bar for prosecuting the remedies in the civil court or tribunals constituted under any special law. The bench speaking through Justice Chelameshwar held that although the issue examined by Justice Hidayatullah pertained to bar created in special law *vis-à-vis* filing of the civil suit by an aggrieved party, yet the decision laid down the general principle as to how the courts should

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483. *Sri Vedagiri Lakshmi Narasimha Swami Temple v Induru Pattabhirami Reddy*, AIR 1967 SC 781 : (1967) 1 SCR 280, at p 287.
484. *Sudhir G Angur v M Sanjeev*, AIR 2006 SC 351 : (2006) 1 SCC 141.
485. *Sudhir G Angur v M Sanjeev*, AIR 2006 SC 351, at p 354 : (2006) 1 SCC 141.
486. *Basha Sahib v Valikandapuram Village Kasi Viswanathasamy Koil*, (2003) 1 Mad LJ 563 (Mad) : (2003) 1 CTC 519.
487. *Dhulabhai v State of Madhya Pradesh*, AIR 1969 SC 78 : 1968 SCR (3) 662.

decide the issue of express or/and implied bar in the context of the remedies available in law. It was held conclusively that though the Indian Trusts Act, 1882, does not provide any express bar in relation to the applicability of other Acts for determining disputes arising under it, yet there is an implied bar of exclusion of applicability of the Arbitration Act, 1940, for deciding the disputes relating to trust, trustees and beneficiaries through private arbitration. Therefore, disputes arising under the Indian Trusts Act, 1882, can only be adjudicated upon by the principal civil court of ordinary jurisdiction and not by an arbitrator despite the existence of the arbitration agreement to that effect.[488]

Section 73 of the Rajasthan Public Trusts Act, 1959 bars jurisdiction of civil court. But where in a litigation the question was whether it was public trust or private trust and it was held to be a private trust and the decision became final, there was no question of applying the Rajasthan Public Trusts Act, 1959. It was held that *inter se* disputes could only be decided by civil suits filed under section 9 of the Code.[489]

The allegations made in the plaint show that the only right claimed by the appellants is that of being ancestral *pujaris* of the temple. The appellants do not claim themselves to be the trustees of any trust as defined under section 2(18) of the Bombay Public Trusts Act, 1950. No declaration regarding the existence or otherwise of a trust or that any particular property is the property of such trust which comes within the purview of the deputy or assistant charity commissioner under section 79 of the Bombay Public Trusts Act, 1950, has been claimed. The only relief claimed is a declaration regarding the right of the appellants to function as hereditary *pujaris* or their *pujariki* rights of performing *puja* in the temple and a consequential decree for injunction for restraining the respondents from interfering with the aforesaid rights of the appellants. The reliefs so claimed do not at all come within the ambit of section 19 or section 79 of the Bombay Public Trusts Act, 1950, on which the deputy or assistant charity commissioner has the jurisdiction to hold an inquiry and give a decision. Therefore, the bar of section 80 of the Act which by the express language used is confined to "any question which is by or under this Act to be decided or dealt with by any officer or authority under this Act, and in respect of which the decision or order of such officer or authority has been made final and conclusive" would not apply.[490]

[s 9.47] Suits Between Landlords and Tenants

A suit for eviction or possession under the general law can be filed only in a civil court. If such suit is in respect of open land, the suit for possession will always lie in the civil court. If the suit is in respect of accommodation, *viz*, building where no relationship of landlord and tenant is alleged, the suit will lie in the civil court. If some unauthorised person committed trespass in the building owned by the plaintiff, he can file suit for possession against such trespassers in the civil court. If, however, relationship of landlord and tenant between the parties is admitted and the disputed property is building and the relief sought is possession by eviction of the tenant and for recovery of rent such suit will be triable by the rent court.[491]

In relation to a case under the West Bengal Premises Tenancy Act, 1997, it has been held by the Calcutta High Court that an application for repair of suit premises would not come under the bar imposed by section 44 of the Act. Such an application, being in the nature of

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488. *Vimal Kishore Shah v Jayesh Dinesh Shah*, (2016) 8 SCC 788.
489. *Dinesh Chandra Swami v Manesh Chandra Swami*, 2007 (1) Raj LR 654 (Jaipur Bench).
490. *Sahebgouda v Ogeppa*, AIR 2003 SC 2743 : AIR 2003 SCW 3088 : (2003) 6 SCC 151.
491. *Bharvad Chhota Bhaga v Bharvad Jaga Dahya*, AIR 1999 Guj 17.

an interlocutory proceeding, would not come within the ambit of "proceedings" as defined in section 44. As such, civil court is competent to decide the application in accordance with law.[492]

The question has often come up before the courts as to ouster of their jurisdiction in disputes between landlords and tenants when special courts are constituted for settling them. It has been held in accordance with the principles stated above that courts would have jurisdiction to interfere with the decisions of the tribunals only if they had acted in excess of the jurisdiction conferred by the statute or in contravention of the rules of natural justice. Thus, where a decision of the tribunal under the Orissa Tenants Protection Act, 1948, was assailed on the ground that the parties did not stand in the relationship of landlord and tenant, it was held that as the Act postulated such a relationship as the foundation for the exclusive jurisdiction of the tribunal, its decision was open to review by the civil court;[493] but when the legislature made the decision of the tribunal on that question final, the correctness of that decision could not be questioned in the civil courts.[494] Though it is true that serious question of title cannot be decided by the revenue court and where basic relationships of landlord and tenant has been challenged, the same ought to be decided by the civil court, where a person has accepted the other parties as landlord by attornment and does not claim title and in himself, such question may be decided by the authority as they do not involve serious question of title.[495] Since no jural relationship of landlord and tenant existed between the respondent and the appellant, *mamlatdar* was not competent to decide the dispute and civil court alone had jurisdiction to decide the matter.[496] When concurrent findings by the courts of fact were that the respondent was the owner of the premises and the appellants were in unauthorised occupants thereof, in such circumstances, only civil court and no other court will have the jurisdiction to order eviction.[497]

The tenancy of a shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence. When the tenanted shop has been completely destroyed by fire, the tenancy right stands extinguished as the demise must have a subject matter and if the same is no longer in existence, there is an end of the tenancy. Section 108(B)(e) of the Transfer of Property Act, 1882, has no application in case of premises governed by the State Rent Act. Therefore, when the tenanted premises is completely destroyed by natural calamities, tenant cannot resist dispossession on strength of section 108(B)(e) of Transfer of Property Act, 1882.[498]

Since the words "parts of building" used in definition of word "building" under State Rent Act do not refer to land on which building is constructed but refer to any other super structure which is part of that main building and as the tenancy of the shop which was let out was a superstructure thus what is protected by the Act is the occupation of tenant in the super structure, so the tenancy no longer continues under State Rent Act. The subject matter of tenancy having been completely destroyed, the tenant can no longer use the said shop and in fact he has ceased to occupy the said shop. Section 11 of the State Rent Act does not provide for eviction of the tenant on the ground of destruction of the building or the super structure. Thus, when there is no super structure in existence, the landlord cannot claim recovery of

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492. *Kartick Chandra Bhandari v Ashim Kumar Samanta*, AIR 2008 Cal 279 : 2008 (2) Cal LJ 20.
493. *Magiti Sasmal v Pandab Bissoi*, AIR 1962 SC 547.
494. *Brij Raj Krishna v SK Shaw*, AIR 1951 SC 115.
495. *Pyarelal Sakseria v Devishankar Parashar*, AIR 1994 MP 115.
496. *Somabhai Kanjibhai Baria v Patel Parshottam Das Jamna Das*, (1995) 3 SCC 282.
497. *Ram Singh v Ajay Chawala*, (1988) 1 SCC 364.
498. *Vannattankandy Ibrayi v Kunhabdulla Hajee*, AIR 2003 SC 4453 : (2001) 1 SCC 564.

possession of vacant site under the State Rent Act. The Act is not intended to govern vacant land. The only remedy available to him is to file a suit in a civil court for recovery of possession of land. In view of the matter, the civil court was competent to entertain and try the suit filed by the respondent landlord.[499]

A land lady filed a suit for eviction on different grounds including *bona fide* requirement for personal use. The averments in the plaint did not show that the suit was filed in the capacity of "specified landlord" under the Madhya Pradesh Accommodation Control Act, 1961. It was held by the Supreme Court that the jurisdiction of civil court does not stand excluded, more so when the title of the land lady was disputed.[500] Explaining the definition of "specified landlord" as contained in section 23J of the Act, SB Sinha J, speaking for the bench in the above case, observed as follows:

> 16. Chapter III-A provides for special provisions. It is confined to eviction of tenants on grounds of *bona fide* requirement of different classes of landlord specified therein. A summary procedure is provided for. Recourse thereto can be taken only by the specified landlord within the meaning of the provision of Section 23-J of the Act which means a "landlord who is a widow or divorced wife" amongst others. Amongst others a servant of any Government including a member of defence services, would also fall within the purviews of the said definition. Only a landlord who comes within the purview of the said definition is entitled to file suit on the ground of his or her *bona fide* requirement.[501]

On the question of jurisdiction of civil court, the judgment went on to state as follows:

> 36. The definition of "specified landlord" as contained in section 23-J of the Act is not as broad as the definition of the same term as contained in Section 2(b) thereof. A statute must be read, keeping in view the constitutional scheme of equality as adumbrated in Article 14 of the Constitution of India. Once a special benefit has been conferred on a special category of landlord, the same must receive strict construction. Even otherwise, it is well settled, that an exclusion provision must be construed strictly. A statute ousting the jurisdiction of civil court should also be strictly construed.[502]

A perusal of section 108(B)(e) of the Transfer of Property Act, 1882, shows that where a premise has fallen down under the circumstances mentioned therein, the destruction of the shop itself does not amount to determination of tenancy under section 111 of the Transfer of Property Act, 1882. In other words, there is no automatic determination of tenancy and it continues to exist. If the tenancy continues, the tenant can only squat on the vacant land but cannot use the shop for carrying on business as it is destroyed and further he cannot construct any shop on the vacant land. Under such circumstances, it is the tenant who is to suffer as he is unable to enjoy the fruits of the tenancy but he is saddled with the liability to pay monthly rent to the landlord. It is for such a situation that the tenant has been given an option under section 108(B)(e) of the Transfer of Property Act, 1882, to render the lease of the premises as void and avoid the liability to pay monthly rent to the landlord. Section 108(B)(e) cannot be interpreted to mean that the tenant is entitled to squat on the open land in the hope that in future if any shop is constructed on the site, where the old shop existed he would have right to occupy the newly constructed premises on the strength of original contract of tenancy.[503]

One co-owner inducted a tenant without the consent of other co-owners. The tenant ran a workshop without licence from the municipal corporation (as was then required under the law). It was held that a co-owner can sue for a declaration that the tenant had no right to

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499. *Vannattankandy Ibrayi v Kunhabdulla Hajee*, AIR 2003 SC 4453: (2001) 1 SCC 564.
500. *Sulochana v Rajindra Singh*, AIR 2008 SC 2611 : (2008) 15 SCC 538.
501. *Sulochana v Rajindra Singh*, AIR 2008 SC 2611, para 16, at p 2614 : (2008) 15 SCC 538.
502. *Sulochana v Rajindra Singh*, AIR 2008 SC 2611, para 36, at p 2617 : (2008) 15 SCC 538.
503. *Sulochana v Rajindra Singh*, AIR 2008 SC 2611, para 36, at p 2617 : (2008) 15 SCC 538.

run the workshop and for permanent injunction.[504] The suit for ejectment and recovery of possession from legal heirs of deceased statutory tenant who continued to be in possession of premises beyond the period of one year from the date of death of the deceased tenant and thereby lost protection available to them in Delhi Rent Control Act, 1958 (59 of 1958) and became unauthorised occupants, is maintainable before the civil court and not barred under section 111 of Transfer of Property Act, 1882 (4 of 1882).[505]

A dispute regarding identification of boundaries between two adjacent land owners is a dispute of a civil nature, which can be entertained by a civil court.[506] Where an occupancy tenant has challenged the validity of the sale deed by way of which the land occupied by him was sold by a third person and the sale deed clearly showed that it was a small piece of land surrounded by the houses of different people and has been sold for construction of a house and the land in question was not established as an agrarian land, the jurisdiction of the civil court would not be barred.[507] On a proper construction of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, the question on which the jurisdiction of civil court is excluded is only the determination as to the fair rent of the premises. It will not be open to the civil court to re-determine the rent payable by the tenant to the landlord because that is a matter squarely and exclusively within the jurisdiction of the rent controller and, therefore, impliedly excluded from the purview of the civil court; but, his decision is not final on the issue that opens up his jurisdiction and cannot preclude an owner from contending in a civil court, that he should not be asked to pay rent for his own property to someone else.[508]

An analysis of section 91 read with section 93 Madhya Bharat Land Revenue and Tenancy Act (66 of 1950) shows that the recourse to a civil court is not available to a *pakka* tenant who has been dispossessed unless he exhausts the remedy under section 91 of the Act. In this connection, the use of the expression in section 93 of the Act that no order passed under sections 91 and 92 shall preclude any person from establishing such rights shows that a *pakka* tenant who has been dispossessed and claims recovery of possession is first required to take recourse to the remedy available under section 91 of the Act.[509]

The civil court cannot pass a decree for possession against a tenant from the premises to which provisions of the Rent Control Act apply. Mere disclaimer of owner's title does not result in automatic termination of tenancy and hence decree cannot be passed against such a tenant also.[510] Section 13 of Haryana Urban (Control of Rent and Eviction) Act 1973, which gives the rights to the landlord to seek eviction of the tenant for default in the payment of rent, provides that the remedy and the forum and the decree of ejectment passed by the controller or the appellant authority or the revisional authority or conformation either in appeal or revision is final under the Act. Thereby, by necessary implication the jurisdiction of the civil court under section 9 is excluded.[511]

In a *Madras* case, the defendants agreed to pay a monthly rent of Rs 50. The plaintiff issued one month's notice, terminating the tenancy which was from month to month with reference to the Tamil month. The original lease of the entire property could not be sustained, by reason

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504. *Jadunath v Mritunjoy*, AIR 1986 Cal 416.
505. *Krishna Prakash v Dilip Harel Mitra Chenoy*, AIR 2002 Del 81 (DB).
506. *Achyutan Nair v P Narayan Nair*, (1987) 4 SCC 71.
507. *Sheel Kumar v Prem Singh*, AIR 1997 J&K 37.
508. *Life Insurance Corp of India v India Automobiles*, (1990) 4 SCC 286.
509. *Babu Khan v Nazim Khan*, AIR 2001 SC 1740 : (2001) 5 SCC 375.
510. *Govindamma v Murugesh Mudaliar*, AIR 1991 Kant 290.
511. *Sushil Kumar Mehta v Gobind Ram Bohra* (*deceased*), (1990) 1 SCC 193.

of the purchase by the defendants of the three-fourth share belonging to the three brothers of the plaintiff. Therefore, the plaintiff filed a suit praying for a decree: (i) for partition and separate possession of one-fourth of the share of the property after removing the superstructure and machinery; and (ii) for passing a decree for eviction of the defendants from plaintiff's one-fourth share of the property and for costs. It was held that the suit as framed was maintainable and both the reliefs, namely, partition and separate possession and eviction, could be prayed for in the same suit. The plaintiff could not file a suit for eviction of the defendants from the entirety of the property, as the plaintiff was entitled to one-fourth share only. The only way the plaintiff could get possession of his one-fourth share in the property was to file a suit and combine, in one suit, the prayers relating to eviction as also for partition and separate possession. That was what he had done in this case and he was entitled to the reliefs prayed for.[512]

An amendment to the Bombay Tenancy and Agricultural Lands Act, 1948, became applicable to the suit and the defendant's status as a protected tenant got revived by the time civil court was seized of the matter. Consequently, the civil court ceased to have the jurisdiction over the matter.[513] The civil court has no jurisdiction to determine whether the person who succeeded the recorded tenant rightly is recorded as tenants. This determination can only be made by the revenue authorities.[514] A relief for actual possession under the Bombay Tenancy Act, 1939, from the defendants who claimed to be the protected tenants could be granted only by the revenue court and not by the civil court.[515] It was after amendment to the Goa, Daman and Diu Agricultural Tenancy Act, 1964, in 1975, that the civil court lost jurisdiction to try the issue of tenancy relating to suit plots which are *bagayat* (garden) lands, as well as the question of nature of land. Therefore, civil court is precluded from deciding even incidentally, questions falling within the ambit of section 7 of the said Act, and, as such, it is necessary that the issue of tenancy raised by the respondent be referred to the *mamlatdar* for decision.[516]

The sole question that possessed itself for consideration before the Hon'ble Supreme Court in *Parvati v Fatehsinhrao Pratapsinhrao Gaekwad*[517] was whether the issuance of notification under sub-section (1)(b) of section 88 of Act 30 of 1956, on 21 May 1958, making the provisions of the Bombay Tenancy and Agricultural Land Act, 1948, inapplicable to the lands reserved for non-agricultural or industrial development of the municipal limit of the city of Baroda, retrospectively. It was held that if the Act does not at all apply then the determination of the rent of the suit land was made by the *mamlatdar* under the provisions of sections 8 and 9 of the Bombay Tenancy and Agricultural Land Act, will be of no avail and the civil court will be competent to determine the rent payable by the tenant in respect of this land.[518] The *mamlatdar* is a tribunal of limited jurisdiction and the Bombay Tenancy and Agricultural Land Act itself contemplates that a negative declaration can be given by the *mamlatdar* in an application under section 4. This would contemplate that the legislature expressly conferred power on the *mamlatdar* to grant a negative declaration in limited cases. If section 7 of the Goa, Daman and Diu Agricultural Tenancy Act (7 of 1964) was all embracing and the *mamlatdar* could decide the issue of both positive and negative declarations, there would be no need to provide for negative declaration under section 4. No part of the Act or, for that matter

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512. *KMSK Rabindranath v S Bakyam Pillai*, AIR 1988 Mad 358.
513. *Dahiben (Widow of Ranchhodji Jivanji) v Vasanji Kevalbhai (deceased)*, (1995) Supp 2 SCC 295.
514. *Azhar Hasan v Dist. Judge, Saharanpur*, (1998) 3 SCC 246.
515. *AA Shirdone v Saheb H Tajbhokhari*, (1985) 2 SCC 477.
516. *Bhaskar Pandurang Prabhu Dessai v Gajanan Arjun Salgaonkar*, AIR 1997 Bom 177.
517. *Parvati v Fatehsinhrao Pratapsinhrao Gaekwad*, (1986) 4 SCC 319.
518. *Parvati v Fatehsinhrao Pratapsinhrao Gaekwad*, (1986) 4 SCC 319.

language of a statute, can be said to be otiose. That is a cardinal principle of interpretation. It is the duty of the court to give effect to the intent of the legislature. Once the legislature has expressly provided for grant of negative declaration in limited cases, it would contemplate ouster of jurisdiction in matter other than section 4. This would also be a harmonious construction as the jurisdiction of the civil court would not be ousted and there would be no conflicting judgments. The language of the Tenancy Act, therefore, contemplates that no negative declaration can be granted by the *mamlatdar*. Of course, when the issue arises before the *mamlatdar*, he can always decide whether the person who claims the right has so proved or not. This is the jurisdiction inherent in deciding an issue. That does not mean that because the *mamlatdar* could decide the issue either on a reference by a civil court or on application before him, he can assume jurisdiction not vested in him.[519]

[s 9.48] Civil Court's Jurisdiction Barred by Rent Act — Counter Claim If Maintainable

It is now well-settled that a decree passed by a court having no jurisdiction is a nullity. The civil court had no jurisdiction to pass a decree for eviction only on the basis that the tenant has denied their title. The matter might have been different if the civil court has otherwise jurisdiction to entertain a suit. The legislature has created new rights and liabilities for both the landlord and tenant in terms of the provisions of the said Act and provided a forum therefor. The jurisdiction of the civil court having been barred except in a situation where the proviso appended to sub-section (1) of section 10 would be attracted, the civil court has no jurisdiction to entertain a suit for eviction on a ground envisaged under section 10(2)(vi) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960. The civil court, thus, had no jurisdiction to entertain the counter-claim.[520]

In suit for injunction filed by the appellant tenant against landlord, the landlord filed a counter-claim under O VII, rule 6 of the CPC claiming eviction of appellants, inter alia, under clause (e) of section 12(1) of the Madhya Pradesh Accommodation Control Act, 1961 (41 of 1961). In view of Ch III-A and section 23A, which were inserted in the Act in 1983, was later amended and confined to specified landlord defined in section 23J thereunder, the civil court has jurisdiction to entertain counter claim with regard to eviction of tenant on ground of *bona fide* need for occupation as residence and decree for eviction passed by civil court is not vitiated for want of jurisdiction.[521]

[s 9.49] Ownership Certificate Issued by Rent Tribunal — Civil Court's Decree Not Executable

A civil court does not have jurisdiction to decide matters which are required to be dealt with by the tribunal under the said Bombay Tenancy and Agricultural Lands Act, 1948 (67 of 1948). Thus, it is only the tribunal which can decide whether a person is deemed to be a tenant and whether he is entitled to purchase the land held by him. The civil court has no jurisdiction to decide such a question. Even if such a question was to be raised in a proceeding before it, the civil court would have to refer the issue to the authority under the said Act. The suit would then have to be disposed of in accordance with the decision of the authority. Thus, if the tribunal fixes a purchase price, and issues a certificate, then that certificate would be conclusive

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519. *Dattaram A Arolkar v Mamlatdar of Mormugao, Vasco da Gama, Goa*, AIR 2001 Bom 74.
520. *Deva Sahayam v P Savithramma*, AIR 2006 SC 779 : (2005) 7 SCC 653.
521. *Ashok Kumar Gupta v Vijay Kumar Agrawal*, AIR 2002 SC 1310 : AIR 2002 SCW 1124.

proof of purchase. The civil court would then be bound to give effect to the certificate and cannot ignore it. In passing the decree and holding the appellant to be trespasser, the civil court has not considered the provisions of the said Act. The conclusion that the appellant is a trespasser is *de hors* rights of the appellant under the said Act. The appellant had already made an application under section 32O before the suit was filed by the respondents. Respondents were aware that the appellant had made such an application. The appellant was pursuing her remedy under the said Act before the appropriate authority. Respondents were also parties to those proceedings and were contesting those proceedings. These are not questions which could be raised before a civil court. Therefore, rightly neither respondents nor the appellant took up this question before the civil court. Even if the question had been raised, the civil court could not have decided it. The civil court would have had to refer the issues to the appropriate authority and then abide by its decision. A decree passed without the consideration of the provisions of the said Act must be subject to orders of the appropriate authority in proceedings under the said Act.[522]

Thus, so long as the certificate stands, the decree cannot be executed against the appellant. It is only if respondents succeed in getting the certificate set aside, in their pending revision, that they can execute the decree.[523]

[s 9.50] Suits Impliedly Barred

Besides suits of which the cognizance is expressly barred, there are suits which are barred by general principles of law such as suits relating to acts of state and public policy (*vide* notes below.) No suit will lie to recover costs incurred in a criminal court.[524] Again, a suit will not lie for damages for defamatory statements made in the course of a judicial proceeding by a party or by a witness. The ground of this principle is "that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a court of justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury".[525] A suit by a military servant alleging that his discharge from service was illegal is barred by implication.[526] Suit by a legatee claiming allotment of property during pendency of administration of estate suit as per probate will is impliedly barred and the plaint is liable to be rejected.[527]

The Orissa Development Authorities Act, 1982, has provided for adequate efficacious remedy for redressal of the grievance of a citizen who undertakes development/construction over his land in the shape of appeal to the state government or to the official designated by the state government and thereafter he can approach the high court invoking its certiorari jurisdiction. Similarly, the person aggrieved by an order of demolition passed under section 91 of the Orissa Development Authorities Act, 1982, has adequate and efficacious remedy in the shape of appeal before the state government. The legislature in its wisdom has made the

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522. *Saraswatibai Trimbale Gaikwad v Damodar D Motinale*, AIR 2002 SC 1568 : (2002) 4 SCC 481.
523. *Saraswatibai Trimbale Gaikwad v Damodar D Motinale*, AIR 2002 SC 1568 : (2002) 4 SCC 481.
524. *Fazal Imam v Rasul*, (1899) ILR 12 All 166; *Mahomedali v Bayamma*, (1892) ILR 16 Bom 100; *Churamoni v Baidya Nath*, (1907) 32 Cal 429.
525. *Baboo Ganesh Dutt v Mungueeram*, (1873) 41 Beng LR 321, 328; *Mugnee Ram v Ganesh*, (1865) 5 WR 134; *Chidambara v Thirumani*, (1887) ILR 10 Mad 87; *Nathuji Lalbhai*, (1890) ILR 14 Bom 97; *Templeton v Laurie*, (1901) ILR 25 Bom 230; *Dawan Singh v Mahip Singh*, (1888) ILR 10 All 425; *Bikumbar v Becharam*, (1888) 15 Cal 264.
526. *UOI v Ramchand*, AIR 1955 P&H 166.
527. *Himangshu Kumar Basu v Sudhangshu Kumar Basu*, AIR 2004 Cal 217.

decisions under the Act conclusive and final with a further stipulation that same shall not be questioned in any court of law and it is not for the high court to question that wisdom. Thus, the conclusion is irresistible that without exhausting the remedies stipulated under the special statute, i.e., Orissa Development Authorities Act, 1982, a person cannot knock at the doors of a civil court and that the civil court has no jurisdiction to entertain such a suit. Therefore, the jurisdiction of the civil courts is impliedly barred, so far as the redressal of the grievance for which adequate provisions have been enacted under the Orissa Development Authorities Act, 1982. The civil court has also no jurisdiction to grant interim injunctions restraining the statutory authorities from exercising the statutory powers conferred upon them. But then the civil courts shall have jurisdiction to examine cases where there are allegations that the provisions of the Act have not been complied with or the statutory authorities have not acted in conformity with the fundamental principles of judicial procedure.[528]

Where the agreement and the rules framed under the Electricity Act, 1910, provide complete remedy, no suit is maintainable under section 9 of the CPC being impliedly barred. It is true that ordinarily, the civil court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of the procedure has been violated. A suit seeking injunction restraining the board from proceedings in accordance with law cannot be maintained. Such suit is not maintainable because of its being impliedly barred under section 9.[529] The mortgage being outside the scope of the Rajasthan Tenancy Act, 1955, the view that the mortgage was excluded in pursuance to section 43 of the Act and therefore, the residuary Entry 35 of Sch III was attracted, is untenable. Thus, sections 207 and 256 of the Rajasthan Tenancy Act, 1955, conferring exclusive jurisdiction on the revenue court is also inapplicable. The civil court has, therefore, jurisdiction to entertain the suit filed by the bank. On the question of jurisdiction, one must always have regard to the substance of the matter and not to the form of the suit.[530] Where a statute gives a finality to the orders of the special tribunal, the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Where, however, there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular act to find out the adequacy or the sufficiency of the remedies provided may be relevant.[531]

[s 9.51] Family Courts

If the main dispute is between the parties to the marriage, then in view of section 8 of the Family Courts Act, 1984 (66 of 1984), the jurisdiction of civil court is barred and the family court has to try the suit.[532]

The Supreme Court has held that the words "suit or proceeding between the parties to a marriage" contained in Explanation (c) to Section 7(1) of the Family Courts Act, 1984 cannot be read as "parties to subsisting marriage", because divorce does not take it beyond the jurisdiction of family court.[533] Sinha J, speaking for the three-judge bench of the Supreme Court in the above case, observed as follows:

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528. *Puri Konark Development Authority v Ratna Bhadra*, AIR 2002 Ori 207.
529. *Geeta Pump Pvt Ltd v District Judge, Saharanpur*, AIR 2000 All 58; *PSEB v Ashwani Kumar*, (1997) 5 SCC 120; *SP Subramanya Shetty v KSRTC*, AIR 1997 SC 2076 : (1997) 11 SCC 250 : JT 1997 (4) SC 594; *Hyderabad Vanaspati Ltd v APSEB*, (1998) 4 SCC 470.
530. *Bank of Baroda v Moti Bhai*, (1985) 1 SCC 475.
531. *Syyad Mohd Vaquir El-Edroos v State of Gujarat*, (1981) 4 SCC 383.
532. *HP Lakshmid Evaraje v GP Asharani*, AIR 2002 Kant 399.
533. *KA Abdul Jaleel v TA Shahida*, AIR 2003 SC 2525 : (2003) 4 SCC 166 : 2003 (2) Ker LT 403.

> The statement of Objects and Reasons, as referred to hereinbefore, would clearly go to show that the jurisdiction of the Family Court extends, *inter alia*, in relation to properties of spouses or either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other; irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise.[534]

The Kerala High Court has held that the expression "with respect to the property of the parties" contained in Explanation (c) to Section 7(1) of the Family Court Act, 1984, means property of either the husband or the wife or both, but it excludes any other person who has independent rights in the property. Thus, a suit for partition between husband and wife where son is a party is maintainable before civil court. It was observed that the words "or of either of them" following the expression "with respect to the property of the parties" in Explanation (c) to Section 7(1) of the Act would unmistakably lead to the conclusion that the expression refers to parties to a marriage and not parties to the proceedings.[535]

The Andhra Pradesh High Court[536] has held that an argument that family court partakes all the characters of a civil court is undoubtable by virtue of section 10[537] of the Act itself. It held that the distinguishing feature between a civil court and a family court at the maximum is that in addition to holding the powers of a civil court, the family court possesses the powers of criminal courts also in certain matters. The Family Courts Act, 1984, therefore can be said to be a further improvement or reproduction of the existing enactments dealing with the family matters, but not a complete substitution for the substantive and procedural laws that were holding the field earlier to its enactment. Conclusively, it was observed that irrespective of the provision, under which a proceeding is instituted before a civil court and landing in that forum, it continues to be governed by the provisions of the CPC.

Where in a suit for partition an application under section 19 of the Hindu Adoptions and Maintenance Act, 1956, it was held by the Gauhati High Court that family court has exclusive jurisdiction to deal with suits or proceedings referred to in section 7(1) of the Family Courts Act, 1984.[538]

In *R Kasthuri v M Kasthuri*,[539] a suit was filed by plaintiffs seeking declaration of the first plaintiff as wife, second and third plaintiffs as children and the third defendant as mother, thus as the legal heirs of the deceased. The same was opposed by the defendants one and two, who also claimed to be the wife and son of the deceased. The suit was decreed by the trial court and affirmed by the first appellate court. The high court, in the second appeal, reversed the decision holding that, "having regard to the nature of the suit and the reliefs claimed

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534. *KA Abdul Jaleel v TA Shahida*, AIR 2003 SC 2525, at p 2527 : (2003) 4 SCC 166 : 2003 (2) Ker LT 403.
535. *Devaki Antharjanam v Narayan Namboodiri*, AIR 2007 Ker 38 : 2006 (44) All Ind Cas 637.
536. *Anjana Taggarse Motupalli v Sreenivas Motupalli*, 2014 (2) All LT 422 : 2014 (2) Andh LD 334.
537. Section 10 of the Family Courts Act, 1984, provides:
"Procedure generally:-(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)], before a Family Court and for the purposes of the said provisions of the Code, Family Court shall be deemed to be a Civil Court and shall have the powers of such Court.
(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.
(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."
538. *Nishamoni Kalita v Sarda Kalita*, AIR 2009 Gau 62 : 2009 (2) CCC 176.
539. *R Kasthuri v M Kasthuri*, (2018) 2 SCC 729.

the civil court had no jurisdiction to entertain the suit which lay within the domain of the Family Court constituted under the Family Courts Act, 1984." The Supreme Court found the decision of the high court untenable. Looking into the "statement of objects and reasons" and the scheme of the Family Courts Act, 1984, it held that "there is no family dispute between the plaintiffs and the defendants". In its opinion, the dispute between the parties is purely a civil dispute and has no bearing on any dispute within a family which needed to be resolved by a special procedure as provided under the Act. No issue with regard to the institution of marriage and the need to preserve the same also arises in the present case. That apart, it found that the dispute between the parties can only be resolved on the basis of evidence to be tendered by the parties, admissibility of which has to be adjudged within the four corners of the provisions of the Evidence Act, 1872. It thus, set aside the order of the high court and remitted the case back to the high court for deciding it on merits.

[s 9.52] Chit Fund

The Chit Funds Act, 1982 (40 of 1982) came into force in the State of Karnataka with effect from 2 January 1984. If that is so, the suit filed on the basis of the chit which commenced in the year 1982 is not barred and is maintainable before civil court.[540]

[s 9.53] Code of Criminal Procedure, 1898

An order made by a magistrate under section 137 of the Code of Criminal Procedure, 1898, cannot be called into question in a civil court, but a suit will lie for a declaration of exclusive ownership of land which a magistrate has declared to be a public highway;[541] but not a suit to close the road.[542] No suit lies by a "proclaimed" person against an auction-purchaser to recover from him property sold under sections 87 and 88 of the Code of Criminal Procedure, 1898;[543] but, a suit will lie to set aside an irregular sale under section 88,[544] and a civil court has jurisdiction to entertain a suit for the recovery from the government of the proceeds of the sale of property attached and sold under sections 523 and 524 of the Code of Criminal Procedure, 1898.[545]

Where the same issues arise for decision in the civil suit and in the criminal proceedings between the same parties, and involve complicated questions of fact and mixed questions of fact and law, proper forum will be the civil court. The civil suit was for the recovery of balance sale price and the criminal proceeding related to alleged cheating. The defence of the purchaser was that the goods supplied were sub-standard, entitling him to a claim for damages. Except for a blank statement that the defendant had cheated the complainant, the complaint did not disclose the ingredients of the offence. The criminal proceeding was quashed.[546] The same set of events may give rise at times to civil rights as well as to a criminal offence and merely because provisions are specifically included in the Act dealing with criminal liability, the civil liability does not disappear.[547]

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540. *Visalam Chit Funds Ltd v S Sugune*, AIR 2001 Kant 251.
541. *Chuni Lal v Ram Kishen*, (1888) ILR 15 Cal 60.
542. *Roope v Pyaree Lal*, (1869) 16 WR 434.
543. *Dewa Singh v Fazal Dad*, AIR 1928 Lah 562 : (1929) 10 Lah 338.
544. *Mian Jan v Abdul*, (1905) ILR 27 All 572.
545. *Queen-Empress v Tribhovan*, (1885) ILR 9 Bom 131; *Wasappa v Secretary of State*, (1916) ILR 40 Bom 200; *Dayanand v State*, AIR 1976 P&H 190.
546. *Aldo Vogel v Jimmy D Nanavatty*, AIR 1989 Bom 108.
547. *Jiyajeerao Cotton Mills Ltd v MPEB*, (1989) Supp 2 SCC 52.

Under the Jammu and Kashmir Government Servants' Prevention of Corruption (Commission) Act, 1962, supply of copy of enquiry proceedings to the public servant is mandatory. Thus, where the enquiry was held without complying with the mandatory provisions of the Act, it was held by the Supreme Court that the order in such enquiry was without jurisdiction and the jurisdiction of civil court in such matters is not barred.[548]

[s 9.54] Electricity Cases

Where the agreement and the rules framed under the Electricity Act, 1910, provides complete remedy, no suit is maintainable under section 9 of the CPC being impliedly barred. It is true that ordinarily, the civil court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of the procedure has been violated. A suit seeking injunction restraining the board from proceedings in accordance with law cannot be maintained. Such suit is not maintainable because of its being impliedly barred under section 9.[549]

Where a workman employed in the electricity board, Tamil Nadu filed a suit for declaration that the show cause notice issued to him was violative of the principles of natural justice, it was held by the Madras High Court that the civil court's jurisdiction was not barred.[550]

However, the matter is quite different where there is question of theft of electrical energy and excess billing. Where the electricity board authorities issued notice to the consumer to disconnect service connection for alleged theft of power, the suit for injunction filed by the consumer without availing of the remedy provided in terms and conditions of agreement, was held to be not maintainable.[551] In another case, where the electricity board had levied extra charges for alleged theft of electrical energy, it was held that although there was no express bar for filing suit in such matters, civil court's jurisdiction would be impliedly barred since effective remedy of appeal is provided in the Indian Electricity Act, 1910.[552]

In the undernoted cases,[553] it has been held that civil court has no jurisdiction to entertain suits challenging electricity theft bills where the plaintiff has not availed of the remedy contemplated under the Electricity Act, 1910. In *Punjab State Electricity Board v Ashwani Kumar*,[554] the Supreme Court has observed as follows:

> Section 9 of the CPC provides that the civil court shall try all suits of civil nature, subject to pecuniary jurisdiction, unless their cognizance is expressly or by necessary implication barred. Such suit would not be maintainable. It is true that ordinarily, the civil court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of procedure has been violated. The statutory circulars adumbrated above do indicate that a fundamental fairness of the procedure has been prescribed in the rules and is being followed. By necessary implication, the cognizance of the civil cause has been excluded. As a consequence, the civil court shall not be justified in entertaining

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548. *Krishnan Lal v State of J&K*, (1994) 4 SCC 422 : (1994) 2 Mad LJ 117 (SC).
549. *Geeta Pump Pvt Ltd v District Judge, Saharanpur*, AIR 2000 All 58; *PSEB v Ashwani Kumar*, (1997) 5 SCC 120; *SP Subramanya Shetty v KSRTC*, AIR 1997 SC 2076; *Hyderabad Vanaspati Ltd v APSEB*, (1998) 4 SCC 470.
550. *Tamil Nadu Electricity Board v D Vasantha*, (1998) Mad LJ (Supp) 33 (Mad).
551. *Superintending Engineer, Periyar Electricity Distribution Circle v Pavathal*, (2002) 1 Mad LJ 515 (Mad).
552. *Nahar Enterprises v Chairman, T.N.E.B.*, (2007) 5 Mad LJ 58 (Mad).
553. *Tamil Nadu Electricity Board v Chakkravarthy*, (2005) 2 Mad LJ 426 (Mad); *V Kaliamoorthy v Asst Divisional Engineer, T.N.E.B.*, (2000) 1 Mad LJ 174 (Mad); *Superintending Engineer, Virudhunagar Electricity Distribution Circle v Marali Raj*, 2008 (4) Civil Court Cases 172 (Mad).
554. *Punjab State Electricity Board v Ashwani Kumar*, (1997) 5 SCC 120 : 1997 (Supp) CCC 1 (SC).

this suit and giving the declaration without directing the party to avail of the remedy provided under the Indian Electricity Act and the Indian Electricity (Supply) Act and the Instructions issued by the Board in that behalf from time to time as stated above.

Where a demand notice is issued for recovery of electricity dues and the consumer questions the correctness of the demand, it was held that an alternative remedy is provided in section 3(2)(a) of the Tamil Nadu Electricity Board (Recovery of Dues) Act, 1978, and as such civil suit is not maintainable.[555] Where the plaintiff was issued a show cause notice to pay a sum of Rs 6,255/- by the electricity board, Tamil Nadu, it was held that the suit for declaration and permanent injunction filed by him was premature and not maintainable because he neither filed appeal provided by the Rules nor gave any valid reason for not doing so.[556]

However, in a case relating to damages caused due to works undertaken under section 67 of the Electricity Act, 2003, the Himachal Pradesh High Court held that though the Act speaks about the powers of the Regulatory Commission to determine payment of compensation, there is no provision in the Act where there is a stipulation about the manner or the method of enforcement of the Commission's order. No provision lays down that the order of the Commission has the force of law or the force of decree of a civil court and therefore the absence of enforceability creates a void. Hence, civil court's jurisdiction is not barred.[557]

Suit for mandatory injunction directing power corporation uninterrupted supply of energy to plaintiff consumer, through poles erected against roadside, instead of poles passing through forest, is maintainable before civil court.[558] Where, by notification issued by Secretary, Bihar State Electricity Board, the demand charges and guaranteed energy charges are levied, the claim for remission of the amount on account of interrupted supply of electricity being not a proceeding before court, the limitation period of three years under Article 137 of the Limitation Act, 1963, would not apply. The limitation fixed by the notification issued by the board was found justified and limitation period fixed was found not arbitrary.[559] Under Regulation 46 of the Karnataka Electricity Board Electricity Supply Regulations (1988), the suit by the consumer challenging such claims before civil court was not barred, more so, when section 5 of Karnataka Electricity Board (Recovery of Dues) Act (51 of 1976) does not bar suit against the Board by consumer.[560] Where, in the case of sanction for high cost electrical energy, the demand was made by the electricity board from consumer, for quota allotted for whole month, though he did not consume the same, on the ground that he did not surrender sanction, further claim for utilisation of temporary power by the consumer was made without there being written agreement and without depositing advanced consumption charges. On these facts it was held that such claims did not constitute supplemental claims and the appeal against claims was not maintainable.

[s 9.55] Acts of State

An act of the executive as a matter of policy performed in the course of its relations with another state including its relation with the subjects of that state is an act of state. Typical acts of state are making and performing of treaties, the seizure or annexation of land or goods in

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555. *Ponni Gounder v Superintending Engineer, T.N.E.B.*, (2008) 1 Mad LJ 108 (Mad).
556. *Tamil Nadu Electricity Board v K Kamarudeen*, (2001) Mad LJ (Supp) 602 (Mad).
557. *Jai Prakash Hydro Power Ltd v Occhu Ram*, AIR 2007 HP 29 : 2006 (3) Shim LC 31.
558. *Executive Engineer KPTCL & v CB Appachu*, AIR 2003 Kant 61.
559. *Rishi Cement Co Ltd v BSE Board*, AIR 2002 Jhar 1.
560. *Mangalore Chemicals & Fertilizers Ltd v KEB Bangalore*, AIR 2001 Kant 30.

right of conquest or the declaration of war or of blockade.[561] The expression "act of state", however, has been used in different senses and its meaning has varied from time to time. At one time, the expression meant primarily acts done by governmental authorities in exercise of sovereign authority as contrasted with other kinds of acts done in the course of activities not pertaining to sovereign functions, such as trading.[562] In the 21st century, the expression has been defined to mean an act done by the sovereign of one state in relation to the sovereign or subjects of another state. It is a sovereign act which is neither grounded in law nor does it pretend to be so. Stated in different words, it is a "catastrophic" change constituting a new departure.[563] The precise import of the expression "act of state" has been considered by the Supreme Court in a number of decisions.[564] The result of those may thus, be summed up:

(i) An "act of state" is the taking over of sovereign powers by a state over a territory which did not previously form part of it;

(ii) such taking-over may be by conquest, treaty, cession or otherwise;

(iii) acquisition of a right to administer territories belonging to another state and to enact legislation therefore, is also an act of state, even though those territories do not merge in the acquiring state;

(iv) the acquisition may be by a single act or it may be a gradual process spread over a number of years;

(v) it is not within the competence of municipal courts to go into the question of the validity of an act of state;

(vi) no right possessed by the citizen within the acquired territory prior to its being taken over could be enforced in the courts and it makes no difference that the treaty between the high contracting parties under which the territory is taken over, provides for the recognition of those rights;

(vii) where, however, those rights have been recognised by the new state after it assumes sovereignty, they are capable of enforcement in the municipal courts, because there is no such thing as an act of state between a sovereign and its subjects.[565]

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561. Lord Hailsham of St. Marylebone (ed), *Halsbury's Laws of England*, Butterworths, 3rd Edn, Vol 7, pp 279, 281, paras 593, 597.
562. *P&OSN Co v Secy of State*, (1861) ILR 5 Bom HC App 1; approved in *Secy of State v Moment*, (1913) ILR 40 Cal 391 : 40 IA 48; *Jehangir v Secy of State*, (1903) ILR 27 Bom 189; *Shivabhajan v Secy. of State*, (1904) ILR 28 Bom 314; *Rose v Secy. of State*, (1916) ILR 39 Mad 781; *McInerny v Secy. of State*, (1911) ILR 38 Cal 797; *Secy. of State v Cockcraft*, (1916) ILR 39 Mad 351; *Om Prakash v United Province*, AIR 1951 All 205; but see *Bhagat Transport Service v State of Himachal Pradesh*, AIR 1951 HP 36.
563. *LJ Salaman v Secy. of State for India*, (1906) 1 KB 613.
564. *Thakur Amar Singhji v State of Rajasthan*, AIR 1955 SC 504 : (1955) 2 SCR 303 : (1955) SCJ 523 : 1955 SCA 766; *Rajendra Chand v Mst Sukhi*, AIR 1957 SC 286 : (1956) SCR 889 : (1957) SCJ 119; *Dalmia Dadri Cement Co v CIT*, AIR 1958 SC 816 : (1959) SCR 729 : (1958) SCJ 1041; *State of Saurashtra v Memon Haji*, AIR 1959 SC 1383 : (1960) 1 SCR 537 : (1960) SCJ 394; *Jagannath v State of Orissa*, AIR 1961 SC 1361 : (1962) 1 SCJ 179; *State of Saurashtra v Muhammed Abdulla*, AIR 1962 SC 445 : (1962) 3 SCR 970 : (1962) 2 SCJ 70 : (1962) 2 SCA 605; *Pramod Chandra v State of Orissa*, AIR 1962 SC 1288; *Amar Sarjit Singh v State of Punjab*, AIR 1962 SC 1305; *Juwan Nath Zutshi v State of Madhya Pradesh*, AIR 1971 SC 744 : (1972) 4 SCC 75; *State of Gujarat v Vora Fiddali*, AIR 1964 SC 1043 : (1964) 6 SCR 461.
565. *Madhav Rao Scindia v UOI*, AIR 1971 SC 530 : (1971) 1 SCC 85 : 1971 SCR (3) 9; see also *Secy. of State v Bai Rajbai*, (1915) ILR 39 Bom 65 : 42 IA 229; *Vajid Singh v Secy of State*, (1921) ILR 48 Bom 613 : 51 IA 357; *Secy of State v Rustom Khan* 68 IA 109; *Arya Prathimidhi v State of Madhya Pradesh*, AIR 1958 MP 97 : (1957) Lab LJ 909; *Thailendran v State of Uttar Pradesh*, AIR 1959 MP 27 : (1958) Lab LJ 859; *Jagannath v State of Madhya Pradesh*, AIR 1959 MP 136 : (1959) Lab LJ 1; *Subaya v Bhopal Dasaraih*, AIR 1959 Mys 129; *State of Rajasthan v Madan Swarup*, AIR 1960 Raj 138 : (1959) ILR Raj 1217.

When an "act of state" is pleaded, the question which would arise is — "Did the State or its agents purport to act catastrophically or subject to the ordinary course of law"?[566] If the act is of the latter kind, it is not an "act of state".[567] The closure of the Air Transport Service of Portuguese India run by the former Portuguese Administration by the military governor of Goa after its acquisition by India through conquest was an "act of state". So too, the termination of service by him of the employees, till then engaged by it. A municipal court has no jurisdiction to examine the propriety or the legality of such termination of service or the closure of the concern.[568]

[s 9.56] Political Questions

Besides cases comprised in the expression "act of state", there is another class of cases termed "facts of state". It consists of matters and questions, the determination of which is solely in the hands of government. Illustrative of these are such acts as a declaration by government as to whether a state of war exists or whether a particular territory is hostile or whether a particular government is to be recognised as an independent state and the like.[569] These are declarations or decisions of the government on questions having a bearing on its relations with other governments and are properly characterised as political questions. A civil court has no jurisdiction to go into them. Accordingly, disputes as to boundaries between two independent states cannot be the subject of examination by the municipal courts exercising jurisdiction in either state.[570] Thus, where the real object of a suit is to settle the right of succession to a throne and the property right involved is only contingent, the court should decline jurisdiction.[571]

The power of a *Raj Pramukh* to recognise as heir a claimant to the *gaddi* of a deceased *jagirdar* is an incident of sovereignty and is political in character and cannot form the subject of adjudication in court.[572] The Supreme Court, however, has held that recognising or de-recognising a person as a "Ruler" as defined in Article 366(22) of the Constitution is not an exercise of "political power which is a sovereign power". Such a power can be exercised for an adequate reason and its exercise is amenable to scrutiny by the court.[573] It has also been held that courts in British India were entitled to determine the title to property situated within their jurisdiction belonging to an Indian Prince though a political question was involved in such determination.[574]

[s 9.57] Encroachment on Statutory Right

Under the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1964, licence is required for working as commission agent within the "market area" defined in the Act and Rules thereunder. Therefore, if a person establishes an office as a commission agent within the market area, then the committee constituted under the above-mentioned Act has the right

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566. *Secy. of State v Kamachee Boyce Saheba*, (1959) 13 Moo PC 22.
567. *Prasanna v Sri Jagannath*, AIR 1971 Ori 246, 253.
568. *Cipriano Negredo v UOI*, AIR 1969 Goa 76.
569. Lord Hailsham of St. Marylebone (ed), *Halsbury's Laws of England*, Butterworths, 3rd Edn, Vol 7, para 603, p 285.
570. *Maganbhai v UOI*, AIR 1969 SC 783, 795; *Midnapore Zamindary Co Ltd v Province of Bengal*, AIR 1949 FC 143; *Foster v Globe Venture Syndicate Ltd*, [1900] 1 Ch 811; *Duff Development Co v Kilantan Government*, AIR 1924 Cal 797.
571. *Samarendra v Birendra*, (1908) 12 Cal WN 777.
572. *Umrao Singh v Bhagavathi Singh*, AIR 1956 SC 15.
573. *Madhav Rao Scindia v UOI*, AIR 1971 SC 530 at 564 : (1971) 1 SCC 85 : 1971 SCR (3) 9.
574. *Neel Kristo Dev v Beer Chandra*, (1869) 12 Moo Ind App 523.

to file a suit to restrain such persons from recovering, from the cultivators, commission in excess of the rate prescribed under the licence. Such persons are regarded as encroaching upon the statutory right of the committee to regulate the marketing of agricultural produce in the area. The fact that a criminal prosecution can be instituted under such Act does not bar the jurisdiction of the civil courts.[575] Amongst the decisions relied upon for this conclusion, were those mentioned below:

(i) *Firm Kishore Chand v Budaun Electric Supply Co.*[576]

(ii) *Bhudeb Mookerjee v Kalachand Mallik.*[577]

(iii) *Dhulabhai v State of Madhya Pradesh.*[578]

The well-known judgment of Willes J, in *Wolverhampton New Water Works Co v Hawkesford,*[579] was also considered.

[s 9.58] Debt Relief

The civil court cannot decide a question arising under the Maharashtra Debt Relief Act, 1975 (Act No 3 of 1976), because the jurisdiction of the civil court is barred by section 7(1) and section 7(6) of the Act. Under these provisions, if a creditor raises a question that a person who claims to be his debtor is not a "marginal farmer, rural artisan, rural labourer or worker", etc, the matter has to be decided by the revenue officer appointed by the district magistrate, called the "authorised officer".[580]

In *Jagdish,*[581] the Supreme Court dealt with the question of ouster of jurisdiction of the civil courts under section 34 of the SARFAESI Act, 2002. It held that section 34 bars the jurisdiction of civil courts to entertain any suit or proceeding in respect of any matter which a DRT or DRAT is empowered to determine under the SARFAESI Act, 2002. The Supreme Court held that section 34 completely barred the jurisdiction of civil court even in so far as the "measures" taken by a secured creditor under section 13(4), against which an aggrieved person has a right of appeal before the DRT or the DRAT, to determine as to whether there has been any illegality in the "measures" taken.

The question before the Supreme Court in *Mukesh Jain*[582] was that whether, in the instant case, the suit was maintainable against the proceedings initiated under the provisions of the SARFAESI Act, 2002. The application filed by the appellant under O VII, rule 11 of the CPC was rejected mainly for the reason that the tribunal had no jurisdiction to entertain the proceedings under the provisions of section 1(4) of the DRT Act as the value of the suit was less than Rs 10 lakh and therefore, a civil suit was the only remedy available to the respondents (original plaintiffs). It was held that the application submitted by the appellant bank under O VII, rule 11 of the CPC should have been granted by the trial court as, according to section 34 of the SARFAESI Act, 2002, a civil court has no jurisdiction to entertain any appeal arising under the Act. Thus, it was held that the DRT constituted under the DRT Act has jurisdiction to entertain an appeal as per section 17 of the Act even if the amount involved is

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575. *Taj Mohammad v Agricultural Produce Market Committee*, AIR 1982 Bom 553, at pp 556, 558.
576. *Firm Kishore Chand v Budaun Electric Supply Co*, AIR 1944 All 66.
577. *Bhudeb Mookerjee v Kalachand Mallik*, AIR 1921 Cal 129.
578. *Dhulabhai v State of Madhya Pradesh*, AIR 1969 SC 78.
579. *Wolverhampton New Water Works Co v Hawkesford*, (1859) 6 CBNS 336 : (1859) 141 ER 486.
580. *Bhagwan Motiram Mali v Jayant Shridhar Khare*, AIR 1982 Bom 82, at pp 85, 90, para 26 (DB).
581. *Jagdish Singh v Heeralal*, (2014) 1 SCC 479 : 2014 (1) CTC 652 : (2013) 8 Mad LJ 84 (SC).
582. *State Bank of Patiala v Mukesh Jain*, (2017) 1 SCC 53 : 2016 (6) CTC 330.

less than Rs 10 lakh. However, as a note of abundant caution, it was observed that the appellate jurisdiction must not be misunderstood with the original jurisdiction of the tribunal.

However, in a case, where the plaintiff, an agriculturist, sought redemption of mortgage without payment, availing the benefit under the Tamil Nadu Debt Relief Act, 1982 (50 of 1982), it was held by the Madras High Court that right of redemption is a common law remedy and the statute under which the special tribunal has been established, neither expressly nor impliedly bars the jurisdiction of civil court. It has been observed that the Act only provides additional body to indebted agriculturists.[583] In another case, it has been held that for obtaining relief under the Tamil Nadu Debt Relief Act, 1980 (13 of 1980), the jurisdiction of the civil court is not barred.[584]

From the provisions of the Tamil Nadu Debt Relief Act, 1980 (13 of 1980), the legislative scheme is clear that the scheme is not to allow interference by any court with determination of the question of eligibility to receive benefit under the Act by the applicant-debtor by the *tahsildar* and his order is made final subject to an appeal under section 8. The legislative intent is to vest the jurisdiction to determine the question relating to eligibility for the benefits under the Act in the statutory authorities, to the exclusion of the court so that a debtor who is entitled to the benefits under the Act is able to enjoy such benefit without a hassle of a protracted litigation in a civil court or revenue court. The view taken by the high court that if a civil suit for realisation of the amount or any other relief based on the debt in question has been filed or on the filing of such a suit the *tahsildar* would lose his jurisdiction to deal with the matter if accepted will defeat the very purpose for which the legislature enacted the statute, that is, to grant relief to a certain class of debtors. If the view taken by the high court is accepted, then it would be easy for a creditor to prevent the debtor from getting benefits granted under the Act by filing civil suit relating to the debt. On the other hand, in section 4(b), a declaration is made that any civil court which entertains any suit or other proceeding against the debtor for recovery of any amount of such debt (including interest, if any); all suits and other proceedings (including appeals, revisions, attachments or execution proceedings) pending at the commencement of the Tamil Nadu Debt Relief Act, 1980, against any debtor for the recovery of any such debt (including interest, if any) shall abate.[585] The further question that arises for consideration is what is the appropriate course to be followed in a suit which was filed by the creditor against the debtor before the debtor made the application to the *tahsildar* seeking relief under the Tamil Nadu Debt Relief Act, 1980, should it be dismissed immediately on filing or should it be suspended/stayed till the *tahsildar* disposes of the application filed by the debtor. In such a case, the proper and reasonable course to be followed is to stay the proceeding in the suit till the *tahsildar*/appellate authority disposes of the proceeding under the statute. If it is held in that proceeding that the debtor is not entitled to the benefit under the Act, then the civil suit may be proceeded with. If, on the other hand, it is held that the debtor is entitled to the benefits provided in the Tamil Nadu Debt Relief Act, 1980, then the suit has to be dismissed under section 4. In no case can it be held that by filing a civil suit for realisation of the mortgage amount the proceeding pending before the *tahsildar* or the appellate authority is to be dismissed without adjudication.[586] A full reading of section 34 of the SARFAESI Act, 2002 (54 of 2002) shows that the jurisdiction of the civil court is barred in respect of matters which a DRT or appellate tribunal is empowered to determine in respect of any action taken

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583. *Eswaramoorthy Velar v Parvathammal*, (2000) 1 Mad LJ 291 (Mad).
584. *Ramaswamy v Velliammal*, (1998) Mad LJ (Supp) 314 (Mad).
585. *P Nirathilingam v Annaya Nadar*, AIR 2002 SC 42 : (2001) 9 SCC 673.
586. *P Nirathilingam v Annaya Nadar*, AIR 2002 SC 42 : (2001) 9 SCC 673.

"or to be taken in pursuance of any power conferred under this Act". That is to say prohibition covers even matters which can be taken cognizance of by the DRT though no measure in that direction has so far been taken under sub-section (4) of section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the tribunal. Therefore, any matter in respect of which an action may be taken even later, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the DRT, apart from those matters in which measures have already been taken under sub-section (4) of section 13. Therefore, it is incorrect to say that before any action or measure is taken under sub-section (4) of section 13, there would be no bar to approach the civil court.[587]

On the factual score, a civil suit stands filed and thereafter the claim was preferred before the Commissioner of Payments in terms of the Sick Textile Undertakings (Nationalisation) Act, 1974 (57 of 1974). The right of a claimant to proceed before the commissioner and to file a suit to recover the amount due to him cannot, on a perusal of the statute, be taken away, though the claimant would not be entitled to recover any amount at both the ends. The amount paid by the commissioner would stand reduced to the extent of payment by the commissioner. The filing of the civil suit, thus, is not barred. Once the claim stands paid, though partially, question of proceeding with the suit would not arise. It is in this context, Supreme Court concurred with the findings of the Bombay High Court in *Oriental Coal Co Ltd, Calcutta v Mohanlal Kisanlal*,[588] and recorded its approval and similar concurrence also went to the decision of the Calcutta High Court in *Barakar Coal Co Ltd v NC Mehta*.[589]

In *Nahar Industrial Enterprises Ltd*,[590] the Supreme Court has held that the term "suit" has to be confined in the context of sub-section (1) of section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)[591] to those actions which are dealt with under the CPC and not in the comprehensive over-arching proceedings so as to apply to any original proceedings before any legal forum. The term "suit", therefore, would apply only to proceedings in civil court and not actions or recovery proceedings filed by banks and financial institutions before a tribunal such as DRT.

The DRT Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under section 20 against order passed by DRT directing sale of mortgaged property and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution of India or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution of India, nevertheless when there is an alternative remedy available, judicial prudence demands that the court refrain from exercising its jurisdiction under the said constitutional provisions. The high court should not entertain the petition under Article 227 of the Constitution of India and should direct the party to take recourse to the appeal mechanism provided by the Act.[592]

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587. *Mardia Chemicals Ltd v UOI*, AIR 2004 SC 2371 : (2004) 4 SCC 311 : 2003 (9) Scale 185.
588. *Oriental Coal Co Ltd, Calcutta v Mohanlal Kisanlal*, AIR 1984 Bom 174; As cited in: *IFCI Ltd v Cannanore Spg & Wvg Mills Ltd*, AIR 2002 SC 1841.
589. *Barakar Coal Co Ltd v NC Mehta*, AIR 1984 Bom 174; As cited in: *IFCI Ltd v Cannanore Spg & Wvg Mills Ltd*, AIR 2002 SC 1841.
590. *Nahar Industrial Enterprises Ltd v Hong Kong and Shanghai Banking Corp*, (2009) 8 SCC 646 : 2003 (9) Scale 185; *Inderjeet Arya v ICICI Bank Ltd*, (2014) 2 SCC 229.
591. The SICA is repealed with effect from 1 December 2016.
592. *Punjab National Bank v OC Krishnan*, AIR 2001 SC 3208 : (2001) 6 SCC 569 : 2001 SCR 966 : 2001 (5) Scale 196.

An application was filed by the bank under the DRT Act before the tribunal for recovery against borrower company. During the pendency of the said application before the tribunal, the borrower company filed civil suit against the bank alleging breach by bank in not releasing sanctioned loans. It was held by the Supreme Court that the suit of the borrower company and bank's application before the tribunal are not inextricably connected and as such the provisions of section 31 of the Act are not applicable. Further, the suit was not counter-claim to the application filed by the bank. Thus, the application filed by the bank for transfer of the suit to the tribunal was not maintainable.[593] RV Raveendran J, speaking for the division bench in the above case, observed as follows:

> 9. The issues that arose in the Bank's application was whether the borrower failed to repay the sums borrowed and whether the Bank was entitled to the amounts claimed. On the other hand, the issues that arose in the borrower's suit were whether the Bank had promised/agreed to advance certain monies; whether the Bank committed breach in refusing to release such loans in terms of the sanction letter; whether the borrower failed to fulfil the terms and conditions of sanction and therefore the Bank's refusal to advance was justified; and even if there was breach, whether the borrower suffered any loss on account of such non-disbursement and if so whether the borrower was entitled to the amounts claimed. While the claim of the Bank was for an ascertained sum due from the borrower, the claim of the borrower was for damages which required firstly a determination by the court as to whether the Bank was liable to pay damages and thereafter assessment of quantum of such damages. Thus there is absolutely no connection between the subject-matter of the two suits and they are in no way connected. A decision in one does not depend on the other. Nor could there be any apprehension of different and inconsistent results if the suit and the application are tried and decided separately by different forums. In the circumstances, it cannot be said that the borrower's suit and the Bank's application were inextricably connected.[594]

[s 9.59] Debt Recovery Tribunal Not Subordinate to High Court

Section 41(b) of the Specific Relief Act, 1963 (47 of 1963) provides that there cannot be any injunction restraining a person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. But, here it is not a case, which falls under section 41(b). The injunction restraining the respondents from proceeding with the case before the DRT does not fall within the scope of section 41(b). On the other hand, it is a question as to whether the high court had jurisdiction or not. If the DRT has exclusive jurisdiction and the high court ceases to have jurisdiction, in that event, it is not a question of granting injunction restraining the respondents from proceeding with the same. But it is a case whether the high court has jurisdiction to proceed with or not, if it has jurisdiction, in that event, it can very much grant the injunction. If it has no jurisdiction, it cannot do so. Even if it is assumed that section 41(b) applies, still then DRT as such is not a court subordinate to the high court. It does not fall within the hierarchy of the courts as provided in the Bengal, Agra and Assam Civil Courts Act, 1887. The tribunal constituted under the Debts Recovery Tribunals (Procedure) Amendment Rules, 1994 is not a court. It is a tribunal having the trappings of a court. A tribunal with trappings of court cannot be equated with a court as is understood from the expression "Court". Subordination under Article 226 of the Constitution of India does not make DRT a court subordinate to the high court within the meaning of section 41(b) or for the purpose of appeal or revision as the case may be. So far as Article 227 is concerned, it is a power conferred on the high court by the Constitution

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593. *Indian Bank v ABS Marine Products Pvt Ltd*, AIR 2006 SC 1899 : (2006) 5 SCC 72.
594. *Indian Bank v ABS Marine Products Pvt Ltd*, AIR 2006 SC 1899, para 9, at p 1903 : (2006) 5 SCC 72.

of India, for exercising superintendence over all courts and tribunals subordinate to it. It makes a distinction between courts and tribunals and brings within its sweep both courts and tribunals. Therefore, subordination of tribunal under Article 227 of the Constitution of India subject to power of superintendence is not a subordination of a court within the meaning of section 41(b). Therefore, the high court cannot stay further proceedings pending before a tribunal in exercise of its jurisdiction envisaged under section 9 of the CPC and/or by reason of clause 12 of the Letters Patent. Therefore, DRT is not a court subordinate to the high court exercising co-ordinate jurisdiction under clause 12, as contemplated in section 41(b). This suit for injunction would not be maintainable before the high court by reason of section 18 of the DRT Act. This suit is maintainable before the DRT. Thus, so far as the high court exercising original side jurisdiction is nothing more than a court of co-ordinate jurisdiction. Inasmuch as, the same suit is sought to be proceeded with before the high court as a court of trial. Under section 31, the records of this suit are to be transmitted to the DRT. Whereas out of the same cause of action, the respondents have initiated the proceeding in the DRT. Therefore, in relation to these proceedings, the DRT and the high court cannot be placed at a level higher than court of co-ordinate jurisdiction.[595]

The petition filed by the bank before the DRT under section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) can only be adjudicated by the DRT constituted under the Special Act, namely the DRT Act. Therefore, by the introduction of the DRT Act, there cannot be any dispute that the high court or any civil court cannot adjudicate the claim of the bank to recover debts due under section 17 of the DRT and it is the DRT which alone has the exclusive jurisdiction to try such claims. Accordingly, the high court cannot have any jurisdiction to try and adjudicate the application filed by the bank to recover its dues from the company even if the said application can be transferred to the high court because the application filed by the bank before the DRT can only be decided by the DRT under the DRT Act. Therefore, the question of trying the same by the high court after transfer cannot arise at all. If such a suit is tried after transfer, the judgment and decree that would be passed by the high court would be a nullity and without jurisdiction. Therefore, the question of jurisdiction readily comes into play, that is to say, the high court has no jurisdiction or cannot have any jurisdiction to try the pending application filed by the bank before DRT under the DRT Act and such being the position in law, the question of entertaining a petition under clause (13) of the Letters Patent to transfer the application filed under section 17 by the bank against the company from the tribunal to the high court cannot arise at all. Similarly, the high court also cannot grant stay against proceedings pending before the DRT.[596]

[s 9.60] Finality

The fact that a provision in a statute declared a certain order to be "final", does not apply where the provisions of this Act have not been complied with, or the statutory tribunal has not acted as per fundamental principles of judicial procedure. Several other aspects, like the scheme of the Act, adequacy and sufficiency of remedies provided, etc, have to be considered.[597]

Whenever a right is created by a statute and that statute provides a machinery for the enforcement of the right, the civil court's jurisdiction is barred: but, if the right is a pre-existing

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595. *State Bank of India v Madhumita Construction Pvt Ltd*, AIR 2003 Cal 7.
596. *Vysya Bank Ltd v Shankarlal Export Pvt Ltd*, AIR 2001 Cal 47 (DB).
597. *Raja Ram Kumar Bhargava v UOI*, AIR 1988 SC 752 : (1988) 1 SCC 681 : (1988) 2 SCR 352 : (1988) 17 ITR 254 (SC).

one at common law and the statute provides only a new remedy for its enforcement, then a civil suit is not barred.[598]

Under the Rajasthan Municipalities Act, 1959 (38 of 1959), sections 139 and 143, the Municipal Council sent a letter to inform the company that the agreement between them was terminated and octroi duty would be charged. No assessment or alteration of assessment was made by this letter. Nor was it a notice of demand. The civil court's jurisdiction is not ousted in such matters.[599]

[s 9.61] Partition

The plaintiff and his three brothers owned a property. The vacant site was leased by these four brothers to the defendants under a lease deed dated 28 October 1955, for the purpose of construction of a rice mill. The monthly rent agreed to was Rs 200/-. The defendant-lessees were permitted to put up a building to install machinery and to remove the same at the end of the lease period of 10 years. There was a clause that at the end of the 10 years' period, the defendants shall hand over vacant possession after removing the super-structure and the machinery. In September 1957, the defendant lessees purchased the three-fourth share of the three brothers of the plaintiff. Consequently, there was a fresh agreement between the plaintiff and the defendants in relation to the undivided one-fourth share of the plaintiff, for which the defendants agreed to pay a monthly rent of Rs 50/-. The plaintiff filed a suit for partition and separate possession of one-fourth share of the suit property. It was held that the suit as framed was maintainable and both the reliefs, namely, partition and separate possession and eviction could be prayed for in the same suit.[600]

[s 9.62] Amalgamation of Plots

Where the dispute between the parties is as to whether any permission was granted by the plaintiff to the defendants for the purpose of amalgamation of two plots or not and the plaintiff's specific case was that no such permission was given to the defendants either in the Development Agreement or in the Power of Attorney which was executed in their favour. The question which fell for consideration is as to whether the suit filed by the plaintiff can be tried in civil court or not.

From the perusal of the said section 149, Maharashtra Regional and Town Planning Act, 1966 (37 of 1966), it is apparent that every order passed or direction issued by the state government or order passed or notice issued by any regional board, planning authority or development authority under the Act shall be final and shall not be questioned in any suit or legal proceedings. The Maharashtra Regional and Town Planning Act, 1966 empowers the government to issue various orders or directions regarding numerous matters pertaining to either reservation or preparation of development plan, etc. The civil court's jurisdiction is ousted in respect of such matters where state government or its authorities alone are empowered under the Act to adjudicate or decide any matter. In the present case, dispute is regarding the question as to whether the plaintiff had permitted the defendants to apply for amalgamation for the two plots or not. The dispute therefore is one which is arising out of the terms and conditions of the contract or the terms and conditions in the power of attorney which is

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598. *Raja Ram Kumar v UOI*, AIR 1988 SC 752 : (1988) 1 SCC 681 : (1988) 2 SCR 352 : (1988) 17 ITR 254 (SC).
599. *JK Synthetics v Municipal Council Kota*, AIR 1989 Raj 51.
600. *KMSK Rabindranath v S Bakyam Pillai*, AIR 1988 Mad 358.

executed by the plaintiff. Therefore, bar of section 149 would not be applicable to the facts of the present case. Moreover, a division bench of the Bombay High Court in a judgment in the case of *Raja Bahadur Motilal*,[601] in para 12 has observed as under:

> What is necessary under section 149 to acquire finality and invite the bar of civil suit is, it should be an order passed or direction issued by the State Government or it should be an order passed or notice issued by any Regional Board Planning Authority or Development Authority under this Act. It is provided by this section that no such order shall be questioned in any suit or in any legal proceedings. It is obvious therefore that a suit or legal proceeding for quashing a deemed permission under section 45(5) is maintainable. Even otherwise under section 149 what is barred is questioning of an order made under the Act in the civil suit. It does not bar any suit whereby a party to it can be prevented from acting on an action and order made under the Act. The bar spelt out by section 149 is therefore very limited.[602]

[s 9.63] Deemed Sanction of Construction

Where the building was constructed by the plaintiff on the basis of "deemed sanction" under section 31(5) of the Himachal Pradesh Town and Country Planning Act, 1977 (12 of 1977), the notices issued by the authority that the construction was without sanction and liable for demolition, the suit filed by the plaintiff that the notices were illegal and void was found maintained before civil court.[603]

[s 9.64] Restrictive Covenant

A company incorporated in Germany entered into contract with an Indian company. The Indian company was to sell certain goods in India. There was a negative covenant, restraining the company from selling goods after termination of the contract. It was held that this covenant was not enforceable.[604]

[s 9.65] Assignment

A contract was in the name of an individual. The suit was filed in the name of the company. There was no assignment from the individual, Ludwig Taprogge, to the company, Taprogge Geselleschaft MBH, as per pleadings. It was held that the company did not have any right to sue on the contract.[605]

[s 9.66] Special Statutes

Where a special statute creates a special right or liability and provides for its determination by a special forum, the jurisdiction of ordinary courts is still not ousted where:

(i) the relevant section in the special statute provides that the finality is "for the purposes of this Act" (and not generally or for all other purpose);

(ii) the statute does not lay down that all questions about the special right, etc. shall be determined by the special forum; or

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601. *Raja Bahadur Motilal*, (2003) 1 Bom CR 251.
602. *Gadre Constructions v Sadashiv Keshav Sathe*, AIR 2004 Bom 392.
603. *Narain Singh Bramta v State of Himachal Pradesh*, AIR 2003 HP 81.
604. *Taprogge Geselleschaft MBH v IAEC India Ltd*, AIR 1988 Bom 157.
605. *Taprogge Geselleschaft MBH v IAEC India Ltd*, AIR 1988 Bom 157.

(iii) if the remedy provided is not adequate to do all which a civil court can do.

(*Dhulabhai*'s case[606] applied, as regards situations (i) and (ii) above).[607]

If the remedy provided by the special statute is not adequate, then the jurisdiction of the ordinary courts is not ousted. The use of the expression "finality" in section 2(1)(a), Bombay Personal Inams Abolition Act, 1952, is not intended to bar the jurisdiction of civil courts.[608] The jurisdiction of the civil court to adjudicate title of the parties is not barred by the virtue of the provisions of Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963.[609] The decision of a *tahsildar* under section 3 of Andhra Pradesh (Andhra Area) Inams (Abolition and Conversion into Ryotwari) Act, 1956, that the property was not a Wakf property was not within jurisdiction. In such circumstances, the bar of section 14 of the Act will not apply as it pre-supposes an order passed within jurisdiction.[610] No suit or proceedings shall lie before the civil court against the decision of the Wakf board to include property in the register of Wakf.[611]

Under the Christian Marriage Act, 1872, maintenance to neglected Christian wife and children can be awarded even though there is no provision for such relief in the said Act. A civil suit for maintenance can be instituted as taking cognizance of such a suit is neither expressly nor impliedly barred.[612] AS Pachhapure J in the above case observed as follows:

> **12.** Law cannot be made to meet any sort of eventuality and in such circumstances, if the provisions of the Indian Christian Marriage Act, 1872, (hereinafter called as "the Act 1872" for short) is perused, it provides the procedure regarding the performance of marriage, but at the same time does not contain any such provision as to the relief that has to be provided, in case, if the wife and children are neglected by the husband. Even if the marriage under the Indian Christian Act, 1872 is a contract, when a breach occurs, there are certain obligations on the part of the spouses. If the facts are looked into in the context of the provisions of the Act 1872, there is no prohibition so far as the award of maintenance, in case, if the wife or children do not have their own economic provision or source of income for their survival. Thereby, under the provisions of Section 9 of CPC, all the civil suits can be tried by the courts unless there is any specific bar.[613]

In the above decision, a passage from the decision of the Supreme Court in *MV Elisabeth v Harwan Investment and Trading Pvt Ltd*[614] was quoted, wherein it has been observed as follows:

> **17.** The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to court which is an important right vested in every citizen implies the existence of the power of the court to render justice according to law. Where statute is silent and judicial intervention is required, courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.

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606. *Dhulabhai v State of Madhya Pradesh*, AIR 1969 SC 78 : (1968) 3 SCR 662.
607. *State of Tamil Nadu v Ramalinga Samigal Madam*, (1985) 4 SCC 10.
608. *Sayed Mahomed v State of Gujarat*, AIR 1981 SC 2016 : (1981) 4 SCC 383.
609. *Sri-La-Sri Sivaprakasa Pandara Sannadhi Avargal v T Parvathi Ammal*, (1998) 9 SCC 603.
610. *Sayyad Ali v Andhra Pradesh Wakf Board, Hyderabad*, (1998) 2 SCC 642.
611. *Subhan Shah v Madhya Pradesh Wakf Board*, AIR 1997 MP 8.
612. *K Kumar v Smt. Leena*, AIR 2010 Kant 75.
613. *K Kumar v Smt. Leena*, AIR 2010 Kant 75, para 12, at p 78.
614. *M.V Elisabeth v Harwan Investment and Trading Pvt Ltd*, AIR 1993 SC 1014 : JT 1992 2 65 (per TK Thommen J).

A suit for declaration and permanent injunction was filed for restraining cancellation of Patta granted under the Updating Registry Scheme. It was held by the Madras High Court that the provisions relating to abolition and vesting of property under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963, do not have the effect of obliterating or destroying any pre-existing right. Since the statutory authorities have exercised their jurisdiction in a summary manner, the jurisdiction of civil court is not barred in respect of adjudication of claims of title and issues which are not required to be adjudicated for the purpose of enforcement of the laws, which intends to implement ryotwari settlement. It was further held that even where finality is accorded, civil court is entitled to nullify such order.[615]

In a case, where Inam land had been granted to a temple and the Inam Tehsildar granted Ryotwari Patta to the defendant, it was held by the Madras High Court that the suit filed by the temple for declaration of title is maintainable and civil court has jurisdiction to adjudicate.[616]

In another case, it was held by the Madras High Court that Ryotwari Patta granted by the tribunal constituted under the Tamil Nadu Minor Inams (Abolition and Conversion in Ryotwari) Act, 1963, could be a question before a civil court. Orders passed and decisions rendered under the Act being given finality does not have the effect of ousting the jurisdiction of civil court.[617]

A civil court can interfere if the statutory authority acts in violation of rules, or acts in abuse of its authority or in violation of fundamental principles of judicial procedure. Where fresh interview was held for the post of assistant teacher in violation of the order of the court and in contravention of the statutory rules of recruitment, the civil court can interfere. Application under Article 227 of the Constitution of India challenging maintainability of a civil suit is liable to be dismissed.[618] If a right or liability is created by statute, two situations may arise:

(i) The statute may create a specific forum for its enforcement.

In such a case, the question of whether the civil court's jurisdiction is impliedly excluded within the meaning of section 9 of the CPC is one of statutory construction. If the right is new one, ouster may be inferred.

(ii) If, while creating a liability, no machinery is provided for enforcement, civil courts can entertain the suits, besides the suit of which the cognizance is expressly barred.

These are suits which are barred by general principles of law.

To ensure expeditious settlements of consumer disputes, the electricity board issued a commercial circular which provided settlement of all consumer dispute by circle level committee constituted by the board for that purpose. Where the consumer challenged the clubbing of two metres and demands of common bills, by way of civil suit, such suit was not maintainable as only the committed had the jurisdiction to entertain the petition.[619] A bare perusal of section 330(c) of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, read with proviso to rule 285K framed thereunder, is sufficient to indicate that the institution of a suit in the civil court for the purpose of setting aside a sale on the ground of fraud is not barred.[620]

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615. *Ramakrishnan v Mayilsamy*, (2007) 1 Mad LJ 72 (Mad).
616. *Ramalingam v Idol of Sri Thayumanaswamy*, (1998) Mad LJ (Supp) 354 (Mad) : (1998) 3 CTC 665.
617. *Srinivasan v Sri Madhyarjuneswar Swami, Pattavaithalai*, (1998) 2 Mad LJ 722 : (1998) 1 CTC 630.
618. *Binal Sahoo, Secretary, Basudevpur Girls' High School v Gouri Rani Pahari*, AIR 1991 Cal 120.
619. *PSEB v Jeewan Kumar*, AIR 1999 P&H 187.
620. *Roshan Prasad v Shiv Pal*, (1997) 8 SCC 167.

Where an order was passed by the collector for confiscation of goods under section 6A of the Essential Commodities Act, 1955, the aggrieved person has remedy of filing an appeal against that order under section 6C and civil suit filed against the order would not be maintainable as the civil court's jurisdiction is expressly barred under section 6E in case of seizure or any other order under the Act in relation to essential commodities.[621]

[s 9.67] Mines and Minerals

Forum under section 23 of the Coking Coal Mines (Nationalisation) Act, 1972 (36 of 1972) is an additional forum. It does not oust the jurisdiction of the civil court under the general law and the suit before the civil court is maintainable. Besides that the liability of the erstwhile owner of a coal mine does not cease due to vesting of coal mines.[622]

[s 9.68] Hard Coke Plant

An authority under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, has a very limited jurisdiction and it has to determine only a dispute that may arise, *viz*-a-*viz* a public premise. Upon an application made before it, it has to proceed in a summary disposal thereto. The question as to whether the area formed part of the Royal Tisra Colliery or not, consequently making it a public premise is a question that becomes the focal point of the instant case and it, therefore, obviously involves determination/finding of fact. Undoubtedly, while attempting to come to such finding, the authority may be faced with complicated question of title as is involved in the instant case. The authority in the aforementioned case cannot be said to have the jurisdiction to embark upon the domain of the civil court for the purposes of adjudicating on a question of a complicated title, which can only be done by a civil court. It would be extremely unreasonable to allow a court vested with summary procedure to give a finding which can only be arrived at by a civil court having the necessary judicial competence.[623]

[s 9.69] Service Matters

The broad guiding consideration for determining whether jurisdiction of civil court is excluded, is this:

(a) If a right, not pre-existing in common law, is created by a statute and that statute itself has provided a machinery for the enforcement of the right, both the right and the remedy having been created by that statute, a finality is intended. The civil court's jurisdiction is impliedly barred;

(b) If, however, a right pre-existing in common law, is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil court's jurisdiction, then both the common law remedy and the statutory remedy might become concurrent remedies, leaving open an element of election to the persons entitled to sue in the civil court or in the statutory tribunal.[624]

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621. *State of Gujarat v Mer Parbat Ramaji*, (1991) ILR Guj 185.
622. *ML Harnarain v Karamchand Thaper & Bros Pvt Ltd*, AIR 2004 Jhar 143.
623. *Shree Bajrang Hard Coke Manufacturing Corp v Ramesh Prasad*, AIR 2003 Jhar 17.
624. *Raja Ram Kumar v UOI*, AIR 1988 SC 752 : (1988) 1 SCC 681 : (1988) 2 SCR 352 : (1988) 17 ITR 254 (SC).

In a suit based on wrongful dismissal, the civil court cannot grant re-instatement, but can grant compensation.[625]

Where at the hearing of application relating to interim relief in a suit, objection of jurisdiction is taken, such issue is to be decided by the court as a preliminary issue.

The Central Civil Services (Classification, Control and Appeal) Rules, 1965, neither expressly nor by necessary implication take away the jurisdiction of the civil courts to deal with service matters. Thus, where a Central Government employee, dismissed from service, filed a suit for re-instatement and the matter was litigated for more than five years, it was held by the Supreme Court that the high court in second appeal cannot hold that civil court has no jurisdiction in the matter.[626] Elaborating on the point, it was observed that it is an erroneous view that civil court does not have jurisdiction to adjudicate on an order passed by disciplinary authority, and that only writ application can be filed after exhausting departmental remedies. Provisions of Central Civil Services (Classification, Control and Appeal) Rules, 1965, do not oust the jurisdiction of civil courts. It is a different matter to insist that departmental remedies should be exhausted before a person approaches the civil court but it is not proper for the single judge of the high court to hold after five years, while hearing second appeal, that civil court has no jurisdiction. The case should have been decided on merits. The appellant could not be non-suited on the ground that he had failed to take recourse to proceedings under the Central Civil Services (Classification, Control and Appeal) Rules, 1965, against the order of dismissal. It was further held in the case that it is also an erroneous view that jurisdiction of civil court under section 34 of the Specific Relief Act, 1963, is also ousted. Service rules neither expressly nor by implication have taken away jurisdiction of civil court to deal with service matters.[627]

An employee of the Life Insurance Corporation was dismissed from service and the employee challenged his dismissal in the civil court. A departmental inquiry had been conducted in the case but the copy of the inquiry report was not made available to the plaintiff. Even the show-cause notice did not disclose as to on what premise a finding of guilt was recorded by the inquiry officer or by disciplinary authority. It was held by a division bench of the Rajasthan High Court that there has been a violation of principles of natural justice and where principles of natural justice and service regulations are violated, the civil court will have jurisdiction. It was further held that if the dispute is not an industrial dispute and it does not relate to enforcement of any right under the Industrial Disputes Act, 1947, the remedy lies only in civil court.[628]

Where an individual workman filed a suit against his employer seeking relief in respect of grant of selection scale or with holding of increment as a measure of punishment, the dispute is not covered by section 2A of the Industrial Disputes Act, 1947. Since the cause of the workman is not espoused by the union or the body of workmen and the dispute is not industrial dispute, it was held that the jurisdiction of civil court is not barred.[629]

In the case of dismissal of an employee of an insurance company on the basis of domestic enquiry, it was held by the Supreme Court that if the findings of the departmental proceedings are based on no evidence, the civil court can interfere in the matter.[630] In the above case, the Supreme Court laid down guidelines to be followed where the findings of a domestic enquiry

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625. *Sitaram v Pigment Cakes*, AIR 1980 SC 10 : (1979) 4 SCC 12.
626. *Ramendra Kishore Biswas v State of Tripura*, AIR 1999 SC 294 : (1999) 1 SCC 472.
627. *Ramendra Kishore Biswas v State of Tripura*, AIR 1999 SC 294 : (1999) 1 SCC 472.
628. *Life Insurance Corporation of India v Rampal Singh*, 2006 (2) Civil Court Cases 649 (Rajasthan) (DB).
629. *RSRTC v Ramesh Kumar Sharma*, 2008 (4) Civil Court Cases 81 (Rajasthan).
630. *Narinder Mohan Arya v United India Insurance Co Ltd*, AIR 2006 SC 1748 : (2006) 4 SCC 713.

were challenged before civil court or a writ court. Speaking for the bench in the above case, SB Sinha J observed as follows:

> 26. In our opinion the learned Single Judge and consequently the Division Bench of the High Court did not pose unto themselves the correct question. The matter can be viewed from two angles. Despite limited jurisdiction a civil court, it was entitled to interfere in a case where the report of the Enquiry Officer is based on no evidence. In a suit filed by a delinquent employee in a civil court as also a Writ Court, in the event the findings arrived at in the departmental proceedings are questioned before it should keep in mind the following: (1) the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry.[631] (2) In a domestic enquiry fairness in the procedure is a part of the principles of natural justice.[632] (3) Exercise of discretionary power involve two elements—(i) objective and (ii) subjective and existence of the exercise of an objective element is a condition precedent for the exercise of the subjective element.[633] (4) It is not possible to lay down any rigid rules of the principles of natural justice which depends on the facts and circumstances of each case but the concept of fair play in action is the basis.[634] (5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject-matter of the charges is wholly illegal.[635] (6) Suspicion or presumption cannot take the place of proof even in a domestic enquiry. The Writ Court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances.[636]

[s 9.70] Service Matters Between Workmen and Management

The appellant, Rajasthan State Road Transport Corporation, constituted under the Road Transport Corporations Act, 1950, contended that the suits filed by the respondent-employees impugning the termination of their services for misconduct on the ground of contravention of standing orders were barred and that the only remedy available to the respondents was a reference of the dispute for adjudication to a labour court.

The instant cases are governed by the decision in *Jitendra Nath Biswas* case and in accordance with the said decision, it must be held that the jurisdiction of the civil courts is excluded. It may be stated that from the point of view of the workmen also, the remedy of adjudication available under the Act would be more beneficial to them than that of a civil suit inasmuch as the civil court cannot grant the relief of reinstatement which relief can be granted by the labour court or the industrial tribunal.[637] On the date of filing the suit, none of the situations contemplated under section 2A of the Industrial Disputes Act, 1947, had happened so as to give the appellant a cause of action to approach the industrial court. It cannot be doubted that the maintainability of the suit has to be decided with reference to the date of institution of the proceeding and since on the day when the civil suit was filed, none of the eventualities covered by section 2A had happened, the appellant could not have approached the forum under the 1947 Act for relief.[638]

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631. See *State of Assam v Mahendra Kumar Das*, AIR 1970 SC 1255 : (1970) 1 SCC 709.
632. See *Khem Chand v UOI*, AIR 1958 SC 300 and *State of Uttar Pradesh v Om Prakash Gupta*, (1969) 3 SCC 775.
633. See *KL Tripathi v State Bank of India*, AIR 1984 SC 273 : (1984) 1 SCC 43.
634. See *Sawai Singh v State of Rajasthan*, AIR 1986 SC 995 : (1986) 3 SCC 454 : 1986 SCR (2) 957.
635. See *Director (Inspection & Quality Control) Export Inspection Council of India v Kalyan Kumar Mitra*, 1987 (2) Cal LJ 344.
636. See *Central Bank of India Ltd v Prakash Chand Jain*, AIR 1969 SC 983; *Kuldeep Singh v Commr of Police*, (1999) 2 SCC 110. *Narinder Mohan Arya v United India Insurance Co Ltd*, AIR 2006 SC 1748, para 26, at p 1754 : (2006) 4 SCC 713.
637. *Rajasthan State Road Transport Corp v Ramesh Chandra Tailor*, (1994) Supp 1 SCC 268; *State of Haryana v Randhir Singh*, (1995) Supp 1 SCC 144.
638. *Ishar Singh v National Fertiliser Ltd*, (1991) Supp 2 SCC 649.

In a case relating to employment on the work charge basis till the completion of project, the plaintiff's services were terminated on the completion of the project. The plaintiff challenged the termination as null and void in a civil suit. The claim of the employer was that the termination simpliciter was effected in the light of Rules under the Certified Standing Orders. On the other hand, the plaintiff claimed that the said Rules were completely ignored and highly arbitrary approach was adopted by the employer by picking and choosing plaintiffs for the purpose of termination. It was held by the Supreme Court that the dispute fell under the premise of Industrial Disputes Act, 1947, and the jurisdiction of civil court stood barred.[639] VS Sirpurkar J, speaking for the bench in the above case, observed as follows:

> . . . there is no doubt that the dispute and the main issue fell squarely under the premise of Industrial Disputes Act. Further as specifically held in *Krishna Kant's* case[640] that where the Certified Standing Orders were applicable and where the breach thereof is complained of, such issues fell in the exclusive area of the machinery provided by the Industrial Disputes Act and as such the civil court's jurisdiction was specifically barred. We are left with no doubt that the situation is identical in the present case.

In service matters between workman and management, the civil court has limited jurisdiction. The Supreme Court has held that the jurisdiction of civil court is not totally excluded. Thus, if a right is claimed under the Industrial Disputes Act, 1947, or the sister laws, the jurisdiction of civil court would be barred, but if no such right is claimed and the order of the management is claimed to be against the principles of natural justice, such matters are not beyond the jurisdiction of civil court.[641] SB Sinha J, speaking for the bench in the above case, observed as follows:

> **11.** Civil court may have a limited jurisdiction in service matters but it cannot be said to have no jurisdiction at all to entertain a suit. It may not be entitled to sit in appeal over the order passed in the disciplinary proceedings or on the quantum of punishment imposed. It may not in a given case direct reinstatement in service having regard to Section 14(1)(b) of the Specific Relief Act, 1963 but, it is a trite law that where the right is claimed by the plaintiff in terms of common law or under a statute other than the one which created a new right for the first time and when a forum has also been created for enforcing the said right, the civil court shall also have jurisdiction to entertain a suit where the plaintiff claim benefit of a fundamental right as adumbrated under Article 14 of the Constitution of India or mandatory provisions of statute or statutory rules governing the terms and conditions of service.[642]

Where the respondent, who was a daily wages employee, was removed from service by his employer, he filed a civil suit for his reinstatement and the suit was decreed by the lower courts. It was held by the Supreme Court that the respondent being a worker and the dispute being an industrial dispute, the civil court had no jurisdiction to try the case. The only remedy available to him is a reference under the Industrial Disputes Act, 1947, and not by way of a civil suit.[643]

The disputes involving rights or obligations created by the Industrial Disputes Act, 1947, do not fall within the jurisdiction of the civil court.

In a case from Haryana, a conductor was dismissed from service by the State Roadways. In the suit filed by the conductor, the civil court framed issues including the issue of whether it had jurisdiction to try the suit against the order of dismissal. However, without recording

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639. *Chief Engineer, Hydel Project v Ravinder Nath*, AIR 2008 SC 1315 : (2008) 2 SCC 350.
640. *Rajasthan State Road Transport Corp v Krishna Kant*, AIR 1995 SC 1715 : (1995) 5 SCC 75.
641. *Rajasthan State Road Transport Corp v Mohar Singh*, AIR 2008 SC 2553 : (2008) 5 SCC 542.
642. *Rajasthan State Road Transport Corp v Mohar Singh*, AIR 2008 SC 2553, para 11, at p 2554 : (2008) 5 SCC 542.
643. *Rajasthan State Road Transport Corp v Ramdhara Indolia*, (2006) 6 SCC 287 : (2006) 4 Mad LJ 1269.

any finding on the issue of jurisdiction, the civil court decreed the suit. It was held by the Supreme Court that such a suit is beyond the jurisdiction of civil court and hence the decree is a nullity.[644]

A three-judge bench of the Supreme Court has rendered a decision which is of far-reaching consequence in regard to workmen and management, the rights of workmen and the powers and jurisdiction of the civil courts *vis-à-vis* the tribunals established under the Industrial Disputes Act, 1947. SB Sinha J, speaking for the three-judge bench in *Bal Mukund Bairwa's* case,[645] has observed as follows:

> Section 9 of the Code is in enforcement of the fundamental principles of law laid down in the maxim *Ubi jus Ibi remedium*. A litigant, thus, having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impliedly barred by any statute. *Ex facie*, in terms of Section 9 of the Code, civil courts can try all suits, unless barred by statute, either expressly or by necessary implication.
>
> 10. The civil court, furthermore, being a court of plenary jurisdiction has the jurisdiction to determine its jurisdiction upon considering the averments made in the plaint but that would not mean that the plaintiff can circumvent the provisions of law in order to invest jurisdiction on the civil court although it otherwise may not possess. For the said purpose, the court in given cases would be entitled to decide the question of its own jurisdiction upon arriving at a finding in regard to the existence of the jurisdictional fact. It is also well settled that there is a presumption that a civil court will have jurisdiction and the ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or Tribunal acts without jurisdiction.

Explaining the point that the nature of the dispute, the reliefs claimed by the plaintiff and pleadings are important factors in determining the question of jurisdiction, it was further observed in the above case as follows:

> 21. A dispute arising in between an employer and employee may or may not be an industrial dispute. The dispute may be in relation to or arising out of a fundamental right of the employee, or his right under a Parliamentary Act and the Regulations framed thereunder, and/or a right arising under the provisions of the Industrial Disputes Act or the sister laws and may relate to same or similar rights or different rights, or even may be based on common law right or contractual right. The question in regard to the jurisdiction of the civil court must, therefore, be addressed having regard to the fact as to which rights or obligations are sought to be enforced for the purpose of invoking or excluding the jurisdiction of a civil court.[646]

It was further observed in the above case as follows:

> 23. If an employee intends to enforce his constitutional rights or a right under a statutory regulation, the civil court will have the necessary jurisdiction to try a suit. If, however, he claims his right and corresponding obligations only in terms of the provisions of the Industrial Disputes Act or the sister laws so called, the civil court will have none. In this view of the matter, in our considered opinion, it would not be correct to contend that only

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644. *State of Haryana v Bikar Singh*, AIR 2006 SC 2473 : (2006) 9 SCC 450. See also *Rajasthan State Road Transport Corp v Zakir Hussain*, (2005)7 SCC 447; *Rajasthan State Road Transport Corp v Krishna Kant*, AIR 1995 SCW 2683 : (1995) 5 SCC 75.
645. *Rajasthan State Road Transport Corp v Bal Mukund Bairwa*, (2010) 4 SCC 299 : 2010 (1) Civil Court Cases 545 (SC).
646. *Rajasthan State Road Transport Corp v Bal Mukund Bairwa*, (2010) 4 SCC 299 : 2010 (1) Civil Court Cases 545, para 23, at p 555 (SC).

> because the employee concerned is also a workman within the meaning of the provisions of the 1947 Act or the conditions of his service are otherwise governed by the Standing Order certified under the 1946 Act *ipso facto* the civil court will have no jurisdiction.[647]

The appellant, a probationer, fitter on daily basis was terminated from service on ground of unsatisfactory work. The appellant did invoke the provisions of the Industrial Disputes Act, 1947, for getting the dispute referred to an appropriate forum under the said Act for an adjudication but he failed and he did not pursue the remedy any further though such refusal could have been challenged by way of a writ petition. He having failed to do so, he cannot then resort to a remedy by way of a civil suit, which is otherwise not maintainable in law.[648]

The Industrial Disputes Act, 1947, is enacted by the Parliament to provide speedy, inexpensive and effective forum for resolution of disputes arising between workmen and the employers, the underlying idea being to ensure that the workmen do not get caught in the labyrinth of civil courts which the workmen can ill-afford. The procedure followed by civil courts are too lengthy and consequently, is not an efficacious forum for resolving industrial disputes speedily. The power of industrial courts also is wide and such forums are empowered to grant adequate relief as they think just and appropriate. It is in the interest of the workmen that their disputes, including the dispute of illegal termination are adjudicated upon by an industrial dispute within the meaning of section 2(k) and under section 17 of the Industrial Disputes Act, 1947. Every award of labour court, industrial tribunal or national tribunal is required to be published by the appropriate government within a period of 30 days from the date of its receipt and such award published under section 17(1) is held to be final.[649]

The workmen of the Ahmedabad Municipal Corporation challenged the orders of dismissal/ removal from service by filing a civil suit. Relief sought was whether the orders of termination of services were null and void, having been passed by an authority who had no competence to pass the same.

It was held by Supreme Court having regard to the relief sought for in the suits filed in the civil court, jurisdiction of the civil court is impliedly barred and the appropriate forum for resolution of such dispute is the forum constituted under the Industrial Disputes Act, 1947.[650]

[s 9.71] Consumer Protection Matters

The provisions of the Consumer Protection Act, 1986, do not strike at the independence of the judiciary. By reason of the provisions of section 3 of the Consumer Protection Act, 1986, it is evident that remedies provided thereunder are not in derogation of those provided under other laws. The said Act supplements and not supplants the jurisdiction of the civil courts or other statutory authorities. The said Act provides for a further safeguard to the effect that in the event a complaint involving complicated issues requiring recording of evidence of experts, the complainant would be at liberty to approach the civil court for appropriate relief. The right of the consumer to approach the civil court for necessary relief has, therefore, been provided under the Act itself. The provisions of the said Act are required to be interpreted as broadly as possible. It has jurisdiction to entertain a complaint despite the fact that other fora/courts would also have jurisdiction to adjudicate upon the lis.[651]

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647. *Rajasthan State Road Transport Corp v Bal Mukund Bairwa*, (2010) 4 SCC 299 : 2010 (1) Civil Court Cases 545, para 23, at p 555 (SC).
648. *BS Bharti v IBP Co Ltd*, AIR 2004 SC 4355.
649. *CJ Nikam v Municipal Corp of Ahmedabad*, AIR 2002 SC 997 : (2002) 2 SCC 542 : 2002 (1) LLJ 842.
650. *CJ Nikam v Municipal Corp of Ahmedabad*, AIR 2002 SC 997 : (2002) 2 SCC 542 : 2002 (1) LLJ 842.
651. *State of Karnataka v Vishwabarathi House Building Coop Society*, AIR 2003 SC 1043.

The proceedings under the Consumer Protection Act, 1986, and in a civil court can simultaneously go on, even if the issues involved in the two proceedings are substantially similar. The existence of parallel or other adjudicatory forums cannot take away or exclude the jurisdiction created under the Act. Thus, where the proceedings in the civil court and those in the consumer forum have been initiated by two different parties, and their grievances relate to the same incident, it was held that in fact they are independent and separate proceedings.[652]

Where given the nature of the claim in the complaint and the prayer for damages in the sum of Rs 15 crores and for an additional sum of Rs 60 lakhs for covering the cost of travelling and other expenses incurred by the appellant, it is obvious that very detailed evidence would have to be led, both to prove the claim and thereafter to prove the damages and expenses. It is, therefore, in any event, not an appropriate case to be heard and disposed of in a summary fashion. The National Consumer Disputes Redressal Commission was right in giving to the appellant liberty to move the civil court. This is an appropriate claim for a civil court to decide and, obviously, was not filed before a civil court to start with because, before the consumer forum, any figure in damages can be claimed without having to pay court fees. This, in that sense, is an abuse of the process of the consumer forum.[653]

It has been held by the Supreme Court that a government servant cannot raise any dispute regarding his service conditions or for payment of gratuity or general provident fund or any of his retiral benefits before any of the forum under the Consumer Protection Act, 1986. A government servant does not fall under the definition of a "consumer" as defined under section 2(1)(d)(ii) of the Act. A government servant is entitled to claim his retiral benefits strictly in accordance with his service conditions and regulations or statutory rules framed for that purpose. The appropriate forum for redressal of any of his grievance may be the state administrative tribunal, if any, or civil court, but certainly not a forum under the Act.[654] It was also reiterated that the conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. An issue of such nature can be raised at any stage of the proceedings.

[s 9.72] Corporate

Unless jurisdiction is expressly or implicitly barred under a statute, for violation or redress of any such right, the civil court would have jurisdiction. There is nothing under the Companies Act, 1956, expressly barring the jurisdiction of the civil court, but the jurisdiction of the "Court" as defined under the Act, exercising its power under various sections where it has been invested with exclusive jurisdiction, the jurisdiction of civil court is impliedly barred. The jurisdiction of "Court" under section 155, to the extent it has exclusive jurisdiction; the jurisdiction of the civil court is impliedly barred. For what is not covered as aforesaid, the civil court would have jurisdiction. Similarly, even under section 446(1), its words itself indicate the jurisdiction of the civil court is not excluded, the words "except by leave of the court" itself indicate on leave, given the civil court would have jurisdiction to adjudicate one's right.[655] A bare perusal of the provisions leave no manner of doubt that thereby the jurisdiction of the

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652. *Hindustan Motors Ltd v Amardeep Singh Wirk*, AIR 2009 Del 122 : 2009 (161) DLT 88 (DB).
653. *Synco Industries v State Bank of Bikaner and Jaipur*, AIR 2002 SC 568 : 2002 AIR SCW 151 : (2002) 2 SCC 1.
654. *Jagmitter Sain Bhagat v Director, Health Services, Haryana*, AIR 2013 SC 3060 : 2013 AIR SCW 4387 : (2013) 10 SCC 136 : 2013 (8) SCR 77.
655. *Ammonia Supplies Corp Pvt Ltd v Modern Plastic Containers Pvt Ltd*, (1998) 7 SCC 105.

civil court has not been ousted completely, when the civil court of the Indian Companies Act, 1956, was concerned with the rival claims of the parties as to whether one party has illegally been dispossessed by the other or not. Such a suit, apart from the general law, would also be maintainable in terms of section 6 of the Specific Relief Act, 1963. In such matters, the court would not be concerned even with the question as to title/ownership of the property.[656] The right to approach a civil court by a shareholder in a circumstance where there is a clear standing rift between the company secretary and the chairman and managing director, which can be saved only by conducting an urgent general meeting, is not taken away though there is a specific provision under sections 397 and 398 of the Indian Companies Act, 1956.[657] Where in a suit for injunction the plaintiff claimed that there was violation of provisions of Securities Contracts (Regulation) Act, 1956, by the defendants, the suits would be maintainable in the civil court. Since the Act did not even provide a machinery through which the said remedy could be obtained, there was no ouster of the jurisdiction of the civil court to entertain a complaint that the provisions of Securities Contracts (Regulation) Act, 1956, were being violated by the defendants and that they were liable to be prevented from violating that statute. In such a case, the mere fact that the plaintiff could complaint to the authorities created by that Act and hope that the authorities under that Act would take action cannot be said to bar the rights of the plaintiff to approach the civil court for redressal of its grievances. Moreover, even assuming that the plaintiff was seeking to enforce a right created by the Act, this would be a case where the statute gives the right to sue but provides no particular form of remedy, thus relegating the aggrieved party to the civil court.[658] The relief claimed by the plaintiff was that he should be declared to be the owner of 300 shares and duplicate shares be issued to him cancelling the transfer of these shares in favour of the transferees. All other reliefs were consequential. In the circumstances of the case, when the plaintiff himself has stated that he had signed the transfer deeds and kept them along with the share certificates and ultimately it is found that someone has come to possess the transfer deeds and original shares and put them up before the company for the shares being registered in their names, it is clearly a case of cancellation of such registration of shares in the name of the transferees obtained by misrepresentation or fraud or any other reason. There is no question of declaration, because when the register is rectified, automatically, the shares would revert back to the plaintiff. Moreover, the transferees would be necessary parties to suit for any such declaration and they are not impleaded.[659]

In the aforesaid circumstances, the case is clearly cognisable by the company law board and not by the civil court under section 9 of the CPC.

[s 9.73] Land Grabbing

If the appellants could have availed the remedies of review under section 17A of the Act and the suit for declaration of title and right, in the author's view, the learned single judge ought not to have expressed any opinion on the merits of the case because after the high court has put its seal of approval on the judgment and order of the special court, the result of the review application and the suit would become a foregone conclusion. In regard to the remedy of the suit, having regard to the provisions of section 8(2) read with section 15 of the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (12 of 1982), no suit for title in respect of the disputed

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656. *Dwarka Prasad Agarwal v Ramesh Chandra Agarwala*, AIR 2003 SC 2696 : 2003 AIR SCW 3328 : (2003) 6 SCC 220 : JT 2003 (6) SC 377.
657. *Jayanti R Padukone v ICDS Ltd*, AIR 1994 Kant 354.
658. *DL Walton v Cochin Stock Exchange*, AIR 1995 Kant 106.
659. *Eternit Everest Ltd v Neelmani Bhartiya*, AIR 1999 Raj 235.

land which is alleged to be a land grabbed by the first appellant, could be entertained by the civil court. It may be apt to point out that under section 8(8) in any case, pending before any court or other authority immediately before the constitution of a special court, as would have been within the jurisdiction of such special court, stood transferred to the special court as if the cause of action on which the suit or proceeding is based had arisen after the constitution of the special court. In other words, the suit for declaration of title by the appellants would not be maintainable.[660]

The special court constituted under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982, gets jurisdiction to try a case of land grabbing only when it is alleged specifically that an act of land grabbing had been committed as otherwise it will not have any jurisdiction. To maintain a petition before the special court, it must be specifically averred in the application that an act of land grabbing has been committed by a land grabber without any lawful entitlement to the land and with a view to taking illegal possession of such land or to construct unauthorised structures or to perform any other acts as enumerated *inter alia* in clause (e) of section 2 of the Act. It was held by a division bench of the Andhra Pradesh High Court that in the absence of any such averments in the application, the jurisdiction of the special court or the special tribunal, as the case may be, is not attracted although the question of title or right to or possession over the land in dispute is involved.[661]

The Supreme Court has held that under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (Act 12 of 1982), the tribunal constituted under it derives jurisdiction only when jurisdictional facts are disclosed in the petition. For invoking the jurisdiction of the court under the Act, it is necessary not only to allege the act of land grabbing within the meaning of the Act but also a *prima facie* case must be found out by the special court.[662] Sinha J, speaking for the bench, observed thus:

> Ordinary disputes with regard to a title of property are not within the exclusive jurisdiction of the Special Court or the Tribunal. They have to be determined in ordinary civil courts. The Special Courts and the Tribunals are not substitutes for the civil courts in the litigations involving a civil dispute relating to immovable property within the meaning of Section 9 of the Code of Civil Procedure. It has the exclusive jurisdiction where land grabbing is alleged or appeared from the application filed before it.[663]

In another case under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982, the Supreme Court held that in a proceeding before the special court, the only issue which falls for decision is whether there has been an act of land grabbing as alleged and who is the guilty party. The special court has no jurisdiction to decide questions relating to acquisition of title by adverse possession under the Act as the same would fall within the domain of the civil courts.[664]

[s 9.74] Constitutional Matters

The declaration of the President of India, under Articles 341 and 342 of the Constitution of India with respect to lists of scheduled tribes in relation to a state, that a particular caste or

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660. *LL Sudhakar Reddy v State of Andhra Pradesh*, AIR 2001 SC 3205 : (2001) 6 SCC 634 : 2001 (Suppl) SCR 383.
661. *Basanthilal Aggarwal v PS Bhamdari*, AIR 2007 (NOC) 999 : 2007 (3) Andh LD 805 (AP) (DB).
662. *Om Prakash Singh v M Lingamaiah*, AIR 2009 SC 3091 : (2009) 12 SCC 613.
663. *Om Prakash Singh v M Lingamaiah*, AIR 2009 SC 3091, at p 3095 : (2009) 12 SCC 613.
664. *N Srinivasa Rao v Spl. Court under Andhra Pradesh Land Grabbing (Prohibition) Act*, AIR 2006 SC 3691 : (2006) 4 SCC 214. See also *Andhra Pradesh Housing Board v Mohd. Sadatullah*, (2007) 6 SCC 566.

tribe as defined in Articles 366(24) or (25) respectively, is conclusive subject to an amendment by Parliament. By necessary implication, the jurisdiction of the civil court to take cognizance of and give a declaration stands prohibited.[665] In view of provisions of Article 363(1) of the Constitution any dispute arising out of the merger agreement or the instrument of accession of Jammu and Kashmir is beyond the competence of the courts to inquire into.[666]

A decision by the Government of India that a certain property does not belong to ex-ruler of an erstwhile state as his private property cannot be challenged by a suit in the civil court, in view of specific bar under Article 363 of the Constitution of India. The issue as to whether the Government of India was obliged to recognise the private property of the ex-ruler and whether, under the terms of the covenant executed in 1948 (Article 12 of the covenant), the said ex-ruler of Kapurthala was entitled to have it thus recognised, are disputes which are clearly barred by Article 363 and the court had no jurisdiction to decide the said issues. By the covenant, all rights, authority and jurisdiction of erstwhile rulers were vested in the Patiala and East Punjab State Union (Pepsu) and all assets and liabilities of the covenanting state become the assets and liabilities of the Union. It is only Article 12 which ensured certain rights to the ruler with regard to full ownership, use and enjoyment of all private properties (as distinct from state properties) belonging to him on the date of his making over the administration of the state to the *Raj Pramukh*. Consequently, he was also required to furnish to the *Raj Pramukh*, before the deadline of the inventory of all the immovable properties, securities and cash balances held by him as such private property. This was obviously done so that the Government of India could ascertain the correctness of the claim. No doubt, clause (3) of Article 12 provides that a dispute arising as to whether any item of property was the private property of the ruler or state property was referrable to a nominee of the Government of India and such nominee's decision would be final and binding on all the parties concerned, provided that such dispute was to be referred by the deadline of 31 December 1948. Interpreting the said clause (3) it cannot be said that under the treaty the Government of India could not unilaterally refuse to recognise any property as private property of the ruler, and, if it did, it was obliged to refer it to a person contemplated by clause (3) and that failure to do so would imply recognition of the claim as to private property. Such a view would be erroneous on two counts. In the first place, this interpretation ignores the true nature of the covenant. The covenant is a political document resulting from an act of state. Once the Government of India decides to takeover all the properties of the ruler, except the properties, which it recognises as private properties, there is no question of implied recognition of any property as private property. On the other hand, clause (3) of the covenant merely means that if the ruler of the covenanting state claimed property to be his private property and the Government of India did not agree, it was open to the ruler to have this issue decided in the manner contemplated by clause (3). Clause (3) of Article 12 does not mean that the Government was obliged to refer to the dispute upon its failure to recognise it as private property. Secondly, the dispute as to whether a particular property was or was not recognised as private property of the ruler was itself a dispute arising out of the terms of the covenant and, therefore, not adjudicable by municipal courts as being beyond the jurisdiction of the municipal courts by reason of Article 363 of the Constitution of India.[667]

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665. *State of Tamil Nadu v A Guruswami*, (1997) 3 SCC 542.
666. *State of Jammu and Kashmir v Karan Singh*, AIR 1997 J&K 132 (DB).
667. *Draupadi Devi v UOI*, AIR 2004 SC 4684.

[s 9.75] Equity Jurisdiction — Adjudicatory Fact-Jurisdictional Fact

A court of law cannot exercise its discretionary jurisdiction *de hors* the statutory law. Its discretion must be exercised in terms of the existing statute.[668] SB Sinha J, speaking for the Supreme Court Bench in the above case, observed as follows:

> In England, the Court of Equity exercises jurisdiction in equity. The courts of India do not possess any such exclusive jurisdiction. The courts in India exercise jurisdiction both in equity as well as law but exercise of equity jurisdiction is always subject to the provisions of law. If exercise of equity jurisdiction would violate the express provisions contained in law, the same cannot be done. Equity jurisdiction can be exercised only when no law operates in the field.[669]

In *Shamsu Suhara Beevi v G Alex*,[670] the Supreme Court while dealing with a matter relating to grant of compensation by the high court under section 21 of the Specific Relief Act, 1963, in addition to the relief of specific performance in the absence of prayer made to that effect, observed as follows:

> Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law.

Referring to judicial flexibility to impart justice based on equity, Krishna Iyer J stated as follows:

> It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the *lis* has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is not violated, with a view to promote substantial justice . . .[671]

While dealing with the exemption granted under section 3(1)(b) of the Maharashtra Rent Control Act, 1999 (Act No 18 of 2000), to public limited companies on the basis of paid-up share capital, the Supreme Court held that eviction proceedings against such companies are not barred under section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.[672] CK Thakker J, speaking for the bench in the above case, pointed out the distinction between "jurisdictional fact" and "adjudicatory fact" in the following words:

> Stated simply, the fact or facts upon which the jurisdiction of a Court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a Court, Tribunal or Authority has jurisdiction to decide other issues. If such fact does not exist, a Court, Tribunal or Authority cannot act. It is also well settled that a Court or a Tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate Court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.[673]

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668. *Shiv Kumar Sharma v Santosh Kumari*, AIR 2008 SC 171 : (2007) 8 SCC 600.
669. *Shiv Kumar Sharma v Santosh Kumari*, AIR 2008 SC 171, at pp 174–175 : (2007) 8 SCC 600.
670. *Shamsu Suhara Beevi v G Alex*, (2004) 8 SCC 569.
671. *Pasupuleti Venkateswarlu v Motor & General Traders*, AIR 1975 SC 1409 : (1975) 1 SCC 770.
672. *Carona Ltd v Parvathy Swaminathan*, AIR 2008 SC 187 : (2007) 8 SCC 559.
673. *Carona Ltd v Parvathy Swaminathan*, AIR 2008 SC 187, at p 193 : (2007) 8 SCC 559.

Elaborating on the point and holding that the existence of a jurisdictional fact is the *sine qua non* or condition precedent to the assumption of jurisdiction by a court or tribunal, Thakker J further observed:

> But there is distinction between "jurisdictional fact" and "adjudicatory fact" which cannot be ignored. An "adjudicatory fact" is a "fact in issue" and can be determined by a court, Tribunal or Authority on "merits", on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish "jurisdictional fact" and "fact in issue" or "adjudicatory fact". Nonetheless the difference between the two cannot be overlooked.[674]

The above judgment quoted with approval, a passage from *Halsbury's Laws of England*, wherein it has been stated:

> Where the jurisdiction of a tribunal is dependent upon the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive.[675]

[s 9.76] Land Acquisition Matters

The Land Acquisition Act, 1894 (1 of 1894) is a law of exceptional character. While on the one hand it aims at promoting important public interests by making available land for government for executing projects for public purposes, on the other hand it protects individual private interests by providing for adequate compensation to land owners. The Act is a complete code by itself.

In *State of Bihar v Dhirendra Kumar*,[676] the Supreme Court has held that the Land Acquisition Act, 1894, is a complete code in itself and is meant to serve a public purpose. It was also held that a civil court has no jurisdiction to go into the question of the validity or legality of the notification under section 4 and declaration under section 6 of the Act except by the high court in a proceeding under Article 226 of the Constitution.

It has been held by the Bombay High Court that the question of validity of notification under section 4 and the declaration of public purpose under section 6 cannot be gone into by civil court. The issue can be decided only by writ court under Article 226 of the Constitution.[677]

In another case, it was held that where the challenge is neither with respect to the acquisition proceedings nor the amount of compensation but as to the entitlement who should receive the compensation, it was held by the Punjab and Haryana High Court that civil court has jurisdiction to entertain suit.[678]

It is clear that the Land Acquisition Act, 1894, is a complete code in itself and is meant to serve a public purpose. By the doctrine of necessary implication, the power of a civil court to take cognizance of the case under section 9 stands excluded and a civil court has no jurisdiction to go into the question of the validity or legality of the notification under section 4, declaration under section 6 and subsequent proceedings except by the high court in a proceeding under Article 226 of the Constitution. Therefore, a civil court is devoid of jurisdiction to give declaration or even bare injunction on the invalidity of the procedure contemplated under

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674. *Carona Ltd v Parvathy Swaminathan*, AIR 2008 SC 187, at pp 193–194 : (2007) 8 SCC 559.
675. *Halsbury's Laws of England*, Butterworths, 4th Edn, vol I, January 1, 1989, para 55, p 61.
676. *Laxmi Chand v Gram Panchayat*, AIR 1996 SC 523 : 1996 SCC (7) 218 : JT 1995 (8) SC 195.
677. *Mahadeo Gopala Shinde v Nivrutti Sripati Jadhav*, 2007 (2) Mah LJ 362 : 2007 (3) All MR 110.
678. *Shyam Lal v Sham Lal*, AIR 2007 P&H 89 : 2007 (2) Rec Civ R 484. See also *State of Tamil Nadu v M Balakrishnan*, (1999) Mad LJ (Supp) 81 (Mad).

the Act. The only right available for the aggrieved person is to approach the high court under Article 226 and the Supreme Court under Article 136 with self-imposed restrictions on their exercise of extraordinary power.[679]

Where notification was issued under section 4(1) of the Land Acquisition Act, 1894, and declaration made about public purpose under section 6 of the Act, civil court has no jurisdiction to take cognizance of the matter. Thus, application for injunction for restraining the land owner from alienating the land or plea seeking injunction against government from proceeding with acquisition proceedings are not maintainable.[680]

In another case, it was held by the Madras High Court that after issuance of notification under section 4 of the Act and declaration under section 6, the civil court cannot declare that acquisition proceedings are void.[681]

In author's view, it appears that a crucial provision of the Land Acquisition Act, 1894, has failed to find space in all these judgments. Section 52 of the Act[682] provides that if any aggrieved person wants to file a suit for challenging *"anything done in pursuance of the Act"*, then a month's prior notice is mandatory to be served on such person who acted under the Act. A similarly worded provision can be found in section 97 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. But the 2013 Act has been supplanted with section 63 as well, which expressly holds that no civil court, except a high court in a proceeding under Articles 226/227 of the Constitution shall have jurisdiction to entertain any dispute relating to land acquisition in respect of which the collector or the authority is empowered by or under this Act and no injunction shall be granted in respect of any such matter. So, by virtue of section 52, the jurisdiction of civil courts was not expressly barred and when the legislative enactment was refined, a separate dedicated provision had to be inserted to bar the jurisdiction of civil courts. The expression in section 52 "anything done in pursuance of the Act" has a wide meaning and it should cover all and any acts including acts done in pursuance of section 4 and section 6 of the said Act. The jurisdiction of a civil court needs to be expressly or impliedly barred as per section 9. A dedicated provision like section 63 of the 2013 Act, section 175 of the Motor Vehicles Act, 1988 and section 34 of SARFAESI Act, 2002, cannot be traced to the Land Acquisition Act, 1894.

STATE AMENDMENT

[S 9A] (Maharashtra Amendment)[683]**.**—Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue—

(1) Notwithstanding anything contained in this Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of

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679. *Bangalore Development Authority v Brijesh Reddy*, 2013 AIR SCW 2378 : (2013) 3 SCC 66 : 2013 (1) SCR 853.
680. *UOI v Zurin Taj Begum*, (1998) 1 Mad LJ 237 (Mad) : (1997) 2 LW 845.
681. *State of Tamil Nadu v Rajamanickam*, (2000) 3 Mad LJ 753 (Mad).
682. Section 52—Notice in case of suits for anything done in pursuance of Act.—No suit or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act, without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends.
683. Inserted by Maharashtra Act 65 of 1977, section 3 (w.e.f. 19-12-1977).

a receiver or otherwise, made in any suit, an objection to the jurisdiction of the court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction.

SYNOPSIS

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[s 9A.1] Scope

Section 9A (Maharashtra Amendment of 1970), opens an umbrella under which there is provided a self-contained scheme with a definite object. The scheme indicates that the court has to determine the objection to the jurisdiction as a preliminary issue, on a consideration of all the aspects in which the said issue is enveloped. Determination of the issue after hearing even at that stage "would get a label of finality, in so far as all proceedings of the suit is concerned".[684]

But, where interim injunction was granted and the defendant transferred his tenancy rights in violation of the interim injunction, without raising any question of jurisdiction, it was held by the Bombay High Court that the purchaser of tenancy rights cannot seek setting aside of injunction order on the ground that the court had no jurisdiction to grant interim injunction.[685]

[s 9A.2] Essence

The essence of the provision is that the issue of jurisdiction should not only be decided at the interlocutory stage but at the threshold, before the court proceeds with the matter on any other issue; for if it has no jurisdiction to try and entertain the suit as presented, then obviously it should not dwell upon any other matter at all. The only exception is provided by sub-section (2) — to grant *ad-interim* relief, pending determination of the preliminary issue of jurisdiction. A priori, the court is obliged to decide the question of jurisdiction of the court at the interlocutory stage itself to avoid hearing of any other issue or relief on merits. Thus, the appellate court while considering the appeal filed by the respondents against the order passed by the trial court refusing to grant interim relief, having prima facie observed that the suit as presented is barred by jurisdiction, ought to have relegated the parties to the trial court to first resolve that issue.[686]

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684. *Kranti Mohan v Fatehchand*, AIR 1982 Bom 263.
685. *Ghanshyam Jamnomal Shewakramani v Lachmandas Tulsiram Nayar (HUF)*, 2010 (2) AIR Bom R 353 (DB).
686. *Arjun Dada Gadage v Mallappa Gurappa Chongule*, AIR 2003 Bom 441.

[s 9A.3] Stage

When the stage of filing written statement has been reached, then the only option available to the defendants is to file their written statement raising therein their objection regarding jurisdiction. There is no other stage which gives a right to defendants to take out notice of motion taking objection to jurisdiction. If and when the defendants file written statement and raise an objection to jurisdiction, then the issue will have to be framed on that point. The defendants will have to convince the court that the said issue has to be decided as a preliminary issue and if that is done by the court, then only the objection to jurisdiction can be decided. There is no intermediary stage for raising an objection to jurisdiction except filing of written statement and taking that plea or unless the matter is covered by section 9A of the CPC. Further, the stage of first hearing of the suit is after filing of the written statement and before framing of the issues. Consequently, O XV, rule 1 has no application in the present case; as a result, the only stage of raising objection to jurisdiction, if the matter does not come under section 9A of the CPC is by filing written statement and raising the objection therein.[687]

However, once parties and court have chosen not to try the issue regarding jurisdiction of court as preliminary issue and evidence was led on all issues and the matter was fixed for final order, the court has to record findings on all issues. If the court disposed of the matter simply on the point of jurisdiction at that stage, the very purport of provisions of O XIV, rule 2 of the Code would be defeated.[688]

[s 9A.4] Interim Orders

Section 9A lays down that where an objection to jurisdiction of a civil court is raised to entertain a suit and to pass any interim orders therein, the court should decide the question of jurisdiction in the first instance but that does not mean that pending the decision on the question of jurisdiction, the court has no jurisdiction to pass interim orders as may be called for in the facts and circumstances of the case. A mere objection to jurisdiction does not instantly disable the court from passing any interim orders. It can yet pass appropriate orders. At the same time, it should also decide the question of jurisdiction at the earliest possible time. The interim orders so passed are orders within jurisdiction when passed and effective till the court decides that it has no jurisdiction to entertain the suit. These interim orders undoubtedly come to an end with the decision that the Supreme Court had no jurisdiction. It is open to the court to modify these orders while holding that it has no jurisdiction to try the suit.[689]

Providing for hearing of issue of jurisdiction first as preliminary issue in applications filed for grant of *ad interim* relief in suits are not inconsistent with or repugnant to the provisions of O XIV, rule 2 of the Central Act. Hence, section 9A cannot be said to be repeated as a result of amendment of the Code by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) and Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002).[690]

[s 9A.5] Moulding the Relief

Where the gravamen of the grievance made by the applicants under section 9A, CPC is that the Indian courts have no jurisdiction to try and entertain the dispute between the parties,

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687. *BSI Ltd v MV "Cristian-C"*, AIR 1999 Bom 320.
688. *Jagdish Hari Thatte v Municipal Corporation of Greater Bombay*, 2007 (2) AIR Bom R 256 (DB).
689. *M Bagasarwalla v Hind Rubber Industrial Pvt Ltd*, (1997) 3 SCC 443.
690. *Madhuri Prabhakar Potole v Aruna Satischandra Gaikward*, 2008 (5) AIR Bom R 378 (DB).

even though the relief in the application is couched in such a way so as to pray for return of plaint, however, that would not denude the petitioner or for that matter the court from dealing with the issue of jurisdiction of the court. And if the court were to hold that it had no jurisdiction to try and decide the dispute, then it would be the bounden duty on the court to mould the relief and pass such order as would be warranted in the fact situation of the case especially having regard to the mandate of section 9A of the CPC.[691]

[s 9A.6] Question of Limitation

Where the suit for specific performance of agreement to sell and for perpetual injunction restraining the defendant from interfering with the suit property was filed after 29 years of the date of execution of the agreement with no time limit fixed for performance thereof in the agreement, it was held that the suit for injunction would be governed by Article 113 of the Limitation Act, 1963, cause of action for the said reliefs arose when right to sue accrued and dismissal of suit as barred by limitation by treating issue of limitation as preliminary issue was found not proper as the said issue has to be decided on the basis of the evidence of the parties.[692]

PK Balasubramanyan J, speaking for the Supreme Court Bench in the above case, observed as follows:

> It is seen that the suit was dismissed by the trial court on the finding that the claim for the relief of specific performance was barred by limitation. The plaint contains not only a prayer for specific performance but also a prayer for perpetual injunction restraining the defendants from interfering with the possession of the plaintiffs and from creating any documents or entering into any transaction in respect of the suit property. Of course, the latter part of that prayer is directly linked to the claim for specific performance, but the suit as regards the prayer for perpetual injunction to protect the possession of the plaintiff over the suit property on the claim that the predecessor of the plaintiffs was put in possession of the property pursuant to the agreement for sale, on a subsequent date, could not have been held to be not maintainable on any ground. Of course, the grant of the relief of injunction in a sense is discretionary and the court ultimately might or might not have granted the relief to the plaintiffs. The defendants could have also shown that the relief of injunction claimed is merely consequential to the relief of specific performance and was not an independent relief. But that is different from saying that the suit could be dismissed merely on a finding that the prayer for specific performance of agreement was barred by limitation.[693]

The Bench further went on to observe as follows:

> The question as to how long a plaintiff, even if he had performed the whole of his obligations under an agreement for sale, in which a time for performance is not fixed, could keep alive his right to specific performance and to come to court after 29 years seeking to enforce the agreement, may have also to be considered by the court especially in the context of the fact that the relief of specific performance is discretionary and is governed by the relevant provisions of the Specific Relief Act. But again, these questions cannot be decided as preliminary issues and they are not questions on the basis of which the suit could be dismissed as barred by limitation. The question of limitation has to be decided only on the basis of Article 54 of the Limitation Act and when the case is not covered by the first limb of that Article, normally, the question of limitation could be dealt with only after evidence is taken and not as a preliminary issue unless, of course, it is admitted in the plaint that the plaintiffs had notice that performance was refused by the defendants and it is seen that the plaintiffs approached the court beyond three years of the date of notice. Such is not the case here.[694]

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691. *Rhodia Ltd v Neon Laboratories Ltd*, AIR 2002 Bom 502.
692. *Gunwantbhai Mulchand Shah v Anton Elis Farel*, AIR 2006 SC 1556.
693. *Gunwantbhai Mulchand Shah v Anton Elis Farel*, AIR 2006 SC 1556, para 8, at p 1559.
694. *Gunwantbhai Mulchand Shah v Anton Elis Farel*, AIR 2006 SC 1556, para 11, at p 1560.

However, the Bombay High Court has held that where specific plea is taken by the defendant that the suit claim was barred by limitation and the pleadings clearly showed that the suit claim was barred by limitation, the order dismissing the suit on the preliminary issue of limitation was proper.[695]

In *Kamalakar*,[696] the Supreme Court while seized of a question that whether the question of limitation could be considered as preliminary issue under section 9A as amended in Maharashtra, held that section 9A neither contemplates nor refers to any circumstance where an objection besides the jurisdiction of the court may be determined as a preliminary issue. It only contemplates an issue of jurisdiction to be framed and to be determined as a preliminary issue by the court. It was further held that the legislature inserted section 9A to ensure that a suit which is not maintainable for want of jurisdiction of the concerned court, ought not be tried on merits without first determining the question of maintainability of the suit as to jurisdiction of the court, approached by the plaintiff, as a preliminary issue. It was further observed that a perusal of the Statement of Object and Reasons of the Amendment Act would clarify that section 9A talks of maintainability only on the question of inherent jurisdiction and does not contemplate issues of limitation. The high court was found to have erred in not considering the statutory ambit of section 9A while approving the preliminary issue framed by the trial court and thus, rejecting the writ petition filed by the appellant.

Interestingly, immediately after three months from the date of pronouncement, the view taken in *Kamalakar*[697] was nullified and it was held to be per incuriam in *Foreshore Coop Housing Society Ltd.*[698] The Supreme Court was dealing with ambit and scope of section 9A as in Maharashtra *vis-à-vis* provisions of O XIV, rule 2. An ancillary question which was framed was that whether the phrase "*an objection to the jurisdiction of the court to entertain such suit*" as used in section 9A would include an objection with regard to limitation, i.e., whether an issue relating to a bar to the suit created by law of limitation can be tried as a preliminary issue under section 9A. A necessary corollary was drawn that whether courts shall be guided by the provisions of O XIV, rule 2 or section 9A as amended by the Code of Civil Procedure (Maharashtra Amendment) Act, 2018, in the matter of deciding the objection with regard to the jurisdiction of the court which concerns the bar of limitation as a preliminary issue. It was held that O XIV, rule 2 confers power upon the court to pronounce judgment on all the issues. But there is an exception to that general rule, i.e., where issues both of law and fact arise in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on the issue of law, it may try that issue first if that issue relates to the jurisdiction of the court or a bar to the suit created by any law. Section 9A was held to be a complete departure from the procedure provided under O XIV, rule 2. It was further found that the decision in the case of *Kamalakar*[699] was contrary to the law settled by the constitution bench and three judges bench of Supreme Court, followed by other division bench in *Pandurang Dhondi Chougule v Maruti Hari Jadhav*,[700] *Manick Chandra Nandy v Debdas Nandy*,[701] *National Thermal Power*

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695. *Foreshore Co-op Housing Society Ltd, Bombay v Praveen D Desai*, AIR 2009 (NOC) 902 (Bom—DB).
696. *Kamalakar Eknath Salunkhe v Baburav Vishnu Javalkar*, (2015) 7 SCC 321 : 2015 (3) Scale 34 : 2015 (2) Mad LJ 886.
697. *Kamalakar Eknath Salunkhe v Baburav Vishnu Javalkar*, (2015) 7 SCC 321 : 2015 (3) Scale 34 : 2015 (2) Mad LJ 886.
698. *Foreshore Coop Housing Society Ltd v Praveen D Desai*, AIR 2015 SC 2006 : 2015 AIR SCW 2671 : (2015) 6 SCC 412 : JT 2015 (9) SC 150.
699. *Kamalakar Eknath Salunkhe v Baburam Vishnu Javalkar*, (2015) 7 SCC 321 : 2015 (3) Scale 34 : 2015 (2) Mad LJ 886.
700. *Pandurang Dhondi Chougule v Maruti Hari Jadhav*, AIR 1966 SC 153 : 1966 SCR (1) 102.
701. *Manick Chandra Nandy v Debdas Nandy*, AIR 1986 SC 446 : (1986) 1 SCC 512 : 1985 (2) Scale 1478 : 1986 (1) UJ 209 SC.

Corp Ltd v Siemens Atkeingesellschaft,[702] *Official Trustee v Sachindra Nath Chatterjee,*[703] *ITW Signode India Ltd v CCE*[704] and *Kamlesh Babu v Lajpat Rai Sharma.*[705] It was conclusively held that section 9A as introduced by Code of Civil Procedure (Maharashtra Amendment) Act, 2018, is mandatory in nature and is a complete departure from the provisions of O XIV, rule 2.

[S 10] Stay of suit.—No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [706][India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [707][India] established or continued by [708][Central Government] [709][***] and having like jurisdiction, or before [710][the Supreme Court].

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in [711][India] from trying a suit founded on the same cause of action.

SYNOPSIS

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702. *National Thermal Power Corp Ltd v Siemens Atkeingesellschaft*, AIR 2007 SC 1491 : 2007 AIR SCW 1985 : (2007) 4 SCC 451 : 2007 (3) SCR 399 : JT 2007 (4) SC 202.
703. *Official Trustee v Sachindra Nath Chatterjee*, AIR 1969 SC 823 : (1969) 3 SCR 92.
704. *ITW Signode India Ltd. v CCE*, (2004) 3 SCC 48 : 2003 (158) ELT 403 (SC).
705. *Kamlesh Babu v Lajpat Rai Sharma*, (2008) 12 SCC 577 : 2008 (6) SCR 653 : 2008 (6) Scale 403 : JT 2008 (4) SC 652.
706. Substituted by CPC (Amendment) Act 2 of 1951 for words "the States".
707. Substituted by CPC (Amendment) Act 2 of 1951 for words "the States".
708. Substituted by AO 1937 for "the G.G. in C".
709. The words "or the Crown Representative" omitted by A.O. 1948.
710. Substituted for the words "His Majesty in Council" by AO 1950.
711. Substituted by CPC (Amendment) Act 2 of 1951 for words "the State".

[s 10.1] Alterations in the Section

The words "proceed with the trial" have been substituted for the word "try". The words "except where a suit has been stayed under section 20", which occurred at the commencement of the corresponding section of the Code of 1882, the words "for the same relief" which occurred after the words "previously instituted suit", and the words "whether superior or inferior" which occurred after the words "any other court", have been omitted. The words "litigating under the same title" are new.

The words "or the Crown Representative" were omitted from this section by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, and the words "the Supreme Court" were substituted for the words "His Majesty in Council" by the Adaptation of Laws Order 1950.

[s 10.2] Scope

The present section provides that where a suit is instituted in a court to which the Code applies, the court shall not proceed with the trial of the suit, if —

First, the matter in issue in the suit is directly and substantially in issue in a previously instituted suit between the same parties;

Secondly, the previously instituted suit is pending —

(i) in the same court in which the subsequent suit is brought; or

(ii) in any other court in India (whether superior, inferior or co-ordinate); or

(iii) in any court beyond the limits of India established or continued by the Central Government; or

(iv) before the Supreme Court (formerly His Majesty in Council); and,

Thirdly, where the previously instituted suit is pending in any of the courts mentioned in clause (b) or clause (c), such court is a court of jurisdiction competent to grant the relief claimed in the subsequent suit.[712]

A plain reading of section 10 of the CPC makes clear that where the subject matter of the suit is one and the same and the parties are also the same, under such circumstances, if there are two suits between the parties, it is the subsequent suit which has to be stayed and not the previous one.[713] Section 10 of the CPC will not be applicable if issue in both the concerned matters is not directly or substantially common, and judgments in both the matters may be contradictory with each other but is within the gamut of the statutory framework.[714]

Where execution proceeding is pending in a previously instituted suit and appeal against the decree is also pending, section 10 will have no application. Although pendency of appeal against the decree can be treated as pendency of suit, but once the suit is finally decided, there is no question of applying section 10. However, if the matter in issue in the subsequent

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712. *Nirmal Singh v Om Prakash*, AIR 1965 J&K 99; *JT Republike v Rungta & Sons*, AIR 1966 Cal 382; *Lekhraj Diddi v Sawan Singh*, AIR 1971 MP 172; *Channabasappa v Kishanchand*, AIR 1972 Mys 112; *Paira Mal v Rajnarain*, (1919) PR 114, 298; *Troyloknath v Macleod*, (1900) ILR 28 Cal 28, 34; *Kalipada v Charubala*, AIR 1933 Cal 887, (1933) ILR 60 Cal 1096; *Tara Devi v Kamla Gupta*, AIR 1999 Pat 103; *Bijender Kumar v Basant Kumar*, AIR 1994 All 81.
713. *MV Rajashekhar v MV Rajamma*, AIR 2004 Kant 280.
714. *Balamukund Bhatia v Lalit Bhatia*, S.B. Civil Revision Petition No. 181/2018 decided by the High Court of Judicature for Rajasthan at Jodhpur on 24 July 2020.

suit was decided in the previous suit, the aggrieved party can take the plea of *res judicata*, because section 10 lays down a procedure and it does not confer any substantive right upon parties.[715]

The section does not of course empower one court to stay the proceedings of another court. A district court exercising insolvency jurisdiction under the Provincial Insolvency Act, 1920 (Act 5 of 1920), cannot under this section stay a suit pending against the insolvent in a subordinate court.[716] Since however, the provisions of the section are mandatory, the court before which the subsequent suit is pending ought to stay it where all the conditions laid down in the section exist.[717]

[s 10.3] Object

The object underlying section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in a previously instituted suit.[718] The basic object of section 10 is to protect a person from multiplicity of proceedings between the same parties.[719] The object behind section 10 of CPC is to bar one of the courts having concurrent jurisdiction to try simultaneously. Even the parties are the same and courts are competent to try both the suits, the final decision reached in the previous suit will operate as *res judicata* in the subsequent suit.[720]

B, residing in Calcutta, has an agent *A* at Calicut employed to sell his goods there. *A* sues *B* in Calicut claiming a balance due upon an account in respect of dealings between him and B. During the pendency of the suit in the Calicut Court, *B* institutes a suit against *A* in Calcutta for an account and for damages caused by *A's* alleged negligence. Here, the matter at issue in *B's* suit is directly and substantially at issue in *A's* suit: further both the suits are between the same parties; therefore, if the court at Calicut is a court of jurisdiction competent to grant the relief claimed in *B's* suit, the Calcutta Court must not proceed with the trial of *B's* suit, and the suit in the Calicut Court, being the one instituted *prior in point of time*, should alone be proceeded with.[721] But if *A* was *B's* agent at Pondicherry instead of at Calicut, and the suit was brought by him in the Pondicherry Court, the Calicut Court, would not be precluded from proceeding with the trial of *B's* suit, the Pondicherry Court being then a "foreign" court. (See the Explanation to the section.).

This section enacts merely a rule of procedure and a decree therefore passed in contravention of it is not a nullity and cannot be disregarded in execution proceedings.[722] It can be waived, although the section is so worded as not to leave any discretion in the court where its conditions

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715. *S Kumar v Sudhakaran*, AIR 2009 Ker 170 : 2009 (2) Ker LT 298.
716. *Official Receiver v Palaniswami*, AIR 1925 Mad 1051 : (1925) ILR 48 Mad 750.
717. *Sequeira v P Francisco Sequeira*, AIR 1976 Goa 48.
718. *National Institute of MH&NS v C Parameshwara*, AIR 2005 SC 242 : (2005) 2 SCC 256; see also *Indian Express Newspapers v Basumari Pvt Ltd*, AIR 1969 Bom 40; *Naurati v Mehma Singh*, AIR 1972 P&H 421; *Life Pharmaceuticals Pvt Ltd v Bengal Medical Hall*, AIR 1971 Cal 345; *Gujarat State Road Transport Corp v Vimalaben L Shah*, AIR 1995 Guj 220; *Pukhraj D Jain v G Gopalakrishna*, AIR 2004 SC 3504.
719. *Munnilal v Sarvajeet*, AIR 1984 Raj 22.
720. *Balamukund Bhatia v Lalit Bhatia*, S.B. Civil Revision Petition No. 181/2018 decided by the High Court of Judicature for Rajasthan at Jodhpur on 24 July 2020.
721. *Padamsee v Lakhamsee*, (1916) 43 Cal 144; *Meckjee v Kasowji* (1879) 4 CLR 282.
722. *Sheopat Rai v Warak Chand*, (1919) AL 294.

are satisfied.[723] Accordingly, even though the Representation of the People Act, 1951, provides that the provisions of the Code shall as far as possible apply to petitions filed under it, an election tribunal does not err in first taking up for hearing a subsequently filed petition by reason of a discretion vested in it under section 87 of that Act and also because of the parties to it having acquiesced.[724]

The section does not of course empower one court to stay the proceedings of another court. A district court exercising insolvency jurisdiction under the Provincial Insolvency Act, 1920 (5 of 1920) cannot under this section stay a suit pending against the insolvent in a subordinate court.[725] Since, however, the provisions of the section are mandatory, the court before which the subsequent suit is pending ought to stay it where all the conditions laid down in the section exist.[726]

[s 10.4] Section Applies to Legally Maintainable Suits

Generally, help of section 10 of the CPC is taken in support of plea of maintainability of two or more suits by one plaintiff. Section 10 of the CPC is not the permissive provision, but is a restrictive provision and cannot be interpreted to hold that since only proceeding with the trial of issue or suit is restricted by section 10 of the CPC, therefore, it impliedly accepts maintainability of more than one suit by one plaintiff. Said plea is devoid of any force. Section 10 of the CPC applies only to those suits which are legally maintainable. Section 10 cannot be invoked to make the subsequently filed suit maintainable. Other view will be just contrary to entire scheme of the procedure provided for trial of suits in the CPC. All relevant provisions of the CPC are aimed towards avoiding more suits than one by the plaintiff, which also prohibits the plaintiff from even amending suit without leave of the court. Despite all provisions to avoid more than one suit, some unavoidable circumstances permit involvement of same issues in two suits. Those suits are like cross suits or where law permits second suit specifically like withdrawal of suit with permission to file fresh suit or due to accrual of cause of action or entitlement for the relief/ reliefs subsequent to filing of earlier suit to the plaintiff and plaintiff had no right to claim relief at the time of filing of earlier suit and where court either cannot grant relief after taking note of subsequent event or the court refuses to entertain subsequent event for moulding the relief, such suits are maintainable and are permissible. Even where such suits are lawfully maintainable, still law, under section 10, prohibits simultaneous trial of issue and if, due to any reason, trial of suit is proceeded, the decision given on an issue which earlier in time has been made final by section 11 of the CPC when specific provisions of law prohibit trial of even maintainable suit, then interpreting sections 10 and 11 of the CPC as a permissive provision making maintainable two suits simultaneously will be against the legislative intention.[727]

[s 10.5] This Section and Section 5 of Tamil Nadu Debt Relief Act, 1980 (13 of 1980)

The question that arises for consideration is what is the appropriate course to be followed in a suit which was filed by the creditor against the debtor before the debtor made the application

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723. *Shanti Swaroop v Abdul Rehman*, AIR 1965 MP 55, at p 59; *Gangaprasad v Banaspati*, AIR 1937 Nag 132 : (1937) ILR Nag 6.
724. *Shanti Swaroop v Abdul Rehman*, AIR 1965 MP 55, at p 59.
725. *The Official Receiver v Palaniswami*, AIR 1925 Mad 1051 : (1925) 48 Mad 750.
726. *Sequeira v P Francisco Sequeira*, AIR 1976 Goa 48.
727. *Hari Ram v Lichmahiye*, AIR 2003 Raj 319.

to the tahsildar seeking relief under the Act, should it be dismissed immediately on filing or should it be suspended/stayed till the *tahsildar* disposes of the application filed by the debtor. It is the author's view that in such a case, the proper and reasonable course to be followed is to stay the proceeding in the suit till the *tahsildar*/appellate authority disposes of the proceeding under the statute. If it is held in that proceeding that the debtor is not entitled to the benefit under the Act, then the civil suit may be proceeded with. If on the other hand, it is held that the debtor is entitled to the benefits provided in the Act, then the suit has to be dismissed under section 4. In no case can it be held that by filing a civil suit for realisation of the mortgage amount, the proceeding pending before the *tahsildar* or the appellate authority is to be dismissed without adjudication.[728]

[s 10.6] *Res judicata* and *Res sub judice* — Distinction

The rule of *res judicata* is readily distinguished from the rule in section 10 for the latter relates to a res sub judice, that is, a matter which is pending judicial inquiry; while the rule in the present section relates to *res judicata* that is, a matter adjudicated upon or a matter on which the judgment has been pronounced. Section 10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previous suit. The present section bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit. Moreover, public policy requires that there should be an end of litigation. The question of whether the decision is correct or erroneous has no bearing on the question of whether it operates or does not operate as *res judicata*;[729] otherwise, every decision would be impugned as erroneous and there would be no finality.[730]

While section 10 relates to res sub judice, that is, a matter which is pending a judicial adjudication, section 11 relates to *res judicata*, that is to say, a matter already adjudicated upon by a competent court. Whereas section 10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previous suit, section 11 bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a former suit. The object of both the sections is similar, namely, to protect the parties from being vexed twice, for the trial of the same cause and to achieve the public policy that there should be an end of litigation. Therefore, one of the objects of section 10 is to prevent competent courts of concurrent jurisdiction from having to try parallel suits in respect of the same matter in issue, and thereby to pave the way for the application of the rule of *res judicata* contained in the next following section. So, what the court has really to see is if the decision of the matter directly and substantially in issue in the former suit will or will not lead to the decision of the matter directly and substantially in issue in the subsequent suit, and if it is satisfied that it will, then it must stay the trial of the subsequent suit and await the decision in the former suit.[731]

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728. *BALCO Employees Union v UOI*, AIR 2002 SC 350 : (2002) 2 SCC 333.
729. *Tarini Charan v Kedar Nath*, AIR 1928 Cal 777 : (1928) 33 Cal WN 126 (FB); *Mohanlal v Benoy Krishna*, AIR 1953 SC 65 : (1953) SCR 377; *MSM Sarma v Sri Krishna Sinha*, AIR 1960 SC 1186 : (1961) SCR 96 : (1961) 2 SCJ 73 : (1961) 2 SCA 582; *Govardanam Appalacharyulu v Govardhanam Rangacharyulu*, AIR 1957 AP 1002 : (1956) Andh WR 954; *Madathipathi v Bhargavan*, (1957) Ker LJ 857 : (1957) Ker LT 1033; *Dhirendranath v Naresh Chandra*, AIR 1958 Cal 453 : (1958) 62 Cal WN 596; *Jalodhan Singh v Kripa Singh*, AIR 1963 P&H 178 : (1963) 65 Punj LR 26; *Abdul Wasey v State*, AIR 1978 All 247.
730. *Behari v Majid*, (1901) ILR 24 All 138; *Phundo v Jangi Nath*, (1893) ILR 15 All 327; *Gouri Koer v Audh Koer*, (1884) ILR 10 Cal 1087; *Mohideen v Syed Osman*, (1918) Mad WN 580; *Jari v Jaichand*, (1918) PR 82.
731. *Fulchand Motilal v Manbar Lal*, AIR 1973 Pat 196; see also *Radhika Kund Pandit v Kund Pandit*, AIR 1993 Mad 90.

[s 10.7] Fundamental Test

The fundamental test to attract section 10 is whether on final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit.[732]

[s 10.8] Suit

The word "suit" is important for our purpose. As per the provisions of O IV, rule 1 of the CPC every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in its behalf. Therefore, the word "suit" ordinarily means a civil proceeding instituted by presenting a plaint.[733]

A suit within the meaning of this section includes a pending appeal.[734]

[s 10.9] Section Applies Only to Suits Filed in Civil Courts

The language of section 10 suggests that it is referrable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute. The object of section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue.[735]

Application under section 20 of the Arbitration Act, 1940 (repealed by the Arbitration & Conciliation Act, 1996) is not a suit within section 10 of the CPC.[736]

Section 10 does not justify stay of a suit under rent control statute for the eviction of a tenant on the ground that the tenant has filed a suit for specific performance against the landlord on the basis of an alleged agreement of sale of the disputed premises in favour of the tenant. The tenant cannot rely on section 53A, Transfer of Property Act, 1882, by claiming adversary title by claiming that under the agreement he continued in possession as a purchaser and not as a tenant.[737]

In a case from Madhya Pradesh, the plaintiff had filed a suit for declaration of title in respect of the property in dispute wherein the defendant had denied his title. The plaintiff filed another suit for ejectment of the defendant under the Madhya Pradesh Accommodation Control Act, 1961, wherein also the defendant denied the title of the plaintiff. The question of title in the suit for ejectment is not directly and substantially in issue but is incidental and collateral, because for getting a decree in ejectment suit, the plaintiff is not required to prove his title but only that he is the landlord within the meaning of the Act. Hence, section 10 will not be attracted.[738]

Thus, a suit for arrears of rent for a later year cannot be stayed because of the pendency in revision of a suit for rent for a previous year.[739] The Delhi High Court declined to apply

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732. *National Institute of MH&NS v C Parameshwara*, AIR 2005 SC 242 : (2005) 2 SCC 256; see also *Maharashtra State Co-op Mktg Federation Ltd v Indian Bank*, AIR 1997 Bom 186; *Mirta Line v Finlay Mills*, AIR 1982 Cal 41.
733. *SD Dhandepani v Branch Manager Indian Overseas Bank*, AIR 2002 Mad 442 : (2002) 2 Mad LJ 656 (Mad).
734. *JT Republike v Rungta & Sons*, AIR 1966 Cal 382; *Raj Spinning Mills v AG King Ltd*, AIR 1954 P&H 113; *Durgadass v Gitan Devi*, AIR 1977 HP 65.
735. *National Institute of MH&NS v C Parameshwara*, AIR 2005 SC 242: (2005) 2 SCC 256.
736. *Usha Rani v Indermal & Sons*, AIR 1988 Raj 223.
737. *NP Tripathi (Dr) v Dayawanti Devi*, AIR 1988 Pat 123 (DB).
738. *Rajesh Singh v Manoj Kumar*, AIR 2010 MP 16 (DB) (Gwalior Bench).
739. *Gillo Mal v Ratan Kumar*, (1953) ILR Raj 141.

this section in an application under the Arbitration Act, 1940, on the ground that whereas under section 33 of that Act the court can only declare as to the existence or otherwise of an arbitration agreement, relief awardable under section 20 is more comprehensive in that the court cannot only direct the agreement to be filed but also appoint an arbitrator.[740]

As stated above, section 10 of the CPC is referrable to a suit instituted in a civil court. The proceedings before the labour court cannot be equated with the proceedings before the civil court. They are not the courts of concurrent jurisdiction. In the circumstances, section 10 of the CPC has no application to the facts of this case.[741]

The DRT is a special tribunal created under a Special Act and the provisions of the DRT Act (Act 51 of 1993) ousts the jurisdiction of the civil court. The tribunal cannot be considered a civil court and an application filed by a financial institution for recovery of debt cannot be considered a suit. Hence, section 10 has no application.[742]

A proceeding for an interim measure under section 9 of the Arbitration and Conciliation Act, 1996, is almost like an interlocutory application and hence such a proceeding cannot be construed as a suit within the meaning of section 10 of the Code. Therefore, section 10 is not applicable to such proceedings.[743]

In simultaneous prosecution of the defendant in the criminal case, the civil suit on the same subject-matter can be stayed only under very exceptional and compelling circumstances. There is no question to stay the civil suit instituted against defendants during the pendency of the criminal case when they have filed their written statement in the civil suit, no question of any embarrassment or premature disclosure of their defence in the criminal case arises in this case.[744]

The Supreme Court was engaged with a question of whether the high court was justified in staying the proceedings in a civil suit till the decision in criminal case. It was observed that the high court was not justified in doing so. Firstly, because even if there is a possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration. Secondly, in the facts of the present case, there is no likelihood of any embarrassment to the defendants as they had already filed the written statement in the civil suit and based on the pleadings of the parties, the issues have been framed.[745]

In a company proceeding, no plaint is presented and hence, it cannot be regarded as a proceeding based on a suit. Therefore, when the proceedings are not based on a suit, they cannot be regarded as a trial of a suit and hence, the suit for recovery of money pending before the trial court could not be stayed till disposal of company petition.[746]

On the basis of the precedent as well as the principle, it has become evident that the proceedings in a regular suit and the proceedings which are summary in nature contemplated by section 372 of the Indian Succession Act, 1925 (39 of 1925) are entirely different and the latter proceedings would not be covered by section 10 of the Act. The object of issuance of a certificate and its effect is entirely different which would not decide the issue finally between the parties.[747]

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740. *M Malsters Pvt Ltd v Allied Engineers*, AIR 1975 Del 123.
741. *National Institute of MH&NS v C Parameshwara*, AIR 2005 SC 242 : (2005) 2 SCC 256.
742. *Vee Cee Yes Granites v Central Bank of India, Chennai*, (2000) 2 Mad LJ 392 (Mad).
743. *Sovereign Developers and Infrastructure Ltd v Paramount Vijetha Holding, A Partnership Firm*, AIR 2010 Kant 80.
744. *Peroonhayil Remotty v Cheruvath Gangadharan*, AIR 2001 Ker 276.
745. *Guru Granth Saheb Sthan Meerghat Vanaras v Ved Prakash*, (2013) 7 SCC 622.
746. *SD Dhandapani v Branch Manager Indian Overseas Bank*, AIR 2002 Mad 442.
747. *Monica Bibli Sood v Kamal Seth*, AIR 2004 P&H 366.

Where in a suit — application for stay of suit is filed on the ground that subject-matter of suit and second appeal was same, however, applicants failed to discharge their onus by establishing that both suits arose out of same cause of action, same subject-matter and same relief. In fact, cause of action in subsequent suit arose when order in suit under second appeal was passed. The application for stay of subsequent suit was found liable to be dismissed.[748]

[s 10.10] No Bar to File Second Suit

Though, the heading of this section is "stay of suit", it does not operate as a bar to the institution of the subsequent suit. It is only the trial of the suit that is not to be proceeded with.[749]

[s 10.11] Stage

Normally, the application under section 10 of the CPC is to be decided after filing of the written statement, then the court is in a better position to know as to whether the matter in issue in both the suits is directly and substantially the same or not. However, that does not mean that the court has no jurisdiction to entertain the application prior to filing of the written statement. In the given case, the court may decide the question before filing of the written statement if the defendant makes available the copy of the plaint of the earlier suit and the other documents which enables the court to decide as to what the dispute between the parties is. In case, if the court is not in a position to decide as to what dispute between the parties is on the basis of the plaint of previously instituted suit, the court may postpone the petition till the filing of the written statement,[750] because a proceeding instituted first in time cannot be stayed and if anything in terms of section 10 of the CPC which is only a subsequent proceeding as between the parties that can be stayed.[751]

However, the subsequent suit can be stayed only at the stage of trial. There cannot be any application of section 10 at the appellate stage.[752]

For maintaining an application under section 10, the defendant in the suit concerned need not first file his written statement; the section 10 application can be taken out even before filing the written statement.[753]

It is not necessary for the defendant to move the court under this section until he has filed his written statement in the later case.[754]

[s 10.12] Question of Jurisdiction

Jurisdiction with reference to the subject matter of a claim depends upon the allegations in the plaint and not upon allegations in the written statement. The question of jurisdiction raised by the defendant is a question that is virtually between the plaintiff and the court itself. The plaintiff invokes the jurisdiction of the court and the court has always jurisdiction to decide for itself whether it has jurisdiction to try the suit before it. There is nothing in section 10 of the

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748. *Devanayagi Ammal v Manicka Konar*, AIR 2006 (NOC) 1429 (Mad).
749. *Maharashtra State Co-op Mktg Federation Ltd v Indian Bank*, AIR 1997 Bom 186.
750. *Shri Ram Tiwary v Bholi Devi*, AIR 1994 Pat 76.
751. *Chandra Madhav Mishra v Kishore Mishra*, AIR 2006 Pat 164.
752. *C Arunachalam Pillai v S Krishnasamy*, (2007) 2 Mad LJ 399 (Mad) : (2007) 1 CTC 223.
753. *Ashok Kumar Yadav v Noble Designs Pvt Ltd*, AIR 2006 Cal 237.
754. *Wahid-UnNissa Bibi v Zamin Ali Shah*, (1920) ILR 42 All 290; *Mulchand v Gill & Co*, (1920) ILR 44 Bom 283.

CPC to show or suggest that if an issue of jurisdiction has been raised in a previously instituted suit, the defendant cannot invoke provision of section 10 of the CPC in subsequent suit unless he withdraws or waives that objection.[755] Application cannot be dismissed as premature on ground that copy of plaint was not produced or written statement was not filed in instant suit.[756]

[s 10.13] Decree Passed Disregarding This Section — Validity

This section enacts merely a rule of procedure and a decree therefore passed in contravention of it is not a nullity and cannot be disregarded in execution proceedings.[757] It can be waived, although the section is so worded as not to leave any discretion in the court where its conditions are satisfied.[758] Accordingly, even though the Representation of the People Act, 1951, provides that the provisions of the CPC shall as far as possible apply to petitions filed under it, an election tribunal does not err in first taking up for hearing a subsequently filed petition by reason of a discretion vested in it under section 87 of that Act and also because of the parties to it having acquiesced.[759]

The object of the section is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the court as to how the proceedings should be conducted, it is for the court to decide what will be the best course to be adopted for expeditious disposal of the case.[760]

[s 10.14] Matter in Issue

See notes under the heading "Plea of *res judicata* Cannot Be Raised for the First Time Before Supreme Court" under section 11.

[s 10.15] Whether the Subject Matter of Both Suits Must Be the Same

Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradiction to the words "incidentally or collaterally in issue". Therefore, section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical.[761] The language used by the apex court in the above case is very significant. It has been stated that "the key words used in section 10 are 'the matter in issue is directly and substantially in issue' in the previous instituted suit. The words 'directly and substantially in issue' are used in contra-distinction to the words 'incidentally or collaterally in issue." Thus, section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole subject matter in both

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755. *Escorts Construction Equipment Ltd v Action Construction Equipment Pvt Ltd*, AIR 1999 Del 73.
756. *VP Vrinda v Indira Devi*, AIR 1995 Ker 57.
757. *Sheopat Ravi v Warak Chand*, AIR 1919 Lah 294.
758. *Shanti Swaroop v Abdul Rehman*, AIR 1965 MP 55, 59; *Gangaprasad v Banaspati*, AIR 1937 Nag 132 : (1937) ILR Nag 6.
759. *Shanti Swaroop v Abdul Rehaman*, AIR 1965 MP 55.
760. *Pukhraj D Jain v G Gopalakrishna*, AIR 2004 SC 3504 : (2004) 7 SCC 251.
761. *National Institute of MH&NS v C Parameshwara*, AIR 2005 SC 242 : (2005) 2 SCC 256.

the proceedings is identical.[762] The provisions of section 10 would apply when decision in one suit would non-suit the other suit. Only in that event it could be said that the matter in issue in both the suits are directly and substantially the same. In case of two suits between the same parties when the facts clearly disclose and also establish that the suit property in the subsequent suit is absolutely distinct and separate from that of the earlier suit and there is no identity at all with regard to the cause of action and also the reliefs that are sought in both the suits, the subsequent suit between the same parties, was not liable to be stayed as provisions of section 10 of the CPC were not applicable.[763]

Section 12 of the Code of Civil Procedure 1882 contained the words "for the same relief" after the words "previously instituted suit". Hence, it was necessary for the application of the section not only that the matter in issue in the second suit should also be directly and substantially in issue in the first suit, but that the second suit must be *for the same relief* as that claimed in the first suit.[764]

It is not only the identical subject matter but also the relief claimed in both suits that determine the applicability of section 10. The trial of subsequent suit can be stayed only when the court trying the previously instituted suit had power to grant the relief claimed in the subsequent suit. Thus, where the earlier suit was filed for the relief of partition of specific share in property and the subsequent suit was filed in small cause court claiming ejectment of tenant and recovery of rent, it was held that section 10 would not apply.[765]

Even if the cause of action and the relief prayed for or some of the issues in the former and subsequent suits may differ, that will not be a ground for non-application of section 10 of the CPC if the CPC finds that the final decision in the former suit would operate as *res judicata* in the subsequent suit.[766] The words "for the same relief" have been omitted in the present section. The omission of these words, however, does not materially alter the law. In a Calcutta case,[767] RANKIN, CJ, laid stress on the identity of the subject matter. When the two suits were for the recovery of ceses due for different periods, the learned Chief Justice said:

> But it must be observed that judgment for the recovery of subsequent ceses does not differ merely as being for a different form of relief. It is the same kind of relief for an entirely separate subject matter, namely, a debt which was not in existence at all at the time of the previous suit. It does not follow, because the words "the same relief" are no longer in the section, that section 10 is applicable to suits for recovery of successive rents.

It has even been held that a suit cannot be stayed if the main issue in both the suits is the same but the subject matter of the second suit is different from that of the first suit.[768]

Stay of subsequent suit cannot be ordered when one or some of the issues are identical. There must be substantial identity of subject-matter in both suits. Thus, where the main

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762. *National Institute of MH&NS v C Parameshwara*, AIR 2005 SC 242 : (2005) 2 SCC 256, Kapadia J (as he then was), speaking for the bench.
763. *Ajit Singh v Sadhu Singh*, AIR 2004 Del 320; see also *Spice Communication Pvt Ltd v Lakwinder Singh*, 2008 (2) Civil Court Cases 441 (P&H).
764. *Balkishen v Kishanlal*, (1889) ILR 11 All 148; *Ramalinga v Ragunatha*, (1897) ILR 20 Mad 418, p 420; *Bissessur v Gunpur*, (1880) 8 CLR 113; *Raja Ransgit Singha v Bhagabutty*, (1990) 7 Cal WN 720.
765. *Hashmat Ullah Khan v Iqbal Ahmad*, AIR 2007 (NOC) 182 : 2006 (6) All LJ 402 (All).
766. *Shri Ram Tiwary v Bholi Devi*, AIR 1994 Pat 76.
767. *Chowdhury Jamini Nath v Midnapur Zamindary Co*, AIR 1923 Cal 716 : (1923) 27 Cal WN 772 : 774; *Bepen v Jogendra*, (1916) 24 Cal LJ 514; *Maharaja Kesho Prasad v Shiva Saran*, (1919) 4 Pat LJ 557 (pension); *Ma kho U v Maung Ba sein*, AIR 1929 Rang 67 : (1928) 6 Rang 775; *Dinshaw v Galstaun*, AIR 1927 Bom 245 : (1927) 29 Bom LR 382.
768. *Kuberan v Koman*, AIR 1925 Mad 574 : (1925) 48 Mad LJ 251; *Nasibanbi v Iqbal Begum*, AIR 1935 Lah 816.

question involved in the previous suit related to the validity of termination of service of the defendant, the subsequent suit, which related to termination of licence to occupy the premises, cannot be stayed.[769] To attract section 10, it has to be looked into whether the judgment in the earlier suit would operate as *res judicata* in the subsequent suit. Therefore, where two suits related to different transactions relating to supply of materials on different dates, there cannot be said to be identity of cause of action and the matter in issue and as such section 10 would not apply because there cannot be any question of application of *res judicata*.[770]

The Indore Bench of the Madhya Pradesh High Court held that where parties in the subsequent suit are litigating under the title which was claimed by the respondents in the earlier suit, there is identity of jurisdiction in view of Explanation VIII contained in section 11 and as such section 10 would be applicable.[771]

The Jammu and Kashmir High Court has held that section 10 of the CPC forbids trial of any suit in which the matter in issue is also directly or substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim under the same title where such suit is pending in the same or any other court in the state having jurisdiction to grant the relief claimed. It has been further held in the same case that addition of a new party in the subsequent suit does not oust the application of section 10 on the ground that all the parties in the subsequent suit are not the same as in the earlier suit.[772]

Where the first suit was a title suit to declare a notice terminating "leave and licence" to be void, second suit by the defendant to eject the first plaintiff (and for *mesne* profits) is not barred.[773] A suit was filed alleging infringement of plaintiff-company's right by defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with the same colour combination, etc, as that of plaintiff-company. A subsequent suit was filed in a different court by the defendant company against plaintiff company with same allegations. Held, subsequent suit should be stayed. A simultaneous trial of two suits in different courts might result in conflicting decision as there was complete identity of issue in the two suits.[774] While in the first suit the question was only regarding the authority of first plaintiff to create the settlement, the subsequent suit questions the very legality of that settlement. The entitlement to create a document would be one thing while its legality in law would be quite another. That is the difference in the said suits. Thus, the subsequent suit could not be stayed under section 10, CPC till the decision of earlier suits.[775]

Main reliefs sought for in a company petition, filed after a civil suit, was on the basis of oppression, and prayer was for framing a scheme and appointment of directors. In the earlier civil suit, the main relief sought was to restrain government nominated directors from functioning. It was held that stay under section 10, CPC in respect of the company petition could not be granted.[776]

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769. *Madan Mohan Kukreti v Geeta Bhawan*, AIR 2007 Uttr 32 : 2007 (3) All LJ 632.
770. *Dwarka Trading Corp, Allahabad v Cheema Paper Mills (P) Ltd, Bazpur*, AIR 2007 Uttr 83.
771. *Poonamchand Mishrilalji Tunawat v Murti Madan Mohanji*, AIR 2007 (NOC) 1877 (MP) (Indore Bench).
772. *Shashi Devi v Raju Singh*, 2008 (4) Civil Court Cases 062 (J&K).
773. *Mirta Line v Finlay Mills*, AIR 1982 Cal 41.
774. *Wings Pharmaceuticals Pvt Ltd v Swan Pharmaceuticals*, AIR 1999 Pat 96.
775. *KV Subramaniam v Pattabi Bhagavathar*, AIR 1999 Mad 99.
776. *Piyush Kanti Guha v West Bengal Pharmaceuticals Ltd Corp*, AIR 1982 Cal 94.

Two suits were filed between same parties, involving common question arising between them. It was held that consolidation and simultaneous hearing of the suits is not barred under section 10. Section 10 merely lays down a procedure and does not vest any substantive right in the parties. The claim in the later suit was his defence in earlier suit. The court had inherent power to consolidate the two suits and to direct analogous hearing of the same, in the ends of justice.[777]

Suit was filed in a court at *A*, for the recovery of damages by a company from a bank. Another suit was filed in a court at *D* for amount due to the bank on advance at *D*. Parties to both the suits were different. It was held that the suit in court at *D* could not be stayed under section 10. Section 10 applies only where, on the final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. In the instant case, the reliefs in the two suits were different and so were the causes of action. The object of section 10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief.[778]

Section 10 would apply only if the whole of subject matter in both the suits is identical and not where merely one of many issues in two suits is identical. The key words in section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". That means that section 10 would apply only if there is identity of the matter in issue in both the suits meaning thereby, that the whole of subject matter in both the proceedings is identical and not merely one of the many issues arising for determination.[779] Thus, where both suits, the earlier one and the subsequent one are not entirely identical and all the findings recorded in the second suit would not operate as *res judicata* in the first suit, section 10 would not apply.[780] However, in *Pukhraj D Jain's* case,[781] the Supreme Court held that mere filing of application under section 10 does not put an embargo on the power of the court to examine the merits of the suit. GP Mathur J, speaking for the bench, observed (at p 3507 of AIR):

> In a given case the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the Court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side.[782]

Matters in issue in both the suits need not be identical. It is enough if they are substantially the same.[783] Section 10 of the CPC contemplates substantial identity of matter in issue in the two suits. It is not the identity of main issue or all issues but the identity of matter in issue which is the determining test. The decision in one suit must non-suit the other suit. This must be the phraseology of answer, to win the question whether the matter in issue in the two suits is directly and substantially the same.[784]

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777. *Dr. Guru Prasad Mohanty v Bijay Kumar Das*, AIR 1984 Ori 209 (DP Mohapatra J).
778. *Grindlays Bank Ltd v Hindustan Embroidery Mills Pvt Ltd*, AIR 1981 Del 332.
779. *Sohal Engineering Works v Rustam Jehangir Vakil Mills*, AIR 1981 Guj 110.
780. *Spice Communications Pvt Ltd v Lakhwinder Singh*, 2008 (2) Civil Court Cases 441 (P&H).
781. *Pukhraj D Jain v G Gopalakrishna*, AIR 2004 SC 3504 : (2004) 7 SCC 251 : (2004) 3 Mad LJ 183.
782. *Pukhraj D Jain v G Gopalakrishna*, AIR 2004 SC 3504, p 3507, para 4 : (2004) 7 SCC 251 : (2004) 3 Mad LJ 183.
783. *Mehta Gandhi & Associates v Shree Pipes Ltd*, AIR 1990 Del 139.
784. *Arjies Aluminium Udyog v Sudhir Batra*, AIR 1997 Del 232.

For determining whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit, absolute identity of the parties in both the suits is not a consideration.[785]

Main reliefs sought for in a company petition, filed after a civil suit, was on the basis of oppression, and the prayer was for framing a scheme and appointment of directors. In the earlier civil suit, the main relief sought was to restrain the government nominated directors from functioning. It was held that stay under section 10, the CPC in respect of the company petition could not be granted.[786]

Where the first suit was by *A* for specific performance against the original owner, the second suit by *B* for the eviction of *A*, on the ground of personal necessity and default in the payment of rent, does not attract section 10.[787]

The mere fact that one issue is identical in two suits is not enough to attract section 10. It does not make the subject matter identical. As pointed out by SIR ASHUTOSH MOOKERJEE in *Bipin Behari v Jogindra Chandra*,[788] the matter in issue in section 10 is not equivalent to "any of the questions in issue". It means the entire subject matter in controversy.[789]

Two suits by the plaintiff were filed before the subordinate court. Subsequent suit was filed before the high court. Neither the parties nor the issues in earlier suit were the same as those in the subsequent suit. Subject matter in controversy was also not the same. It was held that application for stay of suit under section 10 was not maintainable. Considering various facts, including the position that the determination of the issues involved in the two earlier suits would not put an end to the controversy between the parties with regard to the several other issues that may be left in the subsequent suit, it was not a proper case where such a discretion under section 151 should be exercised for the purpose of stay of the present suit.[790]

Application under section 20, Arbitration Act, 1940 is not a suit within section 10, CPC (repealed by the Arbitration & Conciliation Act, 1996).[791]

Section 10 does not justify stay of a suit under rent control statute for the eviction of a tenant on the ground that the tenant has filed a suit for specific performance against the landlord on the basis of an alleged agreement of sale of the disputed premises in favour of the tenant. The tenant cannot rely on section 53A, Transfer of Property Act, 1882, by claiming adversary title by claiming that under the agreement he continued in possession as a purchaser and not as a tenant.[792]

Where in one suit the question was regarding the authority of a person to create a settlement and in the second suit the very legality of that settlement was questioned, it was held by the Madras High Court that the issues involved in both the suits were not directly and substantially the same and as such the stay of subsequent suit pending appeal against decree in the first suit was improper.[793]

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785. *Ashok Kumar Yadav v Noble Designs Pvt Ltd*, AIR 2006 Cal 237.
786. *Piyush Kanti Guha v West Bengal Pharmaceuticals Corp Ltd*, AIR 1982 Cal 94.
787. *Anant Ram v Mahesh Prasad*, AIR 1984 Pat 161.
788. *Bipin Behari v Jogindra Chandra*, AIR 1917 Cal 248.
789. *Adhish Chandra v Hindustan Gas and Industries Ltd*, AIR 1985 Cal 154.
790. *JC Roy Chowdhury v Krishna Paper Board Mills*, AIR 1988 Cal 183.
791. *Usha Rani v Indermal & Sons*, AIR 1988 Raj 223 (MB Sharma J).
792. *Dr. NP Tripathi v Dayawanti Devi*, AIR 1988 Pat 123 (DB).
793. *KV Subramanian v Pattabi Bhagavathar*, AIR 1999 Mad 99 : (1998) 3 Mad LJ 421 (Mad).

Where a cultivating tenant filed a suit for injunction restraining the landlord from ejecting him from the suit land and then subsequently filed application before Tehsildar for recording him as a tenant under the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act, 1969, it was held that section 10 was not applicable.[794]

But the section will apply if the subject matter is the same, and the only difference is that the second suit contains a prayer for a declaration that an interim order made in the first suit is illegal, or for an injunction restraining the defendant from proceeding with the first suit.[795] In these cases, the words "matter in issue" have been construed as having reference to the entire subject matter in controversy between the parties, and not merely one or more of several issues.[796] But in Calcutta case, it was pointed out that the section contains no reference to the subject matter or to the cause of action and that one test for the applicability of the section is whether on a final decree being reached in the previous suit, such decree would operate as *res judicata* in the subsequent suit.[797] This test was adopted without comment in a Madras case[798] but came in for criticism in an Allahabad case[799] wherein it was held that as the matters directly and substantially in issue in both the suits were not identical, section 10 did not apply. It has been held by the same court that to attract this section, it was not necessary that there should be complete identity of the subject matter and that it would be sufficient if a matter directly and substantially in issue in an earlier suit is directly and substantially in issue in the subsequent suit.[800] Again, in a Calcutta case reported in 1912 where the first suit was for dissolution of partnership and for accounts, and the subsequent suit was by one of the partners for the return of a deposit, the section was held to apply.[801] Where a suit was filed for damages for breach of contract and the defendant filed a cross-suit claiming refund of monies paid under the contract on the ground that the opposite party was in default, it was held that as the issues in both the suits were substantially the same, section 10 was applicable.[802] Again, where cross-suits arising out of the same transaction were filed for different reliefs, it was held that section 10 was applicable because the matters in issue were substantially the same and it did not matter that the cause of action for the two suits and the reliefs claimed were not the same.[803]

[s 10.16] Sections 10 and 25 of the CPC

The suit at Nashik has been instituted first in point of time. By reference to section 10 of the CPC, the trial of the suit at Delhi, being the latter suit, shall be liable to be stayed. For the exercise of its discretionary jurisdiction under section 25 of the CPC, the only consideration which is relevant is "expediency for ends of justice". The court will have regard to and respect for the rule enacted in section 10 of the CPC. Of course, the considerations such as which is the place where most of the evidence is available, convenience of the parties and witnesses,

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794. *S Mani v NG Mani*, (1993) 2 Mad LJ 368 (Mad).
795. *Durgaprasad v Kantichandra*, AIR 1935 Cal 1 : (1935) ILR 61 Cal 670.
796. *Hariram v Hazi Mahomed*, AIR 1954 All 141; *Munisami v Raghupathi*, AIR 1940 Mad 7; *Kumarappa v Ramaswami*, AIR 1948 Mad 150.
797. *Life Pharmaceuticals Pvt Ltd v Bengal Medical Hall*, AIR 1971 Cal 345; *Durgaprasad v K Mukerji*, AIR 1935 Cal 1; *Laxmi Bank v Harikishan*, AIR 1948 Nag 297; *Naurati v Mehma Singh*, AIR 1972 P&H 421; *Shaw Wallace & Co v Bholanath*, AIR 1975 Cal 411 : (1968) 72 Cal WN 830.
798. *Shankar Ejaman v Venkappa Batta*, AIR 1954 Mad 320.
799. *Nemkumar v Nemakumar*, AIR 1958 All 207 : (1957) All LJ 734.
800. *Ram Narain v Ram Swarup*, AIR 1962 All 108.
801. *Mahadev v Gajadhar*, (1912) 16 Cal WN 897.
802. *Jai Hind Iron Mart v Tulsi Ram*, AIR 1953 Bom 117.
803. *Shorab Merwanji v Mansata Film Distributors*, AIR 1957 Cal 727 : (1957) 61 Cal WN 559.

which one of the two places is more convenient to access and attend and so on are also the factors to be kept in view and may in an appropriate case persuade the court to direct a transfer of case in departure from the rule underlying section 10 of the CPC. All would depend on the facts and circumstances of a given case. So far as the present case was concerned, the Supreme Court deemed it proper to transfer the suit at Delhi to the court at Nashik for the purpose of hearing and decision thereat. In doing so, the Supreme Court followed the ordinary rule as there was no factor or consideration relevant for making a departure therefrom.[804]

Merely because plea under section 10 for stay of suit has been rejected, Supreme Court is not denuded of exercise of power to transfer the suit if ends of justice call for exercise of such power.[805]

[s 10.17] Consolidation of Suits

Generally, the purpose of transfer of the suit by Supreme Court under section 25 from one state to another or by the high court or the district judge under section 24 from one subordinate court to another is that two or more suits pending between the same parties on the same subject matter are tried jointly by one court by a convenient method known as consolidation of suits. This method is convenient to the litigants as the evidence is recorded in two or more suits and the deposition of the same witness in different suits is avoided, saving the time of litigants, lawyers and the court. However, it is to be noted that if the two suits pending between the parties are at different stages of the trial, say, for example, one suit is pending at a pre-issue stage and the other at the defendants' evidence, there is no point in consolidation of these suits.

Where in a revision petition before the high court the respondents had filed a suit for the relief of permanent injunction in respect of property in suit no 494/6 and the revision petitioners had filed another suit for various reliefs against the respondents and their mother in relation to the properties in the same suit no 494/6, it was held that the application for consolidation of suits should be allowed because the issue involved in both the suits being conveyance of property, and as such section 10 was no bar to considering such application.[806]

Two suits were filed between same parties, involving common question arising between them. It was held that consolidation and simultaneous hearing of the suits is not barred under section 10. Section 10 merely lays down a procedure and does not vest any substantive right in the parties. The claim in the later suit was his defence in earlier suit. The court had inherent powers to consolidate the two suits and to direct analogous hearing of the same, in the ends of justice.[807]

This section does not bar the power of the court to consolidate for the purpose of hearing an earlier suit and a later suit.[808]

[s 10.18] Discretion of Court

The proceedings in the trial of a suit have to be conducted in accordance with provisions of the CPC. Section 10 of the CPC no doubt lays down that no court shall proceed with

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804. *GC Care Centre and Hospital v OP Care Pvt Ltd*, AIR 2004 SC 2339 : (2004) 6 SCC 756.
805. *Chitivalase Jute Mills v Jaypee Rewa Cement*, AIR 2004 SC 1687.
806. *Sellammal v Mookan*, (2000) Mad LJ (Supp) 363 (Mad).
807. *Guru Prasad Mohanty v Bijay Kumar Das*, AIR 1984 Ori 209.
808. *Gupta v East Asiatic Co*, AIR 1960 All 184.

the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed. However, mere filing of an application under section 10 of the CPC does not in any manner put an embargo on the power of the court to examine the merits of the matter. The object of the section is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the court as to how the proceedings should be conducted; it is for the court to decide what will be the best course to be adopted for expeditious disposal of the case. In a given case, the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side.[809]

In a case of stay against recovery of electricity dues under the Madhya Pradesh Electricity Duty Act, 1949, it was held by the Madhya Pradesh High Court that the State was not prohibited from recovering interest on delayed payment of dues after the vacation of the stay order because the stay order will not provide a protective umbrella for a defaulting consumer. It was observed by the division bench that "equity and fair play provide that if a man secures certain privileges or benefits flowing from an order passed by the court, then such a person should be required to return the benefit after vacation or rejection of the order."[810]

Although pendency of a criminal case is no ground for stay of a civil suit under section 10, courts in its discretion have sometimes directed the stay of civil suit. Thus, where the civil suit was sought to be stayed during the pendency of criminal case on the plea of defence being disclosed, the Andhra Pradesh High Court directed the criminal court to dispose of the case within three months and further directed the civil court to postpone trial of the suit till then.[811]

In this respect, the observations of Vivian Bose J, speaking for a five-judge bench of the Supreme Court in *MS Sheriff v State of Madras*,[812] deserve to be noticed:

> As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.
>
> Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations

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809. *Pukhraj D. Jain v G. Gopalakrishna*, AIR 2004 SC 3504 : (2004) 7 SCC 251.
810. *Vikram Cement, a Unit of Grasim Industries Ltd v State of Madhya Pradesh*, AIR 2008 MP 316 (DB).
811. *K. Vasudeva Reddy v Kambala Sivanageswarappa*, 2009 (3) Civil Court Cases 214 (AP).
812. *MS Sheriff v State of Madras*, AIR 1954 SC 397 : 1954 SCR 1144, at pp 1148–1149.

> obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished.

Even in cases where the issues may not be the same in both the suits, courts can exercise their discretion to stay the subsequent suit to secure the ends of justice. Thus, where divorce petition was filed by the wife and thereafter the husband filed petition for restitution of conjugal rights, the Calcutta High Court held as follows:

> Although in strict sense the issues in both the suits are not directly same, but nevertheless in our conscious judicious consideration the former suit to be tried and disposed of prior to the subsequent suit for the sake of natural justice in as much as in the former suit OP wife has challenged the legality of her marriage with the present petitioner and if the former suit succeeds and the wife obtains decree in that event there will be no need to proceed with the subsequent suit.[813]

A division bench of the Madhya Pradesh High Court has held that where the petitioner's case is based on a will in respect of which the plaintiff has made allegations of forgery and fabrication and in that regard criminal proceedings are pending against the petitioner, the proceedings in the civil suit deserve to be stayed.[814]

[s 10.19] Previously Instituted Suit

It is the pendency of the previously instituted suit that constitutes a bar to the trial of the subsequent suit. Though the word "suit" includes an appeal, it does not include an application for leave to appeal to His Majesty in Council, or the Supreme Court for the application may not be granted at all, and if granted, the applicant may not prefer any appeal.[815] It seems that it does not also include applications under section 47.[816] An application under section 19 of the Bombay Public Trusts Act, 1950, raising the question whether the trust was a public trust cannot be stayed under this section as that is a matter within the exclusive jurisdiction of the charity commissioner.[817] Proceedings under section 18 of the Displaced Persons Debts Adjustment Act, 1951, cannot be stayed under this section.[818] Application was made under the Arbitration Act, 1940 (repealed by the Arbitration & Conciliation Act, 1996) section 20 for the appointment of an arbitrator. Application was made by the non-petitioners under section 10, the CPC for staying further proceedings. It was held that section 10 CPC, cannot apply and the arbitration proceedings cannot be stayed merely because an application under section 20 is registered as a suit, it does not become 'suit' within the meaning of the CPC.[819] An application for determining fair rent by the rent controller under the Orissa House Rent Control Act, 1958, not being a suit, a subsequent suit for recovery of arrears of suit is not liable to be stayed.[820] An eviction proceeding against a tenant under the Andhra Pradesh (Lease, Rent and Eviction) Control Act, 1960, is not a suit and therefore is not liable to be stayed on the ground of a partition suit against the landlord being pending.[821]

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813. *Biswajit Sharma v Deblina Panja*, 2010 (2) Civil Court Cases 618 (Cal).
814. *Ved Prakash v Guru Granth Saheb Sthan, Meerghat Town*, AIR 2009 MP 134 (DB).
815. *Nainappa v Chidambaran*, (1898) ILR 21 Mad 18.
816. *Venkata v Venkatarama*, (1899) ILR 22 Mad 256.
817. *TB Parikh v Charity Commr*, (1955) 57 Bom LR 1069.
818. *Pratab Krishna v Stirling General Insurance Co*, AIR 1953 P&H 226.
819. *Usha Rani v Indermal & Sons*, AIR 1988 Raj 223.
820. *Khalli Panda v Dharam Gouda*, AIR 1967 Ori 172.
821. *M Subbaramayya v B Narasimha Swamy*, AIR 1972 AP 186.

In order that section 10 may apply, the court in the earlier suit must also have jurisdiction to grant the relief claimed under the subsequent suit. It is not enough that the subject matter in both the suits is the same. If the conditions of section 10 are not satisfied, the court cannot, in its inherent jurisdiction order stay of suit.[822]

The jurisdiction for the removal of executor or administrator under a Will vests with the high court under section 301 of the Indian Succession Act, 1925 and that power is not affected by the remedy provided under section 92 of the Code. Thus, a proceeding under section 92 of the Code cannot be said to be pending before a court competent to try the application for removal of executor and an order dismissing application under section 92 of the Code for non-prosecution cannot be said to be by a court competent to grant the relief for removal of executor. In that view of the matter, proceedings under section 301 of the Succession Act cannot be said to be barred on the principle of res sub-judice under section 10 or on the principle of *res judicata* under section 11.[823]

Pending stay of suit under section 10, court can still pass interlocutory orders (in this case orders on an application for amendment and for appointment of a receiver). Passing of such orders does not mean proceeding with the trial of the suit.[824]

Even where the reliefs are based on different causes of action, yet, if the subject matter in the two suits is the same, the later suit should be stayed under section 10.[825]

[s 10.20] Trial

The word "trial" is of wide import. In its widest sense, it would include all the proceedings right from the stage of institution of a plaint in a civil case to the stage of final determination by a judgment and decree of the court. Whether the widest meaning should be given to the word "trial" or that it should be construed narrowly must necessarily depend upon the nature and object of the provision and the context in which it is used.[826]

In the above case, the Supreme Court observed as follows:

> Therefore, the word "trial" in section 10 will have to be interpreted and construed keeping in mind the object and nature of that provision and the prohibition "to proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit". The object of the prohibition contained in section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of a suit. It has been construed by the courts as not a bar to the passing of interlocutory orders such as an order for consolidation of the later suit with the earlier suit, or appointment of a Receiver or an injunction or attachment before judgment. The course of action which the court has to follow according to section 10 is not to proceed with the "trial" of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose.[827]

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822. *Minocher Behramji v Hema Dadachanji*, AIR 1982 Bom 151.
823. *Tara Chand Sharma v Smt. Uma Aggarwal*, AIR 2010 P&H 30 (DB).
824. *VR Balakrishnan Nadar v R Velayudhan Nadar*, AIR 1980 Ker 161.
825. *Challapalli Sugars v Swadeshi Sugar Supply*, AIR 1983 Cal 199.
826. *Indian Bank v Maharashtra State Co-op Mktg Federation Ltd*, AIR 1998 SC 1952 : (1998) 5 SCC 69.
827. *Indian Bank v Maharashtra State Co-op Mktg Federation Ltd*, AIR 1998 SC 1952, para 8 : (1998) 5 SCC 69.

Relying on the above judgment of the Supreme Court, the Gauhati High Court in the undernoted case[828] held that an application under section 10 of the Code can be decided even before the filing of the written statement and prior to framing of issue. It further held that even if an application under section 10 is pending or accepted, that cannot preclude the court from disposing of an application under O XXXIX, rules 1 and 2 read with section 151 of the Code.

[s 10.21] Shall Not Proceed with the Trial

These words indicate the action to be taken by the court under this section. The second suit is not to be dismissed as barred;[829] it is only the trial of the suit that is not to be proceeded with. That may render the institution of a subsequent suit unnecessary in many cases but the section is no bar to the institution of such suit. Nay, there are cases in which it is necessary for a party to institute a regular suit to establish a right claimed by him, and failure to institute the suit within the period of limitation may preclude the party from asserting the right in any other suit or proceedings. Suits referred to in O XXI, rule 63 (Code of 1882 section 283) are suits of this character. This section does not dispense with the necessity of instituting such suits.[830] This is no longer the position in view of the deletion of rule 63 of O XXI by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976). A suit may be stayed under this section even after the hearing has commenced.[831] The application for stay of the suit should be made to the court which is seized of the case.[832]

The Supreme Court has held that for the application of the provisions of section 10, it is required that the court, in which the previous suit is pending, is competent to grant the relief claimed. The use of negative expression in section 10, i.e., *"no court shall proceed with the trial of any suit"* makes the provision mandatory and the court, in which the subsequent suit has been filed, is prohibited from proceeding with the trial of that suit if the conditions laid down in section 10 are satisfied. The basic purpose and the underlying object of section 10 is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and the same relief. The question which invited Supreme Court's adjudication was as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". It was held that the test for applicability of section 10 is whether on a final decision being reached in the previously instituted suit; such decision would operate as *res judicata* in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? It was further held that if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, when the matter in controversy is the same, it will be immaterial what further relief is claimed in the subsequent suit.[833]

Hearing of appeal is not part of "trial" of suit within section 10. If an objection that previous suit was pending between the same parties with the same issues, was not taken in the trial court, section 10 is not attracted in appeal.

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828. *Smt. Gomti Devi Sharma v Smt. Chanda Devi Kar*, AIR 2009 Gau 31 : 2009 (2) Gau LR 94 (Shillong Bench).
829. *Firm Asharfilal v Firm Ganeshram*, AIR 1952 All 546.
830. *Nemagauda v Paresha* (1898) 22 Bom 640.
831. *Wahid-Un-Nissa v Zamin*, (1920) ILR 42 All 290.
832. *Nagappa v Ramsing*, AIR 1941 Bom 160 : (1941) ILR Bom 325.
833. *Aspi Jal v Khushboo Rustom Dadyburjour*, AIR 2013 SC 1712 : (2013) 4 SCC 333; see also *Dunlop India Ltd v AA Rahna*, (2011) 5 SCC 778.

Where there are similar contracts of the same date for rendering services entered into with two different companies *A* and *B*, the stay of suit against *B* cannot be granted, merely for the pendency of appeal in the suit filed against company *A*.

[s 10.22] Between the Same Parties

For determining whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit, absolute identity of the parties in both the suits is not a consideration.[834]

The mere fact that the first suit is between *Z* and *J* as plaintiffs and *W*, *X* and *Y*, as defendants, and the second suit is between *W* as plaintiff and *Z*, *J* and *S* (not a party to first suit) as defendants, will not take the case out of the operation of this section, if the other conditions of the section are satisfied.[835] It is sufficient if there is a sufficient identity of parties. If the additional defendants in the subsequent suit, who are all directors of the plaintiff-company in the earlier suit do not raise any separate and substantial issue as between them and the plaintiff in the subsequent suit, the addition of such defendants does not make the subsequent suit any less a suit between the same parties.[836] The expression "the same parties" means the parties between whom the matter substantially in issue has arisen and also has to be decided. It has accordingly been held that the section does not become inapplicable by reason of there being in addition a party against whom no separate and substantial issue is raised.[837]

Where there are independent contracts with two different limited companies, the parties are not the same, even though company *B* is subsidiary of company *A*.[838]

[s 10.23] Interlocutory Orders Pending Stay

In cases where in a suit further proceedings are stayed for some reason or the other, in order to carry on the process of the suit, certain steps are to be taken in aid of proceedings to keep them alive. Thus, if the interlocutory matters are decided and the suit is kept ready to proceed further as soon as the stay of further proceedings ceases to be operative from a stage which could have arrived to ripen the case, by disposing of interlocutory matters in between, without affecting the merit of the case would be in aid of judicial process.[839] A prayer to stay all further proceedings in the suit cannot be allowed. The application under section 10 cannot bar the court from entertaining interlocutory application.[840] A stay order under this section does not take away the power of the court in the stayed suit to make interlocutory orders, such as orders for a receiver or an injunction, or an attachment before judgment.[841] An order of stay under this section does not take away the jurisdiction of the court to refer the suit to arbitration with the consent of parties.[842]

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834. *Ashok Kumar Yadav v Noble Designs Pvt Ltd*, AIR 2006 Cal 237.
835. *SK Rungta & Co v Naval Kishore Debi Prasad*, AIR 1964 Cal 373; *Rup Chand v Basant Lal*, AIR 1975 P&H 171.
836. *Arun General Industries Ltd v Rishabh Manufacturers Pvt Ltd*, AIR 1972 Cal 128.
837. *Shorab Merwanji v Mansata Film Distributors*, AIR 1957 Cal 727; but see *Radha Shyam v Kashinath*, AIR 1960 MP 169; *Mahanju Prasad v Prayag*, AIR 1975 Gau 40.
838. *N Dutta v Jardin Victor Ltd*, AIR 1984 Pat 7.
839. *Rameshwar v Fifth Addl Disrict Judge, Basti*, AIR 1999 All 1.
840. *VP Vrinda v Indira Devi*, AIR 1995 Ker 57.
841. *Sennaji v Pannaji*, AIR 1922 Bom 276 : (1922) ILR 46 Bom 431; *Kulsumum Nisan v Mohammad Farooq*, AIR 1969 All 479.
842. *Jawarlal v Jagadish*, AIR 1951 All 335.

When a suit is stayed by an order under section 10 of the Code, it does not take away the power of the court to make an order on an interlocutory application for urgent relief. The court has to see whether there is a bar for entertaining such applications.[843]

Where a suit was stayed by appellate court and an interlocutory application was filed before the trial court during the pendency of the stay, it was held that orders passed allowing the commissioner to visit the property and submit report was valid even though the stay was in operation.[844]

Consideration of applications for interlocutory reliefs, such as grant of injunction, appointment of receiver, attachment before judgment, impleadment of a party, amendment in the plaint etc, is not prohibited in spite of the stay, because such an order cannot be taken to be a step in the trial of the suit.[845]

Before considering the question of the stay of the suit under section 10, the civil court is well within its powers to consider the prayers for the issuance of the interim relief and a plea raised under section 10 cannot preclude the court from disposing of an application under O XXXIX, rules 1 and 2 read with section 151 of the CPC.[846]

[s 10.24] Application Under Section 10 to Be Filed Where Subsequent Suit Is Pending

Application for stay of suit under section 10 should be presented to the court in which the subsequent suit is pending.[847]

[s 10.25] Contract Providing for Place of Suing

It is sometimes provided in a contract that suits in respect of matters contained therein shall be instituted in a specified court. That such agreements are valid in law is well-settled.[848] The question of whether a suit instituted by one of the parties in a forum agreed to by them is liable to be stayed under section 10 when the opposite party has filed earlier a suit on the same agreement in a court different from that mentioned in the agreement has often been discussed and the view largely held is that there was nothing in the section to prevent the court from giving effect to the agreement.[849] The controversy has been set at rest by a decision of the Supreme Court wherein it has been held that the language of section 10 was clear, definite and mandatory and prohibited the trial of a subsequent suit and it did not make any difference that the earlier suit was in violation of the agreement of parties or vexatious.[850]

The object of consolidation of suits is to avoid multiplicity of proceedings and unnecessary delay and protraction of litigation. These objects are not in conflict with the principles of section 10, but are in aid of the object of that section. It was clear from the facts of the case that

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843. *K Balu v Madasamy*, (1999) 2 Mad LJ 521 (Mad).
844. *A Subramania Mudaliar v VG Subramania Battar*, (2000) 2 Mad LJ 702 (Mad).
845. *Surendra Sawhney v Murlidhar*, AIR 2008 (NOC) 652 (Raj) (Jaipur Bench) (DB).
846. *Sneh Lata Mathur v Brij Raj Bahadur*, AIR 2003 Del 259. See also *Baburao Vithalrao Sulunke v Kaderappa Prasappa, Dabbanhavar*, AIR 1974 Mys 63; *VR Balakrishnan Nader v R Velayudhan Nader*, AIR 1980 Ker 161; *Jagdamba Oil Agency v State of Madhya Pradesh*, 2006 (3) Civil Court Cases 282 (MP).
847. *Ambika Sahu v Sumitra Sahu*, AIR 1990 Ori 127.
848. See notes to section 20: "Agreement as to Choice of Court".
849. *Tilakram v Kodumal*, AIR 1928 Bom 175 : (1928) 30 Bom LR 546; *Bhagat Singh v Jagbir Sawhney*, AIR 1941 Cal 670 : (1941) ILR 1 Cal 490; *Ram Bahadur Thakur Co v Devidayal*, AIR 1954 Bom 176 : (1954) ILR Bom 334; *Becharam v Baldev Sahai*, AIR 1940 All 241 : (1940) ILR All 232 in which an injunction was issued restraining the defendant from proceeding on with the suit instituted earlier.
850. *Manoharlal v Seth Hiralal*, AIR 1962 SC 527; **reversing** *Manoharlal v Kishan Merik*, AIR 1935 MB 145

the contesting parties in the case of the two suits were the same, the disputed property in the suit filed earlier to it and the case of the plaintiff in the earlier suit was substantially his defence in the later suit and the case of the plaintiff in the later suit was his defence in the earlier suit. The court had inherent power to consolidate the two suits and to direct analogous hearing of the same, in the ends of justice.[851]

[s 10.26] Comprehensive Latter Suit Cannot Be Stayed

The court would not stay the latter suit if it is more comprehensive than the earlier one though both the suits are between the same parties and the cause of action arises out of the same contract.[852]

[s 10.27] Revision

There is practical unanimity of opinion among the high courts that an order under this section is revisable.[853] (But see the proviso to section 115.)

[s 10.28] Conditional Order

It has been held that where the conditions laid down in the section are satisfied, the court should pass an unconditional order for stay and not impose conditions.[854]

[s 10.29] Letters Patent Appeal

An order staying a suit is a judgment under clause 15 of the Letters Patent and an appeal lies therefrom.[855] So also an order refusing to stay a suit.[856] The Madras High Court, however, has held in a full bench decision that an order under section 10 is not a judgment within the letters patent.[857] There is no question of a Letters Patent appeal as section 100A inserted in the Code in 1976 bars it.

Even where the requirements of section 10 are not satisfied, court can grant injunction under its inherent power, restraining a person from proceeding with another suit in the interests of justice.[858]

Application was made under the Arbitration Act, 1940 (repealed by Arbitration and Conciliation Act, 1996), section 20, for the appointment of an arbitrator. Application was made by the non-petitioners under section 10, CPC for staying further proceedings. It was held that section 10, CPC cannot apply and the arbitration proceedings cannot be stayed. Merely because an application under section 20 is registered as a suit, it does not become "suit" within the meaning of the CPC.[859]

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851. *Guru Prasad Mohanty v Bijay Kumar*, AIR 1984 Ori 209.
852. *Brijlal & Co v MPE Board*, AIR 1975 Cal 69.
853. *Ramachandran v Neelambar*, AIR 1923 Mad 88; *Bishen v Bishen*, 61 IC 830; *Dayanand Modi v UOI*, AIR 1952 Pat 373; *Ram Richeal v Dayanand*, (1955) ILR All 309; **overruling** *Sultanat Jahan v Sunder Lal*, 42 All 409.
854. *Appala Naidu v Chinnam Naidu*, (1962) 2 Andh WR 257; *Ratan Singh v Musaddi Lal*, AIR 1972 All 473.
855. *Jivanlal v PR Vakharia & Co*, AIR 1933 Bom 85 : (1933) ILR 57 Bom 364.
856. *Durgaprasad v Kantichandra*, AIR 1935 Cal 1 : (1934) ILR 61 Cal 670; *Jai Hind Iron Mart v Tulsi Ram*, AIR 1953 Bom 117.
857. *Central Brokers v Ram Narayana Poddar & Co*, AIR 1954 Mad 1057 : (1954) ILR Mad 1052.
858. *Subhu Ram Kalita v Dharmeswar Das Koch*, AIR 1987 Gau 73 (DB).
859. *Usha Rani v Indermal & Sons*, AIR 1988 Raj 223.

[s 10.30] Inherent Power to Grant Stay

In the case of *Manohar Lal Chopra v Rai Bahadur Rao Seth Hiralal*,[860] it has been held that inherent jurisdiction of the court to make orders *ex debito justitiae* is undoubtedly affirmed by section 151 of the CPC but that jurisdiction cannot be exercised so as to nullify the provisions of the CPC. Where the CPC deals expressly with a particular matter, the provision should normally be regarded as exhaustive. In the present case, as stated above, section 10 of the CPC has no application and consequently, it was not open to the high court to by-pass section 10 of the CPC by invoking section 151, CPC.[861] It is only in cases where the proceedings are fraudulent, vexatious or for want of being *bona fide*, malicious and improper, then it comes within the meaning of abuse of the process of the court.[862]

In cases not covered by the provisions of section 10 of the CPC in terms, the court may, in very exceptional circumstances, stay a suit under section 151 as the inherent jurisdiction of the court to make orders *ex debito justitiae* is undoubtedly affirmed by section 151; but the court cannot overlook the well-settled principle of law governing the stay of suits. In such cases also, there must be identity of the subject matter and field of controversy between the parties in the two suits. Though subject matter contemplated and field of controversy need not be identical in every particular suit, at least the court must be satisfied that to allow the subsequent suit to continue would be oppressive or vexatious to the defendant and that the stay would not cause injustice to the plaintiff in the subsequent suit.[863]

While laying down the principle regarding applicability of sections 10 and 151 of the CPC, the court observed that where a party claims interference of the court to stop another action between the same parties, it lies upon him to show to the court that the multiplicity of action is vexatious, and the whole burden of proof lies upon him. He does not satisfy that burden of proof by merely showing that there is a multiplicity of actions; he must go further. However, it was held that the inherent powers are to be exercised by the court in very exceptional circumstances for which the Code lays down no procedure. It was thereafter held that the provisions of section 10 are clear, definite and mandatory. A court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. However, where two suits were filed in respect of the properties of Math of Lord Jagannath, the plaintiff of one suit being the defendant in the other and a third proceeding in the form of appeal dealing with the vesting of intermediary interest in the State was pending before collector, it was held by the Orissa High Court that where section 10 has no application, the court could exercise inherent jurisdiction under section 151 of the Code for the ends of justice.[864] When there is a special provision in the Code for dealing with the contingency of two such suits being instituted, recourse to the inherent powers under section 151 is not justified. The provisions of section 10 do not become inapplicable on a court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract.[865] It is true that the CPC does not provide for joint trial of the suits, but at the same time it is a well-accepted position of law that under section 151 of the Civil Procedure in appropriate cases, an order for consolidation of the cases can be made. The courts have even ordered joint trial of the cases. A court has inherent power *ex debito justitiae* to consolidate

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860. *Manohar Lal Chopra v Rai Bahadur Rao Seth Hiralal*, AIR 1962 SC 527.
861. *National Institute of MH&NS v C Parameshwar*, AIR 2005 SC 242: (2005) 2 SCC 256.
862. *MV Rajashekhar v MV Rajamma*, AIR 2004 Kant 280.
863. See notes to O XXXIX, rule 1.
864. *Chandrasekhar Mohanty v State of Orissa*, 2008 (1) Civil Court Cases 60 (Ori).
865. *Tara Devi v Kamla Gupta*, AIR 1999 Pat 103.

suits, where it is in the ends of justice to do so to avoid needless expenses and inconvenience to parties. Where it appears that there is sufficient unity, or similarity in the matter in issue in the suits, and the determination of the suits rests mainly on common questions, it is convenient to have them tried as analogous cases.

Ordinarily, since judgment in the probate proceeding is judgment *in rem*, it would be appropriate for the court to direct the court to dispose off the probate proceeding first in point of time and to stay the civil suit till the probate proceeding is decided. However, in the facts and circumstances of this case, since the probate proceedings as well as special civil suit are of the year 1982, and since the period of more than 11 years has already elapsed, in the court's opinion, it would not be proper to interfere with the discretion exercised by the trial court where the trial court has ordered consolidation of the two proceedings.[866] If the exigencies demand, cause of action or defence for both, civil and criminal proceedings is the same and the defence of the defendant or accused is likely to suffer; or the defendant or accused has to suffer serious prejudice because of particular or peculiar facts of the case, the court can stay the civil proceedings. As a principle of law, it cannot be laid down that whenever a criminal case is instituted, then the civil court on the same cause of action must be stayed. The court may be guided by the attending circumstances. Where a criminal action provides a cause of action for the civil action, then the court may, if the facts so demand, stay proceedings in the civil suit.[867]

[s 10.31] Summary Procedure

Section 10 is a general provision applicable to all categories of cases. The provisions contained in O XXXVII applies to certain classes of suit. One provides a bar against proceedings with the trial of the suit, the other provides for granting of quick relief. Both these provisions have to be interpreted harmoniously so that the objects of both are not frustrated. The words "trial of any suit" will have to be construed in the context of provisions of O XXXVII of the Code. The scheme of summary procedure provided by O XXXVII is that a stage of determination of the matter in issue will arise in a summary suit only after the defendant obtains leave. The trial would really begin only after leave is granted to the defendant.

Considering the objects of both the provisions, i.e., section 10 and O XXXVII, wider interpretation of the word "trial" is not called for. The word "trial" in section 10, in the context of a summary suit, cannot be interpreted to be the entire proceedings starting with the institution of the suit by lodging a plaint. In a summary suit, the "trial" really begins after the court or the judge grants leave to the defendant to contest the suit. Therefore, the court or the judge dealing with the summary suit can proceed upto the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if: (i) the defendant has not applied for leave to defend, or if such application has been made and refused; or if, (ii) the defendant who is permitted to defend fails to comply with the conditions on which the leave to defend is granted.[868]

[s 10.32] Explanation I

The contention that the Explanation 1 of section 11 permits second suit is absolutely misconceived. The Explanation 1 of section 11 of the CPC merely deals with a situation where

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866. *Multivahuji v Kalindivahuji*, AIR 1994 Guj 42.
867. *Sai Udyog Pvt Ltd v Central Bank of India*, AIR 1998 MP 191.
868. *Indian Bank v Maharashtra State Co-op Mktg Federation Ltd*, AIR 1998 SC 1952 : (1998) 5 SCC 69.

two suits are pending in court/courts of competent jurisdiction and in a situation when any of the suit is decided by the court before another suit, then decision given in that suit irrespective of the fact whether it was filed earlier or later, decision on the issue bars re-trial of the same issue.[869]

[s 10.33] Probate Case and Partition Suit

It is well settled that in the probate proceedings the only thing that the court does is declare upon the validity of the execution of Will in respect of the properties mentioned therein. It does not declare or decide upon the validity, legal disposition contained therein. For this purpose, the jurisdiction of the high court and the district judge under the provision of the Succession Act, 1925 are original and exclusive. No civil court can entertain any dispute with regard to validity or otherwise of a Will. Once a Will is probated and letter of administration is issued, if there be any dispute as regard disposition made therein, the parties can institute proceedings in civil courts without impugning the execution of the Will which has already been decided in the probate proceedings. It would thus be seen that the jurisdiction of two courts even in the two proceedings are different and exclusive. In that view of the matter, it cannot be said that one court can stay the proceeding pending decision of the other but as would presently show it also cannot be said that the decision given in the probate case would not have a material effect on the outcome of the partition suit.[870]

Be that as it may, the decision in the probate proceedings on the question of proof of the Will can have a direct impact on the suit.[871]

So, the decision in probate case would have material effect on the suit.[872]

The Delhi High Court has held that a civil court hearing a civil suit cannot stay proceedings in a probate court even though the probate petition was filed later in point of time.[873] It was observed by the high court as follows:

> The legal position which has emerged from the above decisions is that a Probate Court seized with a petition for grant of Probate of Will or Letters of Administration is not a civil court within the meaning of the term under the provisions of the Code of Civil Procedure though the proceedings of the Probate Court in relation to the granting of Probate and Letters of Administration is to be regulated, so far as the circumstances of the case may permit, by the Code of Civil Procedure, 1908. Once a Probate Court is considering a petition for grant of Probate or Letters of Administration in respect of a Will, that court alone is competent to decide on the question of execution and/or validity or otherwise of the Will in question. In such a situation, it is not open to the civil court to go into that question. [874]

[S 11] ***Res judicata.***—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

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869. *Hari Ram v Lichmaniya*, AIR 2003 Raj 319.
870. *Chandra Madhav Mishra v Braj Kishore Mishra*, AIR 2006 Pat 164.
871. *Nirmala Devi v Arun Kumar Gupta*, (2005) 12 SCC 505.
872. *Chandra Madhav Mishra v Braj Kishore Mishra*, AIR 2006 Pat 164.
873. *Amar Deep Singh v State*, 125 (2005) Del LT 627.
874. *Amar Deep Singh v State*, 125 (2005) Del LT 627, at p 630.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purpose of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[875][*Explanation VII.*—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]

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[s 11.1] Alterations in the Section

Explanations VII and VIII have been added by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976). Explanation VII has been added to ensure legislatively what had in several decisions been recognised as the general principle of *res judicata* apart from this section applied to proceedings in execution. Explanation VIII has been added to provide as against certain decisions to the contrary that the decision of a court of limited jurisdiction shall in so far as it is within the jurisdiction of such court operate as *res judicata*, although such court was not competent to try the subsequent suit in which the same question is subsequently raised.

[s 11.2] Scope

The principle of *res judicata* is based on the need of giving finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. When a matter, whether on a question of fact or on a question of law, has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in section 11 of the CPC; but even where section 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The Supreme Court has held that the doctrine of *res judicata*, though stated to belong to the realm of procedural law, is not a mere technical doctrine. It is a doctrine of fundamental importance that seeks to ensure that there is an end to all litigation. This is the public policy of Indian law as well.[876]

876. *Canara Bank v NG Subbaraya Setty*, AIR 2018 SC 3395 : (2018) 16 SCC 228.

In *Subramanian Swamy v State of Tamil Nadu*,[877] the Supreme Court explained the doctrine of *res judicata* in the following words:

> The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "*res judicata*" literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments". "*Res judicata* pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere "*res judicata*", which means that *res judicata* is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence "interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "nemo debet bis vexari pro una et eadem causa" (no man should be vexed twice over for the same cause).

Relying on the earlier judicial decisions,[878] the court also stated that even an erroneous decision on a question of law attracts the doctrine of *res judicata* between the parties. The correctness or otherwise of a judicial decision has no bearing upon the question of whether or not it operates as *res judicata*.

The principle of *res judicata* applies also as between two stages in the same litigation to the extent that a court, whether the trial court or a higher court having at an earlier stage decided in a matter one way, will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings.

Where neither the reliefs claimed in two suits were identical, nor the parties were the same and nor could the decision in the first suit said to have been on the merits, it was held that the principles of *res judicata* cannot be applied.[879]

But an interlocutory order which had not been appealed from either because no appeal lay, or even though an appeal lay, an appeal was not taken can be challenged in an appeal from the final decree or order.[880]

Section 11 of the CPC embodies the rule of conclusiveness as evidence, or bars the plea of an issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a competent court to try such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit, would operate as *res judicata*. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue which directly and substantially had arisen in the former suit between the same parties or their privies, decided and became final, so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the court is saved. It is based on public policy, as well as private justice. They would apply, therefore, to all judicial proceedings, whether civil or otherwise. It equally applies to quasi-judicial proceedings of the tribunals other than the civil courts.

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877. *Subramanian Swamy v State of Tamil Nadu*, AIR 2015 SC 460 : (2014) 5 SCC 75.
878. *Sha Shivraj Gopalji v Edappakath Ayissa Bi*, AIR 1949 PC 302; *Mohanlal Goenka v Benoy Kishna Mukherjee*, AIR 1953 SC 65 : 1953 SCR 377.
879. *City Municipal Council Bhalki v Gurappa*, AIR 2015 SC 3826 : (2016) 2 SCC 200 : JT 2015 (9) SC 1.
880. *Satyadhan v Deorajin Debi*, AIR 1960 SC 941. See also *Shanmughasundaram v Diravia Nadar*, AIR 2005 SC 1836 : 2005 AIR SCW 1426 : (2005) 10 SCC 728 : 2005 (2) SCR 649 : JT 2005 (3) SC 186.

Doubtless the principle of *res judicata* is a fundamental doctrine of law, that there must be an end to litigation.[881] But the plea of *res judicata* has to be specifically and expressly raised.[882] The foundation of the plea of *res judicata* must be laid in the pleadings. If this was not done, no party would be permitted to raise it for the first time at the stage of the appeal. The only exception to this requirement is when the issue of *res judicata* is in fact argued before the lower court.

For the purpose of applying the principle of *res judicata*, the case needs to be subjected to the triple tests regarding — (i) factum of the identity of the parties, (ii) cause of action, and (iii) the subject matter.[883] To answer the subject matter test, it is necessary to determine, in the first place, what matter has been "directly and substantially in issue" in a previous case. Such questions often arise before the courts for determination. The Supreme Court, in *Rithwik Energy Generation (P) Ltd*,[884] endorsed the two tests laid down by this book for determination of what matter has been "directly and substantially in issue" as opposed to being "collaterally and incidentally" in issue in a case. The two tests laid down are:

(i) Whether the issue was "necessary" to be decided for adjudicating on the prime issue involved in a case? If yes, was it decided? or

(ii) Whether adjudication of the said issue is considered material and essential for its decision by the court. The question must be decided keeping in view the facts of each case.

[s 11.3] Binding Nature of Judicial Decisions

A judicial decision binds whether it is right or wrong. An error of law or fact, committed by a judicial or quasi-judicial body cannot be impeached otherwise than in appeal, unless it relates to a matter of jurisdiction. The finding would be binding on the parties even though the abstracted proportion of law dissociated from the facts, may not be so.[885]

It has been reiterated by the Supreme Court repeatedly that to attract the doctrine of *res judicata* there must be conscious adjudication of an issue. A plea of *res judicata* cannot be claimed unless the judgment carries an expression of an opinion on the merits. Although *res judicata* is applicable between the two stages of the same litigation, but the question or issue involved must have been decided at an earlier stage of the same litigation.[886]

[s 11.4] The Doctrine of *Res Judicata*

Res judicata is a plea available in civil proceedings in accordance with section 11 of the CPC. It is a doctrine applied to give finality to "lis" in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice over. The literal meaning of res is "everything that may form an object of rights and includes an object, subject-matter or status" and *res*

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881. *Daryao v State of UP*, (1962) 1 SCR 574.
882. *Medapati Surayya v Tondapu Bala Gangadhare Ramakrishna Reddi*, AIR 1948 (35) PC 3; see also *V Rajeshwari v TC Saravanabava*, (2004) 1 SCC 551 ; 2003 (6) SCR 927 : (2003) 10 Scale 768.
883. *Andanur Kalamma v Gangamma (deceased) by LRs*, (2018) 15 SCC 508 : 2018 (4) Mad LJ 607 : 2018 (3) Scale 653.
884. *Rithwik Energy Generation (P) Ltd v Bangalore Electricity Supply Co Ltd*, (2018) 17 SCC 223 : 2018 (5) SCJ 653 : 2018 (2) Scale 399.
885. *Bharathi Amma v Kumaran Peethambaran*, AIR 1990 Ker 88.
886. *Erach Boman Khavar v Tukaram Shridhar Bhat*, AIR 2014 SC 544 : 2014 AIR SCW 61 : (2013) 15 SCC 655 : JT 2013 (15) SC 581 : 2014 (138) AIC 10.

judicata literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment". Section 11 of the CPC engrants this doctrine with a purpose that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action".[887]

> Plea of *res judicata* is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established; more particularly where the bar sought is on the basis of constructive *res judicata*. The plaintiff who is sought to be prevented by the bar of constructive *res judicata* should have notice about the plea and have an opportunity to put forth his contentions against the same.[888]

Plea of *res judicata* is also not available where there is no contest on an issue between the parties and there is no conscious adjudication of an issue.[889] *Res judicata* cannot stand in the way of an erroneous interpretation of statutory prohibition.[890]

The present section deals with the doctrine of *res judicata*. The leading case on the subject is the *Duchess of Kingstone*'s case,[891] and the following classic passage from the judgment of Sir William de Grey is a statement of the leading principles of *res judicata*:

> From the variety of cases relative of judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first that judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

Section 11 is not exhaustive of the general doctrine of *res judicata* and that the rule of *res judicata* as enacted in section 11 has some technical aspects, i.e., the general doctrine is founded on consideration of high public policy to achieve two objectives namely, that there must be a finality to litigation and that the individual should not be harassed twice over on account of the same litigation. Technical aspects of section 11, as for instance, pecuniary or subject-wise competence or earlier form to adjudicate the subject matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of *res judicata* is to be invoked.[892]

Doubtless, the principle of *res judicata* is a fundamental doctrine of law, that there must be an end to litigation.[893]

Where the stand taken by the State in the earlier round of litigation was that the temple in question was a Hindu temple and the Supreme Court categorically opined that it is a Jain temple, it was held by the Supreme Court that the principle of *res judicata* would come into

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887. *Escorts Farms Ltd v Commr, Kumauon Division, Nainital*, AIR 2004 SC 2186 : AIR 2004 SCW 1960 : 2004 (4) SCC 281 : 2004 (2) SCR 543 : JT 2004 (2) 481.
888. RV Raveendran J in *Alka Gupta v Narender Kumar Gupta*, (2010) 10 SCC 141.
889. *Alka Gupta v Narender Kumar Gupta*, (2010) 10 SCC 141.
890. *SCG Contracts (India) Pvt Ltd v KS Chamankar Infrastructure Pvt Ltd*, AIR 2019 SC 2691 : (2019) 12 SCC 210 : 2019 (4) Scale 574.
891. *Duchess of Kingstone*'s case, (1776) 2 Smith's LC, 13th Edn, pp 644–645.
892. *Ghulam Abbas v State of Uttar Pradesh*, (1982) 1 SCC 71.
893. *Daryao v State of Uttar Pradesh*, (1962) 1 SCR 574; *ITC Ltd v Commr of Central Excise, (New Delhi)*, AIR 2005 SC 1370 : 2004 (7) SCC 591.

play and the State would not be allowed to still contend that it was a Hindu temple. It was observed that the issue cannot be permitted to be reopened.[894]

In *Kalipada De v Dwijpada Das*,[895] the Privy Council observed as follows:

> The question as to what is to be considered to be *res judicata* is dealt with by Section 11 of the Code of Civil Procedure, 1908. In that section are given many examples of circumstances in which the rule concerning *res judicata* applies; but it has often been explained by this Board that the terms of Section 11 are not to be regarded as exhaustive.

In the above case, Lord Justice Darling quoted with approval the observations of Sir Lowrence Jenkins on *res judicata* in *Sheoparsan Singh v Ramnandan Singh*[896] which is as follows:

> . . . their Lordships desire to emphasise that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time. "It hath been well said", declared Lord Coke, "interest reipublicae ut sit finis litium—otherwise great oppression might be done under colour and pretence of law" (6 Coke, 9a). Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu Commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who described the plea thus: "If a person, though defeated at law, sue again, he should be answered, 'You were defeated formerly.'" This is called the plea of former judgment. (See the Mitakshara (Vyavaharaj, bk-II, ch. I, edited by J.R. Gharpure, p. 14 and the Mayuka, ch 1, section 1, p. 11, of Mandalik's edition.) And so the application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

In a case under the Slum Areas (Improvement and Clearance) Act, 1956, the plaintiff, in an earlier round of litigation was allowed relief in respect of only a part of the claim by the competent authority who were empowered under the Act. In the second round of litigation when the matter reached the Supreme Court, it was held that the suit was barred not only under section 37A of the Act but also by the principles of *res judicata*. YV Chandrachud J (as he then was), speaking for the bench in the above case, observed as follows:

> The fact that section 11 of the Code of Civil Procedure cannot apply on its terms, the earlier proceeding before competent authority not being a suit, is no answer to the extension of the principle underlying that Section to the instant case. Section 11, it is long settled, is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of the law. The issues involved in the two proceedings are identical, those issues arise as between the same parties and thirdly, the issue now sought to be raised was decided finally by a competent quasi-judicial tribunal. The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded on equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.[897]

The argument that principle of *res judicata* cannot apply because in the previous suit only a part of the property was involved when in the subsequent suit the whole property is the subject-matter, cannot be accepted. The principle of *res judicata* under section 11 of the CPC is attracted where issues directly and substantially involved between the same parties in the

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894. *Deewan Singh v Rajendra Prasad Ardevi*, AIR 2007 SC 767 : (2007) 10 SCC 528.
895. *Kalipada De v Dwijpada Das*, AIR 1930 PC 22 : 57 IA 24 (Lord Justice Darling, speaking for the Bench).
896. *Sheoparsan Singh v Ramnandan Singh*, AIR 1916 PC 78 : 43 IA 91.
897. *Lal Chand (deceased) by LRs v Radha Kishan*, AIR 1977 SC 789 : (1977) 2 SCC 88 : (1977) 2 SCR 522 at p 532.

previous and subsequent suit are the same — may be — in the previous suit only a part of the property was involved when in the subsequent suit, the whole property is the subject-matter.[898]

In order to decide the question of whether a subsequent proceeding is barred by *res judicata*, it is necessary to examine the question with reference to:

(i) The form or a competence of the court;

(ii) the party and the representatives;

(iii) matters in issue;

(iv) matters which ought to have been made ground for defence or attack in the former suit;

(v) the final decision.

In order that a defence of *res judicata* may succeed, it is necessary to not only show that the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is seeking in the subsequent proceedings. The test is whether the claim in the subsequent suit or proceeding is infact founded upon the same cause of action which was the foundation of the former suit or proceedings. The cause of action for a proceeding has no relation whatsoever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other words, to the media upon which the plaintiff or the applicant asked the court to arrive at a conclusion in his favour.[899] The principles of *res judicata* do not apply in a case involving pure question of law.[900]

In a matter, the question in the earlier suit filed by the appellants in the civil writ petition and in the present suit was whether *H* had only a life estate in the property or full ownership. The earlier suit was dismissed and though the appellants filed a second appeal, the same was withdrawn. The question as to whether or not *H* had only a life interest in the suit property or full ownership was not resolved by the discovery that *H* was alive and the appeal could have been prosecuted. The plea of the appellant that *H* had full ownership in the property and so they are the owners of the property was negated. In such circumstances, it is not open to the appellant to put forth the same plea in the fresh suit. The plea was rightly negated by holding that the present suit is barred by *res judicata*.[901]

It is well-known that *res judicata* is a mixed question of fact and law. It has to be specifically pleaded and the party relying on the principle of *res judicata* should place before the court all material particulars which would be sufficient to give a finding whether the particular case is barred by the principles of *res judicata*.[902] The order of the previous case between the parties was passed on the basis of agreement between the parties; hence, would not operate as *res judicata* and thus, would not operate as a bar to the consideration of the application for custody of a child under the Guardian and Wards Act, 1890.[903] If a plaint claims improper remedies and reliefs, then the principle of *res judicata* would not

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898. *K Ethirajan v Lakshmi*, AIR 2003 SC 4295 : AIR 2003 SCW 4951 : 2003 (10) SCC 578.
899. *Jaswant Singh v Custodian of Evacuee Property*, (1985) 3 SCC 648.
900. *UOI v Pramod Gupta*, AIR 2005 SC 3708 : AIR 2005 SCW 4645 : (2005) 12 SCC 1 : (2005) 8 JT 203 (SC).
901. *Hansraj v State of Punjab*, (1995) Supp 1 SCC 405.
902. *Krishna Chand Nayak v Neela Kanthi Mohanti*, AIR 1996 Ori 1. See also *Madhukar D Shende v Tarabai Aba Shedage*, AIR 2002 SC 637.
903. *Rehana Praveen v Naimuddin*, AIR 2000 MP 1.

operate as the issues could not be tried due to improper pleading.[904] "Lis" disposed off on merits by a speaking order, even if passed in limine, amounts to a decision which can operate as *res judicata* in subsequent proceedings. The dismissal in limine of a writ petition cannot possibly bar the subsequent writ petitions but at the same time such a dismissal in limine may inhibit the discretion of the court. Normally, the court would be disinclined to entertain or to hear petitions raising identical points again where on an earlier occasion, the matter was heard and dismissed. It is not that the court will have no jurisdiction to entertain such matters, but it would normally exercise its discretion against it.[905] Even where notice might not have been issued to the opposite party till dismissal of a petition in limine may amount to create a bar upon a subsequent trial as to the same issue, on the principles of *res judicata*; provided the issue has been decided by a speaking order, on merits thus, whether any order passed in limine operates as *res judicata* or not would depend on the nature of the particular order passed.[906] When a finding as to the title of immovable property is rendered by a court of small causes, *res judicata* cannot be pleaded as a bar in a subsequent regular suit for the determination or enforcement of any right or interest in immovable property. In order to operate as *res judicata*, the finding must be one disposing off a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of *res judicata*. It has long been held that a question of title in a small cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised.[907] The rule of *res judicata* may thus be put upon two grounds — one, the hardship to the individual that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the State that there should be an end to litigation.[908] Putting in another form, it may be said that every suit must be sustained by a cause of action, and there is no cause of action to sustain the second suit, since it is being merged in the judgment of the first.[909]

When the matter regarding the promotion and seniority has been decided earlier and has attained finality, the same cannot be re-opened by the state, being barred by principle of *res judicata*.[910]

[s 11.5] Maxim of Roman Jurisprudence

Section 11 contains the rule of the conclusiveness of the judgment based upon the maxim of Roman jurisprudence "*Interest reipublicae ut sit finis litium*" (it concerns the state that there be an end to law suits); and, partly on the maxim "*Nemo debet bis vexari pro uma at eadam causa*" (no man should be vexed twice over for the same cause). The section does not effect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the

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904. *Anant Shankar Bhave v Kalyan Dombivli Municipal Corp.* (2019) 4 SCC 348 : 2019 (6) SCJ 282 : 2019 (5) Scale 689.
905. *Bar Council of India v UOI*, (2012) 8 SCC 243.
906. *Maghraj Calla v Kajodimal*, AIR 1994 Raj 11.
907. *Gangabai v Chabubai*, (1982) 1 SCC 4.
908. *Lockyer v Ferryman*, (1877) LR 2A 7519; *Raja of Venkatagiri v Province of Madras*, AIR 1947 Mad 5, (1947) II R Mad 190; *Sobha Singh & Sons v Delhi Administration*, AIR 1967 P&H 193 : (1967) ILR 1 Punj 673.
909. *King v Hoare*, (1844) 13 M&W 494, at p 504; *Kendall v Hamilton*, (1879) LR 4 AC 504, at p 526; *Ramagya Prasad v Murli Prasad*, AIR 1974 SC 1320 : (1974) 2 SCC 266.
910. *N Birendra Singh v Priyokumar Singh*, AIR 2006 SC 2228 : (2006) 9 SCC 650.

suit was directly or substantially in issue in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which judgment in section 96, such issue has been raised.[911]

[s 11.6] Section Mandatory

The section is mandatory and the ordinary litigant claiming under one of the parties to the former suit can only avoid its provisions by taking advantage of section 44 of the Indian Evidence Act, 1872. The grounds of avoidance under that section are fraud and collusion.[912] Gross negligence is different from fraud or collusion.[913] Collusion of one of the several defendants with the plaintiff is not enough to avoid the rule of *res judicata*.[914]

The Supreme Court has observed that the plea of *res judicata*, like the plea of limitation, concerns the jurisdiction of the court and a finding on the plea in favour of the party raising it would oust the jurisdiction of that court.[915]

[s 11.7] *Res Judicata* and Res Sub Judice — Distinction

The rule of *res judicata* is readily distinguished from the rule in section 10, for the latter relates to a res sub judice, that is, a matter which is pending judicial inquiry; while the rule in the present section relates to *res judicata* that is, a matter adjudicated upon, or a matter on which the judgment has been pronounced. Section 10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previous suit. The present section bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit. Moreover, public policy requires that there should be an end to litigation. The question of whether the decision is correct or erroneous has no bearing on the question of whether it operates or does not operate as *res judicata*;[916] otherwise, every decision would be impugned as erroneous and there would be no finality.[917]

While section 10 relates to res sub judice, that is, a matter which is pending a judicial adjudication; section 11 relates to *res judicata*, that is to say, a matter already adjudicated upon by a competent court. Whereas section 10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previous suit. Section 11 bars the trial of a suit on an issue in which the matter directly and substantially in issue has already been

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911. *Deva Ram v Ishwar Chand*, (1995) 6 SCC 733.
912. *Venkata Seshayya v Koteswara*, AIR 1937 PC 1 : (1937) ILR Mad 263 : 64 IA 17; *Pandurang v MRT, Nagpur*, AIR 1974 Bom 20 : (1974) ILR Bom 816 : (1973) Mah LJ 792.
913. *Venkata Seshayya v Koteswara*, AIR 1937 PC 1 : (1937) ILR Mad 263 : 64 IA 17; *Nagamma v Korathi*, AIR 1950 Mad 546 : (1950) ILR Mad 326.
914. *Baboo v Kirpa*, AIR 1950 All 488.
915. *Pandurang v Maruti*, AIR 1966 SC 153 : (1966) 1 SCR 102 : (1966) 68 Bom LR 41.
916. *Tarini Charan v Kedar Nath*, AIR 1928 Cal 777 : (1928) 33 Cal WN 126 (FB); *Mohanlal v Benoy Krishna*, AIR 1953 SC 65 : (1953) SCR 377 : (1953) SCJ 130; *MSM Sarma v Sri Krishna Sinha*, AIR 1960 SC 1186 : (1961) SCR 96 : (1961) 2 SCJ 73 : (1961) 2 SCA 582; *Govardanam Appalacharyulu v Govardhanam Rangacharyulu*, AIR 1957 AP 1002 : (1956) Andh WR 954; *Madathipathi v Bhargavan*, (1957) Ker LJ 857 : (1957) Ker LT 1033; *Dhirendranath v Naresh Chandra*, AIR 1958 Cal 453 : (1958) 62 Cal WN 596; *Jaljodhan Singh v Kripa Singh*, AIR 1963 P&H 178 : (1963) 65 Punj LR 26; *Abdul Wasey v State*, AIR 1978 All 247.
917. *Behari v Majid*, (1901) ILR 24 All 138; *Phundo v Jangi Nath*, (1893) ILR 15 All 327; *Gouri Koer v Audh Koer*, (1884) ILR 10 Cal 1087; *Mohideen v Syed Osman*, (1918) Mad WN 580; *Tani v Tarachand*, (1918) PR 82.

adjudicated upon in a former suit. The object of both the sections is similar, namely, to protect the parties from being vexed twice, for the trial of the same cause and to achieve the public policy that there should be an end to litigation. Therefore, one of the objects of section 10 is to prevent competent courts of concurrent jurisdiction from having to try parallel suits in respect of the same matter in issue, and thereby to pave the way for the application of the rule of *res judicata* contained in the next following section. So, what the court has really to see is if the decision of the matter directly and substantially in issue in the former suit will or will not lead to the decision of the matter directly and substantially in issue in the subsequent suit, and if it is satisfied that it will, then it must stay the trial of the subsequent suit and await the decision in the former suit.[918]

In *Canara Bank v NG Subbaraya Setty*,[919] the Supreme Court dealt with a question as to when does *res* cease to be *sub judice* and become *judicata*. After examining the case laws, the court reiterated the legal position that *res* is not to be considered *judicata* until the limitation period for filing an appeal is over. Till that time *res* remains *sub judice*. It is only after the limitation period is over, *res* (subject matter) can be considered *judicata* (stand adjudicated).

The Court also explained the procedure that should be followed in the second suit or proceedings initiated by a party to a previous suit before the expiry of limitation period for filing appeal or immediately after its expiry. In such cases, the Court opined that the court hearing the second proceeding can very well ask the party who has lost the first round whether he intends to appeal the aforesaid judgment. If the answer is yes, then it would be prudent to first adjourn the second proceeding and then stay the aforesaid proceedings, after the appeal has been filed, to await the outcome of the appeal in the first proceeding. If, however, a sufficiently long period has elapsed after limitation has expired, and no appeal has yet been filed in the first proceeding, the court hearing the second proceeding would be justified in treating the first proceeding as *res judicata*.

The Court, however, stated that no hard-and-fast rule can be laid down and what needs to be done has to be decided on case-to-case basis. The court hearing the second proceedings must take into account the entire facts and circumstances of the case for deciding whether to dismiss the same on the basis of *res judicata* or to stay/adjourn the proceedings by treating the earlier proceedings as *sub judice*. The Court was of the view that the judicious use of the weapon of stay would, in many cases, obviate a court of first instance in the second proceeding treating a matter as *res judicata* only to find that by the time the appeal has reached the hearing stage against the said judgment in the second proceeding, the *res* becomes *sub judice* again because of condonation of delay and the consequent hearing of the appeal in the first proceeding. This would result in setting aside the trial court judgment in the second proceeding, and a *de novo* hearing on merits in the second proceeding commencing on remand, thereby wasting the court's time and dragging the parties into a second round of litigation on the merits of the case. In cases where the appeal is grossly belated or where it is unlikely that the appellate court would condone the delay owing to creation of the third-party right in the interregnum, etc. the court hearing the second proceedings may proceed to decide the case on the basis of *res judicata*.

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918. *Fulchand Motilal v Manbar Lal*, AIR 1973 Pat 196. See also *Radhika Kanal Pandit v Kanal Pandit*, AIR 1993 Mad 90.
919. *Canara Bank v NG Subbaraya Setty*, AIR 2018 SC 3395 : (2018) 16 SCC 228.

[s 11.8] *Res Judicata* and Industrial Disputes

It is well-established that although the entire CPC is not applicable to industrial adjudication, the principle of *res judicata* laid down under section 11 of the CPC are applicable; including the principle of constructive *res judicata*. Thus, in *State of Uttar Pradesh v Nawab Hussain*,[920] it was held that the dismissal of a writ petition challenging disciplinary proceedings on the ground that the charged officer had not been afforded reasonable opportunity to meet the allegations against him, operated as *res judicata* in respect of the subsequent suit in which the order of dismissal was challenged on the ground that it was incompetently passed. Supreme Court also held:

> .....it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have, therefore, treated such a course of action as an abuse of its process.[921]

At this stage, the *Pondicherry Khadi and Village Industries Board* case, deserves to be noticed with some greater detail. In that case, a dispute was raised about the termination of service of a temporary workman by way of writ petition. The high court passed a reasoned order on merits after contested hearing. That order became final. It was held by the Supreme Court that re-agitation of the same issue before labour court would be barred by *res judicata*, more so when the "lesser relief" of reinstatement which was subject-matter of the industrial dispute had already been claimed by the workman in the writ petition.[922] Explaining the principle of law, Mrs. Ruma Pal J, speaking for the bench in the above case, observed as follows:

> 11. The principle of *res judicata* operates on the court. It is the courts which are prohibited from trying the issue which was directly and substantially in issue in the earlier proceedings between the same parties, provided the court trying the subsequent proceeding is satisfied that the earlier court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such court. Here the parties to the writ petition filed by the respondent in the Madras High Court and the industrial dispute were the same. The cause of action in both was the refusal of the appellant to allow the respondent to rejoin service. The Madras High Court was competent to decide the issue which it did with a reasoned order on the merits and after a contested hearing. This was not a case where the earlier proceedings had been disposal of on any technical ground as was the case in *Workmen of Cochin Port Trust v Board of Trustees of the Cochin Port Trust*, (AIR 1978 SC 1283); *Smt. Pujari Bai v Madan Gopal (dead) L.Rs.* (AIR 1989 SC 1764). The "lesser relief" of reinstatement which was the subject-matter of the industrial dispute had already been claimed by the respondent in the writ petition. This was refused by the High Court. The correctness of the decision in the writ proceedings has not been challenged by the respondent. The decision was, therefore, final. Having got an adverse order in the writ petition, it was not open to the respondent to re-agitate the issue before the Labour Court. . .

and the labour court was incompetent to entertain the dispute raised by the respondent and re-decide the matter in the face of the earlier decision of the high court in the writ proceedings.[923]

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920. *State of Uttar Pradesh v Nawab Hussain*, AIR 1977 SC 1680 : (1977) 2 SCC 806 : (1977) Lab IC 911.
921. *Workmen of the Straw Board Mfg Co Ltd v Straw Board Mfg Co*, AIR 1974 SC 1132 : (1974) 4 SCC 681 : (1974) Lab IC 730; see also *Pondicherry Khadi & Village Industries Board v P Kulothangan*, AIR 2003 SC 4701 : 2003 AIR SCW 5725 : (2004) 1 SCC 68 : 2003 (9) Scale 115.
922. *Pondicherry Khadi & Village Industries Board v P Kulothangan*, AIR 2003 SC 4701 : 2003 AIR SCW 5725 : (2004) 1 SCC 68 : 2003 (9) Scale 115.
923. *Pondicherry Khadi & Village Industries Board v P Kulothangan*, AIR 2003 SC 4701 : (2004) 1 SCC 68.

When the second reference of industrial dispute made by appropriate government to labour court/industrial tribunal for adjudication has nothing to do with the earlier reference of industrial dispute, the principle of *res judicata* has got no application.[924]

The principles embodied in O XXIII, rule 1 of the CPC laying down a public policy is not applicable to a case where the writ petition filed by the workman was not adjudicated on merit, as the petitioner did not avail the more efficacious remedy available to her in another jurisdiction in terms of the provisions of the statute. A writ petition filed by the workman could have been dismissed even on the ground that another alternative remedy which was more efficacious was available and furthermore on the ground that the writ court would not go into the disputed question of fact. Even in such an event, it was open to the workman to approach the labour court or to take recourse to other remedies which were otherwise available to her.[925]

But when the writ petition was dismissed on findings of fact that the petitioners-daily wagers were not entitled to continue in service, the said finding operates as *res judicata* before labour court, where, re-instatement with back wages was sought. The general principle of *res judicata* applies to industrial adjudication.[926]

[s 11.9] *Res Judicata* and Estoppel

The principle of *res judicata* is a species of the principle of estoppel. When a proceeding based on a particular cause of action has attained finality, the principle of *res judicata* shall fully apply.[927]

Res judicata is sometimes treated as part of the doctrine of estoppel, but the two are essentially different. Estoppel is part of the law of evidence and prevents a man from saying one thing one time and the opposite thing at another time, while *res judicata* precludes a man from avowing the same thing in successive litigations.[928] A court which has no jurisdiction in law to try an eviction suit cannot be vested with the jurisdiction by applying principles of *res judicata*. There can be no estoppel on a pure question of law and the question of jurisdiction is a pure question of law.[929] The operation of the doctrine is the transformation of a question of fact into a question of law.[930] In *Sita Ram v Amir Begam*, Mahmud J[931] said:

> Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel, is to say that while the former prohibits the court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party, who, relying upon those declaration or acts to the prejudice of another party has altered his position. In other words, *res judicata* prohibits an inquiry in limine, whilst an estoppel is only a piece of evidence.

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924. *KPTC Ltd v Amalgamated Electricity Co Ltd*, AIR 2001 SC 291 : 2001 I LLJ 556.
925. *KPTC Ltd v Amalgamated Electricity Co Ltd*, AIR 2001 SC 291 : 2001 I LLJ 556.
926. *Executive Engineer, ZP Engg., Division v Digambara Rao*, AIR 2004 SC 4839 : AIR 2004 SCW 5546 : (2004) 8 SCC 262.
927. *Iswar Dutt v Land Acquisition Collector*, AIR 2005 SC 3165 : (2005) 7 SCC 190.
928. *Cassomally v Carrimbhoy*, (1911) ILR 36 Bom 214; *Bhagirathi v Balishwar*, (1913) ILR 41 Cal 69; *Raja of Venkatagiri v Province of Madras*, AIR 1947 Mad 5; *Radha Rani v Binoda Moyee*, AIR 1942 Cal 92 : (1942) 1 ILR Cal 169.
929. *Isabella Johnson v MA Susai*, AIR 1991 SC 993 : (1991) 1 SCC 494.
930. *Radha Rani Dassi v Binodamoyee Dassi*, AIR 1942 Cal 92 : (1942) 1 ILR Cal 169.
931. *Sita Ram v Amir Begam*, (1886) ILR 8 All 324, at p 332.

The Supreme Court has held that where the decision is on a pure question of law, then a court cannot be precluded from deciding such a question of law differently. Such bar cannot be invoked either on principle of equity or estoppel. No equitable principle or estoppel can impede powers of the court to determine an issue of law correctly in a subsequent suit which relates to another property founded upon a different cause of action though parties may be same.[932]

The doctrine of *res judicata* as embedded in section 11 of CPC, corresponds to what is known as estoppel by judgment in English law. It is one of convenience and not of absolute justice. The section does not strike at the jurisdiction of the court. The very basis of the rule of estoppel is public interest. If a property is liable to be taxed under the statute which is law of the land, it must be so taxed without regard to the fact that for an earlier year it has successfully escaped taxation upon an erroneous view of fact and/or law. The public interest would be better served by passing the rule of *res judicata* and taxing the property in a year of assessment, if the incidence of tax be rightly attracted under the law and ignoring the factum of its having been excluded in an earlier year though by a conscious and deliberate decision. The court held that the civil court judgment restraining recovery of tax, in a suit based on a cause of action arising out of assessment for a particular year and holding the plaintiff as not liable to payment of tax, does not constitute *res judicata* for liability to pay tax or assessment of tax for subsequent years.[933]

The Supreme Court considering the ratio regarding "*cause of action*" in *Kunjan Nair Sivaraman Nair v Narayanan Nair*,[934] found that the suit filed by the plaintiff in 1962, based on the settlement deed executed by her husband in her favour and the sufferance of the dismissal of the suit, will not be a bar for making a claim for her share in the family property. In the instant case, the suit for the entire property was based on a settlement deed and it was a suit for possession. Whereas, the later suit for partition was for plaintiff's one-half share in the property based on her birth right. The Supreme Court held that the cause of action was therefore entirely different and *res judicata* did not apply.[935]

In a suit, the petitioner took the plea that his dismissal was illegal as he had been appointed by the Inspector-General of Police, but was dismissed by an officer lower in rank, i.e., Deputy Inspector-General of Police. However, the petitioner did not raise the said plea in the writ petition filed by him, which he could have raised. It was held by the Supreme Court that the subsequent suit raising that plea is barred by constructive *res judicata*.[936] PN Singhal, speaking for the three-judge bench in the above case, observed as follows on the doctrine of estoppel and *res judicata*:

> 3. The principle of estoppel per *res judicata* is a rule of evidence. As has been stated in *Marginson v Blackburn Borough Council* (1939) 2 KB 426 at p. 437 it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) the finality and conclusiveness of the judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of

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932. *Satyendra Kumar v Raj Nath Dubey*, (2016) 14 SCC 49.
933. *Delhi Golf Club Ltd v NDMC*, AIR 1997 Del 347.
934. *Kunjan Nair Sivaraman Nair v Narayanan Nair*, AIR 2004 SC 1761 : (2004) 3 SCC 277.
935. *Nagabhushanmmal v C Chandikeswaralingam*, (2016) 4 SCC 434.
936. *State of Uttar Pradesh v Nawab Hussain*, AIR 1977 SC 1680 : (1977) 2 SCC 806.

> action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of *res judicata*.[937]

In another three-judge bench decision, SB Sinha J, speaking for the bench, explained the distinction between estoppel and *res judicata* as follows:

> **30.** *Res judicata* debars a court from exercising its jurisdiction to determine the *lis* if it has attained finality between the parties whereas the doctrine of issue estoppel is invoked against the party, if such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of *res judicata* creates a different kind of estoppel *viz.* Estoppel by Accord.[938]

In a case under the Motor Vehicles Act, 1988, an award was passed under section 140 of the Act in favour of the person injured in the accident. No appeal was preferred either by the owner or the insurer of the said vehicle. At a later stage, the fact of the said vehicle being involved in the accident was challenged in the proceeding under section 166 of the Act. It was held by a division bench of the Calcutta High Court that the question of the said vehicle being involved in the accident cannot be reopened again at the instance of the owner or the insurer. The doctrine of estoppel and acquiescence can be invoked against the insurer and the owner.[939]

The division bench in the above case has quoted a passage from the decision of the Supreme Court in *Satyadhyan Ghoshal v Deorajin Debi*,[940] wherein Das Gupta J, speaking for the three-judge bench, stated as follows:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter—whether on a question of fact or on a question of law—has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original courts as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

[s 11.10] *Res Judicata* and Order II, Rule 2

Order II of the CPC deals with the frame of the suit and each plaintiff is supposed to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.[941]

Order II, rule 2 of the CPC confers certain privileges in favour of the plaintiff who brings the suit, but simultaneously it imposes an embargo or restriction in claiming/bringing another suit for any of the reliefs which he could have prayed in the earlier suit. Order II, rule 2 of the

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937. *State of Uttar Pradesh v Nawab Hussain*, AIR 1977 SC 1680, para 23 : (1977) 2 SCC 806.
938. *Bhanu Kumar Jain v Archana Kumar*, AIR 2005 SC 626 : (2005) 1 SCC 787.
939. *Prakash Chandra Biswas v New India Assurance Co Ltd*, AIR 2010 Cal 19 : 2011 ACJ 622.
940. *Satyadhyan Ghoshal v Deorajin Debi*, AIR 1960 SC 941 : (1960) 3 SCR 590, at p 594.
941. *Gujarat Electricity Board v Saurashtra Chemicals*, AIR 2004 Guj 83 (DB).

CPC is divided into three sub-rules and the scheme is based on the principle that defendant may not be and should not be vexed twice for one of the same causes of action. It is true that this rule is not really a matter of substance, but it simply deprives the plaintiff claiming his remedy and does not vest any right in favour of the defendant. Therefore, in absence of permission, defendant can positively make a grievance that he has been wrongly vexed again for the same alleged wrong. Again the phraseology used in O II, rule 2(3) of the CPC creates implied bar.[942]

When the earlier suit filed by the plaintiff company was not decided on merits, requirement of section 11 of the CPC cannot be said to have been satisfied and therefore, the second suit could not have been dismissed by treating it as barred by the principles of *res judicata*.[943]

The ground of *res judicata* under section 11 is also not applicable when the judgment and order of dismissal in the application under O I, rule 10 of the CPC did not decide the issue involved in the suit. Moreover, such proceeding was not a "suit" within the meaning of section 11 of the CPC. Hence, the subsequent suit is maintainable.[944]

The second writ petition from the same cause of action is not maintainable due to bar of *res judicata* and the principle incorporated in O II, rule 2 is also applicable to writ proceedings.[945] The principles of constructive *res judicata* are also a part of the doctrine of *res judicata*. The doctrine of *res judicata* applies to what is actually adjudicated or determined in a previous case, and on the other hand, constructive *res judicata* applies to every other matter which the parties might and ought to have litigated or which was incidental to or essentially connected with the subject matter of the previous litigation. Those principles are applicable to writ proceedings as well.[946]

In an execution case, the construction on the suit property made in violation of the decree was ordered to be removed by the executing court. The objection raised by the judgment debtor was rejected. Thereafter, the judgment debtor filed a second objection petition raising new grounds not taken in the earlier petition. The Rajasthan High Court held that the second objection petition, although on grounds not taken in the earlier objection petition, would be barred by *res judicata* as also the principles contained in O II, rule 2 of CPC.[947]

In *Sucha Singh Sodhi v Baldev Raj Walia*,[948] two interesting questions with regard to application of O II, rule 2(2), CPC arose for the consideration of the Supreme Court —

(i) Whether a bar contained in O II, rule 2(2) applies to the second suit for "specific performance" filed after withdrawing the first suit filed for "permanent injunction"?

(ii) Whether the plaintiff was entitled to file a second suit for "specific performance" in the absence of permission or liberty granted to him by the trial court at the time of withdrawing the first suit for permanent injunction?

In the instant case, the plaintiff-appellant had filed a first suit for permanent injunction. In the plaint, he had averred that the defendant-respondent had agreed to sell suit property to him and accordingly an agreement to sell had been entered into between them. On payment

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942. *Gujarat Electricity Board v Saurashtra Chemicals*, AIR 2004 Guj 83 (DB).
943. *Gujarat Electricity Board v Saurashtra Chemicals*, AIR 2004 Guj 83 (DB).
944. *Anadi Mohan Rashit v Nalin Sarker Street UP School*, AIR 2002 Cal 22 (DB).
945. *Awadhesh Narain Pandey v District Inspector of Schools, Varanasi*, AIR 2006 (NOC) 1266 (All) : (2006) AIHC 1825.
946. *Shiv Chander More v Lt. Governor*, 2014 AIR SC 2669 : (2014) 11 SCC 744 : 2014 (4) SCR 417 : JT 2014 (4) 143.
947. *Renu v Baboolal*, 2007 (3) Civil Court Cases 301 : 2007 (3) Raj LW 2508.
948. *Sucha Singh Sodhi v Baldev Raj Walia*, AIR 2018 SC 2241 : (2018) 6 SCC 733 : 2018 (4) SCJ 413.

of advance, the appellant was placed in possession of the property and later the respondent had threatened to dispossess him from the same. It is on this cause of action the suit was filed for permanent injunction. In the said suit, the respondent had filed his written statement stating, *inter alia*, that he had already transferred the suit property to another person and, therefore, the proper remedy for the plaintiff would be to file suit for specific performance and not seeking permanent injunction. After this, the plaintiff sought to withdraw the suit for the purpose of initiating the proceedings before the "competent forum for appropriate relief". The respondent did not object for the withdrawal. The trial court, after recording the statement of both the parties, allowed plaintiff to withdraw the suit. The order allowing the withdrawal of the suit did not, however, explicitly state that the plaintiff has the liberty to file a subsequent suit for appropriate relief.

When the second suit for specific performance was filed, the defendants, apart from filing a written statement, also filed an application under O VII, rule 11 for rejection of the plaint on the ground that the suit is hit by the provisions of O II, rule 2(2), CPC. According to them, "non-claiming of relief of specific performance of the agreement in the previously instituted suit though available to the plaintiff for being claimed on the cause of action pleaded in the previous suit would attract the bar contained in O II Rule 2..." The trial court allowed the said application and dismissed the suit. The said decision was upheld by the high court.

While dealing with the appeal against the aforesaid decisions, the Supreme Court answered the first question in the negative and the second in the affirmative.

As regards the first question, it held that the *sine qua non* for invoking O II, rule 2(2) against the plaintiff by the defendant is that the relief which the plaintiff has claimed in the second suit was also available to the plaintiff for being claimed in the previous suit on the causes of action pleaded in the previous suit against the defendant and yet not claimed by the plaintiff.

Having noted the facts of the case, the court held that the plaintiff could not have claimed a relief of specific performance of agreement in the earlier suit on the basis of the cause of action pleaded therein. It further observed that when both the reliefs/claims, namely, (1) permanent injunction and (2) specific performance of agreement are not identical, when the causes of action to sue are separate, when the factual ingredients necessary to constitute the respective causes of action for both the reliefs/claims are different and lastly, when both the reliefs/claims are governed by separate articles of the Limitation Act, 1963, then, it is not possible to claim both the reliefs together on one cause of action.

As regards the second question, even though the court thought that the same does not survive for consideration as a result of answering the first question in the negative, it opined, relying on *Gurinderpal*,[949] that both the statement of the plaintiff and order of the court granting permission to withdraw the suit are to be read together to understand whether the court has granted liberty to file a subsequent suit or not. In the instant case, reading them together would satisfy the requirement of O XXIII, rule 1(3) and, thus, the plaintiff was entitled to file the second suit.

[s 11.11] *Res Judicata* and *lis* Pendens

Res judicata means a matter adjudicated upon, or a matter on which judgment has been pronounced. The rule of *res judicata* has been put on two grounds, one, the hardship to the

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949. *Gurinderpal v Jagmittar Singh*, (2004) 11 SCC 219 : 2005 (3) Scale 326.

individual that he should not be vexed twice for the same cause, and the other, public policy, that it is in the interest of the state that there should be an end to litigation.[950]

Lis pendens is an action pending and the doctrine of *lis* pendens is that an alienee *pendente lite* is bound by the result of the litigation.[951]

It is also settled law that in the absence of fraud or collusion, the doctrine of *lis* pendens applies to a suit which is decided *ex parte* or by compromise. If the compromise has not been fairly and honestly obtained, the suit which ended in a compromise will not operate as *lis* pendens. This is the doctrine of *lis* pendens.[952]

To determine whether in the event of a conflict arising between the rule of *res judicata* and the doctrine of *lis* pendens either the one or the other should prevail. The rule of *res judicata* rests on the necessity of having a finality in litigation, and so does the doctrine of *lis* pendens. Both have the same end in view, the former that, as between the same parties, or their representatives-in-interest litigating under the same title, once the decision is reached in a suit, the same question shall not be canvassed in any other suit, and the latter that whatever the party may choose to do by way of transfers *pendente lite*, the transferee *pendente lite* shall be bound by the result of the litigation. There is, however, this difference between the two that the rule of *res judicata* is concerned with more actions than one, whereas the doctrine of *lis* pendens is concerned with the very same suit during the pendency of which there is an alienation of the right, title and interest of one of the parties thereto. In the case of *res judicata*, the same cause of action may sustain various actions simultaneously, but once the cause of action is merged in the judgment pronounced in a previously decided suit, there is no cause of action left to sustain the second suit. In the case of *lis* pendens, however, the cause of action continues as it was, sustaining the suit which has been filed for the adjudication of the rights of the various parties thereto and the doctrine applies during the pendency of that suit sustained on that cause of action.

Whatever be the transfers, *pendente lite*, they do not affect the result of the litigation qua the parties to the suit, and the transferee *pendente lite* is bound by the result of that litigation, irrespective of whatever has happened between his transferor and himself. Once, however, even in the case where the doctrine of *lis* pendens applies, a judgment is pronounced and the cause of action is merged in the judgment. That judgment is the final pronouncement which binds not only the parties to the suit but also the transferees, *pendente lite* from them. The conveyance is treated as if it never had any existence. The effect of it is not to annul the conveyance but only to render it subservient to the rights of the parties in the litigation. Whether this decision is reached in the same suit or in a different one and whether the cause of action which sustained the suit in which the doctrine of *lis* pendens applies was merged in the judgment pronounced in the very same suit or in another one, the position would be that that decision would determine the rights of the parties and would be binding on them as well as the transferees *pendente lite* from them. The transferee *pendente lite* would be legitimately treated as the representative-in-interest of the parties to the suit and the judgment which has been pronounced, whether in the same suit or in another, would be determinative of the rights of the parties. There would be then no *lis* or action which would survive. The *lis* or action can only be sustained by a cause of action. If the cause of action was merged in a judgment duly pronounced by a competent court, there would be no more occasion for any *lis* to continue

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950. *Digambarrao Hanmantrao Deshpande v Rangrao Raghunathrao Desai*, AIR 1949 Bom 367 (DB).
951. *Digambarrao Hanmantrao Deshpande v Rangrao Raghunathrao Desai*, AIR 1949 Bom 367 (DB).
952. *Digambarrao Hanmantrao Deshpande v Rangrao Raghunathrao Desai*, AIR 1949 Bom 367 (DB).

pending. If a judgment duly pronounced on that particular cause of action was to merge the cause of action in itself, that judgment would govern the rights of the parties, whether it is pronounced in the same suit in which the doctrine of *lis* pendens applies or in any other. If it is in the same suit, there would be no question of the applicability of the rule of *res judicata*. The rule of *res judicata* would come into operation only if it was pronounced in another suit which came to be decided earlier than the one in which the doctrine applied. But once that judgment was pronounced, it would have the effect of finally determining the rights of the parties and the cause of action which would sustain the suit in which the doctrine of *lis* pendens applied would be merged in the judgment duly pronounced in what may be described as the previously decided suit. Therefore, the rule of *res judicata* prevails over the doctrine of *lis* pendens and the conclusion is that once a judgment is duly pronounced by a competent court in regard to the subject matter of the suit in which the doctrine of *lis* pendens applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees *pendente lite* from them.[953]

The final decree passed before the institution of the suit cannot be held to be ineffective on account of the institution of the subsequent suit. As a matter of fact, the principle of section 52 of the Transfer of Property Act, 1882, applicable to transfers of property is not applicable to suits and decrees passed in such suits. The plaintiff should have taken steps to get the proceedings stayed and if he failed to do that and allowed a decree to be passed against him, then the mortgage suit became "a former suit" within the meaning of section 11 of the CPC, by virtue of Explanation I added thereto.[954]

The doctrine of *lis* pendens cannot prevail over the rule of *res judicata*, in case the latter rule applies.[955]

The rule of *res judicata* prevails over the doctrine of *lis* pendens and once a judgment is duly pronounced by a competent court in regard to the subject-matter of the suit in which the doctrine of *lis* pendens applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees *pendente lite* from them.[956]

[s 11.12] Cause of Action Estoppel; Issue Estoppel and *Res Judicata*

The issue has been discussed in *Thoday v Thoday* as follows . . .

> "cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, that is, judgment was given on it, it is said to be merged in the judgment... If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam.[957]

The above dicta was followed in *Barber*'s case.[958] A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings.

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953. *Digambarrao Hanmantrao Deshpande v Rangrao Raghunathrao Desai*, AIR 1949 Bom 367 (DB).
954. *Mustafai Begam v Raghuraj Singh*, AIR 1937 All 108 (DB).
955. *Official Assignee v Jagabandhu Mullick*, AIR 1934 Cal 552 (DB).
956. *Digambarrao Hanmantrao Deshpande v Rangrao Raghunathrao Desai*, AIR 1949 Bom 367 (DB).
957. *Thoday v Thoday*, (1964) 1 All ER 341.
958. *Barber v Staffordshire Country Council*, (1996) 2 All ER 748.

In such an event, the bar is absolute in relation to all points decided save and except allegation of fraud and collusion.

In *Arnold v National Westminster Bank Plc*,[959] the House of Lords noticed the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject-matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the Law of England, prevent the latter from being reopened. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. Here also bar is complete to litigation but its operation can be thwarted under certain circumstances.

There is a distinction between "issue estoppel" and "*res judicata*". *Res judicata* debars a court from exercising its jurisdiction to determine the *lis* if it has attained finality between the parties whereas the doctrine of issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of *res judicata* creates a different kind of estoppel, namely estoppel by accord.[960]

[s 11.13] Mixed Question of Facts and Law

It is true that in determining the application of the rule of *res judicata*, the court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law, that is, the interpretation of a statute, it will be *res judicata* in a subsequent proceeding between the same parties where the cause of action is the same.[961]

It is well-known that *res judicata* is a mixed question of fact and law. It has to be specifically pleaded and the party relying on the principle of *res judicata* should place before the court all material particulars which would be sufficient to give a finding whether the particular case is barred by the principle of *res judicata*.[962]

Rather, a decision on a question involving facts as well as the application of law to the facts, would be *res judicata*. One cannot dissociate the decision on law from the decision on facts.[963]

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959. *Arnold v National Westminster Bank Plc*, (1991) 3 All ER 41.
960. *Bhanu Kumar Jain v Archana Kumar*, AIR 2005 SC 626 : AIR 2005 SCW 270 : (2005) 1 SCC 787 : JT 2005 (1) 220.
961. *Mathura Prasad Bajoo Jaiswal v Dossibai NB Jeejeebhoy*, AIR 1971 SC 2355 : (1970) 1 SCC 613 : 1970 SCR (3) 830; see also *Secunderabad Cantonment Board v Mohammed Mohiuddin*, AIR 2004 SC 784 : AIR 2003 SCW 6973 : (2003) 12 SCC 315.
962. *Krishna Chand Nayak v Neela Kanthi Mohanti*, AIR 1996 Ori 1; see also *Madhukar D Shende v Tarabi Aba Shedage*, AIR 2002 SC 637 : (2002) 2 SCC 85.
963. *Bharathi Amma v Kumaran Peethambaran*, AIR 1990 Ker 88.

Contentions of *res judicata* based on mixed question of law and facts cannot be entertained by the Supreme Court for the first time at the stage of special leave petition.[964]

Questions of fact or even mixed questions of law and fact which have attained finality in absence of appeal, cannot be referred to a larger bench because of the application of the doctrine of *res judicata*. A reference to a larger bench is made when a bench finds that there is already a precedent of a co-ordinate bench of the same court on a particular point of law and the referring bench is unable to concur with that earlier view on the question of law taken by the co-ordinate bench. In other words, the reference must be on a pure question of law already decided by a co-ordinate bench which is a precedent on that point of law. There is no scope of referring a question of fact or even a mixed question of law and fact already decided by a co-ordinate bench in the earlier judicial proceedings between the same parties or parties claiming through them which has attained finality. Thus, a full bench of the Calcutta High Court held that a referring bench even if it did not agree with the findings given by the first division bench on a question of fact or a mixed question of law and fact was bound to accept such findings as the doctrine of *res judicata* stood in the way of reopening the said issue. The doctrine of *res judicata* cannot be surmounted by making reference to a larger bench.[965]

[s 11.14] Two Stages in the Same Litigation

Res judicata applies also between two stages in the same litigation. Where a court, (whether a trial court or a higher court) has, at an earlier stage, decided the matter in one way, the parties cannot re-agitate the matter at a subsequent stage of the same proceeding.[966]

The principle of *res judicata* applies as between two stages in the same litigation, so that if an issue has been decided at an earlier stage against a party, it cannot be allowed to be reagitated by him at a subsequent stage in the same suit or proceeding. Thus, where the question of whether section 15 of the Kerala Buildings (Lease and Rent Control) Act, 1965 (2 of 1965) bars the eviction petition, was decided against the tenants by the appellate authority at the earlier stage of suit and it was allowed to become final, it is not open to the tenants to reagitate the same at the subsequent stage of the suit.[967]

The principle of *res judicata* is based on the need of giving a finality to judicial decisions. The principle which prevents the same case being litigated twice is of general application and is not limited by the specific words of section 11 of the CPC in this respect. *Res judicata* applies also as between two stages in the same litigation to the extent that a court, whether

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964. *Ram Harakh v Hamid Ahmed Khan*, (1987) 7 SCC 484.
965. *General Manager (PA), Allahabad Bank v Shib Sankar Mukherjee*, AIR 2010 Cal 105 (FB).
966. *Puranmal Bajoria v Nagarmal*, AIR 1980 Pat 143.
967. *CV Rajendran v NM Muhammed Kunhi*, AIR 2003 SC 649 : (2002) 7 SCC 447 : 2002 (6) Scale 485 : JT 2002 (7) 174; see also *Aparnath Mukherjee v Kanailal*, AIR 1950 Cal 300; *Ramchandra v Ramchandra*, AIR 1922 PC 80 : (1922) ILR 45 Mad 320 : 49 IA 129, p 138; *Maharajadhiraj Sir Rameshwar Singh v Hitendra Singh*, (1925) 29 Cal WN 413 (PC), *Bank of Baroda v Fischo*, AIR 1975 Cal 225 : (1974) 78 Cal WN 535; *Suryanarayanrao v Rajeshwari*, AIR 1966 AP 269; *Abdul Ghani v Mahant Ram Saran*, AIR 1976 J&K 72. *Rajalakshmi v Banamali*, AIR 1953 SC 33 : (1953) SCR 154; *Burn & Co v Employees*, AIR 1957 SC 38 : (1956) SCR 781 : (1957) SCJ 28 : (1957) SCA 1175; *MSM Sarma v Krishna Sinha*, AIR 1960 SC 1186 : (1961) 1 SCR 96 : (1961) 2 SCJ 73 : (1961) 2 SCA 582; *Daryao v State of Uttar Pradesh*, AIR 1961 SC 1457 : (1962) 1 SCR 574 : (1962) 1 SCJ 702; *Staya Dhyan v Deo Ranjni Debi*, AIR 1960 SC 941 : (1960) 3 SCR 590 : (1961) 1 SCA 10; *Abdul Shukur v Kotwaleshwar*, AIR 1958 All 54; *Corp of Calcutta v Sirajuddin & Co*, AIR 1957 Cal 399 : (1957) 61 Cal WN 1009; *Benode Behari v State of West Bengal*, AIR 1971 Cal 400; *Braj Bhushan v Nigendra Singh*, AIR 1977 Pat 129; *YB Patil v YL Patil*, AIR 1977 SC 392 : (1977) 1 SCR 320; *Prabhu Halwai v Fulchand*, AIR 1969 Pat 16.

the trial court or a higher court, having at an earlier stage decided a matter in one way, will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."[968]

In a proceeding for execution of a decree, warrant of attachment was issued by the executing court and thereafter the judgment-debtor raised objection. It was held by the Supreme Court that failure on the part of the judgment-debtor to raise the objection earlier thereby allowing the preliminary stage to come to an end, disentitles him to raise objection at a subsequent stage after issuance of warrant of attachment as it would be barred by the principle of constructive *res judicata*."[969] Dr. Arijit Pasayat J, speaking for the bench in the above case, observed as follows to explain the law:

> There is no dispute and it has not been agitated that the order for proceeding by the judgment under O XXI, rule 22 amounts to a decree under Section 47 of CPC and it is appealable as a decree i.e. to say it is not an appeal against the interim order but an appeal against the decree which is provided against the final order. It means that at the different stages of the execution orders passed by the executing court have attained finality unless they are set aside by way of appeal before the higher forum. Otherwise they bind the parties at the subsequent stage of the execution proceedings so that the smooth progress of execution is not jeopardised and the stage which reached the finality by dint of various orders of the O XXI, operates as *res judicata* for the subsequent stage of the proceedings. Since the order passed at different stage itself operates as a decree and is appealable as such, the same cannot be challenged in appeal against subsequent orders also, because appeal against an order passed under O XXI, rule 22 does not amount to appeal against order at initial stage, but amounts to a decree finally determining the question. That is why no appeal against orders made under O XXI has been provided under O 43."[970]

It has been held by the Kerala High Court that the contention originally raised and overruled by the court at the time of passing of preliminary decree for partition, cannot be agitated again at the time of passing of final decree.[971]

A suit for specific performance of agreement to sell was filed. In that suit, an application for being impleaded as a party was filed by another person claiming an earlier agreement to sell from the same land-owner. The said application for being impleaded was dismissed on objection from the plaintiff who was said to be subsequent purchaser. However, the court granted him liberty to file a separate suit. The separate suit filed by the earlier purchaser was decreed and was got executed and a sale deed in favour of the earlier purchaser was executed. Now the subsequent purchaser filed an application for impleading the earlier purchaser as a necessary party in the same suit filed by him. It was held by the Punjab and Haryana High Court that the second application for being impleaded was barred by *res judicata*.[972]

Where in an execution proceedings to execute the order passed by the consumer forum, objections to execution were rejected and no appeal was filed against the order of rejection, it was held by a division bench of the Karnataka High Court that reagitation of identical claim at a subsequent stage of the same proceedings would be barred by *res judicata*.[973]

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968. *Uttar Pradesh State Road Transport Corp v State of Uttar Pradesh*, AIR 2005 SC 446 : AIR 2004 SCW 7025 : (2005) 1 SCC 444.
969. *Barkat Ali v Badri Narain (dead) by LRs*, AIR 2008 SC 1272 : (2008) 4 SCC 615.
970. *Barkat Ali v Badri Narain (dead) by LRs*, AIR 2008 SC 1272, at p 1274, para 7 : (2008) 4 SCC 615.
971. *Sarojini Prabhu v Pappikutty Adiesiar*, AIR 2007 Ker 44.
972. *Bahadur Singh v Avtar Singh*, 2007 (3) Civil Court Cases 417 : 2007 (3) Rec Civ R 44.
973. *Gokulram Farms and Estates Pvt Ltd v Muneer Pasha*, AIR 2008 (NOC) 2239 : 2008 AIHC 3044 (Kant) (DB).

[s 11.15] Suits

Section 11 applies in terms to cases where the matter in issue in a subsequent "suit" was in issue in a former "suit". A "suit" is a proceeding which is commenced by a plaint (section 26). The section is made applicable to execution proceedings by adding to the section the new Explanation VII which provides inter alia that the provisions of the section shall apply to proceedings for execution of decrees and that references in the section to any suit shall be construed as references to proceedings for execution of decrees.

Some cases extending the doctrine beyond the limits of the Code have given a more extensive meaning to the word "suit." Thus, when probate was refused after a contentious proceeding, the judgment was held to operate as *res judicata*, for section 295 of the Indian Succession Act, 1925, requires the proceeding to take the form as far as possible of a suit.[974] Similarly, proceedings under section 54 of the Companies Act, 1956, have been treated as a suit for the purposes of this section.[975] On the other hand, although an application to file a private award was required by Eleventh Schedule, para 20, to be numbered and registered as a suit, refusal to file a private award has been held not to operate as *res judicata*.[976] In a case decided under section 10 of the Code it was said the term "suit" is a very comprehensive one. It is understood to apply to any proceeding in a Court of Justice by which an individual pursues that remedy in a court of Justice which the law affords him, that the modes of proceedings may be various, but that if a right is litigated between parties in a Court of Justice the proceeding by which the decision of the Court is sought is a suit.[977]

By non-payment of court-fee on the counter-claim in appeal, the appellate court is not in a position to consider the question of counter-claim. Thus, it has to be held that the counter-claim as rejected by the lower court has become final. That portion of the discharge of the suit amount as raising the counter-claim cannot be considered by the appellate court on the principle of *res judicata*, however, at the same time the question of discharge of decree amount can be considered by the appellate court.[978] The section is not exhaustive, and the doctrine of *res judicata* has been extended to adjudications in proceedings other than suits.[979] In certain matters, the doctrine of suit has been given an extended meaning which goes beyond the limits of the Code. Thus, when probate was refused after a contentious proceeding, the judgment was held to operate as *res judicata* for, section 295 of the Indian Succession Act, 1925, requires the proceedings to take the form as far as possible of a suit.[980] Similarly, proceedings under section 54 of the Companies Act, 1956, have been treated as a suit for the purposes of this section.[981] On the other hand, although an application to file a private award was required by the Second Schedule, para 20, to be numbered and registered as a suit, refusal to file a private award has been held not to operate as *res judicata*.[982]

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974. *Kalianchand v Sitabai*, (1914) 38 Bom 309; *Venkataratnam v Yanamandara*, AIR 1924 Mad 578 : (1924) 46 Mad LJ 383.
975. *Jayanthi Bai v Popular Bank Ltd*, AIR 1966 Ker 296 : (1966) 2 Ker 187.
976. *Rajmal v Maruti*, AIR 1921 Bom 389 : (1921) ILR 45 Bom 329; *Abdul Aziz v Chandu*, AIR 1925 Bom 418 : (1925) 27 Bom LR 652. But see *Guru Charan v Uma Charan* (1921) Cal WN 940.
977. *Arikapudi Balakotayya v Yadlapalli Nagayya*, AIR 1946 Mad 509 : (1946) Mad 566; *Venkata Chandrappa Nayanivaru v Venkatarama Reddi*, (1899) ILR 22 Mad 256, at p 257.
978. *Nherapoyil P. Moiden v K. Narayanan Nair*, AIR 1997 Ker 318.
979. See note "Section Not Exhaustive", below.
980. *Kalianchand v Sitabai*, (1914) ILR 38 Bom 309; *Venkataratnam v Yanamandara*, AIR 1924 Mad 578 : (1924) 46 Mad LJ 383.
981. *Jayanthi Bai v Popular Bank Ltd*, AIR 1966 Ker 296 : (1966) ILR 2 Ker 187.
982. *Rajmal v Maruti*, AIR 1921 Bom 389 : (1921) ILR 45 Bom 329; *Abdul Aziz v Chandu*, AIR 1925 Bom 418 : (1925) 27 Bom LR 652. See also *Guru Charan v Uma Charan*, (1921) 25 Cal WN 940.

It has been held that an insolvency proceeding is not a suit for the purpose of this section.[983] The proceedings before the district judge, under the Charitable and Religious Trusts Act, 1920, are of a summary nature, and do not fall within the definition of a suit and his decision holding that the property was not a religious endowment, cannot operate as *res judicata*; so also, a proceeding under section 26J of the Bengal Tenancy Act, 1885,[984] but not a proceeding under section 84(1) of the Madras Hindu Religious Endowments Act, 1927 (2 of 1927), as it is not a summary one and the decision of the district judge under section 84(2), operates as *res judicata*.[985] An assistant collector or commissioner acting under section 12 of the United Provinces Agricultural Tenants (Acquisition of Privileges) Act, 1949, is not a court and his decisions are not *res judicata* in proceedings, before regular courts.[986] In deciding whether a dispute should be referred to a tribunal under section 10 of the Industrial Disputes Act, 1947, the government is exercising executive power and the principle of *res judicata* has no application to its decisions which can be reviewed or altered,[987] but a proceeding under section 36 of the Bengal Money-Lenders Act, 1940, to reopen a personal decree is a suit and a second suit for the same relief will be barred.[988]

[s 11.16] Court

The expression "court" is neither defined in CPC nor defined in General Clauses Act, 1897 but section 2(e) of the Indian Arbitration and Conciliation Act, 1996 defines "court" as follows:

> "Court" means the Principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such Principal civil court or any Court of Small Causes.

The principle of *res judicata* operates on the court. It is the courts which are prohibited from trying the issue which was directly and substantially in issue in the earlier proceedings between the same parties, provided the court trying the subsequent proceeding is satisfied that the earlier court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such court.[989]

The Supreme Court has held that in order to operate as *res judicata*, a judicial finding must be such that it disposes of a matter that is directly and substantially in issue in the former suit, and that the said issue must have been heard and finally decided by the court trying such suit. It further held that a matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly in issue in the case cannot be made the basis for a plea of *res judicata*. Therefore, a question regarding title in a small cause suit, may be regarded as incidental only to the substantial issue in the suit, and therefore, when a finding as regards the

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983. *Beni Madhab v Abdul Razak*, AIR 1933 Cal 673 : (1933) 37 Cal WN 390.
984. *Amirthalinga v Chandrasekhara*, AIR 1945 Mad 242 : (1946) ILR Mad 36; *Srish v Kala Chand*, AIR 1942 Cal 445 : (1942) ILR 1 Cal 510; *Prem Nath v Her Ram*, AIR 1934 Lah 771.
985. *Arikapudi Balakotayya v Yadlapali Balakotayya*, AIR 1946 Mad 509 : (1946) ILR Mad 566; *Sankaran Nambudri v Parameswaran Nambudri*, AIR 1959 Ker 156 : (1958) ILR Ker 1184; *Arikapudi Balakotayya v Yadlapali Nagayya*, AIR 1946 Mad 506 : (1946) ILR Mad 566.
986. *Budhu Singh v Board of Revenue*, AIR 1957 All 719.
987. *LH Sugar Factories and Oil Mills v State of Uttar Pradesh*, AIR 1962 All 70.
988. *Haridas Mondal v Ananthanath Mitra*, AIR 1961 SC 1419.
989. *Pondicherry Khadi & Village Industries Board v P Kulothangan*, AIR 2003 SC 4701 : 2003 AIR SCW 5725 : (2004) 1 SCC 68 : 2003 (9) Scale 115; see also *Executive Engineer, ZP Engg Division v Digambara Rao*, AIR 2004 SC 4839 : AIR 2004 SCW 5546 : (2004) 8 SCC 262.

title to immovable property is rendered by a small causes court, *res judicata* cannot be pleaded as a bar in the subsequent regular suit, for the determination or enforcement of any right or interest in the immovable property.[990]

[s 11.17] Explanation to a Section

It is settled law that explanation to a section is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the section or to clarify certain ambiguities or clear them up. It becomes a part and parcel of the enactment. Its meaning must depend upon its terms. Sometimes, it would be added to include something within it, or to exclude from the ambit of the main provision, or condition on some words occurring in it. Therefore, the explanation, normally, should be so read as to harmonise with and to clear up any ambiguity in the same section.[991]

[s 11.18] Interlocutory Orders

It is needless to point out that interlocutory orders are of various kinds, some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that parties might not be prejudiced by normal delay which the proceeding before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation, the principle of *res judicata* does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the court would be justified in rejecting the same as an abuse of process of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit nor put an end to the litigation.[992]

Placing reliance on the above decision of the Supreme Court, the Madhya Pradesh High Court held that where application for grant of temporary injunction was rejected on ground of delay and not on merit, the subsequent application for injunction on account of subsequent developments would not be barred by the principles of *res judicata*.[993] Where an earlier application filed in a suit to recognise a person as duly constituted Attorney on the basis of a power of Attorney, was returned without passing any order, subsequent application for the same cause is not hit by *res judicata* as no order was passed on the earlier application.[994]

The case of an application under O IX, rule 7 would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against

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990. *Ramji Gupta v Gopi Krishan Agarwal*, AIR 2013 SC 3099 : (2013) 9 SCC 438 : 2013 (5) SCR 398 : JT 2013 (10) SC 443.
991. *Sadanand Keot v Juna Ram Saikia*, AIR 1998 Guj 109.
992. *Arjun Singh v Mohindra Kumar*, AIR 1964 SC 993. See also *Tara Devi v District Judge, Basti*, AIR 2003 All 64.
993. *Kashi Bai v Sundarlal Vaidh*, AIR 2007 MP 112 (Gwalior bench).
994. *RBK Rajeswari Nachiar v NNSA Mohammed Kasim*, AIR 2007 Mad 155 : 2007 (53) All Ind Cas 504 (Madurai bench).

the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the re-opening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to "set the clock back" does not attain finality. However, it needs to be seen whether the same court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the rule of *res judicata* does not apply, it would not follow that on every subsequent day on which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of *res judicata*. Thus, if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose, even if based on the same facts, is not barred on the application of any rule of *res judicata*, but would be rejected for same grounds on which the original application was refused. The principle underlying the distinction between the rule of *res judicata* and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of *res judicata* is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the court, the bar would continue to operate and preclude a fresh investigation of the issues, whereas in the other case, on proof of fresh facts the court would be competent, i.e., would be bound to take those into account and make an order conformably to the facts freshly brought before the court.[995]

A decision or direction in an interlocutory proceeding of the type provided for by O IX, rule 7 is not of the kind which can operate as *res judicata* so as to bar the hearing on the merits of an application under O IX, rule 13.[996] Where the earlier application of the defendant under O IX, rule 7 of the CPC was dismissed, being filed after next date of hearing, but subsequently the application by plaintiff for amendment of plaint was allowed, thereafter fresh application under O IX, rule 7 of the CPC was filed to submit additional written statement, merely because amendment application of plaintiff was allowed, could not give any fresh right to the defendant to file another application under O IX, rule 7 of the CPC, so the second application under O IX, rule 7 of the CPC was found barred by principles of *res judicata*.[997] When the application for amendment of pleading under O VI, rule 17, CPC, for addition of plea of acquisition of title by adverse possession is dismissed, the second application for amendment of pleadings for the same purpose filed after two years is barred by the principle of *res judicata*.[998]

Interlocutory orders do not operate as *res judicata*.[999] That the decision given by the court at an earlier stage of a case binding at a later stage is well-settled though interlocutory judgments are open for an adjudication in an appeal against the final judgment. It however, does not mean that because at an earlier stage of litigation, the court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again.[1000]

The doctrine of *res judicata* cannot be applied to the application of the legal representative of the deceased appellant when the court felt that the earlier applications were not applicable.[1001]

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995. *RBK Rajeswari Nachiar v NNSA Mohammed Kasim*, AIR 2007 Mad 155 : 2007 (53) All Ind Cas 504.
996. *Arjun Singh v Mohindra Kumar*, AIR 1964 SC 993. See also *Tara Devi v District Judge, Basti*, AIR 2003 All 64.
997. *Prahlad Singh v Niyaz Ahmad*, AIR 2001 All 78.
998. *Prabhunath Dixit v Third Addl Distt Judge, Deoria*, AIR 2001 All 355.
999. *Mahadeo Mahto v Hiralal Venna*, AIR 1991 Pat 235.
1000. *Prahlad Singh v Sukhdev Singh*, (1987) 1 SCC 727.
1001. *Ganeshprasad Badrinarayan Lahoti v SJ Chourasiya*, AIR 2004 SC 4158 : AIR 2004 SCW 4607.

A second application for issue of temporary injunction under O XXXIX rules 1–2, is not barred if the petitioner shows that such consideration is necessary in view of new facts and new situations and circumstances that have taken place subsequently. Interlocutory orders like the temporary injunctions are meant only to preserve the status quo during the pendency of the proceeding and not decide the controversy in issue on merits. Such orders are therefore, capable of being altered or varied, but only on proof of new facts or new situations, which may have emerged subsequently.[1002]

A party is not bound to appeal against an interlocutory order, such as an order appointing or not appointing a receiver. Even if the court has refused to appoint a receiver in partition suit it does not necessarily mean that later where there is a change in circumstances, the court cannot make such an order.[1003] It is not open to the court to have allowed or even entertained a fresh application for appointment of a receiver in the year 1992, when a similar application of petitioner was dismissed on contest and on merits by the same court in the year 1988, through the medium of a reasoned and speaking order. The maintainability of the second application for the same relief was patently barred on the principles of *res judicata*. The second application might have been maintainable, had the petitioner brought to the notice of the court certain facts which have occurred after the dismissal of the first application.[1004]

Revision from an interlocutory order was dismissed, not on the merits, but as not maintainable. Observations by revisional court upon the Stamp Act, 1899 were held not binding on the lower court. The revisional judge in the instant case, after analysing the case law, eventually held that no revision lay. Having categorically held that revision was not maintainable, any observation, cannot be held to be a "decision" which could bind the parties. No doubt, the judge held that the document in question could not be admitted in evidence unless stamp duty as well as penalty was paid. But those observations were of no avail as they had been made in the exercise of a jurisdiction which did not vest in the judge. Therefore, they cannot be said to be amounting to *res judicata* and would not bind the subordinate judge while again trying the case.[1005]

Where the applications under section 45 of the India Evidence Act, 1872, were filed by the petitioners for sending the promissory notes for opinion of the expert, an exercise, to be undertaken under section 45 of the Indian Evidence Act, 1872, *vis-a-vis*, a document, must be comprehensive and total. A party cannot be permitted to split the purposes in the context of examination through an expert under section 45 of the Indian Evidence Act, 1872. In other words, if several parts of the documents are to be subjected to expert opinion, the relief must be claimed in relation to all. Different applications cannot be permitted to be made in relation to each and every facet of the document. In a way, it can be said that such a course is prohibited under O II, CPC, in so far as it governs the course of applications also.[1006] Therefore, the second application to obtain opinion of the expert is barred by *res judicata*.

Though *res judicata* can apply even in the same proceedings at different stages, this does not mean that temporary injunction cannot be varied.[1007]

1002. *Madan Lal Khutala v Badri Narayan*, AIR 1988 Raj 61. See also *Bhura v Addl Distt Judge, Jaipur*, AIR 2004 Raj 67.
1003. *Anirudha Adhikari v Amarendra Adhikari*, AIR 1988 Ori 42.
1004. *Nityanand Ghosh v Alo Rani Ghosh*, AIR 2000 Cal 89.
1005. *Pillai Narasimhaswamy Patrudu v Bank of Baroda*, AIR 1982 AP 240.
1006. *Vajjala Sree Rama Murthy v Tadepalli Narayane Murthy*, AIR 2006 AP 315.
1007. *Prahlad Singh v Col. Sukhdar Singh*, AIR 1987 SC 1145 : (1987) 1 SCC 727; *Satya Dhan Ghosal v Deoranjan Debi*, AIR 1960 SC 941 : (1960) 3 SCR 590 reiterated.

Where the order of temporary injunction is passed, and the said order is confirmed in the revision, the finding of revisional court with reference to maintainability of suits in revision would not operate as *res judicata* in final proceedings.[1008]

The dismissal of the previous application for issue of *ex parte* temporary injunction, restraining the beneficiary from encashing of the bank guarantee proceeded on the ground of the same being premature. Even though the applicants did bring a revised petition in which they mentioned the existence of fraud, that petition was dismissed in limine and an adjudication was not made in respect of the perpetration of fraud or otherwise, obviously because, till then, the ground of the application being premature, still continued to exist, as no demand of encashment of bank guarantee was made by the beneficiary. It was held that the second application for injunction would not be barred by the previous judgment.[1009] It is, no doubt true, that the orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to the modification at any future time upon proof of change and circumstances requiring the change of custody but, such change in custody must be proved to be in the paramount interest of the child. However, in respect of orders as to custody already passed in favour of the appellant, the doctrine of *res judicata* applies and the family court cannot re-examine the facts which were formerly adjudicated between the parties on the issue as to custody, or are deemed to have been adjudicated.[1010] An order directing parties to produce an affidavit in support of their cases was passed wherein it was specifically stated that the affidavit would be treated as evidence-in-chief and the appellant would be entitled to cross-examination of the deponents upon the affidavit, on payment of cost. The order was not challenged and was allowed to become final. Thereafter, the appellant challenged the order permitting the production of affidavits which was barred by the principles of *res judicata*.[1011] The hon'ble high court relying upon the matter of *YB Patel v YL Patil*,[1012] and *Prahlad v Sukhdev*,[1013] held that the principle of *res judicata* even applies to the different stages of the same proceedings. It was held that once the appellant had sought to introduce the document and had suffered an order which had since been challenged unsuccessfully in the present petition; it was not open to the appellant to fill up the same lacuna by filing a subsequent application and taking advantage thereof. If such a situation is permitted, in that event, the principle of public policy, on which section 11 is introduced in the Code or the principle of *res judicata* is conceived, would altogether stand frustrated.[1014]

[s 11.19] Procedural Orders

There is a distinction between a procedural statute and a substantive statute for applicability of the principle of *res judicata*.[1015]

The order passed on an application by plaintiff under section 83 of the Transfer of Property Act, 1882 seeking permission to deposit an amount due under mortgage does not operate as *res judicata* in the suit filed for a declaration that the transaction in question, although ostensibly expressed in the shape of a deed of sale, was in fact a transaction of usufructuary

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1008. *Thressiamma v Sebastian Mathew*, AIR 2002 Ker 1.
1009. *Banwarilal Radha Mohan v Punjab State Co-op Supply and Mktg. Federation Ltd*, AIR 1983 Del 86.
1010. *Dhanwati Joshi v Madhav Unde*, (1998) 1 SCC 112.
1011. *Punjab & Sindh Bank v Manjit Properties Pvt Ltd*, AIR 1995 Del 355.
1012. *YB Patel v YL Patil*, AIR 1977 SC 392 : (1976) 4 SCC 66 : 1977 (1) SCR 320.
1013. *Prahlad v Sukhdev*, AIR 1987 SC 1145 : (1987) 1 SCC 727 : JT1987 (1) 541 : 1987 (1) UJ 406.
1014. *Narayan Das v Second Addl District Judge, Muradabad*, AIR 1999 All 74.
1015. *Rajendra Kumar v Kalyan*, AIR 2000 SCW 3537 : (2000) 8 SCC 99.

mortgage. The function of a court in terms of section 83 of the Transfer of Property Act, 1882, is procedural in nature. The provision merely permits the mortgagor to deposit the mortgage amount. Even in a case where such deposit is made, in the event the mortgagee refused to accept the deposit, the mortgagor would have no option but to institute a suit for redemption relying on the mortgage money deposited. The respondent did not file a suit for redemption. It may be that the appellant-defendant objected to the said deposit but despite the fact the purported mortgage amount was allowed to be deposited, the same being not binding upon the mortgagee as he could not be compelled to accept the same, the question of applying the principles of *res judicata* would not arise.[1016]

The contention that the court of the *munsif* was a court exercising limited jurisdiction while entertaining an application under section 83 of the Transfer of Property Act, 1882 and the decision of such a court of limited jurisdiction would also operate as *res judicata* is not tenable. The question of determination in the suit, being a pure question of law, the principle of *res judicata* shall have no application.[1017]

[s 11.20] Former Suit

The Explanation I of section 11 of the CPC merely deals with a situation where two suits are pending in court/courts of competent jurisdiction. In a situation when any of the suit is decided by the court before another suit, then decision given in that suit, irrespective of fact whether it was filed earlier or later, decision on issue bars re-trial of same issue.[1018]

The expression "former suit" means a previously decided suit, and the same interpretation applies to appeals. Explanation I confirms previous decisions to the same effect.[1019] It matters not that the previously decided suit was instituted subsequently[1020] or decided during the pendency of an appeal or revisional application in the subsequent suit.[1021]

[s 11.21] Suits Tried Together — One Judgment

There was a conflict of decisions as to whether if two suits involving common issues are disposed off in one judgment and an appeal is filed against the decree in one and not in the other, the matter decided in the latter suit becomes *res judicata* so that it cannot be reopened in the appeal. The Supreme Court was inclined to the view that the matter would not be *res judicata*.[1022] This decision lends support to the view which has been taken in the following cases[1023] which proceed on the basis that a decision given simultaneously cannot be said to be

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1016. *Bishwanath Prasad Singh v Rajendra Prasad*, AIR 2006 SC 2965.
1017. *Bishwanath Prasad Singh v Rajendra Prasad*, AIR 2006 SC 2965.
1018. *Hari Ram v Lichmaniya*, AIR 2003 Raj 319.
1019. *Balkishen v Kishan Lal*, (1889) ILR 11 All 148; *Ram Lal v Chab Nath*, (1890) ILR 12 All 578; *Beni Madho v Indar Sahai*, (1909) ILR 32 All 67; *Gurujammah v Venkatta*, (1901) ILR 24 All 350.
1020. *Isup Ali v Gour Chandra*, AIR 1923 Cal 496 : (1923) 37 Cal LJ 184; *Lonakutty v Thomman*, AIR 1976 SC 1645.
1021. *Chokalinga v Sankarappa*, AIR 1942 Mad 421 : (1942) ILR Mad 677; *Rangachariar v Rangaswami*, AIR 1936 Mad 190; *Krishnan v Kambi*, AIR 1937 Mad 544.
1022. *Narahari v Shankar*, AIR 1953 SC 419 : [1950] SCR 754; *Sukhlal v Deep Chand*, AIR 1954 Raj 58 : (1954) ILR Raj 17; *K Bivi Ammal v A Nadar*, AIR 1970 Mad 76 : (1969) 1 Mad LJ 241; *Tulison Traders v Gurdit Singh*, AIR 1974 Del 190.
1023. *Man Mohan v Shib Chandra*, AIR 1931 Cal 353 : (1930) 34 Cal WN 839; *Shankar v Bhagwan Sahai*, AIR 1946 Oudh 33 (FB) : (1945) ILR 20 Luck 339; *Manohar Vinayak v Laxman*, AIR 1947 Nag 348 : (1947) ILR Nag 691; *Damodar v Narayan*, AIR 1941 Nag 199; *Abdul Majid v Jeva Nemya*, (1889) ILR 16 Cal 233; *Mariamnissa v Jaynab*, (1906) ILR 33 Cal 1101; *Punchanada v Vaithinatha*, (1906)

[Footnote No. 1023 contd.]

a decision in a *former* suit. The contrary view has been taken by the Patna,[1024] Rangoon,[1025] Calcutta,[1026] Orissa[1027] and Allahabad High Courts.[1028] Cross suits were disposed by a common judgment. One decree was appealed against but the appeal failed. The other decree which had been allowed to become final operated as *res judicata.*[1029] If several suits are decided by a common judgment and separate appeals are preferred, the appeals do not become incompetent merely on the ground that one of the appeals has abated or is dismissed on some grounds other than the merits of the appeal. Each appeal is preferred against the separate decree and even if appeal preferred is affirmed in one of the appeals, it does not operate as *res judicata*. It is the finding or decision which operates as *res judicata* and not a decree.[1030] The Allahabad High Court has held that where two or more suits are consolidated and decided by a common judgment and appeals are filed against the decrees passed in all the suits, no question of *res judicata* can arise if the appeals are also heard and decided simultaneously. But if one of such appeals is either heard and decided separately or is dismissed for want of prosecution or for some other reason and the decision of the court below stands thereby confirmed, the bar of *res judicata* will apply to the other surviving appeals. This is on the basis that an appeal is a continuation of the suit and the decision in one appeal decided separately becomes a decision in a former suit which is prior in point of time.[1031]

The Supreme Court in a case noted this view but declined to express its opinion.[1032]

In *Narahari v Sanker*,[1033] *A* sued *B* and *C* for possession and obtained a decree in the trial court. *B* and *C* filed separate appeals, which were heard together. One judgment was delivered but two decrees, one in each of those appeals were made. *A* appealed against one of those decrees. It was held that there was no scope for the application of the rule of *res judicata* as there was only one suit.

In *Ghansham Singh v Bhola Singh*,[1034] *A*, a mortgagee, sued *B*, the mortgagor, to recover the amount due on a mortgage. The *munsif* passed a decree for *A* and directed each party to bear his own costs. *A* appealed as to costs, and *B* filed a separate appeal as to the amount found due on the mortgage. Both appeals were disposed off in one judgment which reduced the amount payable on the mortgage and awarded *A* proportionate costs; but, two decrees were drawn up — one for each appeal. *A* filed a second appeal against the reduction of the decretal amount in *B*'s appeal, but did not appeal against the decree in his own appeal. It was held that the decree

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[Footnote No. 1023 contd.]
ILR 29 Mad 333; *Ramaswami v Karwooan*, (1915) 29 Mad LJ 551; *Simana v Muthupalani*, AIR 1926 Mad 378; *Lacchmi v Bhulli*, AIR 1927 Lah 289 : (1927) 8 Lah 384 (FB); *Ghansham v Bhola Singh*, AIR 1923 All 490 : (1923) ILR 45 All 506; *Sriram v Sripath Singh*, AIR 1957 All 106; *Umrao v Munni*, AIR 1958 P&H 83 : (1957) ILR Punj 1080; *Abraham v Abraham*, AIR 1959 Ker 75 : (1958) ILR Ker 643; *Sarvannath v Ram Kishen*, AIR 1963 P&H 131 : (1962) ILR 1 Punj 76; *Subramonian v Nagarama*, AIR 1954 TC 235; *Ram Surat v Ram Murat*, AIR 1955 All 543.

1024. *Raghunandan v Soubhagya*, AIR 1948 Pat 191; *Getrude Oates v Milicent D'Silva*, AIR 1933 Pat 78, (1933) ILR 12 Pat 139; *Dhani Singh v Sri Chandra*, AIR 1924 Pat 823.
1025. *Anwar Ali v Ameer Ali*, AIR 1925 Rang 104 : (1925) 2 Rang 633.
1026. *Isuf Ali v Gour*, AIR 1923 Cal 496 : (1923) 37 Cal LJ 184.
1027. *Sumi Devi v Pranakrushna*, AIR 1956 Ori 68 : (1956) ILR Cut 319.
1028. *Bhagwan v Daryao Kuman*, AIR 1963 All 210 (FB).
1029. *Maniram Saikia v Bordolo*, AIR 1990 Gau 32.
1030. *Tata Chemicals Ltd v Sadhu Singh*, AIR 1994 All 66.
1031. *Jai Narain v Bulaqi Das*, AIR 1969 All 504.
1032. *Ramayya Prasad v Murli Prasad*, AIR 1974 SC 1320 : (1974) 2 SCC 266.
1033. *Narahari v Sanker*, AIR 1953 SC 419 : (1950) SCR 754; *Sukhlal v Deep Chand*, AIR 1954 Raj 58 : (1954) ILR 4 Raj 17; *K Bivi Ammal v A Nadar*, AIR 1970 Mad 76 : (1969) 1 Mad LJ 241; *Tulison Traders v Gurdit Singh*, AIR 1974 Del 190 : (1974) ILR 1 Del 190.
1034. *Ghansham Singh v Bhola Singh*, AIR 1923 All 490 : (1923) ILR 45 All 506 (FB).

in that appeal did not operate as *res judicata* as *A* had no reason to appeal from a decree which did not prejudice him. The full bench approved of the decision in *Damodhar Das v Sheo Ram Das.*[1035] This was also a case of one suit and two appeals. *A* sued *B*, his agent to recover profits made by the agent in dealings on his own account. *A*'s claim was decreed in part. *A* and *B* both appealed and the court dismissed *A*'s appeal and allowed *B*'s appeal. Two decrees were drawn up which were exactly similar. *A* filed a second appeal against the decree in his own appeal and it was objected that the appeal was barred by *res judicata* as he had not appealed against the decree in *B*'s appeal. The objection was overruled on the ground that the two decrees were in substance one decree. The full bench also distinguished the case of *Zaharia v Debia.*[1036] In this case, there were two rival suits for pre-emption filed by two claimants *A* and *B*. *B* was a defendant in *A*'s suit, and *A* was a defendant in *B*'s suit. *A*'s suit was dismissed and *B*'s suit was decreed. The full bench observed that it was not necessary to invoke the principle of *res judicata* for *A* had lost his right by allowing *B*'s decree to become final against him. A later full bench has followed *Damodhar Das*'s case holding that decrees in cross appeals in the same suit are infact one decree.[1037] But where there are two suits involving different subject matters even though they are disposed off by a single decision, such a decision is really two decisions. An appeal filed in one suit will be barred by *res judicata* if no appeal is filed against the decision in the other suit.[1038]

[s 11.22] Suits Tried Together — Separate Judgments

If two cross suits are tried together and the same issue is tried and disposed off in two separate judgments, the omission to appeal from the decree in one suit will make the decree in the other *res judicata* so as to bar the appeal.[1039] There were suits by *A* against *B*, and *B* against *A*. In each suit, the issue was, whether *A* was the trustee or *B* was the trustee. *A*'s suit was decreed, and *B*'s suit was dismissed by two separate decrees. *B* appealed only against the decree dismissing his suit. He did not appeal against the decree granting *A*'s suit. It was held that the appeal was barred by *res judicata*, as the decree in *A*'s suit had not been appealed against.[1040] The doctrine of dependent judgment[1041] has no application to such cases unless the adjudication in one of them is made dependent on the result of the other.[1042] When different suits in which the parties and the properties involved are different, are tried together because an important issue is common to them; and thereafter, they are disposed off by different judgments wherein separate decrees are drawn up, the failure to appeal against any of them does not bar the hearing of the appeal against the others on the grounds of *res judicata.*[1043]

1035. *Damodhar Das v Sheo Ram Das*, (1907) ILR 29 All 730.
1036. *Zaharia v Debia*, (1911) ILR 33 All 51.
1037. *Beharilal v Ramchandra*, AIR 1942 Oudh 335 : (1942) ILR 17 Luck 702; *Nannu v Nazim*, AIR 1928 All 274 : (1928) ILR 50 All 517.
1038. *Natesa Chettiar v N Krishniah*, AIR 1971 AP 179.
1039. *Gangadhar v Sekali*, AIR 1921 Cal 291 : (1921) 34 Cal LJ 281; *Abdul Basit v Ashfaq*, (1906) 28 All WN 211, at p 213; *Lacchmi v Bhulli*, AIR 1927 Lah 289 : (1928) ILR 8 Lah 384, pp 404–14; contra *Manohar Vinay v Laxman*, AIR 1947 Nag 298 : (1947) ILR Nag 691; *Ramakrishna v Chandrashekhara*, AIR 1953 Mys 114 : (1951) ILR Mys 503; *Despal v Parswanath*, AIR 1956 Raj 166 : (1956) ILR Raj 127.
1040. *S Kandaswami Chettiar v RA Murugesa*, AIR 1983 Mad 333.
1041. *Chandra Singh v Midnapore Zamindari*, AIR 1942 PC 8, 69 IA 51.
1042. *Nalininath v Bipin Bihari*, AIR 1956 Cal 525.
1043. *Khetra Mohan v Rasananda*, AIR 1962 Ori 141.

[s 11.23] Applications Decided Together

The first application was on the ground that the provisions of sections 38, 39 and 40 of the CPC had not been complied with. In that application, the defence taken was that the decree was being executed under the provisions of section 44A of the CPC. In view of this stand, before any decision was given, the second application had been filed. Both the applications were heard together. In other words, the second application was filed and heard before any decision was given in the first application. Both the applications were only decided on 15 March 1999.

When the second application was filed before any decision on the first application was given, the applicants could have, instead of filing a second application, amended their first application and taken these pleas in that application itself. Had they amended the first application, there would be no bar of *res judicata* or constructive *res judicata*. If that be so, one fails to understand how the second application was barred by principles of *res judicata* or constructive *res judicata*. It is to be remembered that the orders were passed after hearing arguments on both the applications. Under such circumstances, no question arises of there being any *res judicata* or constructive *res judicata*.[1044]

[s 11.24] Plea of *Res Judicata* Cannot Be Raised for the First Time Before Supreme Court Previous Judgments Still Relevant

Res judicata is a mixed question of fact and law. In the case at hand, the Supreme Court did not find the plea of *res judicata* having been raised in the plaint. Copies of pleadings and issues framed in the earlier suit had not been tendered in evidence, and they did not find any issue on *res judicata* having been framed and tried between the parties in the present suit. No submission raising the plea of *res judicata* was made before any of the courts below or the high court. Therefore, it was held that such a plea cannot be permitted to be raised before Supreme Court for the first time and that also at the hearing. However, still it cannot be lost sight of that the earlier litigation was between the same parties wherein this very Will was relied on by this very plaintiff in support of his title to the property in dispute therein. The plaintiff's right to sue based on this very Will was claimed and asserted in the earlier suit and was upheld, though denied by this very defendant. These facts and finding are recorded in the previous judgment and have relevance in the present suit. Thus, away from *res judicata*, the judgment given in the earlier suit is relevant piece of evidence under sections 11, 13 and 35 of the Indian Evidence Act, 1872 and has a material bearing on the controversy arising for decision in the present suit. A relevant and material piece of documentary evidence of undoubted veracity, it ignored and that is a serious error of law having a vitiating effect on the finding on most vital issue in the case.[1045]

It has been reiterated that the plea of *res judicata* cannot be raised for the first time in the appeal before Supreme Court.[1046]

The law where a suit is instituted before the Supreme Court directly is little different. A constitution bench of the Supreme Court has held that a suit under Article 131 of the

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1044. *International Wollen Mills v Standard Wool (UK) Ltd*, AIR 2001 SC 2134.
1045. *Madhukar D Shende v Tarabai Aba Shedage*, AIR 2002 SC 637 : (2002) 2 SCC 85 : 2002 (1) SCR 132 : JT 2002 (1) 74; see also *Tirumala Tirupati Devasthanams v KM Krishnaiah*, AIR 1998 SC 1132 : AIR 1998 SCW 945 : (1998) 3 SCC 331.
1046. *ITC Ltd v CCE, New Delhi*, AIR 2005 SC 1370 : 2004 AIR SCW 7208 : (2004) 7 SCC 591 : JT 2004 (7) SC 409.

Constitution of India cannot and ought not to be decided with extreme technical approach insofar as pleadings and procedure are concerned. A suit filed invoking the original jurisdiction of the Supreme Court is not governed by the procedure prescribed in the CPC, save and except the procedure which has been expressly made applicable by the Supreme Court Rules. The conflicts between the states are to be settled in the large and ample way that alone suits the dignity of litigants concerned. It was further held that principles of *res judicata* were attracted in the case as the 2006 judgment[1047] was rendered in exercise of the jurisdiction of the Supreme Court under Article 32 of the Constitution and the petitions which were transferred to the Supreme Court were under Article 139A but to say that such judgment does not bind the court while deciding the instant suit, which confers exclusive jurisdiction upon it, was found to be incorrect. An earlier decision of the Supreme Court cannot be regarded as a judgment rendered without jurisdiction. The legal position with regard to rule of *res judicata* is fairly well-settled that the decision on a matter in controversy in writ proceeding (Article 226 or Article 32 of the Constitution) operates as *res judicata* in subsequent suit on the same matters in controversy between the same parties.[1048]

[s 11.25] Non-framing of Particular Issue

If the parties went to the trial knowing fully well the real issues involved and adduced evidence in such a case without establishing prejudice, it would not be open to a party to raise the question of non-framing of particular issue.[1049]

In *Swamy Atmananda's* case (*supra*), SB Sinha J, speaking for the Bench, observed as follows:

> **33.** The appellants did not object to the raising of the said plea by Tapovanam in the suit. As the said plea had adequately been raised in the plaint, in relation whereto the Appellants herein had adequate opportunity of traverse and furthermore both the parties having brought on records all the relevant documents the appellants herein cannot be said to have been prejudiced in any manner by reason of non-framing of the issue as regards *res judicata*.

In the *Commr Endowments'* case (*supra*), Shivraj V Patil J, speaking for the bench, observed as follows:

> These findings have attained finality. Failure to frame a formal issue by the court would not invalidate the findings of the binding judgment between the parties. The aforementioned findings against the appellants could neither dilute nor deprive their binding character merely because specific issue was not raised in the suit.

Plea of *res judicata* is not available where there is no contest on an issue between the parties and there is no conscious adjudication of an issue.[1050]

DM Dharmadhikari J, speaking for the Bench in the above case, observed as follows:

> 51. *Res judicata* is a plea available in civil proceedings in accordance with section 11 of the code of Civil Procedure. It is a doctrine applied to give finality to "lis" in original or appellate proceedings. The doctrine in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated twice ever. The literal meaning of res is "everything that may form an object of rights and includes an object, subject-matter or status" and *res judicata* literally means: "a matter adjudged; a

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1047. *Mullaperiyar Environmental Protection Forum v UOI*, AIR 2006 SC 1428 : (2006) 3 SCC 643 : .
1048. *State of Tamil Nadu v State of Kerala*, (2014) 12 SCC 696.
1049. *Swamy Atmananda v Sri Ramakrishna Tapovanam*, AIR 2005 SC 2392 : (2005) 10 SCC 51. See also *Commr of Endowments v Vittal Rao*, AIR 2005 SC 454 : AIR 2004 SCW 7036 : (2005) 4 SCC 120.
1050. *Escorts Farms Ltd v Commr, Kumaon Division, Nainital*, AIR 2004 SC 2186 : AIR 2004 SCW 1960 : (2004) 4 SCC 281.

> thing judicially acted upon or decided; a thing or matter settled by judgment". Section 11 of CPC engrafts this doctrine with a purpose that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action". [See: Black's Law Dictionary at pages 1304-1305]

On the question of applicability of the doctrine of *res judicata* on the proceedings under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1961, it was further observed as follows:

> 52. Proceedings under the Ceiling Act are not adversarial as are proceedings in suit. The Ceiling Act is a legislation to give effect to the Directive Principles contained in clauses (b) and (c) of Article 39 of the Constitution. The State is advised by the Directive Principles contained in Constitution to take necessary legislative measures so as to ensure social justice by equitable distribution of ownership and control of material resources and avoid concentration of wealth and means of production in few hands. The laudable social objectives sought to be achieved by the ceiling legislation is to take surplus land from the holders and distribute the same landless agricultural labourers and peasants surviving on agriculture. In applying the principles of *res judicata*, therefore, to the ceiling proceedings, the object of the Act cannot be lost sight of. All principles of *res judicata* contained in section 11 of the CPC cannot be strictly and rigorously made applicable to ceiling proceedings. Section 38-B introduced by Amendment Act of 1976 with the transitory provisions made both in the Amendment Act No. 18 of 1973 and Act No. 20 of 1976 is a departure from the provisions of Section 11 of the Code of Civil Procedure and indicate non-applicability of bar of *res judicata* in ceiling proceedings under the Act.[1051]

[s 11.26] Conditions of *Res Judicata*

It is not every matter decided in a former suit that can be pleaded as *res judicata* in a subsequent suit. To constitute a matter *res judicata*, the following conditions must concur:[1052]

[s 11.26.1] Essentials of *Res Judicata*

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation III) or constructively (Explanation IV) in the former suit.

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Explanation VI is to be read with this condition.

(iii) The parties as aforesaid must have litigated under the same title in the former suit.

(iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue has been subsequently raised. Explanation II is to be read with this condition.

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Explanation V is to be read with this condition.

The new Explanation VIII extends the application of the section by providing that a decision of a court of limited jurisdiction on an issue heard and finally decided shall, if it is

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1051. *Escorts Farms Ltd v Commr, Kumaon Division, Nainital*, AIR 2004 SC 2186, at pp 2202–2203, paras 51 and 52 : AIR 2004 SCW 1960 : (2004) 4 SCC 281.

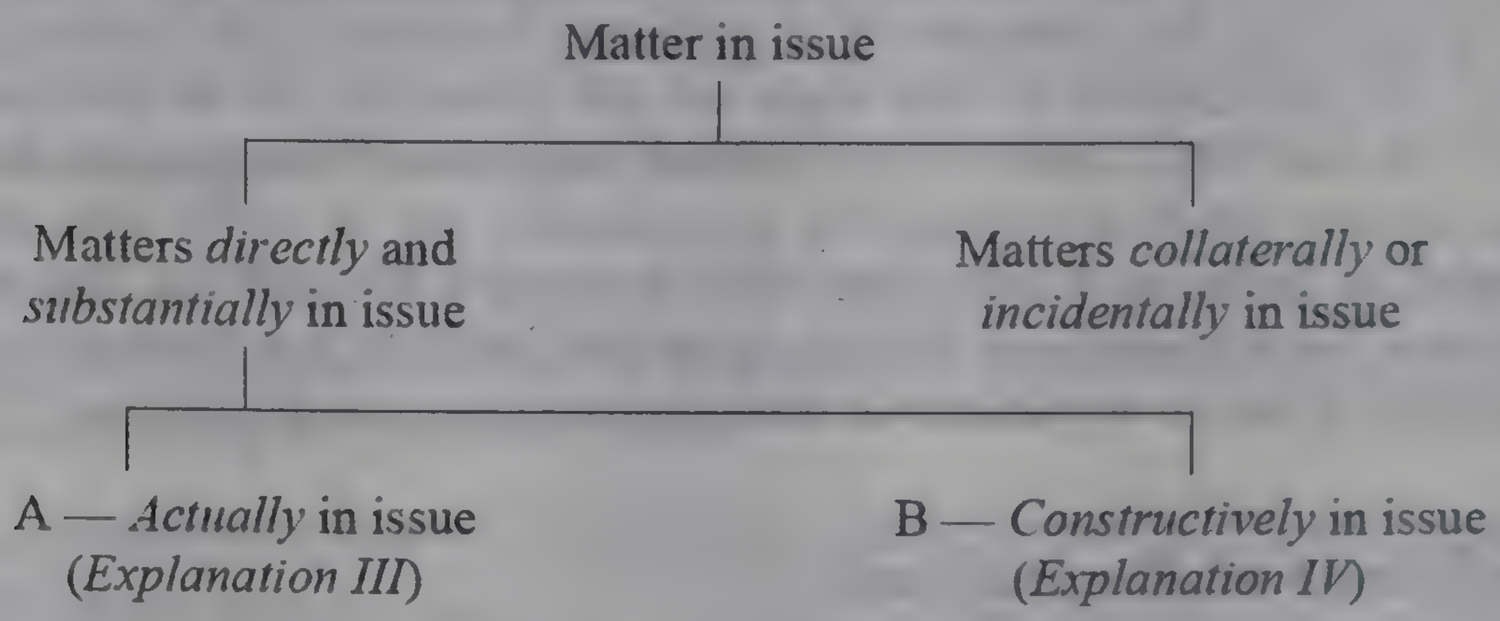
1052. *S Labbai v Hanifa*, AIR 1976 SC 1569; *Perraju v Venkamma*, AIR 1971 AP 74.

within the competence of such court, operate as *res judicata* in a subsequent suit, although such court is not competent to try such subsequent suit or the suit in which such question is subsequently raised. The above conditions are considered in order.

[s 11.26.2] Matter in Issue

For the expression "the matter in issue" in section 11 of the CPC means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the court or a decision of the court sanctioning something which is illegal, by resort to the rule of *res judicata*, a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a rule of procedure cannot supersede the law of the land.[1053]

Matters in issue may be classified as follows:



[s 11.26.2.1] Condition I: Matter Directly and Substantially in Issue

(A) Matter Actually in Issue

(a) Cause of Action Distinguished from Matter Directly and Substantially in Issue.—The expression used in section 2 of the Code of 1859 was "cause of action". As to that expression, their Lordships of the Privy Council said in *Krishna Behari Roy v Brojeswari Chowdranee*:[1054]

> The expression "cause of action" cannot be taken in its literal and most restricted sense. But however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent court as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them".

The expression "matter directly and substantially in issue" was first introduced in the corresponding section 13 of the Code of 1877. The law is accordingly well-settled that to invoke the bar of *res judicata*, it is not necessary that the cause of action in the two suits should be identical. It is only required that the matters directly and substantially in issue should be the same in both the suits.[1055] If the cause of action is the same both, in the former Act and subsequent proceedings, then the decision on an issue of law will be *res judicata* between the

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1053. *Mathura Prasad Bajoo Jaiswal v Dossibai NB Jeejeebhoy*, AIR 1971 SC 2355 : (1970) 1 SCC 613 : 1970 SCR (3) 830; see also *Secunderabad Cantonment Board v Mohammed Mohiuddin*, AIR 2004 SC 784 : AIR 2003 SCW 6973 : (2003) 12 SCC 315; *Ashok Kumar Yadav v Noble Designs Pvt Ltd*, AIR 2006 Cal 237.
1054. *Krishna Behari Roy v Brojeswari Chowdranee*, (1875) ILR 1 Cal 144 : 2 IA 283, at p 285; *Soorjeemoney Dayee v Suddannud*, 1 IA Supp 212 : (1874) 12 Beng LR 304.
1055. *Gauri Shankar v Ram Singhasan*, AIR 1952 Pat 472; *Chiranji Lal v Life Insurance Corp*, AIR 1959 Bom 396 : (1959) ILR Bom 140.

same parties. If the cause of action is not the same in both the proceedings, it will not operate as *res judicata*. When the law has, since the earlier days been altered by a competent authority, that will not operate as *res judicata*.[1056]

(b) Matter Directly and Substantially in Issue: Explanation III.—The word "substantial" means of importance and value. A matter is substantially in issue if it is of importance and value for the decision of the main proceeding.[1057] At the same time, it is not necessary to constitute a matter "directly and substantially" in issue, that a distinct issue should have been raised upon it; it is sufficient if the matter was in issue in substance.[1058]

In *Sri Gangai Vinayagar Temple v Meenakshi Ammal*,[1059] there was a divergence of opinion between Justice Katju and Justice Ganguly on the question that where an issue has been framed in a case by a court and a finding has been reached on the same issue, the said finding, in view of Explanation III to section 11, will be one which has been directly and substantially in issue in a former suit between the same parties. While Justice Katju answered it in the negative, Ganguly J affirmed it. The matter was therefore referred to a three-judge bench. The three-judge bench speaking through Justice Vikramjit Sen found the view taken by Justice Ganguly correct finding that the decisions of the three-judge benches in *Lonankutty*[1060] and *Prabhu*[1061] should have been considered by the two-judge bench.[1062] It was also found that on the issue of applicability of *res judicata* in cases where two or more suits have been disposed of by one common judgment, but separate decrees, and where the decree in one suit has been appealed against but not against the others, various high courts have given divergent and conflicting opinions and decisions. The High Court of Madras and erstwhile High Courts of Lahore, Nagpur and Oudh have held that there could be no *res judicata* in such cases, whereas the High Courts of Allahabad, Calcutta, Patna, Orissa and erstwhile High Court of Rangoon have taken contrary views. It was also noted that there are instances of conflicting judgments within the same high court as well.[1063, 1064]

1056. *Three Aces, Hyderabad v Municipal Corp of Hyderabad*, AIR 1995 AP 17.
1057. *Mangu Ramdas v M Venkataraman*, AIR 1973 AP 256; *Basti Ram v Ved Prakash*, AIR 1974 P&H 152; *Hanumant Rao v Amrutnamma*, AIR 1966 AP 221.
1058. *Soorjomonee v Suddanund*, (1873) 12 Beng LR 304 : 1 IA Supp 212; *Lilabati v Bishun Chobey*, (1907) 6 Cal LJ 621.
1059. *Sri Gangai Vinayagar Temple v Meenakshi Ammal*, (2009) 9 SCC 757 : (2009) 12 Scale 215.
1060. *Lonankutty v Thomman*, AIR 1976 SC 1646 : (1976) 3 SCC 528.
1061. *Narayana Prabhu Venkateswara Prabhu v Narayana Prabhu Krishna Prabhu*, AIR 1977 SC 1268 : (1977) 2 SCC 181.
1062. *Sri Gangai Vinayagar Temple v Meenakshi Ammal*, (2015) 3 SCC 624 : (2009) 12 Scale 215.
1063. See the decision of Tek Chand J in full bench judgment of the Lahore High Court in *Lachhmi v Bhulli* [AIR (1927) Lah 289] and full bench judgment of the Madras High Court in *Panchanda Velan v Vaithinatha Sastrial* [ILR (1906) 29 Mad 333] and of the Oudh High Court in *B Shanker Sahai v B Bhagwat Sahai* [AIR 1946 Oudh 33 (FB)] — the hesitancy or reluctance to the applicability of the rigorous of *res judicata* in these decisions flowed from the notion that section 11 refers only to *"suits"* and as such does not include *"appeals"* within its ambit; that since the decisions arrived in the connected suits were articulated simultaneously, there could be no "former suit" as stipulated by the said section; that substance, issues and finding being common or substantially similar in the connected suits tried together, non-filing of an appeal against one or more of those suits ought not to preclude the consideration of other appeals on merits; and that the principle of *res judicata* would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment.
1064. On the other hand, the verdict of full bench of the Allahabad High Court in *Zaharia v Debia*, ILR (1911) 33 All 51 and decisions of the Calcutta High Court in *Isup Ali v Gour Chandra Deb*, AIR 1923 Cal 496 : 37 Cal LJ 184 and of the Patna High Court in *Mrs. Getrude Oates v Mrs. Millicent D'Silva*, AIR 1933 Pat 78 : ILR 12 Pat 139 are of the contrary persuasion. These decisions largely proceeded on the predication that the phraseology "suit" is not limited to the court of first instance or trial court but encompasses within its domain proceedings before the appellate courts; that non-applicability of *res*

[Footnote No. 1064 contd.]

It is not enough to constitute a matter *res judicata* that it was in issue in the former suit. It is further necessary that it must have been in issue directly and substantially. A matter cannot be said to have been "directly and substantially" in issue in a suit unless it was alleged by one party and denied or admitted, either expressly or by necessary implication, by the other.[1065] It is not enough that the matter was alleged by one party.[1066] A matter in issue is the matter claimed by one and denied by the other. Claim of right in its very inception depends upon proved facts and application of the relevant law. Directly and substantially in issue could be constructively so. Matter in issue may be an issue of fact, an issue of law or one mixed of fact and law. An issue of fact or an issue of mixed fact and law decided by a competent court is finally decided between the parties and cannot be reopened between them in another proceeding.

The claim of right depends upon proof of facts and application of law relevant thereto. When it is said that a previous decision is *res judicata*, it is meant that the right claimed has already been adjudicated upon and cannot again be placed in contest between the same parties. The decision on law cannot be dissociated from decision on facts on which the right is founded. In other words, when the finding on an issue is based on certain view of the law, that view of the law, as an abstract proposition and dissociated from the actual matter in issue, will not be *res judicata* so as to be applicable to all future disputes between the same parties which may give rise to the applicability of the same abstract question of law. *Res judicata* is a rule of procedure and cannot change the law applicable to parties.[1067] If a plaintiff sues in the revenue court which returns the plaint for want of jurisdiction and does not appeal against the revenue court's order, he cannot again sue in the civil court on the same cause of action.[1068] Where a person could not claim a relief in the earlier suit as per the law then in force (eg, where he could not challenge a court sale), he is not debarred by *res judicata* from claiming that relief subsequently.[1069] Where the earlier suit decided that riparian owners of land near a natural stream had no right to cross the bound and divert the water to their own lands, this decision does not operate as a *res judicata* in a later suit involving the question of whether riparian owners could take water for irrigation without diminishing the flow.[1070] The application of the rule (of *res judicata*) by the courts in India should be influenced by no technical considerations of form, but by a matter of substance within the limits allowed by law.[1071] Thus, if there is

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[Footnote No. 1064 contd.]
judicata may lead to inconsistent decrees and conflicting decrees, not only due to multiplicity of decrees but also due to multiplicity of the parties, and thereby creating confusion as to which decree has to be given effect to in execution; that a decree is valid unless it is a nullity and the same cannot be overruled or interfered within appellate proceedings initiated against another decree; that the issue of *res judicata* has to be decided with reference to the decrees, which are appealable under section 96 of the Code of Civil Procedure and not with reference to the judgment (which has been defined differently), but with respect to decrees in the Code of Civil Procedure; that non-confirmation of a decree in appellate proceedings has no consequence as far as it reaching finality upon elapsing of the limitation period is concerned in view of the Explanation II of section 11, that provides that the competence of a court shall be determined irrespective of any provisions as to right of appeal from the decision of such court; and that section 11 of the Code of Civil Procedure is not exhaustive of the doctrine of *res judicata*, which springs up from the general principles of law and public policy.

1065. *Lonakutty v Thomman*, AIR 1976 SC 1645 : (1976) 3 SCC 528.
1066. *Sheo Ratan v Sheo Sahai*, (1884) ILR 6 All 358, at p 362; *Sharma Churn v Prosunno*, (1879) 5 Cal LR 251.
1067. *Bharathi Amma v Kumaran Peethambharan*, AIR 1990 Ker 88.
1068. *Avtar Singh v Jagjit Singh*, AIR 1979 SC 1911 : (1979) 4 SCC 83 : (1980) 1 SCJ 181.
1069. *Jaswant Singh v Custodian of Evacuee Property*, AIR 1985 SC 1096 : (1985) 3 SCC 648.
1070. *M Sesha Reddy v K Gopal Reddy*, AIR 1987 AP 1 (DB).
1071. *Shankar Sahai v Bhagwat Sahai*, AIR 1946 Oudh 33 : (1945) ILR 20 Luck 339 (FB); *Sheoparsan v Ramnandan*, (1916) ILR 43 Cal 694, at p 706, 43 IA 91; followed in *Mohammed Ali v Upendra Nath*, AIR 1934 Cal 179.

a mutual account between *A* and *B*, and *A* sues *B* and obtains a decree on the account, a subsequent suit by *B* against *A* on the same account for the same year, though beginning and ending about a month earlier, will be barred as *res judicata*.[1072]

A decision on a question involving facts as well as the application of law to the facts would be *res judicata*. One cannot dissociate the decision on law from the decision on the facts.[1073]

A judicial decision binds whether it is right or wrong. An error of law on fact, committed by a judicial or quasi-judicial body cannot be impeached otherwise than in the appeal, unless it relates to a matter of jurisdiction. The finding is binding on the parties even though the abstracted proportion of law dissociated from the facts, may not be so.[1074]

In a case from Andhra Pradesh, the property originally belonged to a Mutt granted permanent lease patta in respect of suit land to predecessors of the appellant. The Mutt filed suit for declaration of title and possession. The suit was disposed of by holding that civil court has no jurisdiction to grant the relief of possession. However, it was held in the suit that the appellant has perfected his title as regards tenancy right by adverse possession. The said decision was allowed to become final. It was held by the Supreme Court that subsequent proceeding for eviction of the appellant under Andhra Pradesh (Andhra Area) Tenancy Act, 1956 was not barred by *res judicata* by the earlier decision of the civil court.[1075]

P Sathasivam J, speaking for the Supreme Court Bench in the above case, observed as follows:

> 17. Therefore, the High Court in that instance held two things, (1) that the court did not have jurisdiction over the matters owing to the special process prescribed under the Tenancy Act; and (2) the title with respect of tenancy rights was perfected owing to adverse possession. These two rulings are not in conflict with each other, and are equally binding. The jurisdiction of the High Court was ousted only to a limited extent, i.e., with respect to the eviction of the tenants and possession of the property, as the procedure for that was provided under the Act. But the court continued to have jurisdiction with respect to the determination of the title of the property.
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> 18. The appellants seem to have misunderstood the import of the High Court decision while relying on it for the purposes of *res judicata*. The court, in no uncertain terms, held that the title of ownership belongs to the present respondents, but the present appellants had the title with respect of tenancy rights. This decision was perfected by non-appeal and is binding on the parties. Thus, the present appellants are not the owners of the property, but tenants on conditions prescribed under the permanent lease patta dated 11-03-1931 mentioned above. Thus, we hold that the decision of the High Court in 1973 would not bar any proceedings under the Tenancy Act as the issue decided by the court in that instance was merely the tenancy title in favour of the appellants, while the present case is eviction of tenants under section 13 of the Act.[1076]

Where in a suit the issue regarding the genuineness of agreement and whether there was any interpolation was settled and finally determined and the party gave an undertaking that she will not raise the issue of interpolation, it was held by the Supreme Court that the party could not be allowed to raise the same issue again in a different suit between the same parties.[1077]

In a suit, the plaintiff did not raise the issue of ownership in relation to the entire property but the defendant Wakf raised the plea that the entire property belonged to Wakf and the suit

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1072. *Nizam-ud-din v Ahmed*, AIR 1927 All 799 : (1928) ILR 50 All 28.
1073. *Bharathi Amma v Kumaran Peethambaran*, AIR 1990 Ker 88 (S Padmanabhan J).
1074. *Bharathi Amma v Kumaran Peethambaran*, AIR 1990 Ker 88.
1075. *Chittor Chegaiah v Pedda Jeeyangar Mutt*, AIR 2010 SC 1278 : (2010) 3 SCC 776.
1076. *Chittor Chegaiah v Pedda Jeeyangar Mutt*, AIR 2010 SC 1278, at p 1284, paras 17 and 18.
1077. *Amrendra Komalam v Ush Rani*, AIR 2005 SC 2758 : (2005) 11 SCC 251 : (2005) 2 Mad LJ 101 (SC).

was liable to be dismissed. The suit was, however, decreed holding that the plaintiffs were title holders. The matter was taken upto the Supreme Court, where also the appeal was argued on the basis of the defendant's plea that the property belonged to Wakf. The decree was finally upheld by the Supreme Court, subsequent suit filed by Wakf seeking a declaration that the decree-holders had no night over the disputed property; it was held by the Supreme Court that another suit based on claims contrary to the earlier plea would be barred by *res judicata*.[1078]

(c) Matter Directly and Substantially in Issue — Instances.—Following are the instances where bar of *res judicata* was attracted as the matter directly and substantially in issue were found common to both previous and subsequent suit:

(i) Merely because the petitioner was not a party to those petitions, which were filed for objecting the refinery project, it could not be said that the same has no bearing on the present proceedings. Those proceedings were also filed by the petitioners in the public interest for the protection of environment and ecology. Thus, all these proceedings were filed for the same "interest and claim". Therefore, when the subject matter of the earlier proceedings and the present proceedings is one and when the petitioners in both proceedings were having the same status, then the earlier decision will create the general principle of constructive *res judicata*.[1079]

(ii) On the same principle, an issue will be *res judicata* if the judgment of an appellate court shows that the issue was treated as material and was decided, although the decree passed merely affirms the decree of the lower court which did not deal with the issue.[1080]

(iii) Likewise, when parties go to trial on a particular issue treating it as material and invites the court to give a decision thereon, that will be *res judicata*.[1081]

(iv) Thus, where the issue, that the respondent has acquired the status of an occupant on the abolition of the *inam* under the Hyderabad Abolition of Inams and Cash Grants Act, 1954, was adjudicated upon in a former application, the appellant-landlord cannot re-agitate the same issue in a subsequent application under the Hyderabad Tenancy and Agricultural Land Act, 1950 (Act No 21 of 1950).[1082]

(v) A decree for the recovery of loan by sale of mortgaged property was passed by the Bombay High Court overruling the judgment-debtor's objection as to local jurisdiction. The question of whether or not the appellant was a licensee of the flat or a tenant thereof was directly and substantially in issue between the parties in the previous suit. The finding that he was not a tenant but had only the status of a licensee operates as *res judicata* between the parties. The appellant having failed in his suit for declaration of his alleged status of a tenant brought in the court of small causes, cannot be permitted to re-agitate the same question in these proceedings.[1083]

(vi) In a case, the earlier court recorded a finding that the larger joint family had disrupted and five brothers had separated from each other. The finding was necessitated by

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1078. *Nazim Ali v Anjuman Islamia, Chhatarpur*, AIR 1999 SC 1089 : (1999) 3 SCC 91 : (1999) 3 Mad LJ 43 (SC).
1079. *Gujarat Navodaya Mandal v State of Gujarat*, AIR 1998 Guj 141.
1080. *Midnapur Zamindary Co Ltd v Naresh Narayan Roy*, AIR 1924 PC 144 : 51 IA 293 : 51 Cal 631; *Vertannes v Robinson*, AIR 1930 PC 224 : (1930) ILR 8 Rang 326 : 57 IA 208.
1081. *Madhavan v Kumaran*, AIR 1952 TC 383 : (1952) II R TC 175; *Swamee v Muthukrishnan*, AIR 1955 TC 13 : (1955) TC 1071; *Nemkumar v Nemkumar*, AIR 1958 All 207.
1082. *Rangnath v Daulat Rao*, AIR 1975 SC 2146 : (1975) 1 SCC 686.
1083. *ON Bhatnagar v Rukibai Narsin Das*, (1982) 2 SCC 244.

reason of specific contentions raised by an appellant before that court. The finding becomes *res judicata* in a subsequent suit in which a declaration is sought that the larger joint Hindu family still existed and in which the appellants sought partition of a share in such larger joint Hindu family.[1084]

(vii) Where the issue of excess land under FWA (Framework Agreement) was directly and substantially in issue in the previous public interest litigation and the finding recorded therein had reached finality; the matter could not be reopened by filing another public interest litigation due to bar of *res judicata*.[1085]

(viii) It cannot be held to operate as *res judicata* between parties, only in respect of portion of suit property, which alone was subject-matter of dispute in earlier suit. The principle of *res judicata* under section 11 is attracted where issues directly and substantially involved between the previous and subsequent suit are same. It may be that in previous suit only a part of property was involved, while in the subsequent suit the whole matter is the subject matter.[1086]

(ix) An earlier suit filed by the plaintiff for declaration of his ownership in the suit property on the basis of sale deed and claiming that the defendant was a tenant in the said property. The suit was dismissed negating the claim of the plaintiff and it was held in that suit that both parties were joint owners entitled to half share each. It was held by the Uttarakhand High Court that the said finding would operate as *res judicata* in the subsequent suit claiming similar relief.[1087]

(d) Matter Not Directly and Substantially in Issue — Instances

In the following cases, the bar of *res judicata* did not apply as matters directly and substantially in issue in the decided suit and the subsequent suit were found different:

(i) The decision in the previous suit confined to a question of substitution of receptacles by administrator. The question in the subsequent case was whether beneficial enjoyment attached to the religious duties assigned to *sevaks* are separable, or an integral part of religion. It was held that the earlier case does not operate as *res judicata* in a subsequent case.[1088]

(ii) The previous suit was for injunction, wherein plea of *benami* was taken as the defence. The main question involved in that suit was injunction and the plea of *benami* was only incidental. The subsequent suit was instituted for partition, wherein the defendant was not a party to the earlier suit for injunction. It was held that plea of *benami* taken by the defendant in subsequent suit is not barred by *res judicata*.[1089]

(iii) The order was not set aside in appeal, etc. It was held that judgment-debtor cannot later agitate the question of jurisdiction before the Bihar courts (where execution proceedings against the mortgaged property were being pursued).[1090]

1084. *Jaikishan Das v Nirmala Devi*, AIR 1984 SC 589 : (1984) 1 SCC 682.
1085. *State of Karnataka v All India Manufacturers Organization*, AIR 2006 SC 1846 : (2006) 4 SCC 683: 2006 (4) Scale 398 : JT 2006 (11) 337.
1086. *K Ethirajan v Lakshmi*, AIR 2003 SC 4295 : AIR 2003 SCW 4951 : (2003) 10 SCC 578.
1087. *Kallu Ram v Jai Bhagwan*, AIR 2008 Uttr 29 : 2008 (4) All LJ 179.
1088. *Chinta Mani Khuntia v State of Orissa*, AIR 1994 Ori 46.
1089. *Murugesa Naicker (died) v M Sadayappa Naicker*, AIR 1997 Mad 4.
1090. *LIC of India v Canneshwar Prasad*, AIR 1985 Cal 98.

(iv) However, a mere expression of opinion on a question not in issue cannot operate as *res judicata*.[1091]

(v) In an earlier suit by the lessor, it was alleged by him that the lease had determined. He withdrew that suit. He then sued for recovery of *Khas* possession of the premises, alleging (in the second suit) that lease had been determined by time. It was held that the first suit did not operate as *res judicata* because:

(i) there was no decision on merits; and

(ii) the second suit was based on a new cause of action, alleged to have arisen in the meantime.[1092]

(vi) Where the earlier proceeding did not decide the question of heirship, that question is not *res judicata*.[1093]

(vii) Eviction order was passed against the tenant who appealed, but died during the pendency of the appeal. It was not an issue in appeal, as to whether any permission was required to be taken from the competent authority under the Rent Control Act, for executing the decree against the legal representatives of the tenant. A decision in appeal that execution cannot proceed till the necessary permission is obtained, did not operate as *res judicata* in an objection petition to the application for execution.[1094]

(viii) In a Gujarat case, the first suit was to challenge the legality and validity of search and seizure carried on in the premises of a licensed dealer. The second suit was intended to challenge a show-cause notice for cancellation of the licence. It was held that finding in one cannot be *res judicata* in the other.[1095]

(ix) With reference to the Madhya Pradesh Land Revenue Code, 1959, section 258, the decision of the revenue court on title in mutation proceedings does not operate as *res judicata* in probate proceedings. In the probate proceedings, sole question involved is as to the proof of the Will.[1096]

(x) Where a person was sued on the basis that he was either a tenant or a licensee and the court held that he was only a licensee, it was held that he cannot later sue claiming to be a tenant.[1097]

(xi) Where the land in the subsequent suit is distinctly different from the point of view of location of lands and *Khasra* Nos from the subject matters of earlier suit, by no stretch of imagination it can be said that the subsequent dispute is hit by principle of *res judicata* in view of the decision rendered in earlier civil suit which has attained finality.[1098]

(e) Matter Collaterally or Incidentally in Issue.—Every suit must involve a matter "directly and substantially" in issue. It *may* also involve a matter "collaterally or incidentally" in issue. To constitute a matter *res judicata*, it is necessary that it must be in issue "directly and substantially"

1091. *Ragho Prasad v Shrikrishna*, AIR 1969 SC 316 : (1969) 1 SCR 834.
1092. *Thakuruddin Ramjash v Sourendra Nath*, AIR 1982 Cal 133 : 86 Cal WN 230 (DB).
1093. *State of Uttar Pradesh v Civil Judge, Nagpur*, AIR 1987 SC 16 : (1986) 4 SCC 558 : (1986) JT 774.
1094. *Krishan Kant v Tulsi Bhai*, AIR 1988 Del 203.
1095. *State of Gujarat v Mangal Traders, Jamnagar*, AIR 1987 Guj 234.
1096. *Balwant v Mainabai*, AIR 1991 MP 11.
1097. *ON Bhatnagar v Rukibai Nirsingdar*, AIR 1982 SC 1097 : 1982 (2) SCC 244 : [1982] 3 SCR 681.
1098. *Begum Sunaiya Rashid v State of Madhya Pradesh*, AIR 2006 SC 1283 : (2006) 3 SCC 505 : 2006 (2) SCR 379 : 2006 (3) SCJ 482.

in the suit under trial, and that it must have been in issue also "directly and substantially", as distinguished from "collaterally or incidentally", in a former suit. The question of whether a person should be admitted as a legal representative of the deceased plaintiff to continue the suit is a question collateral to the suit.[1099] The principles of *res judicata* would be applicable only when an issue arose directly and substantially in an earlier suit, a finding regarding an incident or collateral question reached for the purpose of arriving at the final decision would not constitute *res judicata*.[1100]

Where in a suit for declaration of title and recovery of possession on the basis of gift deed executed by the plaintiff and the defendant denied the parentage and claimed himself to be the adopted son of the testator, it was held by the Supreme Court that any finding by revenue authorities with regard to mutation of revenue records or on the question of adoption would not operate as *res judicata*. Findings on incidental or collateral question to arrive at such a decision would not be a bar in the subsequent suit.[1101]

A finding on an issue must be distinguished from an option as to the effect of a piece of evidence. In a suit for rent by *A* against *B*, the court held that a rent note, in which certain land was not included, was genuine. *B* then sued *A* for a declaration that the land was infact part of his holding. In this suit, the question of the genuineness of the rent note is not *res judicata*, for the finding in the first suit is not the decision of an issue but an opinion as to the effect of a piece of evidence.[1102]

All matters involved in a suit may be "directly and substantially" in issue, but they cannot all be "collaterally or incidentally" in issue. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue, the latter the principal issue. The expression "collaterally or incidentally" in issue implies that there is another matter which is "directly and substantially" in issue. The first-respondent filed this suit for declaration that the suit property known as "*Badi Takia*" is a Wakf. In respect of this property, there are several rounds of litigation. The first of them was for declaration, possession and damages against the respondents on the ground that they were owners of the whole property, and the respondent had without the consent of the plaintiff put their *Tazia* on the land. The suit was decreed in favour of the plaintiffs. The appellate court reversed the decree of the trial court, and held the property to be Wakf property which was reversed by the high court. An appeal to the Supreme Court was also dismissed upholding the judgment of the high court in second appeal.

In another round of litigation commenced by the respondent, a suit for declaration was filed praying that the appellants here have no right over the property; the trial court dismissed the suit. The appeal filed by the respondent was allowed by the high court, holding that the decision in the earlier suit was not *res judicata*. It was held by the Supreme Court in the appeal that in the earlier judgment of the Supreme Court, the only question was whether the plot on which *Tazia* was placed was Wakf property, and on that question no satisfactory proof was placed by the defendants before the court and therefore, the Supreme Court agreed with the view of the high court. When those findings had become final and not disturbed by the

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1099. *Koneridoss v N Subbiah*, AIR 1975 Mad 124 : (1974) 2 Mad LJ 252.
1100. *Mahila Bajrangi v Badribai w/o Jagannath*, AIR 2003 SCW 129 : (2003) 2 SCC 464.
1101. *Mahila Bajrangi v Randribai*, (2003) 2 SCC 464 : (2003) 1 Mad LJ 92 (SC); *Madhavi Amma Bhavani Amma v Kunjikutty Pillai Meenakshi Pillai*, AIR 200 SC 2301 : (2000) 6 SCC 301 : (2000) 3 Mad LJ 78 (SC).
1102. *Ramcharitar Sao v Bawan Prasad Singh*, AIR 1946 Pat 225; *Narendranath v Ananda*, AIR 1934 Cal 60 : (1933) ILR 60 Cal 1307.

Supreme Court, the district judge in another round of litigation was justified in holding that the proceedings were barred by *res judicata*.[1103]

(f) Distinction Between Matter "Directly and Substantially" in Issue and Matter "Collaterally or Incidentally" in Issue.—The leading case on the subject is *Barrs v Jackson*.[1104] Every suit must involve a matter or matters in respect of which relief is claimed by the plaintiff. It may also involve matters which, though there is no relief claimed in respect of them, are brought in issue for the purpose of deciding matters in respect of which relief is claimed.

Matter Directly and Substantially in Issue—Every matter in respect of which relief is claimed in a suit is necessarily a matter "directly and substantially" in issue.

ILLUSTRATIONS

(i) *A* sues *B* for the rent due for the year 1907. The defence is that no rent is due. Here, the claim for rent is the matter in respect of which relief is claimed. This, therefore, is a matter "directly and substantially" in issue.

(ii) *A* sues *B*:

(a) for a declaration of title to certain lands; and

(b) for the rent of those lands. *B* denies *A*'s title to the lands, and contends that no rent is due. Here, there are two matters in respect of which relief is claimed, namely: (1) the matter of title; and (2) the claim for rent. Both these are matters "directly and substantially" in issue. But where the former suit was for injunction only and was concerned with the right of possession, a subsequent suit on the question of title is not barred.[1105]

Matter Collaterally or Incidentally in Issue—A matter in respect of which no relief is claimed, but which is put in issue for the purpose of enabling the court to adjudicate on a matter in respect of which relief is claimed may be "directly and substantially" in issue or it may be in issue "collaterally and incidentally". It would be a matter "directly and substantially" in issue if it was necessary to decide it in order to adjudicate on the principal issue and if it was infact decided, and if the judgment was based upon that decision; otherwise, it would be a matter "collaterally or incidentally" in issue. A matter cannot be directly and substantially in issue if the judgment would be correct whether the matter exists or not.[1106]

In *UOI v SP Sharma*,[1107] the Supreme Court, observed that "fraud is not a term or ornament nor can it be presumed to exist on the basis of a mere inference on some alleged material that is stated to have been discovered later on." In the opinion of the Court, the discovery of a reinvestigated fact could have been a ground of review in the same proceedings, but the same cannot be made the basis for reopening the issue through a fresh round of litigation. A fresh writ petition or letters patent appeal which is in continuation of a writ petition cannot be filed collaterally to set aside the judgment of the same high court rendered in an earlier round of litigation. To establish fraud, it is the material available which may lead to the conclusion that the failure to produce the material was deliberate or suppressed or even otherwise occasioned a failure of justice. This also can be attempted, if legally permissible, only in the said proceedings and not in a collateral challenge raised after the matter has been finally decided in the first

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1103. *Nizam Ali v Anjuman Islamia Chattarpur*, (1999) 1 LRI 247; *Sajjadanashin Sayed v Musa Dadabhai Umer*, (2000) 4 LRI 119.
1104. *Barrs v Jackson*, (1842) 1 Y&C Ch Cas 585.
1105. *Selliamman Ayyanar Uthiraosomasundareswarar Temple v Rajanga Asari*, AIR 1965 Mad 355 : (1965) ILR 1 Mad 232.
1106. *Hafiz Md. Fateh Nasib v Swarup Chand*, AIR 1942 Cal 1 : (1941) ILR 2 Cal 434; *Alagamma Achi v Veerappa*, AIR 1956 Mad 428 : (1956) ILR Mad 252.
1107. *UOI v SP Sharma*, (2014) 6 SCC 351 : 2014 (4) All WC 3319 (SC).

round of litigation. Thus, on facts, the court held that the high court had committed a manifest error by not lawfully defining the scope of the fresh round of litigation on the principles of *res judicata* and doctrine of finality.

The court stated that:

> A decision rendered by a competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of proceedings would cease to have any meaning".

In *Kaviraj v State of Jammu & Kashmir*,[1108] it was held as follows:

> The factual position in the present controversy is slightly different. Before this Court two Special Leave Petitions were filed. The Assistant Surgeons against whom the Letters Patent Appeal was dismissed in default, are also before this Court. They have also been afforded an opportunity of hearing. This Court has expressed the opinion that the order passed by the Letters Patent Bench of the High Court on 24.2.2006 deserves to be upheld. If the Assistant Surgeons whose Letters Patent Appeal was dismissed in default, had not been before this Court, it may not have been possible for us to re-adjudicate upon their claim. Since all of them are before us, and have been represented through counsel, we have no doubt in our mind, that the determination on merits in the instant controversy should be extended to them, as well. Since such a choice can be made in the present case, we are of the view, that the proposition which has been upheld as legal, should be extended to the others similarly situated. The converse proposition, does not commend itself for acceptance. It would be unthinkable to implement an order, which has been set aside after due notice and hearing. We, therefore, find no merit in the technical plea advanced at the hands of the learned counsel for the appellants.

Where a suit was filed for a declaration that an alienation by a widow was not binding on the reversioners, the finding given therein that the plaintiff was not the nearest reversioner is not *res judicata* in a subsequent suit for possession brought after the death of the widow as the issue as to relationship was only incidental in the previous suit.[1109] It is not to be assumed that the matters in respect of which issues have been framed are all directly and substantially in issue, nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.[1110]

If the parties to the earlier suit are not the same as those in the subsequent suit and the matters directly in issue in the subsequent suit were not directly in issue in the earlier suit, then the observations in the judgment in the earlier suit have no binding force in the latter case, particularly when the matter was not argued in the earlier case.[1111]

ILLUSTRATION

> *A* sues *B* for rent; *B* pleads abatement of rent on the ground that the area is less than that entered in the lease. The court finds that the area is greater than that shown in the lease. The finding as to the excess area is not *res judicata* for it is only ancillary to the direct and substantial issue whether the area is equal to that shown in the lease; or, less.[1112]

1108. *Kaviraj v State of Jammu & Kashmir*, AIR 2013 SC 767 : (2013) 3 SCC 526 : 2013 (3) SCR 620 : JT 2013 (1) 526.
1109. *Sarangapani v Venkata*, AIR 1952 Mad 384 : (1951) 2 Mad LJ 464; *Valliammal v Palani Goundan*, AIR 1955 Mad 533.
1110. *Laxman Shivshankar v Saraswathi*, AIR 1959 Bom 125 : (1958) ILR Bom 869 : (1958) 60 Bom LR 382.
1111. *Bank of India v Mehta Brothers*, AIR 1991 Del 194.
1112. *Ekram v Holodhur*, (1873) ILR 3 Cal 271.

(g) Examination of Pleadings and Judgment.—Whether a matter was directly and substantially in issue in a former suit is to be determined by a reference to the plaint, the written statement, the issues and the judgment.[1113] Even if a point is not properly raised in the plaint, yet if both parties join issues upon a matter in dispute, the decision will operate as *res judicata*.[1114] For the application of *res judicata* under section 11, of the CPC, it is not necessary that the issue in conflict must be raised in the pleadings. Such conflict may come up for decision otherwise also, i.e., in view of the stand taken by parties in the hearing of the suit.[1115] In the absence of pleadings, or any finding, it is not open to the defendants to invoke the rule of *res judicata* on the ground that in the earlier suit it was found by the trial court that they were the tenants of the land and dispute under the plaintiff.[1116] Section 38B of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960, provides that the finding or decision given before the commencement of this section will not operate as a bar for the re-trial of such proceedings or issue in accordance with the provisions of the Act as amended from time to time. The appellant has raised a similar objection before the high court but the same was rejected on the ground that if an earlier judgment is said to operate as *res judicata* in the subsequent proceedings, then all the necessary facts including pleadings of the earlier litigation must be placed in the subsequent proceedings. This view was affirmed by the Hon'ble Supreme Court.[1117] The decree may also be referred to, but it is not enough to refer to the decree without the judgment, for a decree states merely how a suit is disposed off, and it is in the judgment that the findings on the issues are recorded.[1118] The judgment is admissible under section 40 of the Evidence Act, 1872. (See O XXII, rules 5–6.)

(h) Suits for Rent or Other Recurring Liability

The distinction between a matter directly and substantially in issue and a matter collaterally in issue is well-illustrated by suits for rent or for other recurring liability. These may be divided into three classes, namely:

(i) Where the first suit is for rent, and the subsequent suit is for title.

(ii) Where both suits are for rent, or other recurring liability.

(iii) Where both suits relate to rate of rent or to the area for which rent is payable.

(i) First Suit for Rent, Subsequent Suit for Title.—In this class of cases, it is clear that the subsequent suit being one for title, the question of title is a matter "directly and substantially" in issue in that suit. Whichever party therefore, raises the plea of *res judicata* in that suit must show that the question of title was also "directly and substantially" in issue in the former suit, that is, in the previously decided suit. If the question of title was in issue in its entirety in the former suit, it would be a matter that was "directly and substantially" in issue in that suit. But if the issue in the former suit did not cover the entire question of title, in other words, if it fell

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1113. *Isher Singh v Sarwan Singh*, AIR 1965 SC 948; *S Labbai v Hanifa*, AIR 1965 SC 1569.
1114. *Krishna Chendra v Ramanna*, AIR 1932 PC 50 : (1932) 36 Cal WN 365 : (1932) 34 Bom LR 508.
1115. *Thakur Ram Sahai Sinha v Bimla Devi*, AIR 1980 Pat 204, pp 208, 210 (paras 10, 13) (FB).
1116. *Deva Ram v Ishwar Chand*, AIR 1996 SC 378 : (1995) 6 SCC 733; see also *Mariam Bibi v Rachman Ali*, AIR 2004 Gau 66.
1117. *Darshan Prasad v Civil Judge, (II), Gorakhpur* (1992) Supp 2 SCC 87.
1118. *Kali Krishna v Secretary of State*, (1889) ILR 16 Cal 173, at p 183 : 15 IA 186, at p 193; *Run Bahadur's* case, (1885) ILR 11 Cal 301, at p 310 : 12 IA 23; *Soorjomonee v Suddanund*, (1874) 12 Beng LR 304; *Igirdhar v Dayabhai*, (1884) ILR 8 Bom 174, at p 180; *Ghela v Sanbalchand*, (1894) ILR 18 Bom 597, at p 601; *Amriteswari v Secretary of State*, (1897) ILR 24 Cal 504, at p 519 : 24 IA 33; *Jalasutram v Bommadevara*, (1906) ILR 29 Mad 42; *Kunwarjan v Nazbat ud-Daula*, (1906) ILR 33 Cal 116 : 32 IA 244; *Mitar Poddar v Jadab Chandra*, (1917) 2 Pat LJ 159; *Raja Sashikanta v Raja Sarat Chandra*, AIR 1921 Cal 699 : (1921) 34 Cal LJ 415.

short of going to the very root of the title, and was confined only to some of the incidents of title, the question of title would be a matter which was "collaterally or incidentally" in issue in the former suit.[1119] Where the landlord sued the tenant in ejectment and he pleaded that he held under a permanent tenure, it was held by the Supreme Court that his pleas was not barred as *res judicata* by reason of a decree obtained by the landlord in a prior suit, wherein the only issue raised was whether *Jummaa* could be assessed under the regulation. Permanency of a tenure, it was observed, did not imply fixity of rent.[1120] But where in a former suit for eviction, the landlord's plea that the defendant-tenants were liable to be evicted was rejected on the ground that the defendants had perfected their title by adverse possession, a similar plea in a subsequent suit would not be allowed to be raised even if the subsequent suit is for declaration of title and possession.[1121] The principle is that irrespective of the nature of the suit if the question of title has gone into the making of the decree and not incidentally or collaterally, the decree in the former suit would operate as *res judicata*.[1122]

In the following illustrations, it is assumed that the other conditions of *res judicata* are fulfilled:

ILLUSTRATIONS

(i) *A*, claiming to be the *chela* and heir of a deceased mohunt sues *B* for *rent* of certain lands forming part of the estate of the *mohunt*. *C* claims that he, and not *A*, is the *chela* and heir of the deceased and that he is entitled to the rent. *C* is thereupon joined as a defendant to the suit. The issues raised are:

- Whether A or C is the *chela* and heir of the *mohunt*?
- Whether any and if so what rent is due from B?

The court finds that *A* is the *chela* and heir of the *mohunt*. It also finds Rs 2,500 due by *B* for rent, and *A*'s claim is decreed.

Subsequently, *C* sues *A* for a declaration that he is the *chela* and heir of the *mohunt* and claims that as such he is entitled to the whole of the property left by the mohunt. *A* contends that the question, who is the *chela* and heir of the deceased, is *res judicata*. Is the question *res judicata*? The answer is that it is, for, though the former suit was for rent, the entire question of title to the property of the deceased was directly and substantially in issue in that suit and it was decided against *C*.[1123]

(ii) *A*, a Hindu, dies leaving a widow and a brother *C*. The widow sues *B* for rent of certain property forming part of the estate of her husband. *C* claims the rent on the ground that it was the joint property of himself and his deceased brother and that he became entitled to it by survivorship. *C* is thereupon joined as a defendant to the suit. The issues are:

- Whether the deceased alone received the whole rent of the property in his life-time, or whether the rent was received by him jointly with C?
- Whether any and what rent is due by B?

1119. *Lalit Shaheb v Lal Babu*, AIR 1943 All 340 : (1943) ILR All 843; *Gobind v Taruck*, (1878) ILR 3 Cal 145; *Radha v Monohur*, (1888) ILR 15 Cal 756 : 15 IA 97; *Kasiswar v Mohendra Nath*, (1898) ILR 25 Cal 136; *Dwarkanath v Ramchand*, (1899) ILR 26 Cal 428; *Keramat v Kumar Krishna*, AIR 1926 Cal 1228 : (1926) 47 Cal LJ 536; *Mugtakeshi v Manilal*, AIR 1930 Cal 579 : (1930) ILR 57 Cal 371; *Surendra Nath v Kamakhya Narain*, AIR 1930 PC 45 : (1930) 32 Bom LR 515; *Shankar v Khem Sawant*, AIR 1932 Bom 3 : (1931) 33 Bom LR 1303.
1120. *Bejoy Gopal Mukherjee v Pratul Chandra Ghosh*, AIR 1953 SC 153 : (1953) SCR 930 : (1953) SCJ 195.
1121. *Koshal Pal v Mohan Lal*, AIR 1976 SC 688 : (1976) 1 SCC 449 : 1976 SCR (2) 827; *Deepchand v Santhinath*, AIR 1971 Ori 57.
1122. *Sita Ram v Hukmi Ram*, AIR 1971 All 399.
1123. *Toponidhee v Sreeputty*, (1880) ILR 5 Cal 832; *Gobind v Taruck*, (1878) ILR 3 Cal 145; *Harekrishna v Gourhari*, AIR 1932 Cal 894 : (1932) ILR 59 Cal 1250 : 141 IC 56; *Jitendra v Biswanath*, AIR 1952 Cal 201 : (1952) ILR 1 Cal 383; *Parsa v Durga*, (1961) ILR MB 44; *Ram Karan v Parbati*, AIR 1954 Pat 443.

The finding on the first issue is that the deceased alone received the whole rent in his lifetime. The finding on the second issue is unnecessary for our present purpose.

Subsequently, *C* sues the widow for a declaration that he and his brother were joint, and claimed the said property by right of survivorship. The question of whether the deceased and *C* were joint or separate is not *res judicata*, for it was not "directly and substantially" in issue in the former suit. It was in issue in that suit only "collaterally or incidentally", for it will be seen on referring to the first issue in that suit that it did not cover the entire question of C's title but related merely to the joint or separate receipt of rent.[1124]

(ii) Both Suits for Rent or Other Recurring Liability — Maintenance Suits.—The rules which apply to the preceding class of cases apply also to this class. Thus, where *A* sues *B* for rent due for a particular period, and the defence is that *A* has no title to the land of which the rent is claimed, then, if a direct issue is raised and decided on the question of title, the decision will operate as *res judicata* in a subsequent suit by *A* against *B* for the rent for a subsequent period either of the same[1125] or other[1126] property held under the same title; but, if there is no *direct* issue raised on the question of title, and the finding falls short of going to the *very root of the title* upon which the claim for rent is based, it will not have effect of *res judicata*. If the question of title is gone into in the previous suit as if the right of rent were sought to be established not for one particular year, but *once for all*, it will be said to have been *directly and substantially* in issue; but if the question of title is gone into in the previous suit as if the right of rent were sought to be established not *once for all*, but for one particular year, it will be said to have been in issue *collaterally* or *incidentally*.[1127] The same principles apply to other cases of recurring liability such as *malikana*,[1128] maintenance,[1129] interest,[1130] annuity,[1131] etc. Where the question is whether the decision in a previous litigation could operate as *res judicata* in a later suit relating to a similar claim for subsequent years, the test to be applied is whether the prior decision was based on a general principle applicable to later years or whether it proceeded on considerations peculiar to that year. A subsequent suit would be barred in the former but not in the latter case. It would make no difference whether the prior judgment was on an issue of law or fact.[1132]

ILLUSTRATIONS

(i) A sues B for rent due for the year 1902. The defence is that the land is rent-free. An issue is raised, "whether the land is rent-free". The court finds that the land is rent-free, and A's suit is dismissed. Subsequently, A sues B claiming rent for the year 1904. B again sets up the same defence, namely, that the land is rent-free. Here, the question of A's right to recover the rent having been "directly and substantially" in issue in the previous suit, a suit for the rent for 1904 is barred as *res judicata*.[1133]

(ii) A sues B for rent in kind for betel trees for the year 1897–98 alleging that B was liable to pay. B applied for time to file a written statement which was refused. The only issue raised was as to amount of produce and the suit was decreed. Next year, A again sued B for rent in kind for

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1124. *Run Bahadur v Lucho Koer*, (1885) ILR 11 Cal 301 : 121 IA 23; *Srihari v Khitish Chandra*, (1897) ILR 24 Cal 569; *Raguban v Hardeo*, AIR 1955 Pat 39 : (1955) ILR 34 Pat 324.
1125. *Bishun Das v Laxmi Narayan*, AIR 1949 All 596; *Nobo v Foyzbux*, (1876) ILR 1 Cal 202; *Gnanada Gobinda Chowdhury v Nalini Bala Debi*, AIR 1926 Cal 650 : (1926) 43 Cal LJ 146.
1126. *Chandi Prasad v Mahendra*, (1902) ILR 24 All 112.
1127. *Gnanada Gobinda Chowdhury v Nalini Bala Debi*, AIR 1926 Cal 650 : (1926) 43 Cal LJ 146.
1128. *Balkishen v Kishan Lal*, (1889) ILR 11 All 148; *Gopi Nath v Bhugwant*, (1884) ILR 10 Cal 697.
1129. *Bhikabhai v Bai Bhuri*, (1903) ILR 27 Bom 418.
1130. *Pahlwan v Risal*, (1882) ILR 4 All 55.
1131. *Dwarka Das v Akhay Singh*, (1908) ILR 30 All 470.
1132. *Govardhan Appalacharlu v Govardhan Rangacharlu*, AIR 1957 AP 1002 : (1956) Andh WR 954.
1133. *Rakhal Doss v Heera*, (1874) 22 WR 282; *Venkatachalapati v Krishna*, (1890) ILR 13 Mad 287; *Natesa v Venkatarama*, (1907) ILR 30 Mad 510; *Dwarka Das v Akhay Singh*, (1908) ILR 30 All 470

> 1898–99 and B pleaded that he was not liable to pay any rent. Here, the question of B's liability for all years was not alleged in the previous suit and was not therefore, directly and substantially in issue and that suit is not barred by *res judicata*.[1134]

It may here be observed that each year's rent is in itself a separate and entire cause of action, and where a suit is brought for the rent due for a particular year, or a judgment obtained in that suit, whatever the defence may have been, would seem only to extend to the subject matter of the suit, and hence, the landlord is at liberty to bring another suit for the next year's rent and the tenant is at liberty to set up to *that suit*, any defence he thinks proper. The above proposition, however, is subject to this, and here comes in the doctrine of *res judicata*, that neither party is at liberty to re-open in the suit for rent for the next year, any question that was substantially and necessarily tried and determined between them in the suit for rent for the *previous year*.[1135] For, the essence of the doctrine of *res judicata* is that where a *material issue* has been tried and determined between the same parties in a proper suit and in competent court as to the *status* of one of them in relation to the other or as to a *right* or *title* claimed by either of them against the other, it cannot again be tried in a new suit against them.[1136] A competent court would include by reason of the new Explanation VIII, a court of limited jurisdiction provided the issue determined by that court, though not the subsequent suit, was within its competence. When the nature of requirement pleaded in the earlier suit was different from that in the present suit, the bar of *res judicata* will not operate.[1137]

Maintenance—As regards maintenance, it is to be noted that a decree for maintenance at a particular rate is no bar to a subsequent suit for maintenance at an enhanced rate on the ground of altered circumstances, for the rate of maintenance is a variable quantity changing from time to time according to the circumstances of the parties affected by the decree;[1138] but, a right to maintenance may be barred by *res judicata*.[1139]

Status—In cases where the question of status liable to change from time to time arises, such question though decided previously does not attract the principle of *res judicata*. Thus the question of whether a person is *Adhiar* as defined by the Assam Adhiars Protection and Regulation Act, 1948, can be examined during each year as it is dependent on many circumstances liable to alter from time to time.[1140]

(iii) Rate of Rent or Area for Which Rent Is Payable.—In this class of cases also, both suits are for rent, the first suit being for rent for a particular period and the second for rent for a subsequent period. The matter which is pleaded as *res judicata* is not the plaintiff's title to the land of which the rent is claimed, but the rate of rent or the area for which rent is payable. If the court in the first suit tries and determines the issue, "what is the proper rate of rent", or "what is the proper area for which rent is payable" the issue relates not merely to the rent for a particular period but to the rent payable for the full term of the lease, and the question as to the rate of rent or the area, as the case may be, will be *res judicata* in subsequent suits for rent for the remaining period of the lease.[1141]

1134. *Vishnu v Ramling*, (1902) ILR 26 Bom 25.
1135. *Nobo v Foyzbux*, (1876) ILR 1 Cal 202.
1136. *Krishna v Bunwari*, (1874) ILR 1 Cal 144 : 21 IA 283; *Raj Kumar v Gopinath*, AIR 1971 All 273.
1137. *Surajmal v Radhe Shyam*, (1988) 3 SCC 18.
1138. *Bangaru v Vijayamachi*, (1889) ILR 22 Mad 175.
1139. *Durga v Sashibala*, (1911) 16 Cal WN 603.
1140. *Rahimuddin v Trilok Chandra*, AIR 1965 Assam 18 : (1964) ILR 16 Assam 254.
1141. *Bakshi v Nizamuddin*, (1893) ILR 20 Cal 505; *Nil Madhub v Brojo Nath*, (1894) ILR 21 Cal 236; *Beni Pershad v Chowbey*, (1902) 6 Cal WN 589; *Mane v Dhani*, (1913) 17 Cal WN 76; *Bayyan Naidu v Suryanarayana*, (1914) ILR 37 Mad 70 (FB); *Mittar Poddar v Jadab Chandra*, (1917) 2 Pat

[Footnote No. 1141 contd.]

(i) Ex parte Decree.—Ex parte decree operates to render the matter decided *res judicata*,[1142] and the defendant's failure to appear will not deprive the plaintiff of the full benefit of his decree;[1143] but in the case of a suit in which a decree is passed *ex parte* (see O IX, rule 6; Code of 1882, section 100), the only matter that can be "directly and substantially" in issue is the matter in respect of which relief has been claimed by the plaintiff in the plaint. A matter in respect of which no relief is claimed cannot be "directly and substantially" in issue in a suit in which a decree is passed *ex parte* though the court may have gone out of its way and declared the plaintiff to be entitled to relief in respect of such matter. In a case where an insolvency court made an *ex parte* order declaring a mortgage to be void although no motion to that effect had been made by the official receiver, the decision could not operate as *res judicata* for the matter was never directly and substantially in issue.[1144] In order that an *ex parte* decree might be *res judicata*, it is necessary that the opposite party should have express notice from the pleadings and the prayer that the particular issue or matter would be decided.[1145]

A decree was passed *ex parte* in favour of the husband under section 9 of the Hindu Marriage Act, 1955. Later, the wife also filed a petition for restitution and the husband pleaded *res judicata* taking the plea in an amendment application filed after framing all the issues. It was held that the suit was barred by *res judicata* and the fact that the husband should have taken the plea in a written statement under section 41, Indian Evidence Act, 1872, would not come in the way in the case of the decree in the prior suit produced before the court.[1146] A party setting up an *ex parte* decree as *res judicata* is not bound to prove that in the earlier suit, the summons had been duly served on the defendant.[1147]

A wrong decision on jurisdiction does not becomes *res judicata*.[1148]

The reason why even an *ex parte* judgment becomes *res judicata* is that such a judgment is pronounced after examining the evidence needed to support the factual allegations in the plaint and after the court is satisfied that the case put forth in the plaint has been substantiated.

ILLUSTRATION

A sues *B* to recover Rs 500, being the rent due for the year 1906, at the rate of Rs 2 per sq yard. *A* does not pray for a declaration in the suit that the rate of rent is Rs 2 per sq yard. *B* does not appear and a decree *ex parte* is passed against him for Rs 500. Subsequently, *A* sues *B* for rent due for the year 1907, also, at the same rate. *B* appears at the hearing, and contends that the rate is Re 1 per sq yard. *B* is not precluded from raising that contention, for the question of rate was not "directly and substantially"' in issue between *A* and *B* in the former suit, and it cannot therefore, be *res judicata*. Even if the court in the former suit had declared that *A* was entitled to rent at the rate of Rs 2 per sq yard, the question of rate would not be *res judicata*, for *A* had not asked for a declaration in that suit in respect of the rate of rent. *A*'s claim in the former suit

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[Footnote No. 1141 contd.]
LJ 159 (incidentally in issue); *Beni Madhab v Sarbananda*, AIR 1926 Cal 698 : (1926) 48 Cal LJ 135; *Rajah of Ramnad v Ramanathaswami*, AIR 1921 Mad 306 : (1921) ILR 44 Mad 514.

1142. *Hara Chandra v Bepin*, (1911) 13 Cal LJ 38; *Ram Kumar v Alimaddi*, (1912) 17 Cal WN 627; *Mohammad Gauhar v Samiruddin*, (1913) 18 Cal WN 33; *Sarojini v Lakhi*, AIR 1925 Cal 427, (1925) 29 Cal WN 253; *Baldevdas v Mohanpal*, AIR 1948 Bom 232, (1948) ILR Bom 145 : (1947) ILR 49 Bom LR 902.

1143. *Biraj Mohini v Chintamoni*, (1901) 5 Cal WN 877; *Markanda v Varda Kameshwar Naidu*, AIR 1949 Pat 197 : (1947) ILR 26 Pat 717; *Gopalaswami v Pàdmaraju*, AIR 1966 AP 210.

1144. *Chenchayya v Bapayya*, AIR 1932 Mad 233 : (1932) 62 Mad LJ 177.

1145. *Life Insurance Corp v Seshi Ammal*, AIR 1958 Mad 463.

1146. *Nand Kishore v Shanti Kapoor*, AIR 1982 All 138.

1147. *Brahmanand Rao v Dy Director of Consolidation, Gorakhpur*, AIR 1987 All 100 (DB).

1148. *Hat Narain v Vinod Kumar*, AIR 1987 All 319; *Mathura Prasad v Dossibai*, AIR 1971 SC 2355 : (1970) 1 SCC 613 : 1970 SCR (3) 830.

> was merely for arrears of rent amounting to Rs 500, and the decree in that suit has not a greater effect than evidence that Rs 500 was due when the decree was passed. Had *A* in the former suit also prayed for a declaration in respect of the rate of rent as part of the substantive relief, and had the court then declared that the rate of rent was Rs 2, the question of rate would have been *res judicata* though the decree was passed *ex parte*; for it would then have been a matter "directly and substantially" in issue.[1149]

A suit to set aside an *ex parte* decree on the ground that it was obtained by fraud may be barred by *res judicata* if an application to set it aside on the same ground has been dismissed under O IX, rule 13.[1150]

An *ex parte* decree was passed in a former suit against "K" during the pendency of the subsequent suit between the purchaser from "K" and the plaintiff. The matter was directly and substantially the same in both the suits. In spite of service of summons "K" did not contest the suit. It was held by the Supreme Court that the *ex parte* decree passed against him could be taken as final decision on hearing and as such it would operate as *res judicata* in the subsequent suit.[1151] Explaining the conditions to be satisfied for operation of the principle of *res judicata*, Tarun Chatterjee J, speaking for the Bench in the above case, observed as follows:

> We have carefully examined the provisions under section 11 of the CPC. After a careful reading of the provisions under section 11 of the CPC, it is discernible that in order to constitute *res judicata*, the following conditions must be satisfied—
>
> (i) There must be two suits—one former suit and the other subsequent suit;
>
> (ii) The Court which decided the former suit must be competent to try the subsequent suit;
>
> (iii) The matter directly and substantially is issue must be the same either actually or constructively in both the suits;
>
> (iv) The matter directly and substantially in issue is the subsequent suit must have been heard and finally decided by the court in the former suit;
>
> (v) The parties to the suits or the parties under whom they or any of them claim must be the same in both the suits;
>
> (vi) The parties in both the suits must have litigated under the same title. [1152]

(j) Suit for Eviction

Where, the suit for eviction was filed by the landlord on the ground that the premises were required for starting business by plaintiff's son, the plaintiff's son became advocate and the plea for requirement of premises for starting business was withdrawn, the second suit for eviction on the ground that the premises were required for starting office of plaintiff's advocate son is not barred by *res judicata*.[1153]

The basic principle of *res judicata* is that the cause of action for the second suit being merged in the first suit, it does not survive anymore. Thus, in a case, the earlier suit filed under section 11 (2) of the Kerala Building (Lease and Rent Control) Act, 1965 on the ground of arrears of rent was dismissed with a finding that there was no relationship of landlord and tenant and no rent was paid. The said finding was upheld in appeal. It was held by a Full

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1149. *Madhusudun v Brae*, (1889) ILR 16 Cal 300.
1150. See note under that rule, "Ex parte Decree Obtained by Fraud".
1151. *Saroja v Chinnusamy*, AIR 2007 SC 3067 : (2007) 8 SCC 329 : 2007 (4) Civil Court Cases 101 (SC).
1152. *Saroja v Chinnusamy*, AIR 2007 SC 3067, at p 3068, para 4 : (2007) 8 SCC 329 : 2007 (4) Civil Court Cases 101 (SC).
1153. *SS Khurana v Mahaveer Prasad*, AIR 2004 Raj 107.

Bench of the Kerala High Court that the finding is the earlier suit will operate as *res judicata* in subsequent suit under section 11(2) of the Act in view of section 15 of the said Act.[1154]

Explaining the provisions of the Kerala Act of 1965, JB Koshy J (as he then was), observed as follows:

> In this case, earlier in R.C.P. No. 41 of 1989 even though it was found that the rent control petitioner had title to the property there was no landlord-tenant relationship with the counter petitioner and there is no obligation to pay rent and petition for arrears of rent was dismissed. The above was confirmed by the appellate authority R.C.A. No. 36 of 1991 rightly or wrongly. No revision application was filed and the above became final. In view of Section 15, we only hold that since, in the earlier proceedings under section 11(2), it was held that there is no landlord-tenant relationship and no rent was paid, subsequent petition under section 11(2) is barred. It is true that in an earlier small cause suit rent deed was accepted by the revision petitioner. Effect of the same has to be decided by the civil court. All these matters can be agitated in the civil court as final adjudication of the dispute has to be done by the civil court and notwithstanding the earlier findings regarding title to the property and landlord-tenant relationship and arrears of rent. All the matters can be re-agitated in the civil court. Therefore, without prejudice to the right of the parties to approach the civil court, we set aside the order of eviction passed under section 11(2) as it is hit by the principles of *res judicata* adopted in section 15 of the Kerala Buildings (Lease and Rent Control) Act.[1155]

(k) Suspension of Rent.—If the landlord's suit for rent for a particular period has been dismissed on the ground that the premises are let for one rent and that he has dispossessed the tenant of part of the tenure; then if the landlord sues again for rent for a subsequent period, the tenant claiming a suspension of rent must again prove that he has been kept out of possession during the period of the subsequent suit. This is because the onus of proving eviction is on the tenant, and the subject matter of the two suits is different.[1156]

(l) Election.—Where in relation to reserved constituency, the election to the office of "Pradhan of the Panchayat" was challenged by way of election petition on the ground that the candidate did not belong to the reserved category, the said election petition was dismissed and no revision petition was filed resulting into the attaining of the finality of the order of election tribunal. The re-agitation of the same issue that the petitioner was not entitled to contest the election in the constituency reserved for the schedule caste, before district magistrate, under section 95(1)(g)(iii-a) Uttar Pradesh Panchayati Raj Act (26 of 1947) was found not permissible.[1157]

(m) Suit under Section 77, Registration Act, and Res Judicata.—If a suit under section 77 of the Indian Registration Act, 1908 to enforce registration of a sale deed is infructuous, the purchaser is not debarred from suing for specific performance of the contract of sale;[1158] but, when a party refuses to admit execution on the ground that the document has been materially altered and the court finds in a suit under section 77 of the Indian Registration Act that the document has been materially altered, the finding operates as *res judicata* in a subsequent suit between the parties.[1159]

(n) Divorce Petition and Res Judicata.—Where, in the earlier petition under Hindu Marriage Act, 1955, the finding was recorded by the trial court that the averments made in para no

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1154. *Bharathi v Vinod S Sivasudha*, AIR 2008 Ker 125 : (2008) 1 Ker LT 93 (FB).
1155. *Bharathi v Vinod S Sivasudha*, AIR 2008 Ker 125, para 7 p 131-132 : (2008) 1 Ker LT 93 (FB).
1156. *Sateeshchandra v Resheekesh*, AIR 1933 Cal 290 : (1933) ILR 60 Cal 247.
1157. *Hotilal v State of Uttar Pradesh*, AIR 2002 All 257.
1158. *Balkishen v Bechan*, (1932) ILR 54 All 68.
1159. *Dwijendra v Jogeshchandra*, AIR 1924 Cal 600 : (1924) 39 Cal LJ 40.

4(b) of the written statement filed by the wife did not constitute cruelty and in the absence of filing appeal the said finding had attained finality, the subsequent petition for divorce filed by the husband on the ground that the imputations made by the wife in her written statement in earlier petition was itself an act of cruelty, was found barred by principle of *res judicata*.[1160]

In a divorce case, the husband sought divorce on the ground that the wife deserted him. Whereas wife led evidence that the husband the kept a woman and she left her matrimonial home because of ill-treatment by husband. There was a finding by the trial court in an earlier petition filed by husband for judicial separation that wife was forced to leave and the husband himself deserted her. It was held by the Chhattisgarh High Court that the earlier finding would operate as *res judicata*.[1161]

Where the ground of cruelty available at the time of earlier petition for divorce under section 13(1)(ia) of the Hindu Marriage Act, 1956 was not raised and no explanation was afforded for not raising it earlier, it was held that the subsequent divorce petition on the said ground would be barred by principles of constructive *res judicata*.[1162]

(o) Decree for Restitution of Conjugal Rights and Res Judicata.—A sues B, his wife, for restitution of rights. Restitution is granted, and B goes and lives with A (that is to say, the decree is satisfied). B again leaves A, and A again sues B for the same relief. The suit is not barred as *res judicata*.[1163] The distinction between this and the case of an injunction is that while in a suit for injunction the defendant is forever restrained from doing the acts complained of, the wife cannot be directed in a suit for restitution of conjugal rights to live with her husband for the rest of her life, for many things may occur entitling her to leave him, eg, gross cruelty. On the other hand, where two suits are filed one after the other, one for restitution of conjugal rights and the other for judicial separation, even though the two suits and reliefs claimed therein are of a different nature, a finding in the former suit, if not challenged in appeal, may constitute *res judicata* in the second suit.[1164]

(p) Custom.—A mere negative finding that a custom is not proved will not operate as *res judicata*, for one man may prove more than another.[1165]

(q) Decree for Possession Conditional on Payment.—Where in a suit by the heirs of a Mahomedan against his widow in possession of his estate in lieu of her dower, a decree is passed against her that they should have possession of their shares of the estate upon payment of a proportionate part of the dower debt within six months, and that upon failure to pay their suit should be dismissed, and the plaintiffs fail to pay within six months, the decree is no bar to a subsequent suit for immediate possession by the same plaintiffs against the widow on the ground that the dower debt had in the meantime been satisfied out of the income of the estate in the hands of the widow.[1166] A right to get possession of land at the date when the suit to recover it is instituted is a wholly different thing, a wholly different res from the right to recover it at some future time and possibly under wholly altered circumstances.[1167] So, a consent decree

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1160. *Santosh Sharma v Ashok Kumar*, AIR 2001 Del 422 (DB).
1161. *Shiv Kumar Chandrakar*, (2006) 1 CgLJ 30 : (2006) 37 All Ind cas 771.
1162. *Maya Tiwari v Ajay alias Baba Shukla*, AIR 2008 (NOC) 2308 (Chh) (DB).
1163. *Keshavlal v Parvati*, (1894) ILR 18 Bom 327.
1164. *Trilok Singh v Savitri Devi*, AIR 1972 All 52. See also *Krishna Pillai v Subhadra Amma*, AIR 1971 Ker 44.
1165. *Ram Chandar v Darayoo Singh*, AIR 1933 Lah 593 : (1933) 14 Lah 365.
1166. *Maina Bibi v Chaudhari*, AIR 1925 PC 63 : (1925) ILR 47 All 250 : 52 IA 145; affirming (1919) ILR 41 All 538; *Nawazi Begam v Dilfaroz Begam*, AIR 1927 All 39 : (1926) ILR 48 All 803; compared in *Hadi v Kasim*, AIR 1927 Oudh 60.
1167. *Maina Bibi v Chaudhari*, AIR 1925 PC 63 : (1925) ILR 47 All 250 : (1925) 52 IA 145.

between a usufructuary mortgagee and his mortgagor-tenant will not operate as *res judicata* in a subsequent suit by the latter to redeem the mortgage.[1168]

(r) Compensation for Land Acquisition.—The courts while determining the amount of compensation for acquisition of land would be bound to take into consideration only the materials brought on records. However, factors which would be relevant for determining the amount of compensation would vary from case to case and no hard and fast rule can be laid down therefor. The principle of *res judicata* will, therefore, have no application in the fact of the present matter.[1169]

In a case of acquisition of land and grant of its compensation, the high court issued directions by way of mandamus, the land acquisition officer while passing award took into consideration, said directions of high court and awarded 12% additional compensation at market value. The said order never came to be questioned and, thus, attained finality. The reference court in reference by some of the land owners, or for that matter, the high court exercising its appellate jurisdiction could not have dealt with the said question, as the principle of *res judicata* fully applies. Furthermore, the writ of mandamus is required to be obeyed unless judgment is overruled or legislation by way of validating statute is brought into force.[1170]

Where on the question whether the claimants were entitled to receive entire compensation or whether it was the right of state government to receive compensation amount, there was no finding on the reference made to district judge by the three claimants, which had attained finality, the bar of *res judicata* was not attracted.[1171]

(s) Suit for Injunction.—It cannot be contended that the remedy of injunction is an equitable relief and in equity, the doctrine of *res judicata* cannot be extended to a decree of a court of limited pecuniary jurisdiction. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue, directly and substantially, arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as *res judicata*.[1172]

Where, the earlier suit filed by appellant was withdrawn with liberty to file fresh suit and the earlier suit for injunction filed by respondent was dismissed on the ground that it was not a proper remedy, the fresh suit filed by appellant on the same cause of action is not barred by *res judicata*.[1173] Where, the earlier suit for mandatory injunction was filed for removal of hut in the suit property and the finding of perfection of title of the defendant by adverse possession made therein attained finality, the said finding of title in the earlier suit would operate as *res judicata* in the subsequent suit for declaration of title and recovery of possession of the same property between the same parties as matter directly and substantially in issue in both suits were same.[1174]

1168. *Ambu Nair v Kelu Nair*, AIR 1930 Mad 305 : (1930) ILR 33 Mad 805.
1169. *UOI v Pramod Gupta*, AIR 2005 SC 3708 : AIR 2005 SCW 4645 : (2005) 12 SCC 1 : (2005) 8 JT 203 SC.
1170. *Ishwar Dutt v Land Acquisition Collector*, AIR 2005 SC 3165 : (2005) 7 SCC 190.
1171. *Kiran Tondon v Allahabad Development Authority*, AIR 2004 SC 2006 : AIR 2004 SCW 2089 : (2004) 10 SCC 745.
1172. *Aanaimuthu Thevar v Alagammal*, AIR 2005 SC 4004 : 2005 AIR SCW 3516 : (2005) 6 SCC 202 : JT 2005 (6) SC 333.
1173. *K Sivaramaiah v Rukmani Ammal*, AIR 2004 SC 508 : AIR 2003 SCW 6490 : (2004) 1 SCC 471
1174. *Kodepaka Narsiah v Dandi Narasimha*, AIR 2006 (NOC) 1126 (AP) : (2006) 2 Andh LD 716.

In a case where a dispute arose about succession and management of "Gaddi" of Math, the plaintiff filed a suit for permanent injunction on the basis of his entitlement to succeed to the Gaddi. The matter was taken to the Supreme Court where the judgment of the high court was reversed and the dismissal of the suit recorded by the two lower courts was upheld. However, while disposing of the case, the Supreme Court observed that the plaintiff may file suit for possession, if he is so advised. When the matter reached the Supreme Court again, it was held that the observation of the Supreme Court in the earlier round of litigation would not prevent the court from dismissing the suit as barred by *res judicata*. The plaintiff's claim on the basis of his legal entitlement was rejected by the Supreme Court in earlier suit. Once the issue of entitlement stood determined the same would operate as *res judicata*.[1175]

In a suit for permanent injunction against interference with possession, the trial court held that the plaintiff was in possession and granted a decree of permanent injunction. In a separate suit filed by the applicant for declaration of title and recovery of possession, it was held by the Supreme Court that the decree of permanent injunction does not bar a suit for declaration of title and recovery of possession. It is one thing to say that someone is in possession of the suit land and it is quite another to say that he has a right to possess.[1176] The Apex Court quoted a passage from Corpus Juris Secundum (vol 50, para 735, p 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

> Where title to property is the basis of the right of possession, a decision on the question of possession is *res judicata* on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title.

A suit was filed by a person claiming to be in-charge of the affairs of a Gurudwara that he was the Mohtmim of the said Gurudwara and praying for a decree of permanent injunction. Another suit was filed by the Managing Committee of the said Gurudwara for declaration that the plaintiff in the connected suit was not Mohtmim of Gurudwara. A decree of permanent injunction was granted in the first suit in favour of the plaintiff restraining the Managing Committee from interfering with the plaintiff's possession. The decree attained finality. A second appeal filed by the Vice-President of the Managing Committee not claiming any interest in his individual capacity, was held by Supreme Court to be barred by *res judicata*.[1177] Explaining the status of the parties in the earlier and subsequent suit, SB Siha J speaking for the Bench in the above case, observed as follows:

> The judgment and decree passed in the suit filed by Sant Hari Singh might not have been binding upon the appellant here in had he claimed any right or interest over the said property in his individual capacity and not as a member of the Managing Committee. Indisputably, the Managing Committee did not file any Second Appeal against the judgment and decree passed against it. The said judgment and decree, therefore, attained finality.[1178]

In a case under the Jammu and Kashmir Civil Procedure Code, where the earlier suit based on agreement to sell, was for permanent injunction to restrain the defendant to sell the property to someone else whereas the subsequent suit accrued when despite presentation of

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1175. *Dadu Dayalu Mahasabha, Jaipur (Trust) v Mahant Ram Niwas*, AIR 2008 SC 2187 : (2008) 11 SCC 753.
1176. *Williams v Laurdusamy*, AIR 2008 SC 2212 : (2008) 5 SCC 647 : (2008) 3 Civil Court 022 (SC).
1177. *Harbans Singh v Sant Hari Singh*, AIR 2009 SC 1819 : (2009) 2 SCC 526 : (2009) 2 Civil Court C 315 (SC).
1178. *Harbans Singh v Sant Hari Singh*, AIR 2009 SC 1819, para 12 at p 1821 : (2009) 2 SCC 526 : (2009) 2 Civil Court C 315 (SC).

Hundies demand of money was refused, it was held that the subsequent suit was not barred under O II, rule 2 or section 11 of the CPC.[1179]

(t) Subject Matter of Suits may be Different.—As the test of *res judicata* is the matter directly and substantially in issue, it follows that the subject matter of the second suit may be entirely different. Unless the relief claimed in the former suit is the same or alike as the relief claimed in the subsequent suit, the subject matters in the two litigations are different.[1180] Thus, if *A* claims certain property as the adopted son of *X*, and the defendant denies the adoption, a finding in *A*'s favour on the issue as to adoption will be binding on the defendant as *res judicata* in a subsequent suit by *A* against the same defendant to recover another property claimed under the same title.[1181] It is not open to the defendant to contend that the properties claimed in the two suits being different, the decision on the question of *A*'s adoption in the first suit cannot operate as *res judicata* in the second. On the same principle, where in a suit brought by *A* against *B* for possession of one of the two properties comprised in a sale-deed passed by *B* to *A*, *B* contends that the deed is fictitious, and the court finds that the deed is fictitious, the finding that the sale-deed is invalid will operate as *res judicata* in a subsequent suit by *A* against *B* to recover the other property under the same sale-deed.[1182] Similarly, in Illustration 1 cited under class (ii) of rent-suits, it is no answer to the plea of *res judicata* that the subject matters of the two suits are different. The reason is that the matter directly and substantially in issue in both the suits is the same, namely, whether the particular land of which the rent is claimed is rent-free, and the decision thereof on that issue in the first suit operates as *res judicata* in the subsequent suit; but, the decision cannot apply to other lands unless they form part of the same tenure.[1183] A decision on a question of title in a proceeding under the Land Acquisition Act, 1894, will operate as *res judicata* in a subsequent suit between the parties relating to other properties covered by the same title, as the test of *res judicata* is identity of title and not of property.[1184] Likewise, a decision that certain properties were ancestral would operate as *res judicata* in a subsequent suit between the parties relating to other properties held under the same title.[1185] Difference in the reliefs claimed in the two suits does not render *res judicata* inapplicable. In a suit for restitution of conjugal rights, the court held that the wife had been turned out of the home and the husband sued for divorce on grounds of desertion by the wife. The trial of the issue whether the wife had deserted the husband was barred.[1186]

From the same fundamental principle that the matter directly and substantially in issue, and not the subject matter, constitutes the test of *res judicata*, it also follows that where a matter directly and substantially in issue in a suit is not the same as that in a previously decided suit, the trial of that matter will not be barred, as *res judicata* though the subject matter of the two

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1179. *Balwant Rai v Mohan Lal*, AIR 2009 J&K 71 : (2009) 3 Cur CC 300.
1180. *Dina Dinshaw v Dinshaw Ardeshir*, AIR 1970 Bom 341 : (1969) ILR Bom 1043.
1181. *Pittapur Raja v Buchi*, (1885) ILR 8 Mad 219 : 12 IA 16; *Krishna v Bunwari Lal*, (1876) ILR 1 Cal 144 : 2 IA 283; *Radha Prasad v Lal Saheb*, (1891) ILR 13 All 53, p 62 : 17 IA 150; *Balkishen v Kishan Lal*, (1889) ILR 11 All 148, p 157; *Ananta v Damodhar*, (1889) ILR 13 Bom 25; *Chandi Prasad v Maharaja Mahendra*, (1902) ILR 24 All 112; *Sitanath v Basudeo*, (1900) 2 Cal LJ 540; *Dwarka Das v Akay Singh*, (1908) ILR 30 All 470; *Kedar Nath v Sheo Shankar*, AIR 1923 All 613 : (1923) ILR 45 All 515; *Abdul Gani v Nabendra Kishore*, AIR 1930 Cal 47 : (1929) ILR 57 Cal 258; *Mahalingeshwara Devaru v Seetharama*, AIR 1978 Kant 213; *Rajinder Kumar v Kalyan*, (2000) 3 LRI 1119.
1182. *Kedar Nath v Sheo Shankar*, AIR 1923 All 613 : (1923) ILR 45 All 515.
1183. *Ram Chunder v Madho*, (1886) ILR 12 Cal 484 : 12 IA 188; *Appu v Manradiar*, AIR 1961 Ker 298.
1184. *Rajalakshmi Dasi v Banamali Sen*, AIR 1953 SC 33 : (1953) SCR 154 : (1952) SCJ 618; *Venkatasubbiah v Janakiramiah*, (1959) Andh LT 156.
1185. *Subbarayudu v Balaramiah*, AIR 1955 AP 194.
1186. *C Sarala v K Nalinakishan*, AIR 1991 Ker 362 (DB).

suits may be the same.[1187] An application by a landlord to eject a tenant under the provisions of the West Bengal Rent Control Act, 1950, on the ground that he required the premises for his own use is not barred as *res judicata* by an order dismissing a previous application because though the subject matter is the same; the matter for decision whether the landlord required the house for his own use at the time of the action is different.[1188]

Canteen workers of the Indian Oil Corporation filed a petition seeking the relief of abolition of Contract Labour System in operation at the canteen run by the corporation and for absorption of the canteen workers as employees. The said petition was rejected. Thereafter, a second petition was filed by the canteen workers seeking the making of a reference under section 10 of the Industrial Disputes Act, 1947 to decide whether the contract between the principal employer and the canteen contractor was sham, nominal and was camouflaged. It was held by the Supreme Court that the second petition is not barred either by *res judicata* or the principle of estoppel.[1189] Explaining the point, RV Raveendran J speaking for the Bench, observed as follows:

> 10. The assumption that there is an absolute bar on inconsistent pleas being taken by a party, is also not sound. What is impermissible is taking of an inconsistent plea by way of amendment thereby denying the other side, the benefit of an admission contained is the earlier pleading. Mutually repugnant and contradictory pleas, destructive of each other may not be permitted to be urged simultaneously by a plaintiff/petitioner. But when there is no inconsistency in the facts alleged, a party is not prohibited from taking alternative pleas available in law. Similarly, on the same facts, different or alternative reliefs can also be claimed. When the case of the workers is that the contract was sham and nominal, they could seek a relief that they be declared as the direct employees of the principal employer; and if that contention failed and it is found that the contract was valid, then they can seek issue a direction to the Central Government to consider their representation for abolition of contract labour. Similarly where the workers contend that the contract between principal employer and the contractor was sham and merely a camouflage to deny them the benefits of labour laws, and if their prayer for relief under CLRA Act is rejected, they can then seek relief under the ID Act. The contention of IOC that on account of the dismissal of the first petition, the second petition for a different relief was barred either by principle of *res judicata* or by principle of estoppel is liable to be rejected.[1190]

The earlier suit for eviction was filed on the ground that sub-tenants had been illegally inducted by the tenant. The suit was dismissed. After that, the West Bengal Premises Act, 1956, was enacted and another suit was filed for eviction, on the ground inter alia that section 13(1)(a) of the Act had been violated. It was held that the earlier dismissal did not operate as *res judicata.*[1191]

The earlier suit was to claim title to certain items of property which were the subject matter of a deed. The suit did not involve questions of coparcenership. Present suit for partition was based on coparcenary. It was held that the earlier suit did not operate as *res judicata.*[1192]

The plaintiff in a suit was the auction purchaser of the premises. He filed a suit for injunction praying for restraining the Electricity Board from enforcing the demand of dues of the previous owner. The suit was dismissed and second suit was filed for declaration that the

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1187. *Jagatjit v Sarabjit*, (1892) ILR 19 Cal 159, p 172 : 18 IA 165, p 176; *Ragho v Gopal*, AIR 1930 Bom 132 : (1930) ILR 54 Bom 162.
1188. *Official Receiver v UOI*, AIR 1961 Cal 432; *Harak Chand v Karodi Mal*, AIR 1958 MP 5.
1189. *Sarva Shramik Sangh v Indian Oil Corp*, AIR 2009 SC 2355 : (2009) 11 SCC 609.
1190. *Sarva Shramik Sangh v Indian Oil Corp*, AIR 2009 SC 2355, para 10 at p 2359 : (2009) 11 SCC 609.
1191. *Shantilal Rampuria v Vega Trading Corp*, AIR 1989 SC 1819 : (1989) 3 SCC 552 : (1989) 3 SCR 632 : (1989) 3 JT 301.
1192. *Shankarrao Daji Saheb Shinde v Vithalrao Ganpatrao Shinde*, AIR 1989 SC 879 : (1989) 2 Sup SCC 162.

notice threatening disconnection for non-payment of dues of previous owner was illegal. It was held by the Supreme Court that the matter that was directly and substantially in issue in the second suit was completely different from the matter that was directly and substantially in issue in the first suit. The reliefs claimed were also different, as the first suit was for a permanent injunction and the second suit was for a declaration and consequential relief. Therefore, the second suit was not barred by *res judicata*.[1193]

Where both the matter directly and substantially in issue and the subject matter are the same in both the suits, the matter in issue will be *res judicata* not because of the identity of the subject matter, but because of the identity of the matter directly and substantially in issue.[1194] Where the matter directly and substantially in issue and the subject matter are both different in the two suits, the matter in issue is not *res judicata* not because the subject matters are different but because the matters directly and substantially in issue in the two suits are different;[1195] but, before a decision given in a previous suit with reference to a particular subject matter could be held to operate as *res judicata* in a subsequent suit relating to a different subject matter, it must be shown that the issue raised in the subsequent suit was directly and substantially in issue in the previous suit. Where it was not put in issue, no bar of *res judicata* can arise, merely on the basis of the reasoning and observations in the previous judgment.[1196]

(B) Matter which Might and Ought to have been Made Ground of Attack or Defence

Even otherwise, it is settled law that in every proceeding the whole of the claim which a party is entitled to make should be made and where a party omits to sue in respect of any portion of the claim he cannot afterwards sue for the portion so omitted. Explanation 4 to section 11 of the CPC also provides that any matter which might or ought to have been made a ground of defence or attack in a former proceeding will be deemed to have been a matter directly and subsequently in issue in that proceeding. Therefore, clearly the claim now made was barred on principle of *res judicata* or principles analogous thereto.[1197]

(a) *Matter Constructively in Issue: Explanation IV*

A matter which might and ought to have been made a ground of attack or defence is a matter which is constructively in issue. In the cases cited in the note under (A)—Actually in Issue: Explanation III, the matters were "actually" in issue for they were actually alleged by one party and denied by the other. It often happens, however, that a matter which might and ought to have been made a ground of attack by the plaintiff to substantiate the relief claimed by him in the suit is not alleged by him as a ground of attack; and also that a matter which might and ought to have been made a ground of defence by the defendant is not set up as a ground of defence. A matter, which might and ought to have been made a ground of attack or defence in the former suit, but which has not been alleged as a ground of attack or defence, will be deemed to have been a matter directly and substantially in issue in such suit (Explanation IV); that is to say, though it has not been *actually* in issue directly and substantially, it will be regarded as having been *constructively* in issue directly and substantially. This section draws no distinction between the claim that *was actually* made in a suit and the claim that *might and*

1193. *Haryana State Electricity Board v Hanuman Rica Mills, Dhanauri*, AIR 2010 SC 3835 : (2010) 9 SCC 145.
1194. *Triloki v Pertab*, (1888) ILR 15 Cal 809 : 15 IA 13.
1195. *Zamindar of Pittampuram v Proprietors of Kolanki*, (1878) ILR 2 Mad 23 : 5 IA 206.
1196. *Jai Prakash v Bishambar Das*, AIR 1954 All 215; *New Victoria Mills v Labour Court*, AIR 1970 All 210. See further under the same heading.
1197. *Meher Rusi Dalal v UOI*, AIR 2004 SC 3491 : (2004) 7 SCC 362 : (2004) 4 AWC 3266 SC : JT 2004 (5) SC 129.

ought to have been made. If the parties had an opportunity of controverting it, that is the same thing as if the matter had been actually controverted and decided.[1198]

The principle and philosophy behind Explanation-IV is to prevent "the abuse of process of the court", through re-agitation of the settled issues.[1199]

A conjoint reading of section 11 and Explanation IV shows that a plea which might and ought to have been taken in the earlier suit, shall be deemed to have been taken and decided against the person raising the plea in the subsequent suit. In a particular case the high court in the writ petition filed by the petitioner challenging the validity of the notice of eviction given to him by government under the Land Encroachment Act, gave liberty to the government to establish its title in civil court which order was also confirmed by the division bench in the writ appeal filed by the government. Although before the date of the disposal of the writ appeal the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 had come into force, the government did not seek liberty from the court to approach the special court under that Act, it cannot be held that on the principle of "might and ought", government was barred from approaching the special court. It also cannot be held that the proceeding before the special court was barred by the principle of *res judicata*, when the government had accordingly filed the civil suit before civil court for declaration of its title and recovery of possession of land in dispute and by operation of law, under sub-section (8) of section 8 of the Act it stood transferred to the special court and the government also invoked the jurisdiction of the special court under sections 7 and 8 of the Act by filing a petition against the petitioner. Thus, the principles of constructive *res judicata*, on the ground that the fact of enforcement of the Act on 6 September 1982 was not brought to the notice of the division bench of the high court at the time of disposal of the writ appeal, would not be available to the petitioner. Further, as a statutory right was created in favour of the state under the Act, to eradicate a public mischief, it cannot be precluded from having recourse to the provisions of the Act by operation of the principle of "might and ought" in Explanation IV of section 11 of the CPC, when its title or interest had not been finally determined by the high court.[1200]

In the first round of litigation when the high court had gone into the question of *mala fide*, though the minister was impleaded as a party, it had remitted the matter for disposal on merits. Obviously the words "might and ought" used in section 11 of CPC stand in the way and therefore, it operates as *res judicata* for raising the same question in the present writ petition. The high court could not have gone into that question, much less giving direction to the appellate authority, namely the Excise and Taxation Commissioner to go into that question.[1201] What ought to be pleaded and argued by a party by challenging an order, is the discretion of the party but all points available would be deemed to have been considered by the court while disposing off such matters.[1202]

The company against whom the money suits claiming *mesne* profits for wrongful occupation of premises by the company were filed, did not challenge the jurisdiction of the court trying the suit, either at the time of filing the suit by the original plaintiff in his capacity as executor

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1198. *Beharilal v Ram Swarup*, AIR 1949 All 265 : (1949) ILR All 144; *Sukra v Ram Harakh*, AIR 1951 All 195 (FB); *Cheria Veetil v Chattu Nambiar*, AIR 1951 Mad 285; *Newington v Levy*, (1870) LR 6 CP 180.
1199. *State of Karnataka v All India Manufacturers Organization*, AIR 2006 SC 1846 : (2006) 4 SCC 683 : (2006) (4) Kant LJ 369.
1200. *Konda Lakshmana Bapuji v Govt of Andhra Pradesh*, AIR 2002 SC 1012 : (2002) 3 SCC 258 : (2002) 1 SCR 651 : JT 2002 (2) 253.
1201. *State of Punjab v Surender Kumar*, (1997) 9 SCC 66.
1202. *Rocky Tyres v Ajit Jain*, AIR 1998 P&H 202.

under a will executed by the owner of the premises, or at the time of substitution of his personal representatives. Hence, the plea by the company in the winding up proceedings for the first time, as to the incompetency of the personal representatives to continue the proceeding on the ground that the premises were transferred *pendente lite*, would squarely come within the mischief of the principle of constructive *res judicata*. A plea deliberately given up in the earlier suit must not be allowed to be raised in the subsequent proceedings.[1203] It would not be just and proper to deny relief to the appellant, which is otherwise due on the ground that earlier it had only assailed the question of eligibility to tax. It is correct that the plea now taken could have been advanced earlier as well, but the fact this was not done should not be a ground to deny the relief which was otherwise due to the appellant. The technical plea of constructive *res judicata* should not stand in the way of appellant in a case of the present nature.[1204]

As suit was filed for eviction from premises let out for commercial purposes, the grounds of eviction was the *bona fide* need of the landlord. It was dismissed. Second suit for eviction would have been competent if a new ground had later arisen for eviction.[1205]

The principle of *res judicata* comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication, even than the principles of *res judicata* on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided. Thus, in a case relating to right to hereditary office, the issue of adoption was already decided by a competent civil court between the same parties, the Sub-Divisional Officer could not decide that issue and without giving any decision thereon could not have allowed the claim. Therefore, the principle of *res judicata* would be applicable to the proceeding before the Sub-Divisional Officer.[1206]

If an earlier judgment has to operate as *res judicata* in the subsequent proceedings, then all the necessary facts including the headings of the earlier litigation must be placed on record in the subsequent proceedings. However, where in the subsequent suit, the trial Judge in *extenso* had dealt with the pleadings of the parties in the earlier suit, it was held that there was no question of non-compliance of the mandatory and basic requirement for the application of the principle of *res judicata*.[1207]

The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce judgment. but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence might have brought forward at the time.[1208] The principle underlying Explanation IV is that *res judicata* is not confined to issues which the court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of the litigation and so, clearly could have been raised that it would be an abuse of the process

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1203. *Re Bajrangbali Engineers*, AIR 1989 Cal 356.
1204. *Jeypore Sugar Co Ltd v Sales Tax Officer*, (1998) 9 SCC 358.
1205. *Sumjmal v Radheysham*, AIR 1988 SC 1345 : (1988) 3 SCC 18 : JT 1988 (2) SC 210 : (1988) 2 UJ 233 SC.
1206. *Ravichandra Dagdu Sonavane v Vithu Hira Mahar*, AIR 2010 SC 818 : (2009) 10 SCC 273.
1207. *Ravichandra Dagdu Sonavane v Vithu Hira Mahar*, AIR 2010 SC 818 : (2009) 10 SCC 273.
1208. *Sobhag Singh v Ranjit Singh*, AIR 1945 PC 132 : (1945) 49 Cal WN 743 (PC); *Thakur Durga Baksh Singh v Rama Umanath*, AIR 1944 Oudh 94 : (1944) ILR 19 Luck 428; *Mathuralal v Jamnadas*, AIR 1941 Ngp 346; *Vinayak v Dattatraya*, (1902) ILR 25 Bom 661, p 667; *Krishna Chandra v Surendra Nath*, AIR 1932 Cal 385 : (1932) 36 Cal WN 72; *Mohor Rai v State of Bihar*, AIR 1968 SC 1281.

of the court to allow a new proceeding to be started in respect of them.[1209] Where the plea which is sought to be raised in the subsequent litigation was not available to the party at the time of the previous litigation, it cannot be constructively *res judicata*;[1210] but, where a plea was available at the time of the suit but was not availed of, the same plea would not be allowed to be taken at a later stage against the execution of the decree passed in that suit.[1211] If the plea of sections 2(25) and 125(3) of the Land Reforms Act has not been raised in a suit of redemption, it operates as constructive *res judicata* on the principle of "might and ought". If it is taken and rejected, it operates as *res judicata* and the same cannot be raised in execution. Even if it is left open, in equity, justice and good conscience, it must not be extended to the mortgage.[1212]

Earlier award (based on compromise) and decree in terms of award were based on surrender by the tenant himself. The tenant cannot thereafter say that it was an eviction decree,[1213] in case where ground of attack or defence which was not available when the earlier proceeding commenced but arose only during its pendency.[1214]

Constructive res judicata—There is no question of constructive *res judicata* where there is no adjudication in the earlier proceedings.[1215] The principle of constructive *res judicata* means any matter which "might and ought" to have been made a ground of defence or attack must be made in the same suit and cannot be brought in the subsequent suit as it would be deemed to be a matter directly and substantially in issue in the former suit.[1216] The appellant had applied for a grant of mining lease for chromite extraction in the State of Orissa. The lease was originally granted to Tata Iron and Steel Company (TISCO) for a period of 20 years in 1953. TISCO in 1993 applied for a second renewal of lease for the entire area. The central government approved the renewal but for a limited period of 10 years. The central government, on a complaint, reviewed this order and granted approval for the renewal of lease for TISCO, reducing the area by half and directed the rest of the area be made available to other industries. TISCO challenged this order before the high court. The other steel manufacturers, including the appellant, joined the proceedings by filing cross petitions.

The high court held that the order of the Central Government cannot be sustained in law and requires re-considerations. An expert committee was constituted to consider the submissions of all the parties. The Central Government acted on the report of the committee and requested the state government to grant renewal of mining lease in favour of TISCO for a period of 20 years over a lesser period. Accordingly, the state sliced down the claim of TISCO for allotment by 50%. The remaining 50% was to be distributed between the other applicants on pro-rata basis. The appeal to the Supreme Court by Special Leave, on behalf of TISCO was dismissed. Neither the appellant nor any of the contesting respondents challenged the order of the State to the extent it sliced down their claim for allotment by 50% from the available area.

During the pendency of the aforesaid SLP, the appellant filed a writ petition in the high court, after its representation to the central government for grant of mining lease in the entire

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1209. *Greenhall v Mollard*, (1947) 2 All ER 255; *State of Uttar Pradesh v Nawab Hussain*, AIR 1977 SC 1680 : (1977) 2 SCC 806 : (1977) 3 SCR 428.
1210. *Gurbindar v Lal Singh*, AIR 1959 P&H 123 : (1958) ILR Punj 2258.
1211. *Harihar Prasad v Jodh Singh*, AIR 1971 Pat 284; *Sarjug Singh v Basisth Singh*, AIR 1970 Pat 237 : (1968) ILR 47 Pat 178.
1212. *Victoria v KV Naik*, (1997) 6 SCC 23.
1213. *Kamlabai v Mangilal*, (1987) 4 SCC 585.
1214. *Subbaraju v State of Andhra Pradesh*, AIR 1989 AP 233.
1215. *Kewal Singh v Lajwanti*, AIR 1980 SC 161 : (1980) 1 SCC 290 : (1980) 1 SCJ 486.
1216. *Shalini Agarwal v Sri Shandar Industries Pvt Ltd*, Civil Revision No. 157 of 2019, decided on 8 December 2020 (Uttarakhand HC).

area was turned down and state government sliced down the claim of the four parties covered by the order by 50%. The petition was rejected on the ground of *res judicata* in view of *TISCO*'s case. The issue before the Supreme Court was whether the writ petition filed by the appellant before the high court was barred by the *res judicata* and whether the said petition was barred by the principle of constructive *res judicata*.

It was held that the *TISCO*'s case did not raise a question for considering the assessment of the relative needs of the appellant and the other respondents for chrome ore. Such an issue was not expressly adjudicated upon and the findings thereon, cannot be made the subject matter of fresh proceedings between the parties.[1217]

Where a decree operated as *res judicata*, its operativeness does not depend on the correctness of the former decision.[1218]

Principle of constructive *res judicata* applies to execution proceedings.[1219] Doctrine of *res judicata* partakes of the character of substantive law, though it is usually regarded as belonging to procedure, and applies to proceedings under the Hindu Marriage Act, 1955.[1220] Judgment of a high court is binding in all proceedings in the same case; more so, upon a judgment unsuccessfully challenged before the Supreme Court.[1221] The issue involved in two earlier suits was same as in the instant suit. The party filed three suits accepting decree in earlier two suits and allowed opportunity at his hand to be lost to contest by not filing appeal. It was held that the party was estopped by the principle of constructive *res judicata* to reopen same issue in respect of same property between the same parties.[1222] The courts in an earlier litigation between the appellant and a partnership firm recorded the clear finding about disruption of joint Hindu family resulting in separation of five brothers and carrying on the family business by them as partners. Subsequent suit was filed by the appellant in capacity as son of one of the five brothers, for a declaration that he along with the other appellant were members of larger joint family and as such, entitled to the share in the business and properties of the firm. The Supreme Court held that the finding in the previous suit sufficiently barred the present suit as the principles of *res judicata* were applicable.[1223]

In the earlier suit, issue regarding "Maurisadar" could not be raised regarding the land in defendants' possession. It was held that as regards that issue, the earlier decision cannot be *res judicata*.[1224] But, when the question raised in the suit could have been raised before revenue authorities in the earlier proceedings and the revenue authorities had competence to decide that, the same issue could not be raised in the subsequent civil suit due to bar of constructive *res judicata*.[1225]

Deputationists from the State Government were absorbed in the Food Corporation of India as Assistant Grade III. Claiming absorption in the post of Assistant Grade II, they filed a writ petition which was allowed. Second writ petition was filed by them claiming grant of advance increment in accordance with the Regulation. It was held by the Supreme Court that the plea

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1217. *Ferro Alloys Corp Ltd v UOI*, [1999] 2 LRI 163.
1218. *Kalpu v Sanaurar Khan*, AIR 1982 All 307.
1219. *Kamlabai v Mangilal*, (1987) 4 SCC 585; *Raghunath v Damodar*, AIR 1978 SC 1820 : (1979) 1 SCC 508.
1220. *G Vijaya Lakshmi v G Ramachandra Sakshar Sastry*, AIR 1981 SC 1143 : (1981) 2 SCC 646 : (1981) SCR 3 223.
1221. *AR Antulay v RS Nayak*, AIR 1988 SC 1531 : (1988) 2 SCC 602 : JT 1988 (2) 325.
1222. *Shyama Devi v Seventh Addl District Judge, Allahabad*, AIR 1998 All 392.
1223. *Jai Kishan Dass v Nirmala Devi*, (1984) 1 SCC 682.
1224. *Nagta Singh v Shiv Singh*, AIR 1981 All 75.
1225. *Abdul Rahman v Prasony Bai*, AIR 2003 SC 718 : (2003) 1 SCC 488 : (2003) 1 SCW 14.

of the bar of *res judicata* and/or O II, rule 2 of the code was not tenable, as the said claim could not have been made in the earlier writ petition when the petitioners were not certain as to the grade in which they would be fitted. Moreover, since the plea of bar of *res judicata* had not been taken before the high court, it could not be raised for the first before the Supreme Court.[1226]

Where a petition was made prior to maturity of insurance policy claiming directions to the LIC to make a statement on oath under section 226(3)(vi) of the Income Tax Act, 1961, petition was dismissed after issuing direction to the LIC. The ITO had not withdrawn notice issued to the assignee of policy-holder under section 226(3) of the Income Tax Act, despite the filing of the requisite statement by an LIC petition for policy payment, together with interest. This petition against the LIC was dismissed as withdrawn, as a result of withdrawal of notice by ITO. It was held that subsequent petition raising the question of LIC's liability to pay interest upon principal amount was not barred by *res judicata*.[1227]

A person who in earlier proceedings (between the same parties) takes the plea that he is not a tenant of the suit land but was cultivating it only as a member of the owner's family cannot in a later suit take the plea that he is a permanent tenant. Constructive *res judicata* bars such a plea.[1228]

In execution of a money decree passed against a member of a scheduled tribe, his property was sold without prior permission of the competent authority, as required by Orissa Regulation of 1956. Judgment-debtor raised no objection about the want of such permission, either in the suit or in the execution. It was held that he cannot subsequently raise such a plea, which was barred by constructive *res judicata*, as the basic issue was validity of the sale.[1229]

In a Calcutta case, proceedings were taken under section 8(i), West Bengal Land Reforms Act, 1955. The holder of the pre-emption alleged that the pre-empted land was non-agricultural. Issue was not raised in earlier proceedings under section 24 of WB Non-Agricultural Tenancy Act, 1949. It was held that it could not be raised in proceedings under section 8(i). The party whose representation or conduct led to earlier judgment is precluded from pleading anything contrary to his representation or conduct—not so much because of his earlier representation or conduct, as because of the judgment which precludes the court from adjudicating any issue to be raised by such contrary proceedings.[1230]

Appointment of a receiver depends on the circumstances existing at the time when the matter falls for consideration. The fact that on a particular date, such appointment was refused does not mean that the refusal operates as *res judicata* even when the circumstances have undergone change.[1231]

Where there is no adjudication in the earlier proceedings, there is no *res judicata*.[1232] Without any application for recalling or setting aside the impugned order or review, the prayer made in the application under section 86(1) of the Representation of the People Act, 1950 cannot be granted. No challenge has been thrown to the said order. The unsuccessful candidate is a respondent in the election petition. No appeal has been filed and has such no dispute with regard to the said order can be made or entertained at this stage and the contention of the respondent has become barred by principle of *res judicata*.[1233] If the court came to the

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1226. *Food Corp of India v Ashish Kumar Ganguly*, AIR 2009 SC 2582 : (2009) 7 SCC 734.
1227. *LIC v Gangadhar Vishwanath Ranade*, AIR 1990 SC 185 : (1989) 4 SCC 297 : (1989) Supp 1 SCR 97.
1228. *Patel Naranbhai Jhingabhai v Patel Gopaldas Venidas*, AIR 1982 Guj 340.
1229. *K Adikanda Patra v Gandua*, AIR 1983 Ori 89.
1230. *Bharat Bhushan Ray v Nirmal Kanti Chakraborti*, AIR 1981 Cal 347.
1231. *P Anirudha Adhikari v Amarendra Adhikari*, AIR 1988 Ori 12.
1232. *Kewal Singh v Lajwanti*, AIR 1980 SC 161 : (1980) 1 SCC 290 : (1980) 1 SCJ 486.
1233. *Zainal Abedin v Srisree Kumar Mukherjee*, AIR 1998 Cal 339.

conclusion that the applicant had not pleaded ingredients of O XXXVIII, rule 3(2) of the CPC, the principle of *res judicata* do not come into play. It is well- established that where there is a dismissal on technical grounds and not on merits, principles of *res judicata* do not apply. The same principle would operate in case of application of principles of constructive *res judicata*.[1234]

Where, in an earlier suit, the tenant while invoking the power of the rent court under section 11, Bombay Rent Control Act, 1947, did not press the issue of standard rent (which could have been dealt with under section 11), he cannot assert the same right again. He is deemed to have waived his right to such determination. The second assertion is barred by a *res judicata* or at least a principle analogous to *res judicata* and estoppel.[1235]

Where a matter has been actually in issue, it is necessary to constitute the matter *res judicata* that it should have been heard and finally decided; but, where a matter has been constructively in issue, it could not, from the very nature of the case, be heard and decided; and it will be *deemed* to have been heard and decided against the party omitting to allege it except when an admission by the defendant obviates a decision.[1236] This is in accordance with the view of the section taken by the high courts of Allahabad and Bombay.[1237] In *Kailash Mondal v Baroda Sundari Dasi*,[1238] Banerjee J observed that though a matter which might and ought to have been made a ground of attack or defence, should be *deemed* as provided by Explanation IV to have been *directly and substantially* in issue, yet it could not be deemed to have been "heard and finally decided" as there was nothing in Explanation IV to suggest that such matter should *also* be deemed to have been *heard and finally decided*. This view was followed in a subsequent case,[1239] but it is obviously incorrect, and it was rejected by the same court in later cases,[1240] and it has been dissented from by the High Court of Lahore.[1241] Moreover, in one case the judicial committee took exception to the language in which the observations of Banerjee J were couched saying that the language was not so careful as it might have been.[1242] The Privy Council case illustrates the rigidity with which the principle laid down in Explanation IV is to be applied. In that case, it was held that where a matter which might and ought to have been made a ground of attack is not raised in the plaint, and an application is afterwards made to amend the plaint, but it is refused, the matter will be deemed to have been directly and substantially in issue in that suit.[1243]

ILLUSTRATIONS

(i) *X*, a Hindu, dies leaving a widow. The widow makes a gift to her brother *B*, of certain property belonging to her husband. After the death of the widow, *A*, alleging that he and *X* were members of a joint family sues *B* for a declaration that he is entitled to the property by right of survivorship. The court finds that *A* and *X* were separate, and *A*'s suit is dismissed. Subsequently,

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1234. *State Bank of India v Madhya Pradesh Iron and Steel Works Pvt Ltd*, AIR 1998 MP 93.
1235. *Yakubhai Ahmedji Mistri v Imamuddin Hussenuddin Kadri*, AIR 1991 Guj 180.
1236. *Govt of the Province of Bombay v Pestonji Ardeshir Wadia*, AIR 1949 PC 143 : 76 IA 85 : (1949) 51 Bom LR 635 : (1949) 53 Cal WN 489.
1237. *Sri Gopal v Pirthi Singh*, (1898) ILR 20 All 110, p 113; confirmed on appeal in (1902) ILR 24 All 429 (PC); *Guddappa v Tirkappa*, (1901) ILR 25 Bom 189.
1238. *Kailash Mondal v Baroda Sundari Dasi*, (1897) ILR 24 Cal 711.
1239. *Woomesh v Barada*, (1901) ILR 28 Cal 17.
1240. *Jamadar Singh v Serazuddin*, (1908) ILR 35 Cal 979; *Mohim Chandra v Anil*, (1908) 13 Cal WN 513; *Shib Chandra v LakhiPriya*, AIR 1925 Cal 427 : (1924) 40 Cal LJ 507; *Rayyan Naidu v Suryanarayana*, (1914) ILR 37 Mad 70; *Maung No v Maung Po*, AIR 1923 Rang 236 : (1923) 1 Rang 363.
1241. *Gobindlal v Baldeo Singh*, (1915) PR 12, p 69; *Muhammad v Ghulam Bi*, (1929) ILR 11 Lah LJ 97.
1242. *Fateh Singh v Jagannath Baksh Singh*, AIR 1925 PC 55 : (1925) ILR 47 All 158 : 52 IA 100.
1243. See Illustration (iv) below.

A sues *B* for the recovery of the same property, alleging that as the nearest reversionary heir of *X*, he became entitled to the property on the death of the widow, and that the alienation made by her in favour of *B* was not binding upon him. The suit is barred as *res judicata*. *A* might and ought to have set up the title by heirship as a ground of attack in the former suit. It will therefore be deemed to have been "directly and substantially in issue" in that suit, and it will also be deemed to have been "heard and finally decided" against *A*.[1244]

(ii) *A*, a Hindu, dies leaving a widow and a brother, *B*. The widow sues *B* for recovery of certain property alleging that it was the self-acquired property of her husband, and that a will alleged to have been executed by her husband and relied on by *B* is a forgery. *B* alleges that the property was joint family property, and that on the death of *A* he became entitled thereto by right of survivorship, but he does not claim any title to the property under will. The court finds that the property was the self-acquired property of *A*, and decrees the widow's claim. Subsequently, *B* sues the widow to recover the same property from her, now claiming the same as a devisee under *A*'s will. The suit is barred as *res judicata*. *B* might and ought to have set up the claim under the will as a ground of defence in the former suit. When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge then to bring forward.[1245]

(iii) *A* sues *B* to recover certain property belonging to the estate of *C*, alleging that his father had been adopted by *C*'s brother, *D*, to whom the property descended on *C*'s death. The suit is dismissed on the ground that the adoption is not proved. *A* then sues *B* to recover the same property claiming it as *C*'s bandhu. The suit is barred as *res judicata*. *A* ought to have claimed the property in the first suit in the alternative as *C*'s bandhu.[1246]

(iv) A, claiming as the next reversioner of a deceased Hindu, sues his widow for a declaration that a gift by her to *D* of property inherited by her from her husband was void. *D* was joined as a party defendant, and so also, *G* who claimed to be a reversioner nearer than *A*. As to *G*, *A* alleged that he was in collusion with the widow and the donee, *D*. The defence was that *G* was the nearest reversioner and the only person entitled to dispute the gift. In this state of pleadings, the widow died. On the death of the widow, the question of collusion became comparatively unimportant; for if *G* was the nearest heir, *A* could get no title to the property. *A* then applied for leave to amend the plaint by setting forth the death of the widow and claiming that he had become entitled to institute a suit for possession and by setting up a family custom that he was equal in degree with *G*. The application was rejected on the ground that it was an attempt to introduce a new case. The question then arose whether it was worthwhile contesting the suit. *A*'s counsel admitted that, apart from custom, *A* was one degree more remote than *G*, and that if *A* could not make out the case of a family custom, the suit must fail. The trial judge thereupon dismissed the suit with costs, but gave liberty to *A* to bring a fresh suit for possession. Subsequently, *A* sued *D* and *G* for possession of one-half of the property, founding his title on family custom. The Privy Council held that the second suit was barred, for *A* "might and ought" to have alleged the family custom in the first suit, it being clearly a "ground of attack" in that suit. As the first suit was dismissed and not withdrawn under O XXIII, the trial judge had no power to grant leave to bring a fresh suit.[1247]

(v) *A* sues *B*, *C*, *D* and *E* as joint tenants for rent on the basis of a pottah. The property in respect of which the rent is claimed consists of 25 kittas of land. None of the defendants appeared in the suit, and a decree was passed against them *ex parte*. Subsequently, *A* sued *B*, *C*, *D* and *E* for rent for a subsequent period. *B* appeared and contended that he did not hold the land jointly with *C*, *D* and *E*, and that he was liable only for one-fourth rent of the whole area. *B* is

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1244. *Guddappa v Tirkappa*, (1901) ILR 25 Bom 189. The Bombay ruling was dissented from in *Ramaswami v Vythinatha*, (1903) ILR 26 Mad 760, a case on different facts altogether. The grounds of dissent, it is submitted, are not satisfactory; *Masilamania v Thiruvengadam*, (1908) ILR 31 Mad 385.
1245. *Srimut Rajah v Katama Natchiar*, (1866) 11 MIA 50, 73; *Doorga Persad v Doorga Konwari*, (1870) ILR 4 Cal 190 : 5 IA 149.
1246. *Masilamania v Thiruvengadam*, (1908) ILR 31 Mad 385.
1247. *Fateh Singh v Jagannath Baksh Singh*, AIR 1925 PC 55 : (1925) ILR 47 All 158 : 52 IA 100; *Mautorni v Krishna Ballab Rai*, AIR 1949 Pat 340 : (1948) ILR 27 Pat 835; *SR Singh v Royal*, AIR 1972 Del 150.

precluded from setting up the case of separate tenancy, because he might and ought to have set up that case in the previous suit. It is immaterial that the decree in the previous suit was passed *ex parte*.[1248]

(vi) In April 1921, a consent order was made referring to arbitration, three suits relating to syndicates of two, six, and 10 firms each. In a chamber summons for extension of time for making the award, some of the defendants objected that the syndicate of 10 was an illegal association as it was not registered under section 4 of the Companies Act, 1956, although it was composed of more than 20 persons. These defendants, therefore, objected that the reference was invalid; but, in August 1927, a consent order was made superseding the reference of April 1921 and referring to arbitration the same three suits along with two other suits also. In this consent order, all the parties agreed that the issue as to the legality of the syndicate should be treated as *res judicata*. Nevertheless, a suit was filed by one of the parties to declare the reference to arbitration as invalid on the ground that the syndicate was illegal. It was held that the suit was barred by *res judicata* as the question was not raised when the consent order of April 1921 was taken and that on this point, the order was not superseded but given effect to by the order of August 1927. It was also held that the number of persons composing a syndicate is a mixed question of law and fact which could be the subject of a valid compromise.[1249]

(vii) *A*, a Mohammedan heir, sued to recover his share of inheritance from the widow of the deceased who was in possession of her husband's estate in lieu of dower. *A*'s suit was decreed subject to the payment of Rs 35,223 less the profits of the property in the possession of the widow from the date of the decree to the date of delivery of possession. More than 20 years later A's legal representative sued the representatives of the widow alleging that the amount of the decree had been satisfied out of the usufruct. The widow's representatives urged that interest should be added to the decretal amount which was the balance of the dower debt. The Privy Council held that the claim to interest might and ought to have been made a ground of defence in the first suit and that it was barred by *res judicata* in the second suit.[1250]

(viii) One PK filed a suit for a declaration that certain lands belonged exclusively to his father and that he became entitled to them as his heir and prayed for an injunction restraining the defendants from interfering with his possession. The court negatived the exclusive title set up by the plaintiff. Thereafter, PK filed a second suit claiming that he had acquired an exclusive title to the property by adverse possession. This was a plea available to him when he filed the previous suit and it was held that it was constructively *res judicata*.[1251] First suit was filed on the basis that the suit property belonged to T, plaintiff's father, and on his death plaintiff succeeded to it. The subsequent suit was filed on the basis that T was a mortgagee in possession, and the mortgage not having been redeemed within time, the plaintiffs, as descendants of T, became full owners. It was held that subsequent suit was barred by *res judicata*.[1252]

(b) Test Rules.—The question whether a matter *might* have been made a ground of attack or defence in the former suit rarely presents any difficulty. Whether it ought to have been made a ground of attack or defence depends on the facts in each case. As a general rule, every ground of attack with reference to the title sued on must be pleaded if necessary in the alternative;[1253] for the plaintiff will not be allowed to make out a fresh case afterwards. Thus, if a plaintiff sues for possession on the ground of ownership, and his suit is dismissed, he cannot afterwards claim possession as mortgagee, for it was an alternative ground of attack which he did not raise in the first suit.[1254] If the matter raised as a defence would have defeated, varied, or in any way

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1248. *Sarojini v Lakhi Priya*, AIR 1925 Cal 427 : (1924) 29 Cal WN 253 : 85 IC 123.
1249. *Raoji v Ratansi*, (1930) ILR 54 Bom 696 : 126 IC 305.
1250. *Nawazi Begum v Dilafroz Begam*, AIR 1930 PC 177 : (1930) ILR 52 All 273 : 126 IC 430 : 57 IA 181.
1251. *Popat Kala v Bachu Rugnath*, AIR 1958 Bom 152 : (1957) ILR Bom 548.
1252. *Sivatham v Kaliammal*, AIR 1984 NOC 38.
1253. *Alluni v Kunjusha*, (1884) ILR 7 Mad 264; *Shah Jawaharlal v Shah Chaganlal*, AIR 1959 Raj 197 : (1959) ILR Raj 224.
1254. *Gosbuvarali v Adhiklal*, AIR 1948 Pat 302 : (1947) ILR 26 Pat 24; *Imam Khan v Ayub Khan*, (1897) ILR 19 All 517.

affected the decree in the previous suit, it ought to have been raised.[1255] Conversely, if the decree in the previous suit is inconsistent with a defence which ought to have been raised, that defence must be deemed to have been raised and finally decided, and is barred by *res judicata*.[1256] Thus, if the plaintiff sues on a contract and obtains a decree, the defendant cannot afterwards sue for rescission of the contract on the ground that it did not fully represent the agreement between the parties.[1257] Similarly, if it is found that in a former suit for eviction by the landlord, the defendant-tenant had failed to raise the plea that the landlord before filing the suit ought to have terminated the contractual tenancy which he might and ought to have raised, he cannot be allowed to raise that plea in a subsequent suit for eviction.[1258] If a matter could have been set up as a ground of attack or defence in the former suit, and if its introduction into that suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which ought to have been made a ground of attack or defence in that suit, unless the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion.[1259] Thus, in Illustration (i), the title by heirship could have been made a ground of attack in the alternative in the first suit; it was necessary to do so for the complete and final disposal of all questions as to *A*'s right to the property, and it was not forbidden by any rule of pleading; and, further, the question in both suits being the same, namely, whether *A* was entitled to the property or *B*, the title by survivorship and the title by heirship could not be said to be so dissimilar that their union might lead to confusion. It may appear at first sight that the two matters are dissimilar, for the title by survivorship and the title by heirship have to be supported by different evidence; but, the test of evidence which was relied on in some old cases[1260] is not a satisfactory test, and though it was advanced in argument in two cases before the judicial committee of the Privy Council, no notice was taken of it in the judgments.[1261] The reason is when a plaintiff sets up alternative grounds of attack, or when a defendant sets up alternative grounds of defence, the evidence in support of such alternative grounds would in most cases be different; but, it has been said where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit. The reason given is that the test of determining whether both the grounds ought to have been set up in the same suit is afforded by provision of O II, rule 1 and the provisions of that rule as to the framing of suits are only to be applied "as far as practicable".[1262]

It is clear that it cannot be said of any matter that it ought to have been set up as a ground of attack in a former suit, if its introduction would have been incongruous to or destructive

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1255. *Shib Chandra v Lakhi*, AIR 1925 Cal 427 : (1925) 29 Cal WN 253; *Gopi Lal v Benarsi Prasad*, (1906) ILR 31 Cal 428.
1256. *Mahim v Anil Bandhu*, (1909) 13 Cal WN 513; *Maung No v Maung Po*, AIR 1923 Rang 239, (1923) 1 Rang 363.
1257. *CJ Phillips v AE Mitchell*, AIR 1932 Cal 889 : (1932) ILR 59 Cal 985.
1258. *RK Jain v MH Singh*, AIR 1971 Del 213.
1259. *Goshwarali v Adhiklal*, AIR 1948 Pat 302 : (1947) ILR 26 Pat 24; *Rajah Chattar Singh v Diwan Roshan Singh*, AIR 1946 Ngp 277 : (1946) ILR Nag 159; *Priombada v Joburilal*, AIR 1941 Cal 574; *Rai Bajrang Bhadur v Hubraj Kuer*, AIR 1944 Oudh 281; *Kameswar v Rajkumari*, (1893) ILR 20 Cal 79, p 85 : 19 IA 234; *Moosa v Ebrahim*, (1913) ILR 40 Cal 1 : 39 IA 237; *Guddappa v Tirkappa*, (1901) ILR 25 Bom 189, p 192; *Srimut Rajah v Katama Natchiar*, (1866) 11 MIA 50, p 73; *Woomatara v Unnopoorna*, (1873) 11 Beng LR 158, p 167; *Girdhari Lal v Umdajan*, AIR 1921 Lah 17 : (1921) 3 Lah LJ 215, p 221; *Debendra Nath v Nagendra Nath*, AIR 1933 Cal 900 : (1933) 60 ILR Cal 1158.
1260. *Muttu Chetti v Muttan Chetti*, (1882) ILR 4 Mad 296, p 299; *Naro v Ramchandra*, (1889) ILR 13 Bom 326, p 329.
1261. *Srimut Rajah v Katama Natchiar*, 11 MIA 50, (1873) 11 Beng LR 158.
1262. *Masilamania v Thiruvengadan*, (1908) ILR 31 Mad 385, p 396; *Ramaswami v Vythinatha*, (1903) ILR 26 Mad 760; *Rangaswamy v Appaswamy*, (1916) Mad WN 286; *Raman v Bacha*, AIR 1921 Pat 326; *Anant v Mahableshwar*, AIR 1931 Bom 114 : (1930) 32 Bom LR 1473.

of the matter of that suit.[1263] Thus, a person claiming property on the allegation that it is *wakf* property and that he is the manager thereof is not bound to claim the same property in the same suit alternatively in his own right in the event of its being held that the property was not *wakf* property. As observed:

> Having asserted that the... property was *wakf* property, [he] could not have consistently claimed the same property as [his] personal property except possibly in an alternative form. [He was], however, not under an obligation to adopt the latter course.

The mere fact that he could have claimed the property *in the alternative* as his own property is no ground for saying that he *ought* to have done so.[1264] And so a suit to recover possession of properties on a claim that they belonged personally to the plaintiff is not barred by reason of a decision in a previous suit in which they were claimed as belonging to a *Tarwad* of which he was a member;[1265] and likewise, where a person sued for partition claiming that he was the legitimate son of the deceased and the suit was dismissed, a subsequent suit for partition on the ground that he was the illegitimate son of the deceased is not barred as the two claims are inconsistent with each other.[1266] A suit for accounts on the footing that the plaintiff was a sub-partner of the defendant is not barred under *Explanation IV* by a previous suit wherein the claim was made on the footing of partnership.[1267] Again, *Explanation IV* does not apply, unless the parties are litigating under the same title. Thus, if *A* sues *B* for a declaration that he is the owner of a certain property, he is not bound to plead in the alternative that if he is not the owner he is a permanent tenant. If his suit in the capacity of owner is dismissed and *B* files a suit against him for possession, he may plead in the second suit that he is a permanent tenant and defend the suit in that capacity.[1268] Where a person who is joined as a defendant in a mortgage suit as being interested in the equity of redemption is entitled to the property by a paramount title, but his title is not disputed in the plaint, he is not bound to set it up as a ground of defence in that suit;[1269] but, if there is an allegation in the plaint derogatory to the title of the prior mortgagee and the latter consents to have his title decided, then he will be bound by the decision and it would be *res judicata*.[1270] Where a party acquires a title during the pendency of a suit and fails to put it forth in that suit, he is not barred from raising it in a subsequent suit.[1271] It has also been held that the principle of constructive *res judicata* has no application to reliefs which are the discretion of the court. If there is no express decision with reference thereto, *Explanation IV* does not bar a fresh suit thereof.[1272]

1263. *Han Soran Das v Bhagwat Prosad*, AIR 1942 Cal 286; *Deputy Commr of Kheri v Khanjan Singh*, (1907) ILR 29 All 331 : 34 IA 72; *Lala Soni Ram v Kanhaiya*, 40 IA 74 : (1913) 17 Cal WN 605 (PC); *Diwan Chand v Hari Chand*, (1914) PR 102, p 383; *Aishan v Muhammad*, (1916) PR 94, p 282; *Re Ayya Nadar*, AIR 1953 Mad 933; *Karimi Banawali v Gulasu Lakhano*, AIR 1977 Ori 128 : (1977) ILR Cut 74.
1264. *Kanhaiya Lal v Ashraf Khan*, AIR 1924 All 355 : (1924) ILR 46 All 230, p 231; *Dola v Balya*, AIR 1922 Bom 29 : (1922) ILR 46 Bom 803; *Bankey Prasad v Thakur Prasad*, AIR 1954 Pat 12.
1265. *Madhavan v Chathu*, AIR 1951 Mad 285 : (1950) 2 Mad LJ 501 : (1950) 63 Mad LW 956 : (1950) Mad WN 713.
1266. *Kokila v Rajabathar*, AIR 1957 Mad 470 : (1957) ILR Mad 968.
1267. *Veeraraghaviah v Seshachalam*, AIR 1957 AP 76.
1268. *Afzalunnissa v Fayazuddin*, AIR 1931 Lah 610 : (1932) ILR 13 Lah 195.
1269. *Asmatulla v Gamir*, AIR 1929 Cal 672 : (1929) 33 Cal WN 659; *Ramana v Venkatanarayana*, AIR 1927 Mad 301 : (1927) 52 Mad LJ 52; *Sohannessa v Abdul Hamid*, AIR 1932 Cal 12 : (1932) ILR 58 Cal 1222
1270. *Rameshwar Rai v Hanakhlal*, AIR 1942 Pat 226 : (1941) ILR 20 Pat 841; *Durga Prasad v Ghasi Ram*, AIR 1950 All 314. See note to O XXXIV, rule 1, "Persons having an interest either in the mortgage security or in the right of redemption".
1271. *Raman Nair v Lakshmi Amma*, AIR 1952 TC 96 : (1951) ILR T C 554.
1272. *Mathura Rai v Ramakrishna*, AIR 1961 Bom 97; *Subbaiah v Champaka*, AIR 1961 Mad 413.

The decisions bearing on this branch of the subject are numerous. An examination of these decisions leads to the following four rules:

Rule I : Where right claimed in both the suits same

Where the *right claimed* in both suits is the *same*, the subsequent suit will be barred as *res judicata*, though the right in the subsequent suit is sought to be established by a title *different* from that in the first suit. That would also be so where there is identity of title though the property in the subsequent proceeding is different.[1273] The dismissal of a plaintiff's suit for the recovery of land based on an alleged lease is no bar to a subsequent suit for the recovery of the same land on the strength of his general title, the reason given being that the *legal relation* put forth in the subsequent suit is *different* from that in the former suit (see illustration 6).

In the following illustrations it is assumed that the other conditions of *res judicata* are fulfilled.

ILLUSTRATIONS

(i) Illustrations (i), (iii) and (iv) above, are cases under this rule.[1274]

(ii) A Hindu, H dies leaving a widow W, and a son-in-law S, the husband of a predeceased daughter D. W sues S, as the heir of her husband H, to recover certain property, alleged that it forms part of the estate of H. The defence is that H had made a gift of the property to his daughter D, and that on D's death, S as D's husband, became entitled to the property as D's heir. W alleges that the deed of gift relied upon by S is a forgery. The court finds that the deed of gift is genuine, and the suit is dismissed. W then sues S to recover the same property, alleging that as it has been found that the property belonged to D, she is entitled to the property as the heir of her daughter D. The suit is barred as *res judicata*. Here, the right claimed in both the suits is the same, namely, the right to the property in question. In the first suit, it was claimed by W as her husband's heir. In the second suit it is sought to be established by her by a different title, namely, as her daughter's heir. W "might and ought" to have claimed in the alternative as her daughter's heir in the former suit. Having failed to do so, her title, as her daughter's heir, will be deemed to have been "directly and substantially" in issue in the former suit, and it will also be deemed to have been heard and finally decided against her in that suit,[1275] but the Madras case falls within the *exception* rather than the *rule*.[1276]

(iii) A lends Rs 50,000 to a Hindu widow on a mortgage to her husband's property. The widow then surrenders the property to B, the reversionary heir of her husband, on B agreeing to pay all her debts. A sues B and the widow to recover Rs 50,000 by *sale* of the mortgaged property. A also asks for a personal decree against the widow, but he does not ask for a *personal* decree against B. B is joined as a defendant on the ground that the mortgaged property formed part of the property transferred by the widow to him. The court finds that the mortgage is not binding upon the husband's estate and the suit against B is accordingly dismissed. As against the widow, a personal decree is passed for the amount of the loan. A realises Rs 5,000 only from the widow, and after her death he sues B for the balance of the money due under the decree (that is to say A asks for a *personal* decree against B for the balance), alleging that B was personally liable under the agreement with the widow to pay her debts. The suit is barred as *res judicata*, for A "might and ought" to have alleged in the former suit that if the mortgage was not binding on the estate B was at all events personally liable to pay the debt in consequence of the agreement which he (B) had entered into with the widow.[1277]

1273. *Ghanshiam Singh v Har Piarey*, AIR 1974 All 229.
1274. *Guddappa v Tirkappa*, (1912) ILR 25 Bom 189; *Masilamania v Thiruvengadam*, (1908) ILR 31 Mad 385; *Fateh Singh v Jagannath Baksh Singh*, AIR 1925 PC 55 : (1925) ILR 47 All 158 : 52 IA 100.
1275. *Denobundhoo v Krishtomonee Dossee*, (1877) ILR 2 Cal 152; dissented from *Ummatha v Cheria* (1882) ILR 4 Mad 308,
1276. See Illustration (vi) below.
1277. *Kameshwar Pershad v Rajkumari*, (1893) ILR 20 Cal 79 : 19 IA 234.

Note—Suppose that in the above illustration, A had applied in the first suit for amendment of the plaint by adding a claim for relief against B personally, but the application was refused; in such a case, it has been held that the subsequent suit would not be barred.[1278] But these decisions, it is submitted, are not correct.[1279]

(iv) A in 1896 makes a gift of her property to B who mortgages it to C. C sues for sale on his mortgage and purchases the property himself in 1918. A who is still in possession sues C in August 1918 for a declaration of her title on the ground that the deed of gift was null and void. In the course of the suit, A applies for leave to amend her plaint and to plead an alternative case that even if the deed of gift is valid, C's title is extinguished by her adverse possession for 12 years. The application is refused and the suit dismissed. A continues in possession and in August 1930, C files a suit to recover possession from A. A again pleads adverse possession. A's plea is a valid defence, for although she is debarred from pleading that she had acquired a title by adverse possession in August 1918, it is still open to her to prove that she has acquired title by adverse possession in August 1930.[1280]

(v) A, alleging that he is the *kitlima* adopted son of B, claims the whole estate of B, and sues for the administration of B's estate. A fails to prove the adoption and the suit is dismissed. A afterwards sues for administration of the same estate claiming one-half of the estate as the *apatitha* adopted son of B. The suit is barred as *res judicata*.[1281]

(vi) A sues B to recover certain lands from him, alleging that B held the lands under a lease and that the lease had expired. The lease is not proved, and the suit is dismissed. Subsequently, A sues B to recover the same land on the strength of his general title. The suit is not barred as *res judicata*.[1282]

(vii) A filed a suit for a declaration that he was entitled to certain lands as heir to X. The suit was dismissed. Then he sued for an injunction alleging that he had been in possession for over the statutory period and had thereby acquired title by adverse possession. This title was available to him even at the time of the previous suit. The later suit is barred by *res judicata*.[1283] For other cases under this Rule.[1284]

Rule II : Where ground of attack in a subsequent suit could be a ground for defence in the former suit

If a matter which forms a ground of attack in the subsequent suit could have been alleged as a ground of defence in the former suit, but was omitted to be so alleged in that suit, it will be *deemed* to have been directly and substantially in issue in that suit within the meaning of Explanation IV.

This rule contemplates cases in which the plaintiff in the subsequent suit was defendant in the former suit. Thus, a claim which might have been pleaded by way of set-off[1285] or counter-claim[1286] to a previous suit, will not be barred.

1278. *Alagirisami v Sundareswara*, (1898) 21 ILR Mad 278; *Thakore v Thakore*, (1890) ILR 14 Bom 31.
1279. *Fateh Singh v Jagannath Bakhsh*, AIR 1925 PC 55 : 51 IA 100 : (1925) ILR 47 All 158.
1280. *Kiranshashi v Official Assignee*, AIR 1933 Cal 246 : (1933) ILR 60 Cal 8 : 143 IC 381 (facts simplified).
1281. *Maung Ba Thein v Ma Jhan Myint*, AIR 1928 Rang 9 : (1927) ILR 5 Rang 565 : 105 IC 586.
1282. *Kandunni v Katiamma*, (1899) ILR 9 Mad 251; *Ummatha v Cheria*, (1882) ILR 4 Mad 308; *Girdhar v Dayabhai*, (1884) ILR 8 Bom 174.
1283. *Dhaniram v Ruttan Das*, AIR 1961 P&H 563.
1284. *Nirman v Phulman*, (1881) ILR 4 All 65; *Hargovan v Mulji*, (1909) 11 Bom LR 921; *Akayi v Ayissa*, (1903) ILR 26 Mad 645; *Imam Khan v Ayub Khan*, (1897) ILR 19 All 517; *Haji Hasam v Manchavam*, (1879) ILR 3 Bom 137; *Woomatara v Unnopoorna*, (1873) 11 Bom LR 158 (PC); *Kesar Singh v Asa Singh*, (1913) PR 86, 305; *Muhammad v Abdul*, AIR 1923 Mad 257 : (1923) ILR 46 Mad 135; *Govind v Veeri*, (1919) Mad WN 677; *Kuppuswami v Subba*, (1921) 62 IC 501; *Mallaya v Punnammamal*, AIR 1924 Mad 608 : (1924) ILR 47 Mad 476; *Hara Chandra v Bhagabat*, AIR 1930 Cal 690 : (1930) 24 Cal WN 442; *Dattatraya v Matha*, AIR 1934 Bom 36 : (1933) ILR 59 Bom 119 : (1933) 35 Bom LR 1131.
1285. *Amritsar National Banking Co v Fazal Ilahi*, (1919) PR 74.
1286. *Pich v Subbarayyar*, (1915) 28 Mad LJ 153.

ILLUSTRATIONS

(i) Illustration (ii) and (v)[1287] under the heading "Matter constructively in issue: Explanation IV", above, belongs to this class.

(ii) A and B, two Hindu brothers, divide the whole of the joint family property except a garden. A dies leaving a widow who sells A's half share in the garden to C. After the death of the widow, C sues B for partition of the garden, and an *ex parte* decree is passed under which C enters into possession of a moiety of the garden. B then sues C to recover possession of the moiety sold by A's widow to C, alleging that the sale was made by the widow without legal necessity, and that on the death of the widow, he became entitled to the moiety as the reversionary heir of A. The suit is barred as *res judicata*, because B "might and ought" to have raised the question of the validity of the sale as a ground of defence in the former suit.[1288]

(iii) A mortgagee, who holds the mortgaged property also as lessee from the mortgagor, sues the mortgagor to recover Rs 3,000 being the amount of the mortgage-debt. At the date of the suit the mortgagee owes Rs 4,000 to the mortgagor for rent under the lease, and this sum the mortgagor claims to set-off against the mortgage-debt under an express agreement in that behalf. The agreement is not proved, and a decree is passed against the mortgagor for Rs 3,000. The property is sold in execution of the decree, and it is purchased by the mortgagee with the leave of the court. The mortgagor then sues the mortgagee to have sale set aside, and for a declaration that the mortgage-debt is extinguished, now claiming that a general account may be taken as between him and the mortgagee, and that in taking such account the rent due to him may be set-off against the mortgage-debt. The suit is barred, for the mortgagor "might and ought" to have set up that claim in the alternative in the former suit.[1289]

(iv) A, who owns a share in a village, mortgages it to B, and sells it subsequently to C. C sues B for redemption of the mortgage, and obtains a decree. Subsequently, B sues C for pre-emption of the share sold by A to C, alleging that he is a co-sharer in the village and entitled as such to pre-emption. The suit is not barred. The right of pre-emption not being a "vested and ascertained" right when B has an answer to the claim for redemption in that suit.[1290] For other cases under this rule, see foot-note.[1291]

Rule III : Where the right claimed in a subsequent suit is different and based on a different title.—

Where the right claimed in the subsequent suit is different form that in the former suit, and it is claimed under a different form than in the former suit, and it is claimed under a different title, the subsequent suit is not barred as *res judicata*.

ILLUSTRATIONS

(i) A sues B for possession of certain lands alleged to have come to his share on a partition of joint family property with B. The defence is that the family property has not yet been divided, and the suit is dismissed on a finding to that effect. A subsequent suit by A against B for partition of the family property is not barred.[1292]

1287. *Srimut Rajah v Katama Natchiar*, (1866) 11 MIA 50; *Doorga Persad v Konwari*, (1879) ILR 4 Cal 190 : 5 IA 149; *Sarojini v Lakhi Priya*, AIR 1925 Cal 427 : (1925) 29 Cal WN 253 : 85 IC 123.
1288. *Shyama v Mrinmayi Debi*, (1904) ILR 31 Cal 79.
1289. *Mahabir Pershad v Macnaghten*, (1889) ILR 16 Cal 682 : 16 IA 107.
1290. *Ram Chand v Durga Prasad*, (1904) ILR 26 All 61.
1291. *Maktum v Imam*, (1873) 10 BHC 293; *Dost Muhammad v Said Begam*, (1898) ILR 20 All 81; *Hari v Ganpatrav*, (1883) ILR 7 Bom 272; *Jagan Nath v Balkisan*, (1907) All WN 275; *Maung No v Maung Po*, AIR 1923 Rang 239 : (1923) ILR 1 Rang 363; *CJ Pillips v AE Mitchell*, AIR 1932 Cal 889 : (1932) ILR 59 Cal 985; *Kedar Nath v Kshiroda*, AIR 1933 Cal 680 : (1933) ILR 60 Cal 832; *Babu Rajnarain v Ganesh Bind*, AIR 1978 All 30. (Sale of joint family property wherein minors were interested.)
1292. *Shivram v Narayan*, (1881) ILR 5 Bom 27; *Konerrav v Gurraw*, (1881) 5 ILR Bom 589; *Nilo v Govind*, (1886) ILR 10 Bom 24; contra *Bheeka v Bhuggo*, (1878) ILR 3 Cal 23; dissented from in *Ummatha v Cheria*, (1882) ILR 4 Mad 308.

(ii) A, alleging that B held certain lands from him under a lease and that the lease had expired, sues B to recover Rs 500 for use and occupation of the land by B after expiration of the lease. The defence is that the lease is a subsisting lease, and the suit is dismissed on a finding to that effect. A subsequent suit by A to recover Rs 500 as rent payable under the lease is not barred.[1293]

[Note the peculiar character of the cases cited above—In Illustration (i), A suing on the basis of a partition, the court finding that there was no partition, and A subsequently suing for a partition; in Illustration (ii), A suing on the basis that the lease has expired, the court finding that the lease has not expired, and A subsequently suing on the basis that the lease is a subsisting lease. (For other cases of this class, see foot-note.][1294]

(iii) A sues B in 1869 to recover a *talukdari* estate from him. The suit is dismissed on a finding that the estate had become the absolute property of B under a conditional sale made by A to B in 1853. A then sues B in 1875 for redemption of the same property, alleging that he had mortgaged the property as absolute owner thereof to B in 1854. The suit is not barred. It was held:

> It may be difficult to reconcile the position of [B] as mortgagee in 1854 with his position as absolute owner in 1853... But if it be established that [A] was mortgagor in 1854, why should he be barred of his right [of redemption] merely because at an earlier date [i.e. in 1853] he may have had no right to the property at all?[1295]

(iv) A sues B for redemption of a mortgage alleged to have been executed in 1856 of 50 cawnies of land. B denies the genuineness of the mortgage, and alleges that 14 out of the 50 cawnies were mortgaged to him in 1853, and that the 14 and the remaining 36 cawnies were sold to him by A in 1855. The mortgage is not proved, and the suit is dismissed. A then sues B to redeem the 14 cawnies on the footing of the mortgage of 1853. The suit is not barred.[1296]

(v) A, alleging that he mortgaged certain lands to B with possession, sues B for *redemption*, the suit being brought by him as mortgagor. The mortgage is not proved, and the suit is dismissed. A then sues B for possession of the same lands claiming them as absolute owner thereof. The suit is not barred.[1297]

No question of *res judicata* can also arise where the issue in the former suit was that the plaintiff had withdrawn the licence and was therefore, entitled to possession and the issue in the subsequent suit was whether the defendant was a licencee or a sub-tenant.[1298] In order to attract the bar under section 11 of the code not only the parties in both suits must be the same, or the parties under whom they or any of them claim must be the same, but also they must litigate under the same title and the matter in issue in both the suits must be directly and substantially the same. Thus, where the issue decided in the former suit was different and the property involved in both the suits are different, it was held by the Patna High Court that of the latter suit is not barred by *res judicata*.[1299]

Four suits were filed by plaintiffs who were common in all the suits, but the defendants were not common. The properties in the four suits were also situated in different villages. The decision in one of the suits attained finality. Thus, it was held by the Supreme Court that the

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1293. *Watson v Dhonendra*, (1878) ILR 3 Cal 6.
1294. *Shridhar v Narayan*, (1874) 11 BHC 224; *Varathayyangar v Krishnaswami*, (1887) ILR 10 Mad 102; *Amer v Nathu*, (1888) ILR 8 All 306; *Zamit-un-Nissa v Rajan*, (1905) ILR 27 All 142.
1295. *Amanat Bibi v Imdad Husain*, (1888) ILR 15 Cal 800 : 15 IA 106, p 111; *Balbhaddar v Ram Lal*, (1904) ILR 26 All 501.
1296. *Ramaswami v Vythinatha*, (1903) ILR 26 Mad 760; *Veerana v Muthukumara*, (1904) ILR 27 Mad 102; *Parambath v Puthengattil*, (1905) ILR 28 Mad 406; *Thrikaikat v Thiruthiyal*, (1906) ILR 26 Mad 153; *Mahabir v Purbhoo Nath*, (1907) 12 Cal WN 292; *Ram Sahai v Ahmadi Begam*, (1911) ILR 33 All 302 : 9 IC 53.
1297. *Mahomed Ibrahim v Sheik Hamja*, (1911) ILR 35 Bom 507 : 12 IC 387; distinguished in *Rajaram v Jagannath*, AIR 1949 Pat 274 : (1927) 51 Bom LR 234.
1298. *Ram Chandra v Janardan*, AIR 1969 Bom 111 : (1969) ILR Bom 766 : (1968) 70 Bom LR 376.
1299. *Harendra Rai v Chandrawati Devi*, AIR 2007 Pat 120 : 2007 (1) Pat LJR 539.

decision in the appeals relating to other two suits would not affect the decision in the relevant suit and would not operate as *res judicata*.[1300] For other cases under this rule, see foot-note.[1301]

Rule IV : Where the right claimed in a subsequent suit would, if included in the prior suit, render it multifarious.—It cannot be said of a relief which if claimed in the first suit would have made that suit bad for multifariousness that it ought to have been made a ground of attack in that suit.[1302]

(c) Suits on Mortgage.—If a mortgagee, in a suit for redemption against him by the mortgagor, *omits to obtain an order for sale* of the mortgaged property on failure of payment by the mortgagor of the mortgage-debt within the time allowed for redemption, he will be precluded from bringing a separate suit for sale in default of payment by the mortgagor within that time. The mortgagee "might and ought" to have claimed the right of sale in the suit for redemption brought against him.[1303] So also, if the mortgagee omits to ask for a personal decree against the mortgagor, he cannot do so in a subsequent suit on the same mortgage;[1304] but if he applies for a personal remedy and his claim is not adjudicated upon, he may renew the claim at a later stage of the same proceeding.[1305]

In a case from Oudh[1306] a puisne mortgagee sued to redeem a prior mortgagee and made the prior mortgagee's sub-mortgagee a party. The prior mortgagee pleaded that the sub-mortgage was fictitious, and a decree for redemption was passed on payment of the amount due on the mortgage to the mortgagee alone. The sub-mortgagee then sued the prior mortgagee for a personal decree under section 68 of the Transfer of Property Act, 1882. The court held that the issue as to the genuineness of the sub-mortgage was not *res judicata* as the sub-mortgagee's presence in the prior suit was not compulsory and there was no necessity for the sub-mortgagee as a person interested in the mortgage security under O XXXIV, rule 1 and in *Narayan v Ganoji*,[1307] it was said that in a redemption suit of land which has been sub-mortgaged the judgment directs an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee. Where a sub-mortgagee was impleaded as defendant in a suit on the mortgage and his claim adjudicated embodied in the decree, a subsequent suit by a transferee from him to enforce the sub-mortgage was held to be barred.[1308]

In a rent note between mortgagor and mortgagee, it was agreed that the mortgagor would occupy the mortgaged house on rent of Rs 200/- per month. The mortgagee's suit for eviction was decided on the above basis. Later, when the mortgagor sued for redemption, the question arose whether the mortgagee's claim for interest at Rs 200/- per month was legally enforceable.

1300. *Brij Narain Singh v Adya Prasad*, AIR 2008 SC 1553 : (2008) 11 SCC 558.
1301. *Thandavan v Valliamma*, (1892) ILR 15 Mad 336; *Sarkun v Rahaman*, (1897) ILR 24 Cal 83; *Nathu v Budhu*, (1894) ILR 18 Bom 537; *Narao v Ramchandra*, (1889) ILR 13 Bom 326; *Sheo Ratan v Sheo Sahai*, (1884) ILR 6 All 358; *Bai Diwali v Umedbhai*, (1916) ILR 40 Bom 614; *Nisha Singh v Hira*, (1913) PR 87, 208; *Aishan v Muhammad Din*, (1916) PR 94; *Dhanapalu v Anantha*, (1913) 24 Mad LJ 418; *Dola v Balya*, AIR 1922 Bom 29 : (1922) ILR 46 Bom 803; *Chotey Lal v Chandra Bhan*, AIR 1923 All 176 : (1923) ILR 45 All 59; *Parshotam v Balwant*, AIR 1929 Lah 872 : (1930) ILR 11 Lah 99; *Ningaya v Madivalava*, AIR 1931 Bom 187 : (1931) 33 Bom LR 204; *Ram Udit v Ram Samuj*, AIR 1931 Oudh 263 : (1931) ILR 7 Luck 73; *Gurusami v Sowminarayana*, AIR 1954 Mad 477.
1302. *Kura v Madho*, (1915) PR 68, p 292.
1303. *Maloji v Sagaji*, (1889) ILR 13 Bom 567.
1304. *Sourendra v Hari Prasad*, AIR 1925 PC 280 : (1925) ILR 5 Pat 135 : 52 IA 418.
1305. *Adinarayana v Appan*, AIR 1941 Mad 217; *Raghukul v Pitam*, AIR 1931 All 99 : (1930) ILR 52 All 901.
1306. *Jagannath v Sheo Shankar*, AIR 1929 Oudh 455 : (1930) ILR 5 Luck 369.
1307. *Narayan v Ganoji*, (1891) ILR 15 Bom 692.
1308. *Erikam v Mahabalaram*, AIR 1951 TC 92.

It was held that the matter was not *res judicata*. The only matter directly in issue in the earlier suit was the quantum of rent. Interest and its legality were not the issue.[1309] If a puisne mortgagee sues for sale on his mortgage and makes the prior mortgagee a party without claiming any relief against him, the prior mortgagee is in the position of a holder by title paramount outside the controversy.[1310] He need not appear in the suit and his rights under the prior mortgage are not affected; but, if the puisne mortgagee suing on his mortgage raises any controversy as to the prior mortgagee and seeks to sell the property unencumbered, the prior mortgage, if he omits to plead his prior mortgage, will be debarred from doing so in a subsequent suit.[1311] On the same principle, it was held that if a person is joined in a redemption suit as an heir and legal representative of a deceased mortgagee, he need not claim part of the property by title independent of and paramount to the mortgagee.[1312]

The Madras High Court also has held that a person claiming title to the mortgaged property independently of the mortgage has been joined as a party, he is not bound to set up in such a suit his permanent title, since although to join him as a party is not obnoxious to the rule as to joinder of parties, he is not a necessary party.[1313] If a puisne mortgagee sues to redeem a *mesne* mortgagee and the latter omits to set up a prior mortgage which he has redeemed and to which he is subrogated, the rights of subrogation will be lost by *res judicata*; and if the *mesne* subsequently sues the puisne mortgagee claiming to be sub-mortgagee of the prior mortgagee, his suit will be barred.[1314] Where in a suit by a previous mortgagee, a subsequent mortgagee was impleaded as a defendant and the decree declared the amount due on his mortgage and directed sale in default of payment, it was held that a suit by him to enforce that mortgage was not barred.[1315]

If a mortgagee has successive mortgages of the same property from the same person, there is a conflict of decisions whether he can obtain an order for sale on one alone. The Bombay High Court has held that if a mortgagee sues on a subsequent mortgage without reference to prior mortgage he is barred by Explanation IV as he might and ought to have included the prior mortgage in his suit.[1316] Similarly, the Madras High Court has held that a suit on a prior mortgage bars a suit on a subsequent mortgage of the same property;[1317] but, it was held that a mortgagee might sue on a later mortgage reserving his rights on a prior mortgage.[1318] In

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1309. *Bharosilal v Shiladevi*, AIR 1989 MP 122.
1310. *Radha Kishun v Khurshed Hossein*, (1943) ILR 47 Cal 662 : 47 IA 11 (prior mortgage not attacked): *Ajudhia v Inayat Ullah*, (1913) ILR 35 All 111 (prior mortgage admitted); *Koi v Atul*, (1930) AIR 1929 Pat 333 : (1930) ILR 9 Pat 118; dissenting from *Krishna v Amirul*, (1914) 19 Cal WN 942 (prior mortgage not attacked); *Abdul Wahid v Sheikh Ali*, AIR 1929 Oudh 463 : (1929) ILR 4 Luck 250 (prior mortgage not attacked); *Official Assignee, Calcutta v Jagabandhu*, AIR 1934 Cal 552 : (1934) ILR 61 Cal 294.
1311. *Rameshwar v Harakhlal*, AIR 1942 Pat 226 : (1941) ILR 20 Pat 841; *Gopal v Benarsi*, (1904) ILR 31 Cal 428; *Gajadhar v Bhagwanta*, (1912) ILR 34 All 599.
1312. *Mehdi Ali v Saiyed Wilayer*, AIR 1930 Oudh 97 : (1930) ILR 5 Luck 658.
1313. *Neelamma v K Velayutham*, AIR 1967 Mad 453.
1314. *Sri Gopal v Pirthi Singh*, (1902) ILR 24 All 429 : 29 IA 118; *Mahomed Ibrahim v Ambika Pershad*, 39 IA 68; *Kanhaiya Lal v Ikram Fatima*, AIR 1932 Oudh 268 : (1933) ILR 8 Luck 130.
1315. *Ammeenamma v Beeviamma*, AIR 1953 Mad 32 : (1952) 2 Mad LJ 421 : (1952) Mad WN 634 : (1952) 65 Mad LW 959.
1316. *Dhondo v Bhikaji*, (1915) ILR 39 Bom 138; *Dalachand v Khema*, AIR 1921 Bom 282 : (1921) ILR 45 Bom 55.
1317. *Nattu v Annangara*, (1907) ILR 30 Mad 353; dissenting from *Sundar Singh v Bholu*, (1898) ILR 20 All 322.
1318. *Subramania v Balsubramania*, (1915) ILR 39 Mad 927; *Dhondo v Bhikan*, (1915) ILR 39 Bom 138, 145; *Jagannath v Mohra Kuar*, (1916) 2 Pat LJ 118; *Rangasami Nadan v Subbaraya*, (1970) ILR 50 Mad 408; *Radha Krishnier v Muthusami*, (1908) ILR 31 Mad 530; *Shankar Sarup v Moje Mal*, (1901) ILR 23 All 313 : 28 IA 203.

Madras, there was a conflict of decisions at one time which was set at rest by a decision of the Full Bench in *Subramania v Balasubramania*[1319] which adopted the above view. In doing so, the Full Bench followed the decision of the Allahabad High Court in *Sundar Singh v Bholu*[1320] which held that the two mortgagees constituted different causes of action. This view is correct and has been generally followed;[1321] but, as it is a hardship on the mortgagor that his property should be sold twice, it is now provided by section 32 of the Transfer of Property Amendment Act 20 of 1929, that a mortgagee having several mortgages of the same property from the same person must sell all or none.[1322]

In suits for redemption, foreclosure or sale, there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee right up to the time of actual redemption, foreclosure or sale, as the case may be.[1323] A mortgagor, therefore, who has obtained a decree for redemption against a mortgagee in possession and paid what was due according to the decree, and obtained possession, cannot afterwards sue for profits realised by the mortgagee for a period prior to the delivery of possession. Such profits "might and ought" to have been taken into account at the time of passing the decree.[1324] Similarly, where a mortgagor deposits the mortgage money in Court under section 83 of the Transfer of Property Act, 1882 and obtains a decree for possession from a usufructuary mortgagee under section 62, he cannot subsequently sue for profits realized by the mortgagee from the date of the deposit to the date of the delivery of possession.[1325] Where *A*, a zuri *peshdar*, was dispossessed in execution of a decree obtained by *B* representing the mortgagor, and on appeal by *A*, the decree was reversed and thereafter, *B* sued *A* for redemption of the zuri *pesh* and obtained a decree, it was held that a suit by *A* for *mesne* profits for the period during which he had been kept out of possession before redemption was not barred.[1326] Unless it is established that the mortgagee's right to redeem is extinguished, it cannot operate as a *res judicata* so as to prevent the court under section 11 of the Code from trying the second redemption suit.[1327] Successive suit for redemption of mortgage can be filed till the right of redemption is not extinguished. If the mortgage fails to establish that the old decree extinguished the right to redeem, there is no ground for saying that the old decree operates as *res judicata* and the courts are prevented from trying the second suit.[1328] In a proceedings for pre-emption, a finding was made by the court that a subsequent sale of land was a sham transaction. No appeal was preferred by the purchaser under the subsequent transaction. Appeal was made against the suit finding by the first purchaser.

1319. *Subramania v Balasubramania*, (1915) ILR 38 Mad 927.
1320. *Sundar Singh v Bholu*, (1898) ILR 20 All 322; *Raghunath Prasad v Jamna Prasad*, (1907) ILR 29 All 233; *Nazirunnissa v Asifa*, AIR 1927 All 341.
1321. *Lakshmanan v Muthaya*, (1921) 40 Mad LJ 126; *Parmeshwar v Raj Kishore*, AIR 1925 Pat 59 : (1924) ILR 3 Pat 829; *Udhai Chand v Nagin Singh*, 50 IC 40; *Govind v Harihar*, (1910) ILR 38 Cal 60; *Nilo v Asirbad*, (1920) 25 Cal WN 129.
1322. See section 67A of the Transfer of Property Act.
1323. *Lakshmanan v Muthaya*, (1921) 40 Mad LJ 126; *Parmeshwar v Raj Kishore*, AIR 1925 Pat 59 : (1924) ILR 3 Pat 829; *Udhai Chand v Nagin Singh*, 50 IC 40; *Govind v Harihar*, (1910) ILR 38 Cal 60; *Nilo v Asirbad*, (1920) 25 Cal WN 129.
1324. *Kashi v Bajrang Prasad*, (1908) ILR 30 All 36.
1325. *Rukhminibai v Venkatesh*, (1907) ILR 31 Bom 527; *Satyabadi v Harobati*, (1907) ILR 34 Cal 223; *Ma Nyo v Maung Hla Bu*, AIR 1925 Rang 13 : (1924) 2 Rang 382.
1326. *Jitan Pandey v Hari Nath*, AIR 1928 Cal 459 : (1928) 32 Cal WN 1023; *Malhari v Vinayak*, AIR 1929 Bom 323 : (1929) 31 Bom LR 640.
1327. *Ismile Nathabhai Khatri v Muljibhai Shankar Bhai Braham Bhatt*, AIR 1994 Guj 8.
1328. *Vora Amin Bai Ibrahim v Vohra Taheral Mohammed*, AIR 1998 Guj 31.

The appeal was allowed and held that the suit finding did not operate as *res judicata* in a writ petition by a subsequent purchaser.[1329]

In a case from Chhotanagpur region of Bihar (now Jharkhand) a suit, for declaration of title and restoration of possession was filed by the recorded tenant. The said suit ultimately ended in dismissal by the high court on the ground oral usufructuary mortgage was invalid under the Transfer of Property Act, 1882, and it was held that the defendants are not holding under mortgage. It was held by the Supreme Court that since the plaintiff did not raise the plea of the mortgage being barred by section 46 of the Chhotanagpur Tenancy Act, 1908, the said plea cannot be raised in a subsequent application for restoration of possession under section 71A of the Act.[1330] PP Naolekar J speaking for the Bench in the above case observed as follows:

> The suit of the appellant's predecessors for possession on the basis of oral mortgage was culminated into a decision by the High Court in second appeal (AFAD No. 1909/1948) where a clear-cut finding was recorded that there could not have been an oral usufructuary mortgage of immovable property for value of more than Rs. 100/- under section 59 of the Transfer of Property Act, the same being bad in law. Thus, the predecessors of the respondents could not be treated to be in possession under the mortgage. Under the CNT Act as it stood in the year 1922, the transfer could have been challenged as it contravenes section 46 of the CNT Act, being a contract or agreement of transfer. That plea having not been taken by the appellant's predecessors, the appellants and his predecessors were not entitled to raise the question of transfer being invalid under section 46 of the CNT Act as it stood in 1922 on the principle of constructive *res judicata*.[1331]

(d) Suits for Partition.—If in a previous suit for partition some of the properties are left out by mistake or with the consent of the parties, a subsequent suit for partition of those properties is not barred; but it will be barred if they were excluded by the court from partition after a contest between the parties on the ground that they are incapable of partition.[1332] It will also be barred if they are included in the suit but the decree failed to grant any relief with respect to them;[1333] but, where the decree in the partition suit had declared that the plaintiff was entitled to a share in the family properties but one of the items was, by mistake, omitted in the schedule of properties to be divided, it was held that a second suit for partition thereof was not barred by *res judicata*.[1334] Plaintiff sued for partition of certain properties. It was objected that the matter had been in issue in an earlier suit; but it was found that the earlier suit was based on a deed said to have been executed regarding the property and did not cover all the properties. Coparcenary was not an issue in that suit. It was held that the earlier decision could not be *res judicata*; the issues not being identical.[1335] Where in a suit for partition, some of the members of the family elect to continue as joint, a subsequent suit for partition by them is not barred.[1336] Likewise, if a decree for partition is not followed by actual division and separate possession of properties and the parties continue in joint possession as co-sharers as before, a fresh suit for partition is not barred as that is a recurring right incidental to co-ownership.[1337] The position

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1329. *Rambriksh Yadav v State of Bihar*, AIR 1994 Pat 156. See notes, "Finality of decree in redemption suits", below.
1330. *Fulchand Munda v State of Bihar*, AIR 2008 SC 1139 : (2008) 14 SCC 774.
1331. *Fulchand Munda v State of Bihar*, AIR 2008 SC 1139, para 5 at p 1141 : (2008) 14 SCC 774.
1332. *Sasimohan v Hari Nath*, AIR 1928 Cal 459 : (1928) 32 Cal WN 1023; *Malhari v Vinayak*, AIR 1929 Bom 323 : (1929) 31 Bom LR 640.
1333. *Nageswar Tuvari v Dwarka Prasad*, AIR 1953 All 541.
1334. *Veeriah v Venkatasubbiah*, (1955) ILR Andh 215.
1335. *Shankarrao Bapusaheb Shinde v Vithalrao Ganpatrao Shinde*, AIR 1989 SC 879 : (1989) Supp 2 SCC 162.
1336. *Mallayya v Thanlari Thipparnna*, (1955) ILR Andh 81.
1337. *Santhana Narain v Saran Narain*, AIR 1959 Pat 331 : (1959) ILR 38 Pat 737; *Abdul Kareem v Silar Sahib*, AIR 1957 AP 40; *Tharakishore v Beharu*, AIR 1958 Assam 67 : (1956) ILR Assam 77; *Shyam Sundar v M Chand Bai*, (1962) ILR 12 Raj 96.

would be the same when a suit for partition is dismissed for default under O IX, rule 8.[1338] The plaintiff in a subsequent suit for partition of certain property had an opportunity to press that property in question as joint family property. A plea was certainly taken that the suit was not maintainable on account of non-exclusion of property in question, the plea was however, not pressed. It was held that the possession in the earlier suit operates as *res judicata* and the second suit is not maintainable.[1339]

When the question regarding oral partition was directly and substantially in issue in both suits, it would operate as *res judicata* in subsequent suit for partition.[1340]

Where a suit for partition was filed by the plaintiffs claiming assignment in their favour by one of the executants of *verumpattam* (tenancy) chit in favour of *jenmies* of lands, however, in an earlier suit for partition filed by one of the executants of chit, it was held that the applicant executant (who was not assignor of plaintiffs in instant case), was the only tenant and not the other two executants and that order was set aside in first appeal where the plaintiffs were parties, however, the high court in second appeal wherein the plaintiffs in instant case were not parties again restored judgment of trial court holding that applicant was the only tenant, such judgment would operate as *res judicata* in the subsequent suit against the plaintiff when there was order of land tribunal passed in favour of *jenmies* of land in the application filed by them for resumption of land which had become final and there was no claim by said executant there were two other tenants with him and also when there was oral and documentary evidence not proving the said tenancy chit though executed by three executants and therefore could be challenged under section 92(6) of the Indian Evidence Act, 1872. Moreover, the suit was collusive because the defendant, who was the only tenant, was found by the courts as being plaintiff's father. It was more so when no challenge was set forth by the plaintiffs and therefore he was estopped from questioning that proceeding before land tribunal. It could not be said in such a case, that *jenmies* were estopped from contending that there was only one tenant and not three tenants as alleged, on basis of judgment in earlier case for recovery of rent filed by *jenmies* against three persons when the three persons nowhere in the proceedings claimed that they were tenants and on the other hand, they took the plea that they did not cultivate the land along with the said tenant.[1341]

Where the defendant co-sharer has given consent only insofar as his shares are concerned and not for the mode of division, it would not in any way affect his rights to claim fair and equal division in respect of the shares allotted in his favour by means of the preliminary decree. Therefore, no question of *res judicata* would arise in this context and the defendant co-sharer is entitled to be heard regarding the claim of fair and equitable division of his shares and therefore the consent given for partition of properties would not in any way prevent him nor would he in any manner become disentitled to claim proper and equitable division by metes and bounds.[1342]

Where, in the earlier suit for partition of joint family properties there was compromise between the parties and the properties were divided by metes and bounds in family settlement, thereafter, there was alienation by one of the members of the family of his share to the plaintiffs father by registered sale deed, as the validity of sale deed and transfer thereunder were not in issue in the earlier suit for partition. The subsequent suit filed by the plaintiff for declaration

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1338. *Manoharlal v Onkar Das*, AIR 1959 P&H 252 : (1961) 63 Punj LR 264.
1339. *Krishna Prasad Misra v Panchanan Misra*, AIR 1997 Ori 120.
1340. *Muthakke v Devanna Rai*, AIR 2002 Ker 301 (DB).
1341. *Balachandran v Gopalan*, AIR 2001 Ker 337.
1342. *VS Mani v K Rajendran*, AIR 2003 Mad 432.

of right, title, and interest for permanent injunction, on the basis of said sale deed, was not barred by *res judicata*.[1343]

Where a member of a joint family sued to set aside an alienation by the manager as not binding on the family and obtained a decree for partition of his share in the property alienated, a subsequent suit by the alienee for a general partition praying that the property alienated might in equity be allotted to the share of his alienor, is not barred by *res judicata*.[1344] The validity or the binding nature of an alienation by the manager of a joint Hindu family does not depend on a partition effected after such alienation. If the partition was not directly and substantially in issue in the suit against such alienation a finding that the partition was sham does not operate as *res judicata*.[1345] A suit for partition for common *tarwad* properties was instituted. One of the defendants had the lease deed in respect of certain property in his favour, the said defendant died during the pendency of the case. The brother of the deceased defendant was appointed as a guardian of the sons of the deceased defendant in the partition suit. A preliminary decree of partition was passed; however, before the final decree could be passed, the sons of the deceased defendant attained majority and moved application seeking liberty to file separate written statements on the ground that they were not properly represented by the brother of the deceased defendant. The application was dismissed. A separate suit thereafter was filed by the sons of the deceased defendant seeking a declaration that the brother of the deceased had an interest adverse to them and he did not plead that the leasehold right in the property in question was the individual right of the deceased defendant. The suit was dismissed; however, an appeal was allowed and it was held that the decision of the high court would not operate as *res judicata* in respect of the questions involved in a subsequent suit as to whether the lease hold title in the property in question belonged to the deceased defendant or to both the branches of the deceased defendant and his brothers, who acted as guardians.[1346] One *M* had two sons *B* and *P*. A suit for partition by meets and bounds to extend of their 1/3 share in a house alleged to be belonging to a joint family of *M*, *B* and *P* were filed by the respondent who were descendants through *P*. It was held that *M* was exclusive owner and it was not a joint family property and the respondent had no right to partition. *M* during his lifetime executed a registered will on 28 March 1964, bequeathing the properties to the appellant who were descendants through *B*. *M* died on 12 December 1968. The appellant filed a suit on 14 November 1997, for declaration of title and for possession. The suit was decreed and the decree was affirmed in appeal. The high court in second appeal referred that finding on the ground that the respondent remained in possession for more than 12 years and thereby, they perfected their title by adverse possession. It was held that since there was no plea that the respondents had claimed any hostile title against *M*, the owner of the property, the earlier decree operated as *res judicata*. Moreover, against *M*, the predecessors in title of the appellant, the earlier decree operated as constructive *res judicata* on the principle of "might and ought".[1347] It has been held by the High Court of Orissa that in a suit for partition accounts of profits received from the lands should be taken down to the date of the final decree and that a subsequent suit for profits of this period is barred;[1348] but, this decision has been dissented from by the Madras High Court which has held that while the co-sharer has a right to call for accounts for the period subsequent to the institution of the suit in the suit itself, he is not

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1343. *Ganesh Patra v Banabihari Patra*, AIR 2004 Ori 23.
1344. *Narasimhiah v Chicka Thimmayya*, AIR 1954 Mys 115 : (1953) ILR Mys 655.
1345. *Ganga Bai v Vijay Kumar*, AIR 1974 SC 1126 : (1974) 2 SCC 393 : (1974) Mah LJ 602.
1346. *VB Arun Kumar v Jaya Singh*, (1993) Supp 2 SCC 141.
1347. *Madhav Krishan v Chandana Bhaga*, (1997) 2 SCC 203.
1348. *Udekar v Chandrasekhar*, AIR 1961 Ori 111.

obliged to do so and a subsequent suit therefore, is not barred.[1349] This, it is submitted, is the better view.

(e) Suit for Declaratory Decree.—Failure to sue for a declaratory decree in no way bars a claim for substantive relief when it arises.[1350] A decree is not null and void, merely because it was passed in disregard of the prohibition contained in section 34, Specific Relief Act, 1963. *Res judicata* would still apply to such a decree. The criteria for applying section 11 are not the relief prayed for in the suit, or the structure and texture of the decree or maintainability of the suit. Non-maintainability of the suit is not to be confused with want of competence of the court.[1351] In pursuance of judgment passed by the Supreme Court, the Government of Gujarat passed the following order on 4 August 1969, the relevant operation of which reads as under:

> Shri TS Mankad should be deemed to have remained in service as executive engineer upto the date that he had attained the age of 55 years *i.e.* upto 14 January 1964.
>
> The order in the Government Order Public Works Department No DPA–1861–E, dated 12 October 1961, should be treated to have been closed.

The aforesaid order was challenged by the appellant before the Gujarat High Court with a prayer to declare this order dated 4 August 1969, as illegal, void, *ultra vires*, bad in law and inoperative and the same was not binding on the appellant. This special application was rejected holding that the right of appellant to continue in service and was judicially determined by the Supreme Court and that judicial determination was given effect to by the state government by its order dated 4 August 1969. The special leave petition against this judgment was dismissed on 21 January 1979. Thus the controversy was put to an end and the result was that the appellant was not entitled to continue in service beyond 55 years of age.[1352]

(f) Subject Matter may be Different.—It is not necessary, for Explanation IV to be applicable, that both the issue and the subject matter of the two suits should be the same. It is enough if the matters in issue are the same, otherwise in suits for arrears of rent there could be no *res judicata* at all, for the subject matters of successive suits for arrears of rent are necessarily different.[1353] The argument that the principle of *res judicata* cannot apply because in the previous suit only a part of the property was involved, when in the subsequent suit the whole property is the subject-matter, cannot be accepted. The principle of *res judicata* under section 11 of the CPC is attracted where issues directly and substantially involved between the same parties, in the previous and subsequent suit are the same, may be, in the previous suit, only a part of the property was involved when in the subsequent suit, the whole property is the subject-matter.[1354] In absence of the pleadings of the earlier suit being filed, it cannot be said with certainty that the subject-matter of the suit is same as that of the former suit. Hence, the dispute does not attract the principle of "*Res Judicata*".[1355]

In a case the Supreme Court was considering the provisions of Pondicherry Assistant Engineers (including Deputy Director of Public Works Department) Group B (Technical) Recruitment Rules (1965) in the matter of appointment by promotion to the post of Assistant Engineer. The issue in the case was inter se seniority between degree holder Section Officers and

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1349. *Rasammal v Subbaraya Gouden*, (1963) 1 Mad LJ 148.
1350. *Charu Chandra v Kamakhya Narain*, AIR 1931 PC 5 : (1931) ILR 10 Pat 284 : 58 IA 17.
1351. *Governor, State of Orissa v Taldu Ram Rao*, AIR 1983 AP 214.
1352. *Takhatray Shivadataray Mankad v State of Gujarat*, (1989) Supp 2 SCC 110.
1353. *Jamadar Singh v Serazuddin*, (1908) ILR 35 Cal 979; *Sarojini v Lakhi Priya*, AIR 1925 Cal 427 : (1925) 29 Cal WN 253, p 259; *Pasupathinath v Sankari Prasad*, AIR 1957 Cal 128.
1354. *K Ethirajan v Lakshmi*, AIR 2003 SC 4295 : AIR 2003 SCW 4951. See note under the same heading.
1355. *Bechan Singh v Mansarovar*, Second Appeal No. 238 of 2008 decided by the Chattisgarh High Court on 28 August 2020.

diploma holder Section Officer who acquired degree during service to qualify for promotion. In the course of hearing a point was raised that consideration of the issue is barred by *res judicata* as also the rule laid down in Article 141 of the Constitution as the issue had been decided by an earlier decision of the Supreme Court in *N Suresh Nathan v UOI* (AIR 1992 SC 564). It was held by the Supreme Court that is the earlier case the court had only considered the question of eligibility of diploma holder Section Officers acquiring degree during service for promotion in the quota of degree holders and *inter se* seniority between the two groups of Section Officer was not decided. As such, neither Article 141 nor the principles of *res judicata* bar consideration of the question in issue.[1356]

In *Krishna Hare Gaur v Vinod Kumar Tyagi,*[1357] in response to the advertisement issued inviting applications from the eligible candidates for appointment to the post of headmaster, several persons made their applications. The first respondent was selected and appointed. The appellant made a representation alleging that first respondent had obtained appointment by using forged experience certificates along with his application. Since no action was taken by any of the authorities, the appellant filed the writ petition in the high court challenging the appointment. The high court, after hearing the parties, directed the District Basic *Shiksha Adhikari* to pass a reasoned order. The District Basic *Shiksha Adhikari* rejected the representation of the appellant. Aggrieved by the said order, the appellant preferred writ appeal. The high court dismissed the same holding that the District Basic *Shiksha Adhikari* has recorded a categorical finding that he inspected the original records and found that the first respondent has requisite five years' teaching experience. In the meantime, the district magistrate took cognizance of the appellant's representations made earlier and directed the additional district magistrate to conduct an inquiry and submit a report. The additional district magistrate submitted his report stating that the experience certificates filed by first respondent were bogus and obtained with the collusion of the heads of the respective institutions. The district magistrate forwarded the report to the Basic *Shiksha Adhikari* directing him to take appropriate action in the matter and report at the earliest. Pursuant to the finding and the report, the appointment of first respondent was cancelled. Aggrieved by the same, the first respondent filed a writ petition impleading the appellant as one of the respondents. The high court dismissed the same stating that his appointment was made contrary to the statutory provisions as he did not possess the requisite experience. Against the said order, he preferred a special appeal before the high court, which was allowed by the division bench by applying the principles of *res judicata*.

The Apex Court, relying on *Meghmala v G Narasimha Reddy,*[1358] held that the high court was wrong in applying the principles of *res judicata* in the instant case. It opined that, "[W]hen the appointment is made dehors the rules, the same is a nullity. In such an eventuality, the statutory bar like doctrine of *res judicata* is not attracted."

(g) Issue of Law.—The principle of *res judicata* would apply only when the *lis* was *inter partes* and had attained finality in respect of the issues involved. The said principle will, however, have no application inter alia, in a case where the judgment and/or order had been passed by a court having no jurisdiction therefore, and/or in a case involving pure question of law. It will also have no application in a case where the judgment is not a speaking one.[1359]

1356. *N Suresh Nathan v UOI*, AIR 2010 SC 2171 : (2010) 5 SCC 692, decided on 22 April 2010.
1357. *Krishna Hare Gaur v Vinod Kumar Tyagi*, AIR 2015 SC 1248 : (2015) 11 SCC 355.
1358. *Meghmala v G Narasimha Reddy*, (2010) 8 SCC 383 : (2010) 10 SCR 47 : 2010 (8) JT 658.
1359. *UOI v Pramod Gupta*, AIR 2005 SCW 4645 : (2005) 8 JT 203 : (2005) 12 SCC 1.

The question of determination being a pure question of law, the principles of *res judicata* shall have no application.[1360]

This section provides that no court shall try any suit of "issue" *etc.* Issues are of three kinds: (1) issues of fact; (2) issues of law; and (3) mixed issues of law and fact. An issue of fact may be *res judicata*; but, this is not so where in the subsequent suit altered circumstances are pleaded.[1361] A mixed issue of law and fact may also be *res judicata*.[1362] There is no degree of importance between issues.[1363] An issue of law, it has been held, may or may not be *res judicata*. The law on the subject may be summarized as follows:

(i) A decision on an issue of law operates as *res judicata* if the cause of action in the subsequent suit is the same as that in the first suit.[1364] In *Bindeshwari v Bageshwari*,[1365] where the question of the validity of a grant, in view of section 12A of the Chota Nagpur Encumbered Estates Act, 1876 was directly and substantially in issue in a former suit, it was held by the Privy Council that the determination of the question in that suit operated as *res judicata* in a subsequent suit between the same parties and relating to the same transaction. It would seem, therefore, that a decision on a question whether a section of a statute applied or not to a particular transaction would be *res judicata* if the same question arose again. Lord Thankerton observed; "the question whether it (section 12A) applied to a particular transaction entitles the court to consider the construction of the section and the determination of its applicability rests with the court." It is immaterial that the decision was erroneous in law.[1366] Where the court had jurisdiction to deal with a certain application, but the decision arrived at by the exercise of such jurisdiction was not accepted subsequently by a Division Bench in a case having different parties, the former decision would still operate as *res judicata* inter parte, as regards the subject matter in that decision. It cannot be said that an erroneous decision was arrived at by former decision by an assumption of jurisdiction which the court did not have.[1367] The correctness or otherwise of a decision, viewed in the light of a subsequent decision, has really no bearing upon the question whether it would operate as *res judicata* or not. All that is necessary to be established is, that the matter was substantially in issue in the former proceeding and that it had also been heard and finally decided.[1368] Affirming this principle, it has been held by the Supreme Court that a decision of a question of law

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1360. *Bishwanath Prasad Singh v Rajendra Prasad*, AIR 2006 SC 2965 : 2006 AIR SCW 1235 : (2006) 4 SCC 432.
1361. *Mangharan Chuharmel v BC Patel*, AIR 1972 Bom 46 : (1972) ILR Bom 30 : (1971) 73 Bom LR 140.
1362. *Raja Syed Ahmad Ali v Hinga Lal*, AIR 1947 Oudh 74 : (1946) ILR 21 Luck 586; *Bishun Priya v Bhaba Sundari*, (1901) ILR 28 Cal 318; *Koyyana v Doosy*, (1906) ILR 29 Mad 225.
1363. *Prem Das v Joti Pershad*, AIR 1971 Del 282.
1364. *Gowri Koer v Audh Koer*, (1884) ILR 10 Cal 1087; *Phundo v Jangi Nath*, (1893) ILR 15 All 37; *Kaveri Ammall v Sastri Ramier*, (1903) ILR 26 Mad 104; *Waman v Hari*, (1907) ILR 31 Bom 128; *Annada Prosad v Gopal Chandra*, AIR 1935 Cal 725; *Ram Kumar v Baldeo Prasad*, AIR 1965 All 752; *Bhau Martand v Hajabai Bala*, AIR 1975 Bom 233 : (1975) 77 Bom LR 141; *D Ghosh v Taswar Hussain*, AIR 1977 Pat 110.
1365. *Bindeshwari v Bageshwari*, AIR 1936 PC 46 : (1936) ILR 15 Pat 203 : 63 IA 53.
1366. *Gowri Koer v Audh Koer*, (1884) ILR 10 Cal 1087; approved in *Tarini Charan v Kedar Nath*, AIR 1928 Cal 777 : (1929) ILR 56 Cal 734; *Raj Mohan v Sarada Charan*, AIR 1936 Cal 200 : (1936) 40 Cal WN 627; *Revti Devi v Khilali Ram*, AIR 1967 Del 119.
1367. *NY Panchapagasan v K Swaminathan*, AIR 1985 Mad 154.
1368. *NY Panchapagasan v K Swaminathan*, AIR 1985 Mad 154.

given in a previous execution case between the parties would be binding on them even if it was erroneous.[1369]

In execution of a decree for eviction against a tenant in a proceeding under O XXI, rule 97, the executing court held that the sub-tenant had become direct tenant under the landlord, in view of section 20, Delhi and Ajmer Rent Control Act, 1952. Though the executing court had wrongly relied on section 20 (because it had been repealed), the decision was not challenged by the tenant. The tenant subsequently sued for eviction of the sub-tenant. It was held that the earlier judgment had become final against the tenant and was binding on him and could not be re-agitated. The suit was barred. It was immaterial that the executing court had committed an error of law. It had jurisdiction to decide the question and its order was not a nullity.[1370] A decree for possession was passed against the President of a society. It was wrongly held that it could not be executed against the society or its trustees. A second suit against the trustees is not barred by *res judicata*.[1371] Landlord sued for eviction of the tenant on the ground inter alia of personal necessity—a ground for eviction under the Bihar Rent Control Act. The suit was dismissed for want of notice under section 106, Transfer of Property Act. At that time, the law on the need for such notice was in a fluid condition. Later, the landlord sued again for eviction on the ground of default in rent after the first decree and also personal necessity. The defendant pleaded, in defence, the objection of want of notice. In the meantime, judicial decisions (Supreme Court and High Court of Patna) had held that notice was not required. It was held that the first decision on this point was not *res judicata*.[1372]

(ii) There is a conflict of decisions whether an erroneous decision on a question of law operates as *res judicata*, if the cause of action in the two suits are different, an erroneous decision on a question of law operates as *res judicata*. It has been held in some cases that it does not[1373] (Illustration 2), and in some that it does[1374] [Illustration (iii)]. The latter view was adopted by a Full Bench of the Calcutta High Court in *Rarini Charan v Kedar Nath*.[1375] The judgment proceeded on the broad ground that the correctness or otherwise of a judicial decision had no bearing upon the question, whether it does or does not operate as *res judicata*. It was also pointed out that it was the identity of the matter directly and substantially in issue that was the test of *res judicata* and not the identity of the cause of action.

1369. *Mohanlal v Benoy Krishna*, AIR 1953 SC 65 : (1953) SCR 377. See Illustration (i) below.
1370. *Gopal Krishan v Ram Lal*, AIR 1989 Raj 24.
1371. *Bhil Seva Mandal v Naik Shang Daboda*, AIR 1980 Guj 163.
1372. *Sugan Chand Agarwal v Jivt Shah*, AIR 1984 Pat 184 (DB).
1373. *Alimunnisa v Shama Charan*, (1905) ILR 32 Cal 749; *Baij Nath v Padamanand*, (1912) ILR 39 Cal 848; *Chamanlal v Bapubhai*, (1898) ILR 22 Bom 669; *Vishnu v Ramling*, (1902) ILR 26 Bom 25; *Parthasaradi v Chinna*, (1882) ILR 5 Mad 304; *Venku v Mahalinga*, (1888) ILR 11 Mad 393; *Gopu v Sami*, (1905) ILR 28 Mad 517; *Mangalathammal v Narayanswami*, (1907) ILR 30 Mad 461; *Aitamma v Narain*, (1907) ILR 30 Mad 504; *Kuppana v Kumara*, (1911) ILR 34 Mad 450; *Aghore v Kamini*, (1909) 11 Cal LJ 461; *Purna v Rasik*, (1911) 13 Cal LJ 119; *Taliamand v Muhammad*, AIR 1930 Lah 907 : (1931) 12 Lah 52.
1374. *Venkata v Andavolu*, (1917) 32 Mad LJ 63; *Sitaram v Laxman*, AIR 1921 Bom 87 : (1921) ILR 45 Bom 1260; *Ramlal v Deodhari Rai*, AIR 1924 Pat 265 : (1923) ILR 2 Pat 771; *Hub Lal v Gulzari Lal*, AIR 1927 All 297 : (1927) ILR 49 All 543; *Rajaram v Central Bank of India*, AIR 1926 Bom 481 : (1926) 28 Bom LR 879; *Ayetonnessa Bibi v Amjad Ali*, AIR 1928 Cal 717 : (1928) 32 Cal WN 828; *Tarini Charan v Kedar Nath*, AIR 1928 Cal 777 (FB) : (1929) ILR 56 Cal 723); *Sanichar v Raja Dhakeshwar*, AIR 1930 Pat 585 : (1930) ILR 9 Pat 674.
1375. *Rarini Charan v Kedar Nath*, AIR 1928 Cal 777 : (1929) ILR 56 Cal 723.

It was contended in that case that the law had been altered by judicial decisions since the judgment in the first suit, and reliance was placed upon the judgment of Maclean CJ in *Alimunnissa v Sharma Charan*,[1376] where it was said:

> Cases must be decided upon the law as it stands when judgment is pronounced, and not upon what it was at the date of a previous suit, the law having been altered in the meantime. It has been conceded that, if the law had been altered meanwhile by statute, the objection [of *res judicata*] could not prevail: it is difficult to see why it should prevail, because the law has been since determined to be otherwise by judicial decisions.

Referring to this passage, Rankin CJ observed in the Full Bench case that the reasoning in *Alimunnissa*'s case was erroneous. The learned judge said:

> The legislature, by statute, may alter the rights of parties and when it does so, it makes such provision as it thinks proper to prevent injustice. Courts of law are in no way authorized to alter the rights of parties. They propose, at all events, to ascertain the law, and if the binding character of a decision upon a concrete question as to the terms of a particular holding is to fluctuate with every alteration in the current of authority, the courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof. The principle relied upon is abhorrent to section 11 of the Civil Procedure Code and to the general intention of the doctrine of *res judicata*.

At the same time, the learned judge observed that when a plea of *res judicata* is raised with reference to a point of law which concerns questions of jurisdiction,[1377] or procedure,[1378] or limitation,[1379] and in which besides the parties the courts and the public have an interest, it was at least a question whether special considerations should not apply. In a Bombay case[1380] Baker J after an exhaustive review of the case law expressed entire agreement with the judgment of Rankin CJ. In the Bombay case, however, the decision was not on a pure point of law. The holder of a *saranjam* sought to execute an award decree of 1855 under which he was entitled to a share of the collections made by a junior branch of his family. The defence was that the award had been superseded by a resumption and re-grant of the *saranjam* by the Government in 1900. The same defence had been made to an execution application for a share of the collections of previous years and had been disallowed and the court had then held that the re-grant and resumption of the *saranjam* had not the effect of nullifying the award. This construction of the re-grant was held to be a mixed question of fact and law which operated as *res judicata*. Again, when a deed of partition was construed to be an award, the construction was held to be a mixed question of law and fact and to operate as *res judicata*.[1381] A decision on an abstract question of law unrelated to the facts when gives rise to a right, cannot operate as *res judicata*. Nor can a decision on the question of jurisdiction be *res judicata* in a subsequent suit; but, if the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as *res judicata* between the parties in a subsequent suit or proceeding, atleast if the cause of action is the same.[1382] *Tarini Charan*'s case has been followed by the Madras High

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1376. *Alimunnissa v Sharma Charan*, (1905) ILR 32 Cal 749.
1377. *Rajaram v Central Bank*, AIR 1926 Bom 481 : (1926) 28 Bom LR 879; *Chinnappa Reddi v Srinivasa Rao*, AIR 1935 Mad 835 : (1935) ILR 59 Mad 62; *District Board, Dabhanga v Suraj Narain*, AIR 1936 Pat 198 : (1936) ILR 14 Pat 633. *Bhau Martand v Hajabai Bala*, AIR 1975 Bom 233.
1378. *Kuppana v Kumara*, (1911) ILR 34 Mad 450.
1379. *Aitamma v Naraina*, (1907) ILR 30 Mad 504.
1380. *Keshav v Gangadhar*, AIR 1931 Bom 570 : (1931) 33 Bom LR 1443; *Savitri v Holebasappa*, AIR 1932 Bom 257 : (1932) 34 Bom LR 198.
1381. *Raja Syed Ahmad Ali v Hinga Lal*, AIR 1947 Oudh 74; *Abdul Rahim v Fateh Ullah*, AIR 1933 Lah 274 : (1933) ILR 14 Lah 31.
1382. *Supreme Court Employees, Welfare Association v UOI*, AIR 1990 SC 334 : (1989) 4 SCC 187.

Court;[1383] but the Gujarat High Court has held that if the effect of the law has been differently interpreted by judicial decisions the previous decision cannot have the binding effect for all time and cannot operate as *res judicata*.[1384] It is submitted that this is not correct in view of the decisions of the Calcutta and Bombay High Courts referred to above, particularly the Bombay decisions being binding on the Gujarat High Court, as they have been made before 1960.

(iii) There is no doubt, as observed by Rankin CJ, that if the law is altered by the passing of a new Act after a decision in a case, the decision cannot operate as *res judicata*. Thus, in *Lakshmi v Atal*[1385] after a preliminary decree for sale had been passed on a mortgage and before a final decree was made, Chota Nagpur Tenancy Act, 1908, was extended to the district in which the property was situated. That Act provided that no decree "shall" be passed for the sale of the right of a *raiyat* in his holding and that such right, "shall" not be sold in execution of a decree. It was held that the preliminary decree did not operate as *res judicata* and that the court had no power to pass a final decree for sale. This rule, as stated above, does not apply to a case where the law has been altered by subsequent judicial decisions.[1386] In a suit for eviction, decree was passed on the ground that sub-tenants had been illegally inducted. Subsequently, the West Bengal Premises Tenancy Act was passed. It was held that in a subsequent suit filed after the passing of the Act the earlier decisions was not *res judicata* where the parties were not the same and violation of tenancy legislation was not in issue in the earlier suit.[1387] Change of law after the pronouncement of a judicial decision where the amendment provides for the re-determination of matters decided, takes away the effect of *res judicata*.[1388]

ILLUSTRATIONS

(i) Same cause of action: decisions though erroneous held to operate as *res judicata*:

X sells certain property to *A*. At the time of sale the property was in the possession of *B* who claimed it adversely to *X*. *A* sues *B* in the High Court of Calcutta to recover possession of the property as purchased from *X*. An issue is raised in the suit, and it is an issue of law, namely, whether a person who is not in possession of property at the time of sale is competent to convey it. The issue is found in the negative and *A*'s suit is dismissed. Afterwards, it is decided by a Full Bench of the same high court in another case between different parties altogether that although a person may not be in possession of a property, he is competent to convey it. After the decision of the Full Bench, *A* again sues *B* to recover possession of the *same property* under the *same deed of sale*, and asks for a decision in his favour on the strength of the Full Bench ruling on the point of law which was decided against him in the former suit. Here, the cause of action in the subsequent suit is the *same* as that in the former suit. The court is, therefore, precluded from re-trying the same question of law in the subsequent suit. In other words, the issue of law is *res judicata*. It is immaterial that the decision on the question of law in the first suit was erroneous.[1389]

(ii) Different causes of action: decision held not to operate as *res judicata*: *A* sues *B* in 1874 to recover 12 years' arrears of his share of a certain government allowance received by *B*. *B* contends that *A* is not entitled to recover more than 3 year's allowance, *A*'s claim beyond that period being barred by the law of limitation. The court allows *A*'s claim in its entirety. In 1894, *A* sues *B* for

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1383. *Ramchandra Deo v Ramamurthy*, AIR 1933 Mad 925 : (1933) 65 Mad LJ 684; dissenting from *Mangalathammal v Narayanaswami*, (1907) ILR 30 Mad 461.
1384. *Alimiya v Sayed Mohomed*, AIR 1968 Guj 257 : (1968) 9 Guj LR 1002.
1385. *Lakshmi v Atal*, (1913) ILR 40 Cal 534.
1386. *Rajaram v Central Bank*, AIR 1926 Bom 481 : (1926) 28 Bom LR 879.
1387. *Shantilal Rampuria v Vega Trading Corp.*, AIR 1989 SC 1819.
1388. *Chanderjot Kaur v State*, AIR 1983 Pat 220 (DB).
1389. *Gowri Koer v Audh Koer*, (1884) ILR 10 Cal 1087; *Ramlal v Deodhari Rai*, AIR 1924 Pat 265 : (1923) ILR 2 Pat 771 : 74 IC 781; *Doorvas v Govindaswami*, AIR 1921 Ngp 315 : 67 IC 189 : (1921) 40 Mad LJ 556.

further arrears for 11 years from 1882–1893. B raises the same point of law that was raised by him in the former suit. Held that the decision in the former suit does not operate as *res judicata* in the subsequent suit. Here, the cause of action in the subsequent suit is different from that in the former suit, for the claim in the subsequent suit is for arrears which had accrued due after the institution of the former suit. The court, therefore, is not precluded from re-trying the same question of law, and if it finds that the question of law was wrongly decided in the former suit, it may decide the suit on what it considers is the correct interpretation of law. The court said: "It appears to us that a point of law can never be *res judicata*." The judgment also proceeded on the ground that the first suit was decided under the Indian Limitation Act, 1871, and that the law had been altered by the Act of 1871.[1390]

(iii) Different causes of action: decision though erroneous, held to operate as *res judicata*: *A* executes a *kabuliat* in 1880 in favour of *B*. The *kabuliat* contains a stipulation for payment of interest on arrears of rent at the rate of 75 per cent per annum. In 1898, the holding is sold in execution of a decree for rent obtained by *A* against *B* and it is purchased by *C*. In 1915, *A* sues *C* for arrears of rent and interest on arrears at 75 per cent per annum. The defence is that *C* being an auction purchaser, is not bound to pay interest at the rate stipulated in the *kabuliat* and that it is in the nature of a penalty. This contention is not upheld and a decree is passed in favour of *A* with interest at 75 per cent per annum. In 1924, *A* brings another suit against *C* for arrears for a subsequent period and interest at 75 per cent per annum. *C* raises the same defence and also contends that the decision in the previous suit was erroneous. Held by a Full Bench of the Calcutta high court that the decision in the previous suit, even if erroneous operated as *res judicata*.[1391] The principle is that an erroneous decision by a court having jurisdiction is as much binding between the parties as a right one and can be superseded only by an appeal to the higher court or through other procedure, like review which the law provides.[1392]

In the cases in which it was held that an erroneous decision on a point of law where the causes of action were different, does not operate as *res judicata*, the courts were influenced by the consideration that they would be perpetuating an injustice for all time, if they were to hold that an erroneous decision on a point of law in a former suit was binding upon the parties in a subsequent suit instituted upon a new cause of action. It must, however, be recognized as stated by Mookerjee J in *Aghore Nath v Kamini Debi*,[1393] that the effect of this is to substitute in the present section the expression "cause of action" for "the matter in issue". In *Venkata v Andavolu*,[1394] Napier J took the extreme view that where a decision on a point of law, whether it be on the construction of a document or of a statute or on common law or on customary law, once settles a question that arises directly out of conflicting views as to the rights of the parties, it is *res judicata*. A similar opinion was expressed by Shah J and Fawcett J in *Sitaram v Laxman*[1395] and by Das J in *Ramlal v Deodhari Rai*.[1396] To get over the difficulties which might arise from this extreme view, some judges have suggested a distinction between a decision on an abstract question of law, such as a question of limitation, and a decision on a concrete question, such as the construction of a document entered into between the parties to a suit, the latter question being treated as one to which the rule of *res judicata* applies, and the former as one to which the principle of *stare decisis* applies.[1397] It is difficult to see what the

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1390. *Chamanlal v Bapubhai*, (1898) ILR 22 Bom 669.
1391. *Tarini Charan v Kedar Nath*, AIR 1928 Cal 777 : (1929) ILR 56 Cal 723; *Chandi Prasad v Maharaja Mahendra*, (1901) ILR 23 All 5.
1392. *West Bengal v Hemant Kumar*, AIR 1966 SC 1061.
1393. *Aghore Nath v Kamini Debi*, (1910) 11 Cal LJ 461, p 471.
1394. *Venkata v Andavolu*, (1917) 32 Mad LJ 63.
1395. *Sitaram v Laxman*, AIR 1921 Bom 87 : (1921) 45 ILR Bom 1260.
1396. *Ramlal v Deodhari Rai*, AIR 1924 Pat 265 : (1923) ILR 2 Pat 771, p 773.
1397. *Sitaram Sakharam Mangle v Laxman Vishnu Ketkar*, AIR 1921 Bom 87 : (1921) ILR 45 Bom 1260, per Macleod CJ.

principle of *stare decisis* has to do with the rule of *res judicata.*[1398] In *Tarini Chandran v Kedar Nath*,[1399] Rankin CJ said that whether a decision was correct or erroneous it had no bearing on the question of *res judicata*, and that what was *res judicata* between the parties to a suit was not the reasoning or any principle of law, but the actual decision declaring the rights of the parties.[1400] An issue of law decided by turning a blind eye to the relevant statutory provision cannot be held to be conclusive and binding on the parties litigating subsequently on a different cause of action. Such a decision on a question of law is clearly "*per incuriam*" and cannot acquire the status of a binding decision even in between the parties "*Per incuriam*" are those decisions given in forgetfulness of some inconsistent statutory provisions or of some authority binding on the court concerned, so that in such case some part of the decision or some step in the reasoning on which it is based, is found on that account, to be demonstrably wrong.[1401] The decision on pure question of law rendered *per incuriam* by overlooking the statutory provision in the earlier suit will not operate as *res judicata* in this subsequent suit.[1402]

In this connection, it is interesting to note the decision of the Privy Council in *Broken Hill Proprietary Co v Broken Hill Municipal Council.*[1403] The appeal was from a judgment of the Supreme Court of New South Wales. The question for determination was as to the correct method of ascertaining the annual value of a mine for rating purposes for the year 1919–21. That question turned upon the construction of section 153(3) of the Local Government Act, 1919, of New South Wales. The company was assessed for the years 1917–19 by the Council on a particular construction of the section and that construction was upheld by the High Court of Australia. The council adopted the same method for assessment for the years 1919–21 and it was upheld by the Supreme Court. The company appealed to the Privy Council. It was contended on behalf of the council that the question as to the matter of valuation was *res judicata*, but this contention was overruled and the appeal was allowed. As to the plea of *res judicata*, their Lordships said:

> There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principles of *res judicata* cannot apply.

This case shows that according to the English law an erroneous decision on a question atleast of the interpretation of a statute, does not operate as *res judicata*. If a decision of every question of law were *res judicata*, a decision that one of the several co-sharers may alone maintain a suit for rent of the entire holding, though contravention of the express provisions of section 194 of the Agra Tenancy Act, 1901, would operate as *res judicata* in a subsequent suit between the same parties so as to preclude the tenant from raising the same defence in that suit, but it has been rightly decided that such a decision has not the effect of *res judicata.*[1404] A view has also been expressed in some cases that a decision on a question of jurisdiction, would

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1398. As to *stare decisis*, see *Tricomdas v Gopinath*, (1917) ILR 44 Cal 759 : (1917) 44 IA 65, p 70; *Pate v Pate*, AIR 1915 Cal 1100.
1399. *Tarini Chandran v Kedar Nath*, AIR 1928 Cal 777 : (1929) ILR 56 Cal 723; *Narayana v Subramanian*, AIR 1937 Mad 254 : (1937) 1 Mad LJ 233.
1400. *Jeychand v Dolegobinda*, AIR 1944 Cal 272 : (1944) 48 Cal WN 454; *Panchanon v Ranbir*, AIR 1948 All 336.
1401. *N Sreekanthaiah v MN Mallikarjunaiah*, AIR 1996 Kant 93.
1402. *UOI v Indian Railways, SAS Staff Association*, (1995) Supp 3 SCC 600.
1403. *Broken Hill Proprietary Co v Broken Hill Municipal Council*, AIR 1942 Bom 322 : (1942) 44 Bom LR 710.
1404. *Manohar Lal v Baldeo Singh*, AIR 1927 All 505 : (1927) ILR 49 All 918.

not be *res judicata*.[1405] A previous decision that the defendant were entitled to take advantage of section 7 of the Bihar Money Lenders Act of 1937, does not operate as *res judicata* as to the interpretation of the section in a subsequent litigation between the parties.[1406] A decision in an earlier suit that the municipality was not liable to pay non-agricultural assessment on a portion of the public street on which it had put up a market did not bar the collector from claiming in a subsequent suit that the municipality was liable to pay non-agricultural assessment on another portion of the public street at which it had constructed shops, as a decision on a question of law could be *res judicata* only if the right in dispute was the same.[1407] The doctrine of *res judicata* is a universal doctrine laying down the finality of litigation between the parties. When a particular decision has become final and binding between the parties, it cannot be set at naught on the ground that such a decision is violative of Article 14. So far as the parties are concerned, they will always be bound by the said decision. In other words, neither party will be permitted to reopen the issue decided by such decision on the ground that such decision violates the equality clause under the Constitution.[1408]

An interesting question as to whether the parties can be allowed to re-agitate issues which have been decided by a court of competent jurisdiction on a subsequent change in the interpretation of the relevant provision of law arose for consideration in *Kalinga Mining Corp v UOI*.[1409] The issue involved was whether the application for grant of mining lease would abate on the death of the applicant or can the legal heirs of the deceased applicant be allowed to pursue the application? While the controversy about the abatement of the application was pending, Mineral Concession Rules, 1960 were amended and rule 25-A was inserted which permitted the legal representatives to continue pressing an application for grant of mining lease after the death of the applicant. The high court held that rule 25-A is only clarificatory in nature and thus, had retrospective effect. Accordingly, it allowed the legal representatives to pursue the application. The appellant, another applicant for mining lease, challenged the decision of the high court by filing a SLP before the Supreme Court, which came to be dismissed *in limine*. Thereafter, the Central Government approved the recommendation of the State Government to grant mining leases in favour of the legal representatives of the deceased applicant. After the grant of lease, the appellant filed another writ petition before the high court challenging the same on the basis that the said grant constituted a new cause of action. In the meantime, the interpretation placed on rule 25-A by the high court to the effect that it was clarificatory in nature was reversed by the Supreme Court in *Saligram Khirwal v UOI*.[1410] It was held that rule 25A was only prospective. It was further observed that the legal heirs shall be at liberty to make a fresh application in their own right. The writ petition filed in the high court was allowed to be amended in view of this judgment. The appellant raised a preliminary objection relating to the maintainability of the application for the grant of mining lease by the legal representatives of the deceased applicant. While rejecting the preliminary objection, the high court held that the controversy regarding allowing the legal representatives to be substituted for the deceased applicant stood concluded between the parties and attained finality by the rejection of the SLP by the Supreme Court and the subsequent decision in

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1405. *Meghraj Golab Chand Firm v Chandra Kamal Bhuiyan*, AIR 1941 Cal 493 : (1941) 73 Cal LJ 410 and the cases noticed therein.
1406. *Narayan Singh v Kapil Deo*, AIR 1951 SC 155 : (1951) SCR 138 : 1951 SCJ 199.
1407. *Province of Bombay v Municipal Corp. Ahmedabad*, AIR 1954 Bom 1 : (1953) ILR Bom 1081; *Goripalayam Darga v Narayana*, AIR 1951 Mad 630.
1408. *Supreme Court Employees Welfare Assn v UOI*, AIR 1990 SC 334.
1409. *Kalinga Mining Corp v UOI*, 2013 AIR SCW 1427 : (2013) 5 SCC 252 : (2013) 1 SCR 814 : JT 2013 (2) SC 597.
1410. *Saligram Khirwal v UOI*, AIR 2004 SC 805 : (2003) 7 SCC 689.

Saligram Khirwal is of no consequence. While upholding the order of the high court, the Supreme Court observed:

> The subsequent interpretation of rule 25A by this Court, that it would have only prospective operation, in the case of Saligram (supra), would not have the effect of reopening the matter which was concluded between the parties. In our opinion, if the parties are allowed to re-agitate issues which have been decided by a Court of competent jurisdiction on a subsequent change in the law, then all earlier litigation relevant thereto would always remain in a state of flux. In such circumstances, every time either a statute or a provision thereof is declared ultra vires, it would have the result of reopening of the decided matters within the period of limitation following the date of such decision. In this case not only the High Court had rejected the objection of the appellant to the substitution of the legal heirs of Dr. Sarojini Pradhan in her place, but the SLP from the said judgment has also been dismissed. Even though, strictly speaking, the dismissal of the SLP would not result in the merger of the judgment of the High Court in the order of this Court, the same cannot be said to be wholly irrelevant. The High Court, in our opinion, committed no error in taking the same into consideration in the peculiar facts of this case. Ultimately, the decision of the High Court was clearly based on the facts and circumstances of this case.

The Supreme Court thus reaffirmed the position that *"a wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides."*

(h) Estoppel Against a Statute.—Whether or not a finding on a point of law can be *res judicata*, it is a settled principle that there can be no estoppel against a statute, for estoppel cannot supersede the law of the land.[1411] Thus, in *Woomesh v Barada*[1412] where a previous rent suit had been decreed at a rate which included illegal cess, the defendant was not precluded from questioning the legality of the claim; but, the applicability of a section to a particular transaction may be *res judicata*.[1413] The Bombay High Court has allowed the plea of *res judicata* to sanction what is prohibited by law. This was in case[1414] where a mortgagor lessee of a portion of a *bhag* which was inalienable under the Bombay Bhagdari Act 5 of 1862, when sued for rent, was not allowed to plead that the *bhag* was inalienable because he had omitted to do so in a previous *ex parte* rent suit. In a later case,[1415] the Allahabad High Court dismissed a suit by a single co-sharer for rent because that form of suit was forbidden by section 194 of the Agra Tenancy Act. It was objected that the defendants had not raised this plea in previous rent suits and as to this, the court said that "where the law forbids a certain thing being done in a suit, no amount of failure by a defendant in previous suits to plead the positive bar created by legislature will prevent its being taken up in a subsequent suit."

(i) Modification of Statute.—Unless it is expressly so provided, modification of statute cannot deprive a litigant of a substantive right which he had acquired before the modification came in force. The test in such cases seems to be whether a right claimed is a substantive right or a mere procedural right. An order of the execution court holding that the property in dispute was not rateable under section 16, Bundelkhund Land Alienation Act, 1908, is

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1411. *Muhammad Maqsood v Hoshiar Singh*, AIR 1945 All 377 : (1945) ILR All 394; *Hunt v Wimbledon Local Board*, (1878) 4 CPD 48; *Shridhar v Babaji*, (1914) ILR 38 Bom 709.
1412. *Woomesh v Barada*, (1900) ILR 28 Cal 17.
1413. *Bindeshwari v Bhageshwari*, AIR 1936 PC 46 : (1936) ILR 15 Pat 203 : 63 IA 53.
1414. *Chhaganlal v Bai Harkha*, (1909) ILR 33 Bom 479.
1415. *Manohar v Baldeo*, AIR 1927 All 505 : (1927) ILR 49 All 918, p 923; *Rup Nath v Jagannath*, AIR 1928 Pat 227 : (1928) ILR 7 Pat 178; *Thakur Bhageshwari v Bindeswari*, AIR 1932 Pat 337 : (1933) ILR 12 Pat 147; *Batul Begum v Hemchand*, AIR 1960 All 519.

a substantive right.[1416] In *Colonial Sugar Refining Co Ltd v Irving*,[1417] a right of appeal to a particular forum was considered by their Lordships to be substantive right and was held, not to have been lost as a result of the change in enactment. In *Ram Karan v Ram Das*[1418] a Full Bench of the Allahabad High Court held that if a tenant had been dispossessed before a new Tenancy Act and the cause of action had accrued before that Act came into force, then he was entitled to institute a suit in the civil court within 12 years of his dispossession, notwithstanding the provisions of the new Act that the forum should be the revenue court, and that the suit for possession should lie within six months only. Where as a result of change in law, new rights are conferred on parties, such rights are not barred as *res judicata* by decisions given before the new law came into force.[1419] In *Board of Commr v Rutnaswamy*[1420] it was held that a decision that a temple was an excepted one as defined in the Madras Hindu Religious Endowments Act, 1927, did not operate as *res judicata* on the question whether it was an excepted temple within that Act as amended in 1930. This decision was followed by the Andhra Pradesh High Court in *Raghavendraswamy v Board of Commrs*[1421] wherein it was observed that the principle laid down therein was also applicable to a case where there was a change of circumstances and that it was not confined to changes in law. In *NGDM Trust v RT Ramji,* the legislature immediately on realising the adverse effect of section 121 of the Gujarat Town Planning and Urban Development Act, on operation of Bombay Tenancy Act to which the provisions of the Tenancy Act either apply or are realised, it would result into depriving the tenants of the status of deemed purchaser which was conferred on them; therefore, the state legislature enacted Gujarat Town Planning and Urban Development (Amendment) Act, 1986, which was brought into force wef 12 June 1985, by section 5 of the Amendment Act. It is provided that in the principle Act section 121 of the Transfer of Property Act shall be deleted wef 12 June 1985. In the opinion of the Gujarat High Court, the amendment was not applicable to a case where the statutory purchase had already taken place on 18 April 1957, when the tenant had become a deemed purchaser. Therefore, since the proceedings had already commenced on 18 April 1957, and since the tenant had already become a deemed purchaser, the fixation of the purchase price was a step in aid of the statutory obligation of the *mamlatdar* and ALT to fix the purchase price of the parcel of land of a deemed purchaser had taken place on 1 April 1957. Such a decision where taken by the statutory authority as it is or as the instance of the deemed purchaser, would not render the decision of the authority nonest.[1422] The Hindu Religious and Charitable Endowments Act, 1927, was repealed by the new Act of 1959. A decision on the question under the repealed Act can be taken as *res judicata* for purpose of Act of 1927 and not for the Act of 1959.[1423] Where a previous decision holds a decree to be a nullity because it was made under an Act which had no application to the territory in question, but the Act is later retrospectively extended by legislation to the territory and the decree is validated it was held that the decision holding the decree as a nullity cannot operate as *res judicata*.[1424]

1416. *Sundar v Sheo Dat Singh*, AIR 1937 All 48 : (1936) All LJ 1363.
1417. *Colonial Sugar Refining Co Ltd v Irving*, AIR 1905 Cal 369.
1418. *Ram Karan v Ram Das*, AIR 1931 All 635 : (1931) ILR 54 All 299.
1419. *Ram Deo v Board of Revenue*, AIR 1961 All 278.
1420. *Board of Commr v Rutnaswamy*, AIR 1937 Mad 232 : (1937) ILR Mad 504 : (1937) 45 Mad LW 57; *Amritsar Municipality v State of Punjab*, AIR 1969 SC 1100 : (1969) 1 SCC 475.
1421. *Raghavendraswamy v Board of Commrs*, AIR 1957 AP 150 : (1957) 1 Andh WR 152; *Official Receiver v UOI*, AIR 1961 Cal 432.
1422. *Navrangpura Gam Dharmada Milkat Trust v Ram Tuji Ramaji*, AIR 1994 Guj 75.
1423. *MVPB Nammalwar v Commr Hindu Religious & Charitable Endowments Dept, Madras*, AIR 1997 Mad 287.
1424. *Jai Singh Jai Ram Tyagi v Mamanchand Rati Lal Aggarwal*, (1980) 3 SCC 162.

[s 11.26.2.2] Condition II: The Same Parties or Parties under Whom any of Them Claim

This condition is the principle that judgments and decrees bind only parties and privies.[1425] A privy is a convenient term of English law to describe a person who claims under a party. Latham J in a Bombay case[1426] classified persons other than parties as: (1) privies; (2) persons not claiming under parties but represented by them; and (3) strangers.

The ground of a privy is property and not personal relation. To make a person a privy, he must have acquired an interest in the subject matter of action by inheritance, succession or purchase *subsequently* to the action, or he must hold the property subordinately, eg, as a sub-lessee. In the case of subordinate holder, however, the acquisition of the subordinate interest *prior* to the action would make the subordinate holder a privy to the judgment passed therein against the superior holder if the subordinate interest is of such a character that it is entirely dependent on that of the superior holder and automatically comes to an end as soon as the superior interest is extinguished.[1427] A privy who claims under a party is bound, for, he who takes the advantage must bear the burden—*qui sentit commodum sentire debet et onus.* Persons represented are in fact parties through their representatives—*Explanation IV.* In the absence of fraud, an adjudication is binding on the first two classes, for as to strangers the maxim applies that *res inter alios acta noceri non debet.*

(a) Same Parties.—Parties are persons whose names are on the record at the time of the decision, and a party may be a person who has intervened in the suit.[1428] A party who withdraws or whose name is struck off, ceases to be a party.[1429] A person whose name has been inserted as a party through fraud without knowledge, or if he is a minor on record unrepresented by a guardian, cannot be said to be a party. A person who has unsuccessfully applied to be added as a party is also not a party.[1430] Delay in filing suit was condoned by invoking section 5 of the Limitation Act. The third party was impleaded after that order was passed. That party disputed legality of the order condoning delay in appeal. Plea cannot be disallowed on principle of *res judicata*, as the issue decided was not "between the same parties". Proposition that *res judicata* applies at two stages of the same litigation could not be invoked on the basis that an appeal is a continuation of the suit.[1431] Even though a real owner has not been shown in the record as a party, a decree against his *benamidar* binds him; but this is not an absolute rule. If it is shown that the *benamidar* was not authorised to conduct the litigation and had therefore no right to represent the real owner, the decision against the *benamidar* does not bind the real owner.[1432] A party who dies during the pendency of the suit but whose name erroneously remains on the record is not a party.[1433] If the parties are different, there is no *res judicata.*[1434] A former suit by the plaintiff alone and in his own right does not bar a subsequent suit filed in the name of a deity.[1435] Thus, *A* sues *B* for rent. The defence is that *C*, and not *A*, is the landlord. *A* fails to

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1425. *Mohunt Das v Nil Komul*, (1899) 4 Cal WN 283. See also *Vaishnava Dass v Faqirchand*. AIR 1968 Del 6.
1426. *Ahmedbhoy v Vulleebhoy*, (1882) ILR 6 Bom 703, p 709.
1427. *Sailendra v Bijanlal*, AIR 1945 Cal 283 : (1946) 49 Cal WN 133.
1428. *Gobind v Taruck*, (1878) ILR 3 Cal 145; *Basivi Reddy v Janardan Rao*, AIR 1968 AP 306.
1429. *Kalee Coomar v Pran Kishoree*, (1872) 18 WR 29.
1430. *J Kotamma v P Simhachalam*, AIR 1969 AP 76.
1431. *Sk Md Ismail v Sk Anwar Ali*, AIR 1991 Cal 391.
1432. *Chandran v Subramanya*, AIR 1977 Mad 292 : (1977) ILR 3 Mad 173.
1433. *Bepin Behary v Brojo Nath*, (1882) ILR 8 Cal 357.
1434. *Radha Binode v Sri Sri Gopal*, AIR 1927 PC 128 : (1927) ILR 54 Cal 770 : 54 IA 238. See also *KB Ramachandra Raja v State of Karnataka*, AIR 2001 Kant 512.
1435. *Sri Ramjee v BP Shah*, AIR 1978 Pat 129.

prove his title, and the suit is dismissed. *A* then sues *B* and *C* for a declaration of his title to the property. The suit is not barred, for the parties to the two suits are not the same, *C* not having been a party to the former suit.[1436] Earlier suit was for eviction, on the ground that sub-tenants had been illegally inducted. Sub-tenants were inducted prior to the commencement of the West Bengal Premises Tenancy Act, 1956, and before expiry of lease period. Suit was dismissed. Subsequent suit was filed after commencement of the West Bengal Act. Sub-tenants inducted before and after the commencement of the Act were joined as parties. Eviction on the ground of violation of section 13(1)(a) of the West Bengal Act, inter alia, was pleaded. It was held that earlier suit would not operate as *res judicata*, since the parties were not the same and the question of violation of provisions of the West Bengal Act was not involved in the earlier suit.[1437] A suit was filed to challenge the resolution of a municipality enhancing the fee for market stalls. In an earlier suit, the same resolution had been challenged by the members of another market through a representative suit. It was held that the finding given in the earlier suit did not operate *res judicata* as the present plaintiff was not a member of that market.[1438] Where the parties to the suit are not the same, *res judicata* does not apply even if the issues (existence of relationship of partnership or employment, are the same;[1439] but, where the parties in the suit are the same as in the former suit and the judgment in the former suit has not been appealed from and allowed to be final, it is binding on the parties and they cannot be allowed to go behind it in the subsequent suit.[1440] It has been doubted if the secretary of state can be said to be a party to Land Acquisition proceedings taken by the collector.[1441] A bank which held goods pledged by a firm against cash credit facility, wished to adjust the amount recovered from the pledged goods for wiping out separate dues of the partners. The goods had not been pledged for individual debts of partners. It was held that this could not be done. Finding *inter partes* becomes *res judicata*.[1442] Petition of Union of India about the competent authority appointed under Act 50 of 1962, was dismissed. It was held that special leave petition against such removal can be filed by Hindustan Petroleum Corporation as the grievance was independent of that of the government.[1443] A judgment in a suit for injunction is not judgment *in rem* and binds only the parties to the suit. It may be true that a decree for injunction compels personal obedience and in a proper case would not be forced against the legal representatives. However, this proposition must have a qualification and that qualification is that when the injunction relates to doing something or not doing something in a property that was the subject matter of the earlier suit and the act was on the basis of ownership of an adjacent property or a right claimed in the property of the other side, then such a decree for injunction would be binding not only against the judgement-debtor personally but all those who claim through him.[1444] When once a decree is passed, it is obvious that the defendant in the suit, i.e., the judgement-debtor, would be precluded from carrying on blasting operations in his property. To say that he is succeeded by others, they would not be bound by the restraint relating to the enjoyment of the particular property to derogate from the principle of the public policy that there shall be no second litigation in respect of same right and the same property.

1436. *Dwarkanath v Ramchand*, (1899) ILR 26 Cal 428.
1437. *Shantilal Rampuria v Vega Trading Corp*, AIR 1989 SC 1819.
1438. *Coimbatore Municipality v CG Subbiah*, AIR 1980 Mad 130.
1439. *Munish Kumar Agnihotri v Lalit Prasad Gupta*, AIR 1989 All 202.
1440. *MK Rapai v John*, AIR 1965 Ker 203.
1441. *Secretary of State v Tatya Saheb*, AIR 1932 Bom 386 : (1932) ILR 56 Bom 501.
1442. *Gurbax Rai v Punjab National Bank*, AIR 1984 SC 1012 : (1984) 3 SCC 96.
1443. *Hindustan Petroleum Corp Ltd v Yashwant Gajanan Joshi*, AIR 1991 SC 933.
1444. *Rajappan v Sankaran Sudhakaran*, AIR 1997 Ker 315.

It cannot be a policy of law that every time an assignment of the decree in the scheduled property takes place, the decree-holder should institute a fresh suit against the assignees so as to prevent him from disobeying the decree obtained by the decree-holder against the original owner of the property.[1445] A decree for permanent injunction does not prohibit the defendant from instituting a suit for declaration of his title and for recovery of possession from the very decree-holder. On legal principles that distinguish between ownership and possession, it is difficult to hold that the transferee is a "privy" in estate and the decree made against his transferor operates as *res judicata* against him.[1446] A decree passed *ex parte* against one guarantor on the basis of certain documents cannot bind other guarantors who had no opportunity to put forth their case.[1447]

Direction in preliminary decree about inquiry into *mesne* profits does not adjudicate the controversy and is not *res judicata.*[1448] Suit was filed for specific performance of an agreement of sale of undivided one-third share of the defendant. During its pendency, the share of the defendant was determined to be less than one-third, in partition. It was held that the partition decree passed during the pendency of the suit between the defendant and her co-owner could not operate as *res judicata.* Even if it be held that plaintiffs' suit for specific performance was premature, that could only disentitle them to costs.[1449] As an illustration of parties litigating under the same title see *Radha Mohan v Eliza Jane Hilt.*[1450]

Merely because the petitioner was not a party to the petition, which were filed for objecting the refinery project, it could not be said that the same has no bearing on the present proceedings. Those proceedings were also filed by the petitioners in the public interest for the protection of environment and ecology. Thus, all these proceedings were filed for the same "interest and claim". Therefore, when the subject matter of the earlier proceedings and the present proceedings is one and when the petitioners in both proceedings were having the same status, then the earlier decision will create the general principle of constructive *res judicata.*[1451] A suit was filed by the respondent against the Board or university for alteration of her date of birth in the matriculation certificate. The respondent did not make the state government a party to the suit. It was held that the decree against the Board or university which issued the matriculation certificate was not binding on the government. At best it can only be treated as a piece of evidence.[1452] The order of the high court directing the receiver appointed by the Supreme Court to make demarcation in the disputed fisheries and thereafter, carry out the directions of Supreme Court in respect thereof. The state was neither made a party to the proceeding nor noticed by the high court before passing the high court. The order passed by the high court was also not challenged by the state. It was held that the said order does not operate as *res judicata* taking away the rights of the parties in respect of the said fisheries.[1453]

Dealing with the question of relevancy of former judgments under section 40 of the Indian Evidence Act, the Bombay High Court held in a case that where the defendant of the instant suit was not a party to the earlier suit, the earlier judgment would neither fall within the scope

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1445. *Clothy Theyyathan v John Thomas*, AIR 1997 Ker 249.
1446. *Shankaralingappa v Nanja Gowda*, AIR 1981 Kant 78.
1447. *Eastern Bank v Ports Services of India Ltd*, AIR 1986 Cal 61.
1448. *Gokul Chandra v Atlas & Union Jute Press Co Ltd*, AIR 1986 Cal 392 (DB).
1449. *Ram Niwas v Omkari*, AIR 1983 All 310 (DB).
1450. *Radha Mohan v Eliza Jane Hilt*, AIR 1947 All 147 : (1947) ILR All 186.
1451. *Gujarat Navodaya Mandal v State of Gujarat*, AIR 1998 Guj 141.
1452. *Director of Education v K Sita Devi*, (1991) Supp 2 SCC 387.
1453. *Bansi Lal Farms v Uma Rani Bose*, (1997) 9 SCC 191.

of section 40 of the Indian Evidence Act nor the provisions of section 11 of the CPC would be applicable.[1454]

For application of the rule of *res judicata* it is necessary that parties to the two suits or proceedings must also be same and they must be litigating under the same title. Where plaintiff in the subsequent suit was not a party in the earlier suit, the plea of the defendant that the plaintiff was aware of the suit and he should have got himself impleaded in that would not be tenable. There is no compulsion on a person to get himself impleaded in any court proceeding. If the defendant desired that the decision in the earlier suit would be binding on the plaintiff, he ought to have impleaded the plaintiff as a party in the earlier suit. Thus, the plaintiff being not a party in the earlier suit, the provisions of section 11 of CPC was held to be not attracted.[1455]

(b) Res Judicata Between Co-Defendants.—As a matter may be *res judicata* between a plaintiff and a defendant, so it may be *res judicata* as between co-plaintiffs or between co-defendants. First, as to *res judicata* between co-defendants: if in a suit by *A* against *B* and *C*, there is a matter directly and substantially in issue between *B* and *C*, and an adjudication upon that matter is *necessary* to the determination of the suit, the adjudication may operate as *res judicata* in a subsequent suit between *B* and *C* in which either of them is plaintiff and the other defendant.[1456] In other words, "if a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide the case, and the co-defendants will be bound; but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains".[1457] These are the limits within which the doctrine of *res judicata* should be applied as between co-defendants[1458]

It is well settled that in certain cases principles of *res judicata* may be invoked to prevent a co-defendant(s) in a previous suit from filing fresh suit against other codefendant(s) if certain conditions are satisfied. In *Govindammal v Vaidiyanathan,*[1459] the Supreme Court reiterated the requisite conditions for applying the principle of *res judicata* between the co-defendants.

1454. *Smt Shamlata v Vishweshwara Tukaram Giripunje*, AIR 2008 Bom 155 : (2008) 2 All MR 743.
1455. *Narendra Akash Maharaj Patkar v Shahji Babu rao Patkar*, AIR 2009 Bom 165 : (2009) 5 All MR 173 (DB).
1456. *Radha Rani v Binoda Moyee*, AIR 1942 Cal 92 : (1942) ILR 1 Cal 169; *Ramchandra v Narayan*, (1887) ILR 11 Bom 216; *Magniram v Mehdi Hoossein*, (1904) ILR 31 Cal 95; *Chajju v Umrao*, (1900) ILR 22 All 386; *Balambhat v Narayanbhat*, (1901) ILR 25 Bom 74; *Bapu v Bhawani*, (1898) ILR 22 Bom 245; *Muhammad v Visvanath*, (1903) ILR 26 Mad 337; *Kandiyi v Zamorin of Calicut*, (1906) ILR 29 Mad 515; *Yusuf v Durji*, (1907) ILR 30 Mad 447; *Gurdeo Singh v Chandrikah Singh*, (1909) ILR 36 Cal 193; *Hari Annaji v Vasudev*, (1914) ILR 38 Bom 438; *Gangaram v Vasudeo*, AIR 1923 Bom 203 : (1923) ILR 47 Bom 534; *Rajendra v Biswarup*, AIR 1921 Cal 255 : (1922) 35 Cal LJ 173; *Venkobacharlu v Radhabayamma*, AIR 1924 Mad 858 : (1924) 47 Mad LJ 612; *Muhammad Ahmad v Zahur*, AIR 1922 All 19 : (1922) ILR 44 All 334, p 338; *Mehra v Devi Ditta Mal*, AIR 1921 Lah 47 : (1921) 2 Lah 88; *Maung Thwe v Ma Shwe*, AIR 1924 Rang 279; *Ram Prasad v Mahabir*, AIR 1924 All 310 : (1924) ILR 46 All 220; *Mahip Narain v Mannu Singh*, AIR 1925 All 546 : (1925) ILR 47 All 778; *Dewan Singh v Gokul*, AIR 1921 Lah 25 : (1921) 3 Lah LJ 295; *Pratapa v Simji*, AIR 1927 Mad 50 : (1926) 51 Mad LJ 652; *Ma Pun Nyun v Maung Sit Phaung*, AIR 1928 Rang 315 : (1928) 6 Rang 575; *Barkat Ali v Karim Baksh*, AIR 1932 Lah 325 : (1933) ILR 14 Lah 442; *Dwaraka Das v UOI*, AIR 1953 P&H 120 : (1953) ILR Punj 521; *Ram Sagar v Yogendra Narain*, AIR 1975 Pat 239.
1457. *Cottingham v Earl of Shrewsbury*, (1843) 3 Hare 627, p 628; *Tamwangince Debi v Abhaya Charan*, AIR 1930 Cal 169 : (1930) ILR 57 Cal 480; *Janki v Dharamraj*, AIR 1974 Pat 254.
1458. *Fakirchand v Naginchand*, (1916) ILR 40 Bom 210, p 216.
1459. *Govindammal v Vaidiyanathan*, 2018 SCC OnLine SC 2117.

For application of doctrine of *res judicata* between co-defendants, four conditions must be satisfied namely:

(i) There must be a conflict of interest between the defendants concerned;

(ii) it must be necessary to decide the conflict in order to give the relief which the plaintiff claims;

(iii) the question between the defendant must have been finally decided;

(iv) the co-defendants were the necessary or proper party in the former suit.

The court made it clear that if these conditions are not fulfilled, the principles of *res judicata* cannot be made applicable between the co-defendants in a subsequent suit.

If the plaintiff cannot get at his right without trying and deciding the case between co-defendants, the court will try and discharge the case, and the co-defendants will be bound by the decree; but, if the relief given to the plaintiff does not require or involve a question of any case between co-defendants, the co-defendants will not be bound as between each other.

Where the above four conditions did not exist, the decree does not operate as *res judicata*. It must, therefore, be that all the persons who have right, title and interest are made parties to the suit and that have should have knowledge that the right, title and interest would be in adjudication and the finding or the decree there in would operate as *res judicata* to their right, title and interest in the subject matter of the former suit. Even in their absence, a decree could be passed and it may be used as an evidence of the plaintiff's title either accepted or negatived therein. The doctrine of *res judicata* would apply even though the party against whom it is sought to be enforced was not *eo-nomine* made a party nor entered appearance, nor did he contest the question.

The doctrine of *res judicata* must be applied to co-defendants with great care and caution. The reason is that fraud is the extrinsic collateral act which vitiates solemn proceedings of courts of justice. If a party obtains a decree from the court by practicing fraud or collusion, he cannot be allowed to say that the matter is *res judicata* and cannot be reopened. There can also be no question of *res judicata* in a case where signs of fraud or collusion are transparently pregnant from the facts on record. Therefore, in applying the doctrine of *res judicata* between co-defendants or co-plaintiff care must, of necessity be taken by the court to see that there must infact be a conflict of interest between the co-defendants or the co-plaintiffs concerned and it is necessary to decide the conflict as in order to give relief which the plaintiff in the suit claimed and the question must have been directly and substantially in issue and was finally decide therein.[1460] Three conditions to be fulfilled are:

(i) a conflict of interest between the co-defendants;

(ii) the necessity to decide that conflict in order to give the plaintiff appropriate relief: and

(iii) a decision of the question between the co-defendants.[1461]

1460. *Mahboob Sahab v Syyad Ismail*, (1995) 3 SCC 693.

1461. *Syed Mohammud Sadat Ali Khan v Mirza Wiquar Ali*, AIR 1943 PC 115 : (1944) 48 Cal WN 66; *Chandu Lal v Khalilur Rahaman*, AIR 1943 Cal 76 : (1942) ILR 2 Cal 229; *Chunibhai v Nathabhai*, AIR 1944 Pat 185 : (1943) ILR 22 Pat 655; *Bhupindera v Tarupriya*, AIR 1950 Assam 119 : (1950) 2 Assam 225; *KP Rau Kuppan Chettiar v BM Ramaswami Chettiar*, AIR 1946 Mad 472 : (1947) ILR Mad 58; *Munni Bibi v Tirloki Nath*, AIR 1931 PC 114 : (1931) 58 IA 158; *Kishan Prasad v Durga Prasad*, AIR 1931 PC 231 : (1931) 35 Cal WN 1217; *Jadav v Kailash*, (1916) 25 Cal LJ 322; *Sukh Dial v Bhopi*, AIR 1923 Lah 186; *Ma Tok v Ma Yin*, AIR 1925 Rang 228, (1925) 3 Rang 77, p 79; *Ma*

[Footnote No. 1461 contd.]

In *Municipal Corp of Greater Mumbai v Pankaj Arora*[1462], the Supreme Court took into account the cautions issued by this book against misapplication of *res judicata*. The court quoted him with approval to hold –

> *It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.*

Where the four conditions specified here for the purpose are satisfied an issue between co-defendants may become *res judicata*.[1463] If those conditions are present then the doctrine of *res judicata* would apply to the co-defendant even if he did not appear in the earlier suit and contest the question but subject to the qualification that in such a case it must be proved that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided.[1464] It may be added here that where by the existence of these conditions the decision operates as *res judicata* between the co-defendants in a subsequent suit by one of them, a co-defendant has a right of appeal against the decision even if the suit by that decision has been dismissed against them.[1465] Even where their condition above set out did not exist and the judgment therefore does not operate as *res judicata* between the co-defendants, if the judgment has disposed off the question of the plaintiff's title, it can be taken into consideration as evidence of an instance where the plaintiff's title was negatived.[1466] Landlord sued for ejection of joint tenants. Their defences were not conflicting in that suit. Subsequently, one joint tenant sues for ejectment of the other tenant. It was held that the finding in the previous suit could not operate as *res judicata* in the subsequent suit between the joint tenants.[1467]

In *Maung Sein Done v Pan Nyun*[1468] the intestate had left two daughters S and *P* and two sons. The sons took possession of his estate. Thereupon, S filed a suit against her two brothers and her sister *P* for administration of the estate and to recover her one-fourth share under Burmese Buddhist law. *P* filed no written statement but gave evidence for her sister, the plaintiff. The suit was dismissed on the ground that the succession was governed by Chinese

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[Footnote No. 1461 contd.]
Shin v Maung Han, AIR 1929 Rang 163 : (1929) ILR 7 Rang 80, p 83; *Chidambargauda v Channappa*, AIR 1934 Bom 329 : (1934) 36 Bom LR 694; *Rami Reddi v Tugram Bichalu*, AIR 1952 Mad 837; *Ram Karan Singh v Parbati*, AIR 1954 Pat 443; *Eapen Mathai v Abdul Khader*, AIR 1958 MP 261 : (1958) ILR Ker 1034; *Ram Swarup v Futtu*, AIR 1960 All 367; *Koodi v Baboo*, AIR 1959 Raj 127 : (1959) ILR Raj 632; *SP Misra v Babuaji*, AIR 1970 SC 809 : [1969] 2 SCR 971; *Dhan Singh v Jt Director, Consolidation*, AIR 1973 All 283; *Iftikhar Ahmed v Syed Meharban*, AIR 1974 SC 749 : (1974) 2 SCC 151; *Muna Kuar v Lala Prasad*, AIR 1970 Pat 219.

1462. *Municipal Corp of Greater Mumbai v Pankaj Arora*, (2018) 3 SCC 699. Also see, *M Siddiq (D) Thr Lrs v Mahant Suresh Das*, 2018 SCC Online SC 1677. In this case, the apex court examined whether the issues raised in the instant case were directly and substantially in issue in *M Ismail Faruqui v UOI*, [(1994) 6 SCC 360]? The court answered the question in the negative and held that the present petition was not barred by *res judicata*.

1463. *Debabrata Mukherjee v Ralyan Kumar*, AIR 1983 Cal 241 (DB); *Munni Bibi v Triloki Nath*, AIR 1931 PC 114.

1464. *Chandu Lal v Khalilur Rahaman*, AIR 1950 PC 17 : 77 IA 27 : (1950) 54 Cal WN 211; *Bhoom Reddi v State of Hyderabad*, AIR 1955 Hyd 440 : (1955) ILR Hyd 599.

1465. *Kesavan v Lekshmy Amma*, AIR 1968 Ker 154.

1466. *A Venkateshwarlu v MM Mosque*, AIR 1972 AP 132.

1467. *Sher Singh v Mohd Ismail*, AIR 1981 All 114.

1468. *Maung Sein Done v Ma Pan Nyun*, AIR 1932 PC 161 : (1932) ILR 10 Rang 322 : 59 IA 247; *Kedar Nath v Munshi Ram*, AIR 1935 PC 139 : 62 IA 224 : (1935) 14 Pat 611; *Jeshwant Ramchandra v Govind*, AIR 1934 Bom 313 : (1934) ILR 58 Bom 544 : (1934) 36 Bom LR 612.

customary law under which the sons succeed to the exclusion of the daughters. Subsequently, *P* filed a suit for administration and to recover her one-fourth share. The Privy Council held that the suit was barred by *res judicata* as there was a conflict of interest between *P* and her brother, that conflict would necessarily have had to be decided to give S the relief she claimed and the question between *P* and her brother was finally decided. In *Munni Bibi v Triloki Nath*,[1469] *M* and *K* were rival claimants to a house. *M* alleged that the house belonged to her deceased father Amernath and claimed as his daughter. *K* alleged that the house belonged to her mother and that she had inherited it as stridhan property. A creditor of Amernath sued *M* and *K* to establish his right to sell the house as the property of Amernath. The court found that the house belonged to Amarnath and decreed the creditor's suit. *K*'s son paid off the creditors and took possession of the house. *M* sued to recover the house from *K*'s son who claimed title under *K*. *M* urged that the question of title as between her and *K* was *res judicata* by reason of the decision in the creditor's suit. The Privy Council held that the conditions of *res judicata* were established because there was a conflict of interest between *M* and *K* for it was only if the house belonged to Amernath that the plaintiff's case could succeed and this question was decided in the plaintiff's favour. Their Lordships observed that it was immaterial that *K* had not entered appearance or contested the suit for she was a proper party and had a right to be heard if she so desired. In a case, however, where one defendant actually gave evidence and supported the case of the other defendant, it was held that there was no conflict of interest and no *res judicata* between the defendants.[1470]

A Hindu *H* dies leaving two daughters *D1* and *D2* and a nephew *N*. *D1* sues *D2* and *N* to recover certain property under an oral will of *H*. *D2* claims the property under a will in writing executed by *H*. *N* claims the property as undivided nephew of *H*. The court finds that *H* and *N* were divided, that the will in writing is a valid will, and dismisses *D1*'s suit. Subsequently, *D2* sues *N* to recover the property under the written will. *N* contends that he and *H* were joint, and that he became entitled to the property by right of survivorship. The question whether *H* and *N* were joint is *res judicata*. That question was directly and substantially in issue in the first suit and it was necessary to decide it in that suit to adjudicate upon *D1*'s claim, and it was decided against *N*.[1471] Another type of case in which a question between co-defendants may become *res judicata* is where a suit is brought against two or more defendants, and a will has to be construed by the court to adjudicate upon the plaintiff's claim which is founded on the will. In such cases the decision with regard to the construction of the will on the rival contentions of the defendants may be *res judicata* in a subsequent suit by some or one of them against the rest,[1472] but not if no rival contentions were raised at all.[1473] A decree for partition is in favour of each party to whom a share is awarded and is *res judicata* not only as against the plaintiff,[1474] but as between the co-defendants.[1475] A decision in a partition suit as to the outstanding due to the family and the debts binding on its members is binding on the parties and a second suit with respect to them is barred by *res judicata*. The rule followed in partition suits was extended where the validity of a will was in question in a suit in which the different

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1469. *Munni Bibi v Triloki Nath*, AIR 1931 PC 114 : (1930) ILR 52 All 103 : 58 IA 158.
1470. *Lal Mohan v Ram Lakshmi*, AIR 1932 Cal 271 : (1932) ILR 59 Cal 636.
1471. *Venkayya v Narasamma*, (1888) ILR 11 Mad 204.
1472. *Ram Prasad v Mahabir*, AIR 1924 All 310 : (1924) ILR 46 All 220.
1473. *Gangaprasad v Kuladananda*, AIR 1926 Cal 568 : (1925) 30 Cal WN 415.
1474. *Sheikh Khoorshed v Nubee*, (1887) ILR 13 Cal 551.
1475. *Harihar Prasad Singh v Narsingh Prasad Singh*, AIR 1941 Pat 83 : (1940) ILR 19 Pat 669; *Gandharp v Nirmal* 54 IC 325; *Ejat Ahmed v Szaghir*, AIR 1921 All 287 : (1929) ILR 51 All 850.

defendants who were beneficiaries under it took up attitudes which they considered to be most beneficial to them.[1476]

(c) Res Judicata Between Co-plaintiffs.—Next, as to *res judicata* between co-plaintiffs. As a matter may be *res judicata* between co-plaintiffs, subject to the same conditions which apply to the case of co-defendants.[1477]

(d) Res Judicata between Co-respondents.—The principle of *res judicata* has been held to bind co-defendants if the relief given or refused by the earlier decision involved a determination of an issue between co-defendants (or co-respondents as the case may be). This statement of the law has been approved as far back as in 1939 in *Munni Bibi v Trilokinath*, [1478] where it has been said that to apply the rule of *res judicata* as between co-defendants three conditions are requisite.

Where there was a conflict of interest between the two co-respondents, in appeal against award of tender, to highest bidder, and for the purpose of deciding the relief, if any, to be granted to appellant, it was necessary for the appellate court to decide whether one of co-respondents, i.e., highest bidder, was entitled to participate in the tender process and judgment of appellate court though is cryptic shows application of judicial mind to merits of the case, it can be said that all the three pre-requisite conditions to apply principle of *res judicata* between co-defendants are present and, therefore, judgment of appellate court disposing appellant's appeal would operate as *res judicata* to bind not only appellant but also co-respondents.[1479]

(e) Pro forma Defendant.—A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the court to effectually and completely adjudicate upon the question involved.[1480] In such a case, no relief is sought against him and the matter in issue in the suit is not in issue between him and any other party, and cannot, therefore, be *res judicata* against him. For instance, *A*, claiming to be entitled to possession of a tank as tenant of *X*, sues *B* for possession. *X* is joined as *pro forma* defendant and no relief is claimed against him. The suit is dismissed on a finding that *B* is the owner. *X* then sues *B* for possession and *B* contends that the issue of ownership is *res judicata*. This contention must fail for the issue was decided in the former suit between *A* and *B*, and not between *X* and *B*, for *X* was only a *pro forma* defendant.[1481] Again, *A* sues *B* for possession of a house and joins *C* as a party alleging that part of the house had been let to him. The suit is decreed but the decree was not executed and became time-barred and subsequently, *B* sues *C* for possession. The decree in the first case does not operate as *res judicata* between *B* and *C* and indeed it in no way affects the legal relations between them.[1482] Another instance is the case of *Radha Kishun v Khurshed Hossein*[1483] where a prior mortgage, who was a *pro forma* defendant in a puisne mortgagee's suit

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1476. *Muhammad Hasan v Mehdi Hasan*, AIR 1946 All 399 : (1946) ILR All 325.
1477. *Krishnan v Kannan*, (1898) ILR 21 Mad 8; *Rukhmini v Dhondo*, (1912) 36 ILR Bom 207; *Fakirgowda v Dyamaya*, AIR 1933 Bom 287 : (1933) ILR 57 Bom 488; *Parduman Singh v State of Punjab*, AIR 1958 P&H 63 : (1957) ILR Punj 1629; *Devaki v Raghavan*, AIR 1961 Ker 224.
1478. *Munni Bibi v Trilokinath*, AIR 1931 PC 114 : 58 IA 158, p 165.
1479. *Makhija C&E Pvt Ltd v Indore Development Authority*, AIR 2005 SC 2499.
1480. See O I, rule 10(2) and section 32 of the Code of Civil Procedure, 1882.
1481. *Joy Chand v Dolegobinda*, AIR 1944 Cal 272 : (1944) 48 Cal WN 454; *Official Assignee v Madholal*, AIR 1947 Bom 217 : (1946) 48 Bom LR 828; *Brojo Behari v Kedar Nath*, (1886) ILR 12 Cal 580; *Ramdas v Vazirsaheb*, (1901) ILR 25 Bom 589; *Malhi v Iman-ud-din*, (1905) ILR 27 All 59; *Kumarappa v Adaikkalam*, AIR 1932 Mad 207 : (1932) ILR 55 Mad 483; *Nibaran v Motilal*, (1935) ILR 62 Cal 642; *PN Rao v K Radhakrishnamacharyulu*, AIR 1978 AP 319.
1482. *Krishna v Mungara*, AIR 1932 Mad 298 : (1932) ILR 55 Mad 601.
1483. *Radha Kishun v Khurshed Hossein*, (1920) ILR 47 Cal 662 : 47 IA 11; *Prithvi Singh v Jith Ram*, AIR 1951 P&H 363.

for sale, was not barred from subsequently enforcing his own security.[1484] The fact that a party is described as *pro forma* or that no relief is claimed against him is not sufficient to avoid the bar of *res judicata* if the other conditions laid down in the sections are satisfied.[1485] Where in a suit for rent by *A* claiming as sole shebait, a contention was raised that *B* who was a *pro forma* defendant was also a co-shebait and that accordingly, a suit by *A* alone was not maintainable, a decision on the issue in favour of *A* would be *res judicata* in a subsequent suit between *A* and *B* on the question of co-shebaitship as the decision thereon in the previous suit was necessary for granting relief to the plaintiff.[1486]

(f) Parties in Subsequent Suit Claiming under Parties in Former Suit.—Res judicata not only affects parties but their privies, i.e., persons claiming under them and each privy stands in the shoes of the party under whom he claims. If the decree in the first suit is between *A* and *B*, then the finding is *res judicata* in the subsequent suit if the plaintiff claims under *A* and the defendant under *B*, or vice versa, or if the plaintiff is *A* and the defendant claims under *B*, or vice versa. If, however, the second suit is between parties claiming under *A* alone or under *B* alone there is, of course, no bar.[1487] A decision in a suit under O XXI, rule 63, in which a claimant, the decree-holder and the judgment-debtor are all parties, would be *res judicata* on the question of title in a subsequent suit between them.[1488] This observation will henceforth not be relevant on account of the deletion of O XXI, rule 63 by the Amendment Act, 1976.

ILLUSTRATIONS

(i) *A* sues *B* for a declaration of title to land and obtains a decree. *A* then sues *C* for possession. *C* contends that *B* is owner and that he is in possession as *B*'s tenant. The defence is barred.

(ii) *A* sues *B* for a declaration of his right to a share in the rents of a *bazaar* and obtains a decree. *C*, a tenant of *A*, then sues *D*, another tenant of *A*, for a stall in *A*'s part of the bazaar. No finding in the first suit is *res judicata*.[1489]

Whether one person is bound because he claims under another is a question of substantive law. The following are some instances of cases decided on this point with reference to the rule of *res judicata*:

(i) A *lessee* claims under his lessor, but a lessor does not claim under his lessee and so the dismissal of the lessee's ejectment suit against a trespasser does not bar a similar suit by the lessor.[1490]

(ii) A *purchaser at an execution sale* acquires the right, title and interest of the judgment-debtor in the land sold and is bound by a decision between his landlord the decree-holder and the judgment-debtor as to its area;[1491] but, where mortgaged property is sold in execution of a mortgage decree and it is purchased by the mortgagee, a decision between the landlord and the mortgagor as to the rate of rent is not binding on the purchaser.[1492]

1484. See the note on this case under O XXXIV, rule 1.
1485. *Moniur v Ahmed*, AIR 1953 Cal 155 : (1952) 56 Cal WN 506; *Hirendra v Chandra Singh*, AIR 1958 Assam 179 : (1956) ILR Assam 496; *Gitaram v Prithvi Singh*, AIR 1956 P&H 129 (FB).
1486. *Kshiroda v Debendranath*, AIR 1957 Cal 200.
1487. *Asghar v Mahomed*, (1903) ILR 30 Cal 565; *Vythilinga v Vijayathammal*, (1882) ILR 6 Mad 43.
1488. *Ramireddi v Bichalu*, AIR 1952 Mad 837 : (1952) 1 Mad LJ 475; *Venkiah v Kanthamani*, (1955) Mad WN 690; *Ahmad Ali v B Veeralla*, AIR 1959 AP 280 : (1959) 1 AWR 72.
1489. *Asghar v Mahomed*, (1903) ILR 30 Cal 565.
1490. *Rambrahma v Bunsi*, (1882) 11 Cal LR 122; *Sher Bahadur v Madho Prasad*, AIR 1935 Oudh 394, (1936) ILR 11 Luck 209.
1491. *Kali Dayal v Umesh Prasad*, AIR 1922 Pat 63 : (1922) ILR 1 Pat 174.
1492. *Mahammad v Raghunath*, AIR 1926 Oudh 1 : (1926) ILR 1 Luck 25.

(iii) A *purchaser at a revenue sale* does not claim under the defaulting proprietor and is not bound by a decree against him.[1493]

(iv) A *son in a joint and undivided Hindu family* does not claim under his father;[1494] but a son claiming under a custom of primogeniture claims under his father.[1495] It is submitted that the decision in *Kali Charan*'s case is good law, despite the decision of the Privy Council that succession to an impartable estate of a *mitakshara* family is to the next holder by the rule of survivorship,[1496] for the *ratio decidendi* is not affected by the abovementioned decisions of the Privy Council.

(v) A *remainderman* does not claim under the life-tenant and a remainderman under a will is not bound by a decree against a widow who has a life estate under the will.[1497]

The title by which the parties in the subsequent suit claim must have arisen "subsequently" to the commencement of the former suit—

In order that a decision in a suit between *A* and *B* may operate as *res judicata* in a subsequent suit between *A* and *C*, it is necessary to show that *C* claims under *B* by a title arising *subsequently* to the commencement of the first suit. Thus, a purchaser, mortgagee, lessee or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced *after* the date of the purchase, mortgage, lease or gift;[1498] but, if the decree has been passed against the mortgagor before the mortgage, that decree would bind the mortgagee, he being a transferee from the mortgagor of an interest in the mortgaged property.[1499]

(g) Representative Suit : Explanation VI.—This section deals with representative suits, that is, suits instituted by or against a person in his representative, as distinguished from individual character. Suits brought or defended by one or more persons on behalf of themselves and others with the leave of the court under O I, rule 8, are common instances of this class. *Explanation VI* provides that where persons litigate *bona fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to "claim under" the persons so litigating. It refers to cases in which a decision in a suit may operate as *res judicata* against persons not

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1493. *Gadahar v Radhacharan*, (1907) ILR 34 Cal 868.
1494. *Sunder v Chhitar*, (1906) ILR 29 All 1; *Ram Narain v Bisheshar*, (1888) ILR 10 All 411.
1495. *Kali Charan v Sheo Buksh*, (1912) 16 Cal WN 783.
1496. *Shiva Prasad Singh v Rani Prayag Kumari*, (1932) ILR 59 Cal 1399 : 59 IA 331 : (1932) 36 Cal WN 1049; *Konamal v Annadana*, (1928) ILR 51 Mad 189 : 55 IA 114; *Pratap Chandra Deo v Jagadish Chandra Deo*, (1927) ILR 54 Cal 995 : 54 IA 289 : (1927) 31 Cal WN 942.
1497. *Achhaibar v Hargobind*, 52 IC 845; *Puttuswamiah v Ramachandriah*, AIR 1953 Mys 72 : (1953) ILR Mys 169.
1498. *Kasa Krishna Ghorpade v Vinayak Gangadhar*, AIR 1948 Bom 193 : (1947) ILR Bom 770 : (1947) 49 Bom LR 858; *Beli Ram v Chaudri Md Afzal*, AIR 1948 PC 168 : (1948) 50 Bom LR 674; *Sailendra v Bijanlal*, AIR 1945 Cal 283 : (1946) 49 Cal WN 133; *Ramlakhan v Tribuni*, AIR 1942 Pat 234; *Sita Ram v Amir*, (1886) ILR 8 All 324; *Joy Chandra v Sreenath*, (1905) ILR 32 Cal 357 (vendor and purchaser); *Mussan v Thawara*, AIR 1921 Mad 708 : (1921) 41 Mad LJ 392 (lessor and lessee); *Brojo v Kedar*, (1886) ILR 12 Cal 580 (FB); *Shripadbhat v Rama*, AIR 1927 Bom 270 : (1927) 29 Bom LR 274 (lessor and lessee); *Naizullah v Nazir*, (1893) ILR 15 All 108; *Abdul Alli v Miakhan*, (1911) ILR 35 Bom 297 (donor and donee); *Ramchandra v Malkapa*, (1916) ILR 40 Bom 679; *Duraichami v Adimuthu*, AIR 1925 Mad 358 : (1924) 47 Mad LJ 728 (vendor and purchaser); *Kandaveloo v Kumaran*, AIR 1953 TC 529; *Dodda Rangappa v Kenche Gowda*, AIR 1953 Mys 111 : (1953) ILR Mys 98; *Rajubai v Nandram*, (1954) ILR Raj 417; *Vibhuti Singh v Damari Lal*, AIR 1978 All 370.
1499. *Narain Das v Banarsi Lal*, AIR 1970 Pat 50. See notes below under the head "Condition III: Litigation under the same title".

expressly named as parties to the suit as where a suit is instituted by *A* and *B* on behalf of themselves and others, or where it is instituted against *A* and *B* on behalf of themselves and others. The conditions under which the decision in such a suit may constitute *res judicata* are:

(i) That there must be a *right claimed* by one or more persons *in common* for themselves and others not expressly named in the suit;

(ii) that the parties not expressly named in the suit must be *interested in such right;*

(iii) that the litigation must have been conducted *bona fide* on behalf of all parties interested;[1500] and

(iv) that if the suit is one under O I, rule 8, all the conditions of that section have been strictly complied with.[1501]

The Supreme Court, on being satisfied that the issues which the petition now wishes to raise, had been agitated directly and substantially, not only by the petitioner which was espousing the cause in the earlier litigation but also by the Union of India, it was held that judgment had settled the controversy and become final and binding in respect of the questions debated therein and the issues settled thereby. Since the issues now raised have been agitated twice over, it is not permissible for the petitioners to once again re-agitate the matter by coming now under the "cloak" of a form.[1502] *Explanation VI* to section 11 is subject to the essential condition that the interest of a person concerned has really been represented by the other; in other words, his interest has been protected after in a *bona fide* capacity. If there be any clash of interest between the persons concerned and is assumed representative, or if the latter deemed to collusion or for any other reason *mala fidely* neglects to defend the case, it cannot considered to be a representative interest.[1503]

Shebait, Karnavan, Trustee, Administrator etc.—If the parties in the subsequent suit can be said to have been represented by the parties in the former suit, the decision of the former suit will bind the parties in the subsequent suit.

ILLUSTRATIONS

Nine Akali Sikhs sue for the removal of the mahant of a religious institution. The suit is dismissed on the ground that the institution is a Hindu Dera and not a Sikh Gurudwara. Subsequently, and after the passing of the Sikh Gurudwara Act, 1925, 64 Sikhs sue for a declaration that the institution is a Sikh Gurudwara. The suit is not barred by *res judicata* as in the former suit, the plaintiffs were a sect of religious reformers and were not litigating on behalf of the general body of Sikhs.[1504]

Government land was transferred in 1888 in trust and vested in the Municipal Committee of Lahore. Thereafter, the defendants encroached upon the land, and no action was taken by the committee till 1925, when a notice was served upon the defendant asking him to remove the encroachment. Defendant No. 1 thereupon, brought a suit for a declaration that he and his brothers were owners of the land, and had in any case acquired an indefeasible title by

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1500. *B Mohan Kishan Seth v Ram Prasad*, AIR 1949 All 761; *Somasundara v Kulandavelu*, (1905) ILR 28 Mad 457 (FB); *Surender Nath v Brojo Nath*, (1886) ILR 13 Cal 352; *Jaimangal Deo v Bed Saran*, (1911) ILR 33 All 493; *Ramchand v Maula Baksh*, AIR 1924 All 178 : (1924) ILR 46 All 110; *Sonachalam v Kumaravelu*, AIR 1928 Mad 77 (FB) : (1928) ILR 51 Mad 128; *Chuhar Singh v Raghubir Singh*, AIR 1956 P&H 241.
1501. *Kumaravelu v Ramaswami*, AIR 1933 PC 183 : 60 IA 278 : (1933) ILR 56 Mad 657; *B Mohan Kishan Seth v Ram Prasad*, AIR 1949 All 761; *Jackiria Sakib v Official Receiver*, AIR 1962 Mad 189.
1502. *Junior Telecom Officers Forum v UOI*, (1993) Supp 4 SCC 693.
1503. *Suraiya Begam v Mohd Usman*, 1991 (3) SCC 114.
1504. *Ram Prasad v Shiromani*, AIR 1931 Lah 161 : (1931) ILR 12 Lah 497 : 135 IC 657.

adverse possession. The defendant succeeded on the latter plea. In 1933, the Secretary of State for India, who was not a party to the earlier litigation, sued for possession of the land. It was held that the Municipal Committee being constituted the trustee for the land represented the title for the time being, and the decree obtained against it operated as *res judicata* in the suit by government.[1505]

The plaintiffs, claiming to be trustees of the Malankara Jacobite Syrian Church, sued for possession of properties belonging to the church claiming that they were the lawful trustees and alleging that the defendants who had ceased to belong to that church were not its lawful trustees. There was a previous suit which was commenced as an inter-pleader suit but was converted into a representative action on behalf of the Syrian Christians of Malabar and the decision thereon affirmed the rights of the defendants. It was held by the Supreme Court that this decision was binding on all Jacobite Syrian Christians and the subsequent suit was accordingly, barred as *res judicata.*[1506]

In *Purshottam Das Tandon v Military Estate Officer,* the issue of title was kept open in the second appeal and the subject matter of the inter-pleader suit and the proceedings arising therefrom pertained to the entitlement of the contesting parties to receive rent in respect of the property in question. On the other hand, in the writ petitions, the appellant, claiming ownership, had sought mutation, as an owner, in the cantonment records and also the permission to raise construction, a right flowing from the incidence of ownership of the land. The subject matter of the two proceedings, i.e., inter-pleader suit and the appeals arising therefrom and the writ petitions filed by the appellant, it was held, therefore, cannot be termed to be directly and substantially the same so as to attract the principle of *res judicata.*[1507]

However, a *shebait*, a trustee of a *devarstham*, a *mutavali*, a *karnum*, a holder of *vatan* or *saranjam* lands, an administrator of the estate of a deceased person, a holder of an *inam* grant, represents each his successor; therefore, a decree against him will bind his successor.[1508] If, however, the trustee of a temple, instead of representing the interest of the idol, allows a decree to be passed *ex parte,* the decree will not operate as *res judicata* in a suit by the succeeding trustee.[1509] Though a decree passed in a scheme suit under section 92 will be binding as *res judicata* on all the members of the public under Explanation VI, that does not bar a suit for modification of the same.[1510] A decree against the *karnavan* of a *tarwad* in his representative capacity binds the members of the *tarwad.*[1511] There are certain purposes for which the official

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1505. *Sultan Asad v Secretary of State*, AIR 1936 Lah 998.
1506. *Moran Mar Basselios Catholicos v Paulo Avira*, AIR 1959 SC 31 : (1958) ILR Ker 1340 : 1958 Ker LJ 874.
1507. *Purshottam Das Tandon v Military Estate Officer,* AIR 2014 SC 3555 : (2014) 9 SCC 344; see also *Purshottam Das Tandon v Military Estate Officer,* 1986 Supp SCC 720.
1508. *Sadhu Charan v Krishnamani*, AIR 1942 Pat 181; *Madhavan v Keshavan*, (1888) ILR 11 Mad 191 (trustee); *Venkayya v Suramma*, (1889) ILR 12 Mad 235 (*karnum*); *Radhabhai v Anantrav*, (1855) ILR 9 Bom 198 (*vatan lands*); *Bai Merherbai v Maganchand*, (1905) ILR 29 Bom 96 (administrator); *Raja Ranjit v Basunta*, (1908) 12 Cal WN 739; *Jharula Das v Jalandhar*, (1912) ILR 39 Cal 887 (*shebait*); *Thakur v Jaishth*, AIR 1924 All 504 : (1924) ILR 46 All 651; *Prosunno Kumari v Golab Chand*, 2 IA 145 : (1875) 14 Beng LR 450, p 459 (*shebait*); *Upendranath v Kusum*, (1915) ILR 42 Cal 440; *Subban Ali v Imami Begum*, AIR 1925 PC 184 : (1925) ILR 52 Cal 971 : 52 IA 294 (*inam lands*); *Madhavrao v Anusuyabai*, (1916) ILR 40 Bom 606 (*saranjam lands*).
1509. *Subramania v Vaithilinga*, AIR 1931 Mad 641 : (1931) 60 Mad LJ 590; *Dasia Pillai v Pattamuthu*, AIR 1953 Mad 624 : (1952) 2 Mad LJ 871.
1510. *Srinivas v Purushotham*, AIR 1953 Bom 393.
1511. *Komappan v Ukkaran*, (1894) ILR 17 Mad 214; *Marivittil v Patham*, (1907) ILR 30 Mad 215; *Pare Lal v Sher Gir*, AIR 1938 Lah 499; *Raman v Raman*, AIR 1959 Ker 169 : (1958) ILR Ker 1064.

assignee represents the insolvent.[1512] When, however, the official assignee brings the insolvent's property to sale for the benefit of the creditors, he represents the whole body of creditors. When a claim to an attached house was dismissed, and on the insolvency of the judgment-debtor, the claimant filed a suit to establish his title to the house as against the official assignee, the suit was not barred by *res judicata* as the official assignee represented not the judgment-debtor but the whole body of creditors.[1513] A *benamidar* represents the real owner, and a decree against the *benamindar* binds the owner.[1514] So also, a decree obtained against the *benamindar*'s heir.[1515] A decree passed in a suit against a *farzidar* is binding on the real owner in the absence of fraud of collusion.[1516] It has been held by the Patna High Court[1517] that the rule that the *benamidar* represents the real owner has application only when there is a real transfer by *A* to *B*, but the deed is taken in the name of *X* for the benefit of *B*, but that when there is no real transfer and *A* puts the deed in the name of *B* without intending to vest any title in him, *B* does not represent *A* and a decree against him is not binding on *A*. Though there is a well-recognised distinction between the two classes of transactions,[1518] it is submitted that for the purpose of section 11, they stand on the same footing.

Joint Hindu family.—The question whether the manager of a joint Hindu family represents the other members in a suit affecting the family depends very largely upon the facts of the case. If he was acting in the suit in the interests of the minor members and with the consent of the adult members, they are all bound.[1519] The Kerala High Court has held that in the case of a manager of a joint Hindu family who under the Hindu law is entitled to represent the members of the family, the requirement of identity of parties with regard to the members of the family claiming as such in a subsequent suit, is satisfied.[1520] In such a case, it is not necessary that the plaint or the written statement should state in express terms that the manager was suing or was being sued as the manager. It is sufficient if he was suing or was being sued as representing the family.[1521] If the cause of action is a wrongful act of the father, the son who is not a party is not bound.[1522] (For mortgage suits, see note under O XXXIV, rule 1.)

A Hindu father suing or being used in a representative capacity can bind his minor as well as his major sons by special oath.[1523] When the question is whether a debt incurred by the father is binding on the sons on the basis of the doctrine of pious obligation, it is open to the latter to raise the same in proceedings for the execution of the decree obtained against the father on the debt, provided they were not parties to the suit. Also, where a suit against the sons was

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1512. *Miller v Lakhimani Debi*, (1901) ILR 28 Cal 419.
1513. *Official Assignee v Anju*, AIR 1925 Mad 688 : (1925) 48 Mad LJ 530.
1514. *Gur Narayan v Sheo Lal Singh*, (1919) ILR 46 Cal 566 : 46 IA 1; *Nand Kishore v Ahmed*, (1896) ILR 18 All 69; *Nikunja Behari v Jathindranath*, AIR 1956 Cal 613.
1515. *Raja of Deo v Abdulla*, 45 IA 97 : (1918) 22 Cal WN 891; *Prakash Chandra v Mahima Ranjan*, AIR 1947 Cal 320 : (1947) 51 Cal WN 273.
1516. *Raj Kishore v Subak Narain*, AIR 1959 Pat 89 : (1957) ILR 36 Pat 1027.
1517. *Bhrigurashram v Surendranath*, AIR 1962 Pat 204.
1518. *Meenakshi Mills v CIT*, AIR 1957 SC 49 : (1956) SCR 691 : (1957) SCJ 1, (1956) SCA 1139.
1519. *Schuebo v Subbiah*, AIR 1944 Mad 381 : (1945) ILR Mad 138; *Lingangowda v Basangowda*, AIR 1927 PC 56 : (1927) ILR 51 Bom 450 : 54 IA 122; *Kunj Man v Jaganath*, (1920) ILR 42 All 359; *Thakur Din v Sitaram*, AIR 1939 All 399 (FB) : (1939) ILR All 602; *Kothandarama v Sellammal*, AIR 1959 Mad 524; *Venkatappa v Hanumanthappa*, AIR 1953 Mys 152 : (1953) ILR Mys 295.
1520. *K Pillai v Karthiyani*, AIR 1969 Ker 26.
1521. *Amrit v Sudesh*, AIR 1970 SC 5 : [1969] 3 SCR 1002 : (1969) 71 Punj LR 371.
1522. *Shankar Rao v Kampta Prasad*, AIR 1947 Ngp 129 : (1946) ILR Nag 844; *Varadayya v Sankara*, (1907) 17 Mad LJ 197.
1523. *Lakhanlal Jha v Jwach Jha*, AIR 1948 Pat 388; *Tukaram v Tottaram*, AIR 1938 Bom 465 : (1938) 40 Bom LR 1005; *Gur Basappa v Vankat*, AIR 1956 Hyd 146 : (1956) ILR Hyd 535; *Soorya v Kathiza Begam*, AIR 1957 AP 688.

withdrawn by the plaintiff and dismissed without any decision on the merits, the question of the liability of the sons is not *res judicata* and can be gone into in execution.[1524] A decree against a Hindu father passed by consent will be as much binding on the sons as the one passed after contest.[1525] Any member of a joint family is entitled to file a suit to eject a trespasser from the family properties and the decision in such a suit would be binding on all the members of the family under Explanation VI.[1526]

Co-owners.—A co-owner of the equity of redemption who obtains possession of the property on redemption of the mortgage, should hold the same for the benefit also of the other co-owners, *vide* section 90, of the Indian Trusts Act, 1882. If the suit for redemption, prosecuted *bona fide*, ends in failure, there is no reason why the decree will not be binding on the other co-owners. Section 11 Explanation VI, provides for such a contingency, if it is shown that the plaintiff was *bona fide* litigating in respect of a right common to himself and to the other co-owners. Thus, where the suit for redemption, filed by some of the heirs to the mortgagor, was dismissed, the subsequent suit for redemption filed by an heir who was not a party to the earlier suit, would be barred by *res judicata* when the plaintiff in the second suit has no case of any fraud or collusion in the conduct of the earlier suit, nor does he have a special case apart from the case for redemption pleaded in the prior suit.[1527]

Suit was filed for permanent injunction against the *karta* of a joint Hindu family only (and not in his representative capacity) to restrain him from obstructing the free flow of water from a newly constructed drain. It was held that members of the family were not precluded from challenging the permanent injunction granted against the *karta*. Suit was not filed under O I, rule 8 of the CPC. The judgment rendered in the suit for permanent injunction against the *karta* was only a judgment in *personam*. An injunction acts or operates in *personam* and not in rem, and was therefore, not binding on the other members of the family. An injunction is a personal remedy and does not run with the land. A decree for an injunction is to be executed against the persons against whom the injunction is issued and cannot be executed against any other person in the absence of a statutory provision to that effect.[1528]

Hindu Widow and Reversioners.—A decree passed against a Hindu widow as representing the state of her husband in respect of a debt or other transaction binding on the estate, is binding upon the reversioners,[1529] unless, as was observed by their Lordships of the Privy Council in the *Shivagunga* case:

> it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground.[1530]

The reason of this qualification is that though a Hindu widow represents the estate, to protect it;[1531] but the judgment operates as *res judicata* only in respect of questions tried in

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1524. *Indar Gopal v Bhim Raj*, AIR 1959 All 530.
1525. *Basanta v Rameshwar*, AIR 1957 All 287.
1526. *Rama Rao v Fattechand*, AIR 1956 Ngp 241 : (1956) ILR Nag 256.
1527. *Velayudha Pillai Raman Nair v Krishnan Asarimane*, AIR 1989 Ker 263 (DB).
1528. *Ummedibai v Bhikam Singh*, AIR 1981 MP 53.
1529. *Katama Natchair v Rajah of Shivagunga*, (1863) 9 MIA 539; *Pertab Narain v Triloki*, (1885) ILR 11 Cal 186 : 11 IA 197; *Hari Nath v Mothur Mohun*, (1894) ILR 21 Cal 8 : 20 IA 183; *Prem Jagat Kuer v Harihar Bakash Singh*, AIR 1946 Oudh 163 : (1945) ILR 21 Luck 1.
1530. *Katama Natchair v Rajah of Shivagunga*, (1863) 9 MIA 539; *Chaudhari Risal Singh v Balwant Singh*, (1918) ILR 40 All 593 : (1913) 45 IA 168.
1531. *Nagender Chander v Sreemutty Kaminee Dosee*, (1867) 11 MIA 241, p 267.

the suit.[1532] The observations of their Lordships in the *Shivgunga* case, were construed in many cases to mean, that a decree passed against a Hindu widow or other limited heir did not bind the reversioners, unless the decree was passed in a suit contested to the end, and that neither a consent decree nor a decree on an award, however *bona fide* the compromise or reference might be, bound the reversioners; but, this view has now been definitely rejected by the Privy Council as it involves very extreme consequences, one of them being that a Hindu widow must fight the case up to the Privy Council, and another, that her opponent can never suggest a compromise because he would know that any compromise would be upset. The rule of law as now established is that a widow has power to compromise a suit, and a decree passed against her, though on a compromise or on an award, binds the reversioners as much as a decree in a suit contested to the end, provided the compromise was entered into by her *bona fide* for the benefit of the estate which she represents and not for her personal advantage.[1533] A decree, however, against a Hindu widow not in her representative but personal character, does not bind the reversioners or a son subsequently adopted by her.[1534] A decree passed against the legal personal representative of a Hindu widow in respect of her husband's estate does not bind the reversioners, for the representative of a widow does not represent the estate of the husband.[1535]

There is no authority for the proposition that a Hindu widow, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to a personal disability or disadvantage as a litigant, although the merits of a suit by or against her are tried and the trial is fair and honest. The mere fact, therefore, that she is personally estopped from denying the material facts of a case is no ground for withholding the application of the rule enunciated at the commencement of this paragraph, namely that where the estate of a deceased Hindu was vested in his widow or other limited heirs, a decree fairly and properly obtained against her is binding on the reversionary heirs. Thus, where a Hindu widow instituted a suit for declaration that an adoption made by her to her deceased husband was invalid, and the suit was dismissed on the ground that the widow was estopped by her conduct for denying the validity of the adoption, and it was further found upon the facts that the adoption was valid, it was held, in a suit brought by the reversionary heir after the widow's death for a declaration that the adoption was invalid, that the reversionary heir was bound by the decision in the first suit as *res judicata*.[1536] The dismissal of a suit, brought by a widow on the ground that it was barred by the provisions of section 47 below, does not operate as *res judicata* so as to bar a subsequent suit by the reversioners.[1537]

1532. *Roy Radha Kisen v Nauratan Lal*, (1907) 6 Cal LJ 490, p 525.
1533. *Ramsumran Prasad v Shyam Kumari*, AIR 1922 PC 356 : (1922) ILR 1 Pat 741 : 49 IA 342; *Mohendra Nath v Shamsunnessa*, (1915) 21 Cal LJ 157; *Himan Bibi v Sohan Bibi*, (1914) 18 Cal WN 929 (PC); *Behari v Daud*, (1913) ILR 35 All 240 (settlement of family disputes); *Subbammal v Arudaiyammal*, (1906) ILR 30 Mad 3 (decree on admission); *Bhogaraju v Addepalli*, (1912) ILR 35 Mad 560, pp 564, 565; *Gurunanak v Jainarain*, (1912) ILR 34 All 385 (withdrawal of appeal by widow); *Shib Deo v Ram Prasad*, AIR 1925 All 79 : (1924) ILR 46 All 637 (decree of award); *Baldeo Singh v Achal Singh*, AIR 1948 Oudh 165 : (1947) ILR 23 Luck 150; *Bishen Dayal v Lakshmi Narain*, AIR 1967 All 370.
1534. *Babanna v Channappa*, AIR 1947 Bom 140 : (1946) ILR 48 Bom LR 788; *Subbi v Ramkrishna*, (1918) ILR 42 Bom 69; *Bai Kanku v Bai Jadav*, (1919) ILR 43 Bom 869; *Bayava v Parvatava*, AIR 1933 Bom 126 : (1933) 35 Bom LR 118; *Kullu v Faiyaz*, (1909) ILR 30 All 394; *Sashi v Chandra*, AIR 1923 Cal 204 : (1923) 35 Cal LJ 348.
1535. *Kailash v Girija*, (1912) ILR 39 Cal 925.
1536. *Chaudhari Risam Singh v Balwant Singh*, (1918) ILR 40 All 593 : 45 IA 168; *Narbheram v Jayaram*, AIR 1922 Mad 233 : (1922) 43 Mad LJ 95.
1537. *Ganesh v Lakshmibai*, AIR 1922 Bom 96 : (1921) ILR 46 Bom 726.

A suit by the next reversioner for a declaration that an alienation made by a Hindu widow is not binding on the reversioner is a representative suit on behalf of all the reversioners.[1538] A decree, however, against a Hindu widow not in her representative but personal character, does not bind the reversioners or a son subsequently adopted by her.[1539] A decree passed against the legal personal representative of a Hindu widow in respect of her husband's estate does not bind the reversioners, for the representative of a widow does not represent the estate of the husband.[1540]

There is no authority for the proposition that a Hindu widow, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to a personal disability or disadvantage as a litigant, although the merits of a suit by or against her are tried and the trial is fair and honest. The mere fact, therefore, that she is personally estopped from denying the material facts of a case is no ground for withholding the application of the rule enunciated at the commencement of this paragraph, namely that where the estate of a deceased Hindu was vested in his widow or other limited heirs, a decree fairly and properly obtained against her is binding on the reversionary heirs. Thus, where a Hindu widow instituted a suit for declaration that an adoption made by her to her deceased husband was invalid, and the suit was dismissed on the ground that the widow was estopped by her conduct for denying the validity of the adoption, and it was further found upon the facts that the adoption was valid, it was held, in a suit brought by the reversionary heir after the widow's death for a declaration that the adoption was invalid, that the reversionary heir was bound by the decision in the first suit as *res judicata*.[1541] The dismissal of a suit, brought by a widow on the ground that it was barred by the provisions of section 47 below, does not operate as *res judicata* so as to bar a subsequent suit by the reversioners.[1542]

A suit by the next reversioner for a declaration that an alienation made by a Hindu widow is not binding on the reversioner is a representative suit on behalf of all the reversioners.[1543] A decree fairly and properly obtained against the reversioner in such a suit is binding not only upon him, but the whole body of reversioners presumptive and contingent on the one hand and the alienee or his representative on the other;[1544] even gross negligence of the guardian of a minor reversioner would not avoid the plea of *res judicata*.[1545]

(h) Explanation VI not Confined to O I, Rule 8.—Explanation VI is not confined to cases covered by O I, rule 8, but would include any litigation in which, apart from the rule altogether,

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1538. *Jitendra Singh v Alliance Bank*, AIR 1942 Oudh 199; *Venkatanarayana v Subbammal*, (1915) ILR 38 Mad 406 : 42 IA 125; *Lalmohan v Ramlakshmi*, AIR 1932 Cal 271 : (1932) ILR 59 Cal 636.
1539. *Babanna v Channappa*, AIR 1947 Bom 140 : (1924) 48 Bom LR 788; *Subbi v Ramkrishna*, (1918) ILR 42 Bom 69; *Bai Kanku v Bai Jadav*, (1919) ILR 43 Bom 869; *Bayava v Parvateva*, AIR 1933 Bom 126 : (1933) 35 Bom LR 118; *Kullu v Faiyaz*, (1909) ILR 30 All 394; *Soshi v Chandra*, AIR 1923 Cal 204 : (1923) 35 Cal LJ 348.
1540. *Kailash v Girija*, (1912) ILR 39 Cal 925.
1541. *Chaudhari Risam Singh v Balwant Singh*, (1918) ILR 40 All 593 : 45 IA 168; *Nachikalai v Aiyakannu*, AIR 1922 Mad 233 : (1922) 43 Mad LJ 95.
1542. *Ganesh v Lakshmibai*, AIR 1922 Bom 96 : (1921) ILR 46 Bom 726.
1543. *Jitendra Singh v Alliance Bank*, AIR 1942 Oudh 199; *Venkatanarayana v Subbammal*, (1915) 38 ILR Mad 406 : 42 IA 125; *Lalmohan v Ramlakshmi*, AIR 1932 Cal 271 : (1932) ILR 59 Cal 636.
1544. *Addanki v Ryali Venkataramanayya*, AIR 1944 Mad 326 : (1944) ILR Mad 775; *Kesho Prasad v Sheo Pargash*, AIR 1922 All 302 (FB) : (1922) ILR 44 All 19; *Varamma v Gopaladasaya*, (1918) ILR 41 Mad 659 (FB); *Kahir Muhammad v Umar Din*, AIR 1925 Lah 89 : (1924) ILR 5 Lah 421; *Prannatha Nath v Bhuban Mohan*, AIR 1922 Cal 321 : (1922) ILR 49 Cal 45; *Mata Prasad v Nageshar*, AIR 1925 PC 272 : (1925) ILR 47 All 883 : 52 IA 398; *Thakar Singh v Mst Uttam Kaur*, AIR 1929 Lah 295 : (1929) ILR 10 Lah 613; *Jagdamba v Badri Prasad*, AIR 1932 Oudh 322 : (1933) ILR 8 Luck 586.
1545. *Valliammai v Shankara Ayyar*, AIR 1950 Mad 562.

parties are entitled to represent interested persons other than themselves;[1546] as for instance, where each party in a partition suit claiming that the property, the subject matter of the suit, is joint, asserts a right or title common to others who make identical claims. If that very issue is litigated in another suit and decided, the others making the same claim are claiming a right "in common for themselves and others". Each of them in such a case must be deemed to represent all those, the nature of whose claims and interest are common or identical.[1547]

(i) Exception to Ordinary Rule.—Explanation VI to section 11 is an exception to the ordinary rule of *res judicata*, even as persons who are not parties to the earlier proceedings in certain contingencies. However, in order to attract that provision, if there are any rules prescribed, which regulate the proceedings, they must be strictly complied with. If the procedural provisions are not strictly complied with, Explanation VI to section 11 can have no application.[1548]

(j) Suit under Section 92 of the Code of Civil Procedure.—It cannot be said that the persons whose names are in the suit title are the only parties to the suit. The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eyes of law to be parties to the suit. A suit under section 92 of the CPC is thus a representative suit and as such binds not only the parties named in the suit title but all those who share common interest and are interested in the trust. It is for that reason that Explanation VI to section 11 of the CPC constructively bars by *res judicata* the entire body of interested persons from re-agitating the matters directly and substantially in issue in an earlier suit under section 92 of the CPC.[1549]

(k) Legal Representative.—*L*, a *Karta* of a joint family, endowed part of a property in trust and gifted the other part of the property to his daughter. The daughter, in turn, conveyed it to the trust; and the defendants were inducted as licencees, in the said house. A suit was filed by the sons of *L* (*Karta*) for the recovery of possession and *mesne* profits, on the ground that as per the trust deed executed by the daughter of *L*, the trust was entitled to the property, and that the defendant (inducted as licencees), had no right, title or interest in the property. During the pendency of this suit, the appellants (grandsons of *L*) filed a suit, claiming the said properties, on the ground that it was joint family property and they were entitled to one-tenth share in the same. It was held that the conclusive decision reached in the earlier suit, that the suit property was self-acquired property of *L* and that the settlement deed in favour of his daughter and settlement executed by her were true and valid, would operate as *res judicata* in the suit filed by the grandsons. Earlier suit against son of *L* shall be deemed to be one brought against him as *representing the family*, and not in his individual capacity.[1550]

Decision in respect of legal representation of deceased referred to under O XXII, rule 5 or Under O XXII, rule 10 of the CPC is not a decision on merits and as such it will not operate as *res judicata* when two categories of legal representative claim to be substituted or impleaded.[1551]

1546. *Narayanswami v Parvati Bai*, AIR 1949 Mad 379; *Gurushiddappa v Gurushiddappa*, AIR 1937 Bom 238 : (1937) ILR Bom 326 : (1937) 39 Bom LR 130; *Babu Khan v Hukum Singh*, AIR 1947 All 88; *Sudehaiya v Ramdas*, AIR 1957 All 270.
1547. *Venkateshwara Prabhu v Krishna Prabhu*, AIR 1977 SC 1268 : (1977) 2 SCC 181 : [1977] 2 SCR 636.
1548. *United India Insurance Ltd v Sharda Adyanathaya*, AIR 1998 Ker 141.
1549. *R Venugopala Naidu v Venkatarayulu Naidu Charities*, AIR 1990 SC 444 : (1989) Supp 2 SCC 356 : 1989 (Supp 1) SCR 760 : 1989 4 JT 262; See also *Shiromani Gurdwara Parbandhak Committee v Mahant Harnam Singh*, AIR 2003 SC 3349 : 2003 AIR SCW 4757 : (2003) 11 SCC 377 : 2003 SCR 805.
1550. *MH Ravindranath v ML Hanumantharao*, AIR 1988 Mad 177.
1551. *Rakesh Kumar Gupta v Ravindra Kumar Gupta*, AIR 2009 (NOC) 2262 (All) : 2009 (4) AL J 618 (DB) (Lucknow Bench).

The Supreme Court held that as a legal position, it cannot be disputed that normally, an enquiry under O XXII, rule 5, CPC as to whether a person is legal representative of deceased party is of a summary nature and findings therein cannot amount to *res judicata*, however, that legal position is true only in respect of those parties who set up a rival claim against the legatee. But such finding would be final and operate as *res judicata* as regards that suit and cannot be re-agitated.[1552]

(l) Every Suit not a Representative Suit.—Earlier suit under sections 49 and 59, Uttar Pradesh Tenancy Act was filed by certain parties claiming tenancy rights for themselves. *A* was not a party herein. It was held that the decision in the earlier suit did not operate as *res judicata* against it.[1553]

If a creditor sues merely the person who executes the instrument, he must satisfy himself by proceeding against the executant. The fact that the instrument (a pronote), was executed by two members of a joint family, is not a legal basis for treating it as binding on another member of the joint family who neither signed the note nor was a party to the suit.[1554]

A co-owner of the equity of redemption obtaining possession of the property on redemption of the mortgage should hold the same for the benefit of the other co-owners also, *vide* section 90 of the Indian Trusts Act, 1982, Explanation VI to section 11 of the CPC provides for such a contingency, if it is shown that the plaintiff was *bona fide* litigating in respect of a right common to himself and to the other co-owners. Thus, where the suit for redemption filed by some of the heirs of the mortgagor was dismissed, the subsequent suit for redemption filed by an heir who was not a party to the earlier suit would be barred by *res judicata*, when the plaintiff in the second suit has no case of any fraud or collusion in the conduct of the earlier suit, nor does he have a special case apart from the case for redemption pleaded in the prior suit.[1555]

Where a person claims a right for himself which happens to be common to him and others, he cannot be said to be litigating on behalf of the others, and the explanation does not apply.[1556] So also, where a judgment against a defendant sued in his personal capacity as a trespasser, whose plea was that the property in question was reserved under a trust for *sadhus*, saints and for determining whether the property was the property of a public trust for charitable and religious purposes.[1557] A decision in an application by one of several judgment-debtors for scaling down a decree under the provisions of the Madras Agriculturists' Relief Act, 1938, does not bar the rights of the other judgment-debtors to apply for relief under the Act.[1558] The condition that the litigation was conducted *bona fide* is necessary for the application of the section; but the court cannot, in the absence of fraud or collusion, treat negligence or gross negligence as want of *bona fide*,[1559] or equivalent to fraud.[1560]

1552. *Dashrath Rao Kate v Brij Mohan Srivastava*, AIR 2010 SC 897: (2010) 1 SCC 277.
1553. *Suraj Pal v Deputy Director of Consolidation*, AIR 1981 All 265.
1554. *C Lakshminarayan v KC Subba Rao*, AIR 1990 AP 164 (DB).
1555. *Velayudha Pillai Raman Nair v Krishnan Asari Mani*, AIR 1989 Ker 263 (DB).
1556. *Jitendra v Alliance Bank*, AIR 1942 Oudh 199; *Kumarandy v Venkatasubramania*, AIR 1927 Mad 645 : (1927) 52 Mad LJ 641; *Madhuanand v Suresanand*, AIR 1953 All 547 : (1952) ILR 1 All 148.
1557. *Taloda Municipality v Charity Commr*, AIR 1968 SC 418 : (1968) 70 Bom LR 332 : (1968) Mah LJ 435.
1558. *Krishnamurthy v Satyanarayanamurthy*, AIR 1958 AP 231.
1559. *Laxmi Narain v Mohd Shafi Bosi*, AIR 1949 EP 141; *Venkata Seshayya v Koteswara*, AIR 1937 PC 1 : (1937) ILR Mad 263 : 64 IA 17.
1560. *Nagamma v Korthi Hengsu*, AIR 1950 Mad 546 : (1950) ILR Mad 326.

Where certain parties filed the earlier suit to claim tenancy rights for themselves, *A*, who was not a party to that suit, is not bound by the decision therein.[1561]

ILLUSTRATIONS

(i) A decree in a suit against certain members of a sect alleged to be wrongdoers in their *individual* capacity cannot operate as *res judicata* in a subsequent suit against the other members of the sect.[1562]

The wrong complained of in the former suit was that the defendants carried an idol in procession through certain streets and that such processions were in violation of plaintiff's rights. The suit was against the defendants in their *individual* capacity, and not as representing the sect to which they belonged.

(ii) *A*, alleging that he is the proprietor of a village, sues *B*, *C* and *D* for ejectment. The defence is that *A* is not the proprietor and that part of the village belongs to *B*, *C* and *D*, and the rest to *X*, *Y* and *Z*. The court finds that *A* is not the proprietor, and *A*'s suit is dismissed. *A* then sues *X*, *Y* and *Z* and also *B*, *C* and *D* for declaration that he is the proprietor of the village and for possession. The question of *A*'s title to the village is *res judicata* so as to bar the suit against *B*, *C* and *D*, who were parties to the former suit, but it is not *res judicata* so as to bar the suit against *X*, *Y* and *Z who were not parties to the former suit*. It cannot be said that *B*, *C* and *D* litigated in the former suit in respect of a private right *claimed in common* for themselves and *X*, *Y* and *Z*. They set up only their own right to a *part* of the property and as to the rest they alleged that it belonged to *X*, *Y* and *Z*.[1563]

(iii) *A* files a suit on behalf of himself and other members of his community to establish a right to worship in a temple, but through oversight omits to give notice under O I, rule 8 to the other members of the community. The suit is dismissed but the judgment will not operate as *res judicata* to bar a subsequent suit by another member of the community to establish the same right.[1564]

The right referred to in this explanation may either be a public right or a private right. The words "public right" have been added into this explanation in view of the provisions of section 91 below. The right to have a public nuisance abated is a public right. The right of pasturage claimed by custom by the inhabitants of a village over a tract of land or to take water from a spring or a well is a private right.[1565]

In some of the cases, that arose under the Code of 1882, the opinion was expressed that the present explanation, so far as it relates to private right, must be confined to the cases where leave to sue has been obtained under section 30 of that Code [now O I, rule 8(1)];[1566] but the explanation is not confined to suits under O I, rule 8, but extends to include any litigation in which apart from the rule altogether, parties are entitled to represent interested persons other than themselves;[1567] but, if the suit is one under O I, rule 8, the Privy Council has held that the provisions of the rule must be strictly complied with, otherwise the explanation will not apply, even though the omission is due to inadvertence and has caused no injury.[1568] It had previously

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1561. *Suraj Pal v Deputy Director of Consolidation Allahabad*, AIR 1981 All 265.
1562. *Sadagopa Chariar v Krishnamoorthy Rao*, (1907) ILR 30 Mad 185 : 34 IA 93.
1563. *Jaimngal Deo v Bed Saran*, (1911) ILR 33 All 493 : 9 IC 819.
1564. *Kumaravelu v Ramaswami*, AIR 1933 PC 183 : (1933) 56 Mad 657 : 143 IC 665 : (1933) 60 IA 278.
1565. *Kalishankar v Gopal Chunder*, (1881) ILR 6 Cal 49.
1566. *Thanakoti v Muniappa*, (1885) ILR 8 Mad 496; *Srinivasa v Raghava*, (1900) ILR 23 Mad 28; *Baiju Lal v Bulak Lal*, (1897) ILR 24 Cal 385; *Somasundara v Kulandaivelu*, (1905) ILR 28 Mad 457, p 463.
1567. *Kumaravelu v Ramaswami*, AIR 1933 PC 183 : (1933) ILR 56 Mad 657 : 60 IA 278.
1568. *Kumaravelu v Ramaswami*, AIR 1933 PC 183 : (1933) ILR 56 Mad 657 : 60 IA 278; approving on this point *Thanakoti v Muniappa*, (1885) ILR 8 Mad 496; *Baiju Lal v Bulak Lal*, (1897) ILR 24 Cal 385; *Srinivasa v Raghava*, 28; disapproving *Gopalacharyulu v Subbamma*, (1920) ILR 43 Mad 487.

been held that it was sufficient if the litigation was carried on *bona fide* on behalf of all others interested. (See the under-noted cases[1569] which are no longer law.)

Suits by a Hindu widow or by a manager of a joint Hindu family or by a reversioner in her or his representative character are instances of this class.

(m) Public Interest Litigation.—Explanation VI to section 11 of the CPC applies to public interest litigation as well, but it must be proved that the previous litigation was a public interest litigation not by way of a private grievance.[1570] The writ petition before the Supreme Court was not *inter partes* dispute and was raised by way of public interest litigation. The Hon'ble Supreme Court observed that it may not be taken to have said that for public interest litigation, procedural law do not apply. However, at the same time, it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court. Even if it is said that there is a final order in a dispute of this type, it would be difficult to entertain the plea of *res judicata.*[1571]

The petitioner filed repeated writ petitions claiming compensation for victims of Railway accident. Although it was claimed to be in the public interest, the petitioner filed the writs in this own capacity without consent or authority from the injured persons. The petitioner also withheld the fact of dismissal of his earlier petition claiming the same relief. It was held by a Division Bench of the Bombay High Court that the record reflected the personal interest of the petitioner. Thus, the petition is hit by the principles of constructive *res judicata.*[1572]

The question of applicability of the principles of *res judicata* to Public Interest Litigations has taxed the mind of Judges and jurists alike. While some courts have found the principles to be applicable to PIL, some others rule out its applicability. Even the pronouncements of the Apex Court have not been consistent on this issue. While some decisions hold the rule not applicable to PIL,[1573] some others hold the rule applicable.[1574] But an overall view that emerges from a catena of pronouncements of the Supreme Court is a balanced approach, neither ruling out the application of *res judicata* in PIL altogether not holding it applicable in all cases genuinely affecting interest of the public.

In *V Purushotham Rao v UOI*,[1575] GB Pattanaik J (as he then was), speaking for the Bench of Supreme Court, observed as follows:

> 19. Coming to the second question, Explanation IV to Section 11 of the Civil Procedure Code postulate that any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Order 2 Rule 2 of the Code of Civil Procedure provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and if he omits to sue in respect of, or intentionally relinquishes, any portion of his claim, then he shall not afterwards sue in respect of the portion, so omitted or relinquished. By virtue of Explanation to Section 141 of the Code of Civil Procedure, since proceedings under Article 226 of the Constitution are excluded from the expression "proceedings", therefore, the Civil Procedure Code is not required to be followed in a proceeding under Article 226 unless the High Court itself has made the provisions of the Civil Procedure Code applicable to a proceeding under Article 226. Then again, the principles of Section 11 as well as Order 2 Rule 2, undoubtedly contemplate

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1569. *Gopalacharyulu v Subbamma*, (1920) ILR 43 Mad 487; *Muhammad v Sumitra*, (1914) ILR 36 All 424.
1570. *Forward Construction Co v Prabhat Mandal*, (1986) 1 SCC 100.
1571. *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*, (1989) Supp 1 SCC 504.
1572. *RS Keluskar v UOI*, 2008 (3) Mah LJ 13 : 2007 (6) All MR 304 (DB).
1573. *MC Mehta v UOI*, AIR 2000 SC 2701 : (2000) 5 SCC 525.
1574. *State of Karnataka v All India Manufacturers Organisation*, AIR 2006 SC 1846 : (2006) 4 SCC 683.
1575. *V Purushotham Rao v UOI*, (2001) 10 SCC 305.

> an adversarial system of litigation, where the court adjudicate the rights of the parties and determines the issues arising in a given case. The public interest litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the petitioner in such case, merely brings it to the notice of the court, as the how and in what manner the public interest is being jeopardised by arbitrary and capricious action of the authorities.

The Supreme Court quoted with approval the observation in its earlier judgment in *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*,[1576] wherein the court had repelled the plea of application of *res judicata* by observing that "the writ petitions are not *inter partes* disputes and have been raised by way of public interest litigation and the controversy before the court is as to whether for social safety and for creating a hazardous environment for the people to live in, mining in the area should be permitted or stopped." It was further observed in the case as follows:

> We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of *res judicata*.

Finally, the Supreme Court Bench in the case of *V Purushotham Rao* (supra) cause to the conclusion that "the principle of constructive *res judicata* cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and larger public interest which is being served. There cannot be any dispute that in competing rights between the public interest and individual interest, the public interest would override".

In another case, Explanation VI to section 11 came up for consideration before the Supreme Court is *Forward Construction Co v Prabhat Mandal*,[1577] wherein it was held that in view of Explanation VI, it could not be disputed that section 11 applies to Public Interest Litigation, as long as it is shown that the previous litigation was in public interest and not by way of private grievance. Further, the previous litigation has to be *bona fide* litigation in respect of a right which is common and is agitated in common with others.

In Karnataka, the State Government had external into a Framework Agreement (FWA) with a private party for execution of a Project. The FWA was challenged in a Public Interest Litigation before the high court in *HT Somashekar Reddy v Govt of Karnataka*,[1578] wherein all the objections were decided against the petitioner and the PIL was dismissed. The Supreme Court confirmed the dismissal and the matter reached finality. In the second round of litigation, when the matter reached the Supreme Court, the findings of the high court in the earlier PIL stood in the way of maintainability of the petition. In *State of Karnataka v All India Manufacturers Organisation*,[1579] BN Srikrishna J speaking for the three-Judge Supreme Court Bench, dismissed the PIL with the following observation:

> **47.** In the face of such a finding by the High Court, Explanation IV to Section 11 squarely applies as, admittedly by, the litigation in Somashekar Reddy (supra) exhausted all possible challenges to the validity of the FWA, including the issue of excess land. Merely because the present petitioners draw semantic distinctions and claim that the excess land not having been identified at the stage of the litigation in Somashekar Reddy (supra), the project should be reviewed, the issue does not cease to be *res judicata* or covered by the

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1576. *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*, 1989 Supp (1) SCC 504.
1577. *Forward Construction Co v Prabhat Mandal*, AIR 1986 SC 398 : (1986) 1 SCC 100.
1578. *HT Somashekar Reddy v Govt of Karnataka*, 1999 (1) Kar LD 500 (DB).
1579. *State of Karnataka v All India Manufacturers Organisation*, AIR 2006 SC 1846 : (2006) 4 SCC 683.

> principles analogous there to. If we were to re-examine the issues that had been raised/ ought to have been raised in Somashekar Reddy (supra) it would simply be an abuse of the process of the court, which we cannot allow.

In a case from Goa, the State Government issued two notifications granting rebate of 25% in Electricity Tariff in respect of power supply to Industrial Consumers. The decision to grant rebate was finalised by the Power Minister with placing the proposal before the Chief Minister or the Council of Ministers in violation of the Conduct of Business Rules. The notifications were quashed by the high court as being void *ab initio* and the dismissal was confirmed by the Supreme Court. In the second round of litigation in respect of notifications issued in 1996, it was urged that the State at no point of time before any Court raised the issue of the two notifications being void *ab initio* cannot be raised at this point of time in view of the principles of *res judicata* and doctrine of estoppel. Repelling the above contention, it was held by the Supreme Court that not raising object by the State does not disentitle it or prevents it from raising objections based on legal provisions.[1580]

In a case from West Bengal a large number of plots had been allotted from the discretionary quota by the Chief Minister. In a PIL filed against these allotments, a three-Judge Bench of the Supreme Court presided over by SH Kapadia CJI observed as follows:

> In other words, the allotment of large number of plots in Salt Lake City, Kolkata had been the subject-matter of different writ petitions and/or appeal before the Calcutta High Court as well as this court and for one reason or the other the allotments in favour of the private parties had not been set aside, though there were doubts raised by the Calcutta High Court as well as this court regarding allotments under the discretionary quota of Chief Minister and the manner in which they were made. However, as all these judgments have attained finality, they cannot be permitted to be agitated over and over again including in the present writ petition. The principle of finality as well as fairness demand that there should be an end to the litigation and it is in the interest of public that issues settled by the judgments of courts, including this court, which have attained finality should not be permitted to be re-agitated all over again, interest rei publicae ut sit finis litium.[1581]

(n) Consent Decree in a Representative Suit on Behalf of the Public.—In the undermentioned case,[1582] the Privy Council left it an open question whether in India, persons instituting a suit on behalf of the public can bind the public by a compromise decree. The Bombay High Court has held that a consent decree made in a representative suit could be *res judicata* on the ground of estoppel whether the suit was under O I, rule 8 or under section 92.[1583]

(o) Judgment in Rem.—As already explained, a judgment in a suit is binding only upon the parties to the suit and their privies. As a general principle, a transaction between two parties in judicial proceedings, ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witness, or to appeal from a judgment he might think erroneous.[1584] There are, however, certain judgments which bind all the world and not only the parties to the proceeding in which they were passed and their privies. A judgment that is binding upon the parties and their privies only is called a judgment in *personam*. A judgment which binds all the world is called a judgment in rem. Judgments *in*

1580. *M/s MRF Ltd v Manohar Prikar*, (2010) 11 SCC 374 : (2010) 4 Scale 577.
1581. *Joydeep Mukharjee v State of West Bengal*, AIR 2011 SC 1169 : (2011) 2 SCC 706 : (2011) 2 Scale 172.
1582. *Abdur Rahim v Mahomed Barkut Ali*, AIR 1928 PC 16 : (1928) ILR 55 Cal 519 : 55 IA 96.
1583. *Chiranji Lal v Life Insurance Corp*, AIR 1952 Bom 396 : (1959) ILR Bom 1402; *Chandiram v Rajaram*, AIR 1951 Cal 456.
1584. *Duchess of Kingstone*'s case 2 Smith's LC, 13th Edn, p 644; *Secretary of State v Syed Ahmad Badsha*, AIR 1921 Mad 248 (FB) : (1921) ILR 44 Mad 778.

rem are outside the scope of the present section. They are dealt with in the Indian Evidence Act, section 41.

(p) Decree against Minor.—A decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult. A minor, however, is entitled to impeach a decree passed against him if the next friend or guardian for the suit is guilty of fraud or gross negligence in allowing the decree to be passed.[1585] It has been said in one case that any act or omission on the part of the guardian *ad litem* which in the result has brought prejudice to the minor's interest is gross negligence;[1586] but, in another case,[1587] the court said:

> It is not every kind of negligence that would be a sufficient ground for setting aside a decree, or for declaring that the proceedings in court are null and void, but where the guardian omits to do his plain duty and where by reason of such negligence a suit is decided against a minor, which would not have been otherwise decreed against him, it must be held that the guardian's negligence contributed to the court proceeding in the manner it did.

An omission on the part of a guardian *ad litem* to bring to the notice of the court a previous judgment between the parties for the purpose of raising the plea of *res judicata* has been held not to constitute negligence.[1588]

A decree passed against a minor not properly represented is a nullity and cannot operate as *res judicata*;[1589] but, it has been held that if a suit is brought on the minor's behalf to set aside a sale in execution of such decree, but the plea that the minor was not properly represented in the suit in which the decree was passed is not then taken, it cannot be taken in a subsequent suit to set aside the decree and sale by reason of the rule contained in Explanation IV to the section.[1590] Orders in execution made against a judgment-debtor who is a minor duly represented by a guardian would be *res judicata* in subsequent execution proceedings and cannot be reopened by the minor after he comes of age.[1591]

[s 11.26.2.3] Condition III: Litigating Under the Same Title

The third condition of *res judicata* is that the parties in the subsequent suit must have litigated under the same title in the former suit. The expression "same title" means the same capacity. Thus, where an heir of a deceased mortgagor sues for redemption of the mortgage on the footing that he represents the estate of the deceased mortgagor and obtains a decree on the finding that the mortgagee has been over-paid, a subsequent suit by the mortgagee against him, an executor of the deceased mortgagor for sale of the mortgage property, on the basis that the money was still due to him, is barred by *res judicata*.[1592] Where in a suit between the mother-in-law on the one hand and her daughter-in-law and her adopted son on the other, it was held that the daughter-in-law had lost her right to adopt and that the adoption was invalid and thereafter, the daughter-in-law again adopted the same boy on the strength of a decision

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1585. *Cursandas v Ladka Vahu*, (1895) ILR 19 Bom 571; *Lalla v Ramnandan*, (1895) ILR 22 Cal 8; *Ismail v Sultan Bibi*, (1917) PR 103, 390; *Gotepati v Gotepati*, (1914) 27 Mad LJ 486; *Sundra v Sakhavam*, (1915) ILR 39 Bom 29; *Damu v Vakrya*, (1920) ILR 44 Bom 767. See notes to O IX, rule 9.
1586. *Brij Raj v Ram Sarup*, AIR 1926 All 36 : (1926) ILR 48 All 44.
1587. *Dada Sahib v Gajraj*, AIR 1925 Mad 204 : (1925) 47 Mad LJ 928; *Punnayyah v Viswanna*, AIR 1922 Mad 273, (1922) ILR 45 Mad 425.
1588. *Ananda Rao v Appa Rao*, AIR 1925 Mad 258 : (1924) 47 Mad LJ 700.
1589. *Rattan Chand v Ram Kishan*, AIR 1928 All 447 : (1928) 26 All LJ 777; *Ibrahim v Cherian*, AIR 1956 TC 70.
1590. *Mallayya v Punamma*, AIR 1924 Mad 608 : (1924) ILR 47 Mad 476.
1591. *Rayulu Ayyar v Chocka Narayan*, AIR 1954 Mad 237; *Raman v Narayana*, AIR 1952 TC 478.
1592. *Radha Mohan v Eliza Jane Hilt*, AIR 1947 All 147 : (1947) ILR All 186.

of the Privy Council subsequently pronounced, it was held that a fresh suit by her to establish the adoption was barred as she was litigating in both the suits on the same title.[1593] A verdict against a man suing in one capacity will not stop him when he sues in another distinct capacity, *and, in fact, is a different person in law*[1594] Thus, where a suit is brought by a person to recover possession from a stranger to a *math* property claiming it as the *heir* of a deceased *mohunt*, but the suit is dismissed on his failure to produce a certificate of succession to establish his *heirship*, the dismissal is no bar to a suit by him as manager of the math on behalf of the math.[1595] Where the trustees of a public charity fail in a suit to eject a trespasser, they are not barred from suing again as members of the public with the consent of the Advocate-General.[1596] A decree against the trustee of a temple that certain property attached to the temple belonged to *A* and not the temple operates as *res judicata* in a subsequent suit by the worshippers of the temple against the heirs of *A* for a similar relief, as the title litigated is the same.[1597] The dismissal of a suit by *A* against *B*, *C* and *D* in their individual capacity on a finding that a temple is public property does not operate as *res judicata* against *A* in a subsequent suit brought by *B*, *C*, *D* and others in their representative capacity against *A* for a declaration that the same temple is public property.[1598] A decree passed in a suit against certain persons sued as *shebait* of a temple is not *res judicata* in a suit in which they are sued as executors under a will.[1599] A decision given by a court in Chandernagore after its merger in the Indian Union in accordance with French law which had ceased to operate after merger is without jurisdiction and cannot operate as *res judicata.*[1600] Similarly, the dismissal of a suit brought by a son against his father for maintenance claimed under an agreement is no bar to a suit by him against his eldest brother for a declaration that he is entitled to maintenance out of certain lands in his hands held under a *sanad* from government whereby, it was alleged, the lands were charged at the time of grant with the maintenance of the junior members of the family.[1601] Where in a suit by *A* against *B* for the recovery of a property, *B* sets up a *jus tertii* in *C*, and the court finds that *C* has no title to property, and allows *A*'s claim, the finding does not operate as *res judicata* in a subsequent suit by *B* after *C*'s death against *A*, claiming the same property as the heir of *C*, as it could not have operated as such against *C* himself.[1602] A judgment against a party will not operate as *res judicata* when he subsequently acquires a fresh title under section 43 of the Transfer of Property Act.[1603]

The principles of *res judicata* are not applicable to cases where the earlier order has been passed without jurisdiction. Such an order passed without jurisdiction would not be binding

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1593. *Sundar Bai v Devaji*, AIR 1954 SC 82 : (1953) SCJ 693.
1594. *Mahadwappa v Dharmappa*, AIR 1942 Bom 332 : (1942) ILR 44 Bom LR 710; *Shrivallabh Badrinath v Laxman Vinayak*, AIR 1947 Ngp 39, (1946) ILR Nag 630; *Rajah Chattar Singh v Diwan Roshan Singh*, AIR 1946 Ngp 277 : (1946) ILR Nag 159; *Cheria Veetil v Chattu Nambiar*, AIR 1951 Mad 285; *Dutchess of Kingstone*'s case, 2 Smith's LC, 13th Edn, pp 644, 675; *Afzalunnissa v Fayazuddin*, AIR 1931 Lah 610 : (1932) ILR 13 Lah 195; *Kisandas v Godavari Bai*, AIR 1937 Bom 334 : (1937) ILR Bom 636 : (1937) 39 Bom LR 351; *Ali Moidin v Kombi*, (1882) ILR 5 Mad 239 p 241.
1595. *Babajirao v Laxmandas*, (1904) ILR 28 Bom 215 (distinguished); *Hargovan v Mulji*, (1910) ILR 34 Bom 416; *Ghelabhai v Udderam*, (1912) ILR 36 Bom 29; *Dattatraya v Matha Bala*, AIR 1934 Bom 36 : (1934) ILR 58 Bom 119 : (1933) 35 Bom LR 1131.
1596. *Lakshman Das v Jagat Kishore*, (1898) ILR 22 Bom 216.
1597. *Piare Lal v Sher Gir*, AIR 1938 Lah 499.
1598. *Hari Kishen v Raghubar*, AIR 1926 Oudh 578 : (1926) ILR 1 Luck 489.
1599. *Administrator General v Sulajini*, AIR 1962 Cal 616.
1600. *UOI v Manmul Jain*, AIR 1962 Cal 635.
1601. *Ahmad v Nihal-ud-din*, (1883) ILR 9 Cal 945 : 10 IA 45.
1602. *Jaganandham v Venkatasubba Rao*, AIR 1927 Mad 844 : (1927) ILR 50 Mad 877.
1603. *Deb Nath v Sashi Bhusan*, AIR 1934 Cal 82 : (1933) 37 Cal WN 1144.

on the other party even if no appeal is filed against it. The law on this point has been explained by AK Patnaik J in following words:[1604]

> 59. Thus, the Tribunal in its order dated 7-7-2006 has not just decided a dispute on the interpretation of adjusted gross revenue in the licence agreement, but has decided on the validity of the definition of adjusted gross revenue in the licence agreement. As we have already held, the Tribunal had no jurisdiction to decide on the validity of the terms and conditions of the licence including the definition of adjusted gross revenue incorporated in the licence agreement. Hence, the order dated 7-7-2006 of the Tribunal insofar as it decides that revenue realised by the licensee from activities beyond the licence will be excluded from adjusted gross revenue dehors the definition of adjusted gross revenue in the licence agreement is without jurisdiction and is a nullity and the principle of *res judicata* will not apply.

A mortgagee in a possession does not lose the character of a mortgagee and become a trespasser because he refuses to deliver possession of the mortgaged property to the mortgagor on deposit being made in court of the amount payable on the mortgage. *A* executes a usufructuary mortgage of his property to *B*, and places *B* in possession thereof. At the proper time, *A* tenders the mortgage-debt, Rs 500 to *B* and asks to be restored to possession. *B* refuses to accept the tender on the ground that more is due to him and to deliver possession of the property to *A*. *A* sues *B* for redemption, and deposits Rs 500 in court. The court finds that the tender was proper and directs *B* to deliver possession to *A*. After entering into possession, *A* sues *B* to recover *mesne* profits from *B* from the date of the deposit in court to the date of the recovery of possession. The suit is barred for *A* "might and ought" to have claimed the *mesne* profits in the first suit. The suit is between the same parties litigating "under the same title," that is, as mortgagor and mortgagee. The mortgage is not extinguished after the tender and deposit, and *B* does not become a trespasser after that date. It cannot, therefore, be said that the suit against *B* for *mesne* profits is against him as a trespasser, and not as a mortgagee.[1605]

The words "between parties under whom they or any of them claim litigating under the same title" cover a case where the later litigant occupies by succession, the same position as the former litigant. There may be a succession by the ordinary rules of inheritance or succession by some very special rules as in the case of *saranjam* or *vatan* estates. The words of the section do not make any distinction between different forms of succession. A decree, therefore, against a *saranjamdar* may operate as *res judicata* against his heir and successor;[1606] so also a decree against a *vatandar*.[1607]

[s 11.26.2.4] Condition IV: Court Competent to Try Such Subsequent Suit or the Suit in Which Such Issue has been Subsequently Raised

The operative part of the section requires that in order that a decision made in a former suit operates as *res judicata* in a subsequent suit, it is necessary that the court which made such decision, must at the time of making it, be competent to try the subsequent suit or the suit in which the issue has been subsequently raised. Technical aspects of section 11, as for instance, technical or subjective competence of the earlier forum to adjudicate the said matter or grant leaves sought in the substantial litigation would be immaterial when the general doctrine of

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1604. *UOI v Assn of Unified Telecom Service Providers of India*, (2011) 10 SCC 543.
1605. *Rukhminibhai v Venkatesh*, (1907) ILR 31 Bom 527; *Satyabadi v Havaban*, (1907) ILR 34 Cal 223; *Ram din v Bhoop Singh*, (1908) ILR 30 All 225.
1606. *Madhavrao v Anusuyabai*, (1916) ILR 40 Bom 606.
1607. *Radhabai v Anantrao*, (1885) ILR 9 Bom 198. See notes above, "*Shebait, karnavan*, trustee, administrator, etc."

res judicata is to be invoked.[1608] The fact that that court was competent to try the issue raised in the subsequent suit, is not enough. The new Explanation VIII inserted in the section by the Amendment Act, 1976, extends the applicability of the section by providing that an issue heard and finally decided by a court of limited jurisdiction competent to try such an issue, shall also operate as *res judicata* in a subsequent suit, although the court of limited jurisdiction was not competent to try the subsequent suit or the suit in which such issue has been subsequently raised. This would be so, however, provided the other conditions of the section are satisfied.

(a) Court of Competent Jurisdiction.—In order that a decision in a former suit may operate as *res judicata* in a subsequent suit, it is necessary that the court which tried the former suit must have been a court competent to try the subsequent suit. The words "competent to try such subsequent suit" must refer to the jurisdiction of the court to try the subsequent suit at the time when the first suit was brought.[1609] Mere competency to try the issue raised in the subsequent suit, is not enough. As stated by their Lordships of the Privy Council in *Gokul Mandar v Pudmanund:*[1610]

> A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the judge by whom it was made had jurisdiction to try and decide, *not only the particular matter in issue, but also the subsequent suit itself* in which the issue is subsequently raised. The law is well-settled that even if erroneous, an inter-party judgement binds the party if the court of competent jurisdiction has decided the *lis.*[1611] In this respect the enactment goes beyond s 13 of the previous Act 10 of 1877, and also, as appears to their Lordships, beyond the law laid down by the judges in the *Duchess of Kingstone*'s case.[1612]

In *Maqsood Ali v Hunter,*[1613] the majority of the judges of the Oudh chief court however, held (Madeley J dissenting) after noticing the aforesaid observations of the Privy Council in *Gokul Mander*'s case and considering the cases decided by the high courts of Calcutta, Bombay, Madras, Lahore and the earlier decisions of the chief court of Oudh given after the decision of *Gokul Mander*'s case, that the section should be liberally construed and the word "suit" in the expression "such subsequent suit or the suit in which such issue is subsequently raised" should be construed to mean a part of a suit. Thus, where the entire cause of action upon which the subsequent suit is founded can be treated as divisible and if in the earlier suit one of the component parts of that cause of action was relied on, then the previous suit will stand as a bar to the extent of the matter involved in the earlier suit, though the second suit as a whole could not be tried by the court which tried the earlier suit. In the case which was before the Full Bench, the facts were as follows. *A* sued *B* in a *munsiff's* court for a declaration that he was entitled to annual maintenance allowance as the rate of Rs 200 which was charged on property purchased by *B* and for recovery of the sum due to him for one year. The suit was valued at less than Rs 2000 which was the pecuniary limit of the *munsiff's* jurisdiction. *B* pleaded that there was no charge on the property and that in any event he was a *bona fide* purchaser for value without notice of the charge. His defence was overruled by the *munsiff* who gave a declaration

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1608. *Gulam Abbas v State of Uttar Pradesh,* (1982) 1 SCC 71.
1609. *Gopi Nath v Bagwat Prasad,* (1884) ILR 10 Cal 697; *Gokaran Prasad Singh v Chotty Narain Singh,* AIR 1951 Pat 595; *Abinsh v Madusudhan,* AIR 1952 Cal 673; *Ram Karan v Parbati,* AIR 1954 Pat 443; *Kali Charan v Dy Director of Consolidation,* AIR 1977 All 56.
1610. *Gokul Mandar v Pudmanund,* ILR 29 Cal 707 : 29 IA 196, p 202; *Shibo Rout v Baban Rout,* (1908) ILR 35 Cal 353, p 359; *Fazal Hussain v Jiwan Shah,* AIR 1933 Lah 551 : (1933) ILR 14 Lah 369 dissenting; *Sahebzadi v Muhammad Umar,* AIR 1926 Lah 603 : (1927) ILR 8 Lah 15; *Sri Raja Kotagiri v Vutukuru Papayya Rao,* AIR 1946 Mad 431 : (1946) ILR Mad 760; *Prosanna Kumar v Adya Sakti Dasi,* (1943) ILR 1 Cal 128 : (1942) 46 Cal WN 1022.
1611. *Gorie Gouri Naidu v Thandrothu Bodemma,* (1997) 2 SCC 552.
1612. *Rukmini Devi v Rambilas Singh,* AIR 1951 Pat 361.
1613. *Maqsood Ali v Hunter,* AIR 1943 Oudh 338 : 210 IC 163 (FB).

that the allowance was validly charged on the property that *B* had purchased with notice of the charge. *A* then sues *B* in a subordinate judge's court for maintenance allowance for the subsequent years with a prayer that in default of payment, the charged properties be sold. As the claim was for six years with interest, the suit was valued at over Rs 2,000. Justice Bennet with whom the majority agreed, held that the cause of action on which the second suit was founded can be treated as divisible into two parts, namely: (i) a claim to annual maintenance allowance; and (ii) a claim to the arrears then due, and as the *munsiff* had given a declaration that *A* was entitled to annual maintenance that question could not be re-agitated in the second suit. This view that the word "suit" in the phrase "such subsequent suit" should be taken to mean "a part of the suit" is in clear conflict with the observations of the Privy Council in *Gokul Prasad v Nageshar Sahai*.[1614] The point is now concluded by the decision of the Supreme Court in *Gulab Bai v Manphool Bai* in which it has been held that the word "suit" in the expression "such subsequent suit" should be construed literally and that it meant the whole suit and not merely a part of it or any issue.[1615] This is no longer correct, for, under Explanation VIII, an issue finally decided by a court of limited jurisdiction operates as *res judicata* in a subsequent suit even though the court deciding that issue was not competent at the time it decided that issue to try the subsequent suit or the suit in which such issue has been subsequently raised. To that extent, the legislature can be said to have reversed the "literal" construction placed by the Supreme Court in *Gulab Bai v Manphool Bai* and accepted the "liberal" construction advocated by the majority opinion in *Maqsood Ali v Hunter*.

The court which decided the former suit may be a court of "exclusive" jurisdiction, or a court of "concurrent" jurisdiction, or a court of "limited" jurisdiction. As to superior court, nothing is presumed to be out of jurisdiction except what is expressed to be so; but with inferior courts, the presumption is to the contrary, that nothing is within jurisdiction, except what is expressed to be so.[1616]

(i) Where the court deciding the former suit is a civil court and the court dealing with the subsequent suit is of a limited jurisdiction.—In one case adjudication was made by a competent civil court and a finding had been arrived at holding that the petitioner was in exclusive possession of the case land since 1929. The said finding was confirmed not only by the lower appellate court, but also by the high court in second appeal. It is no more *res integra* that the authority having limited jurisdiction is bound by the decision arrived at by the competent civil court relating to title. Thus, for all acts and purposes, the finding that the petitioner was in possession of the case land since 1929 is also binding upon the Orissa Prevention of Land Encroachment Authorities having limited jurisdiction under Orissa Prevention of Land Encroachment Act (6 of 1972).[1617]

The finding of the civil court in the earlier suit between the same parties that the defendant was in possession of land as trespasser and, not as a tenant, would operate as *res judicata* in subsequent suit for possession. Mere casual reference made by revenue courts, about relationship of landlord and tenant between the parties would not have any effect on civil court while adjudicating dispute between the parties.[1618]

(ii) Where the court which decided the former suit is one of "exclusive" jurisdiction.—If a matter directly and substantially in issue in a former suit has been adjudicated upon by court of

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1614. *Gokul Prasad v Nageshar Sahai*, 52 IA 398.
1615. *Gulab Bai v Manphool Bai*, AIR 1962 SC 214; *PM Kavale v AB Bokil*, AIR 1971 SC 2228.
1616. *R v Nabadwip*, (1868) 15 WR Cr 71.
1617. *Labangalata Panda v State of Orissa*, AIR 2002 Ori 147.
1618. *Saroop Singh v Surjan Singh*, AIR 2003 P&H 70.

exclusive jurisdiction, the adjudication will bar the trial of the same matter in a subsequent suit. Thus, courts of revenue have jurisdiction in respect of certain matters to the entire *exclusion* of a civil court;[1619] but, it is open to a minor to impeach in a civil suit a decree of a revenue court if his guardian has been guilty of fraud or gross negligence in allowing the decree to be passed against him.[1620] The Deccan Agriculturalist's Relief Act, 1879 gives exclusive jurisdiction to the court under that Act over a particular class of suits, and a decision in a previous suit tried by the court will be *res judicata* if the suit falls within the class to which the Act applies.[1621]

(iii) Where the court which decided the former suit was not a court of jurisdiction concurrent with that of the court in which the subsequent suit is brought.—In such a case, the court which decided the former suit cannot be a court "competent to try the subsequent suit" within the meaning of this section.[1622]

(iv) Where the court which decided the former suit was a court of concurrent jurisdiction.—In such a case, the court which decided the former suit might or might not have been "competent to try the subsequent suit." If it was, the decision would operate as *res judicata*, but not otherwise.

(v) Where the court which decided the matter in issue was a court of limited jurisdiction.—In such a case, an issue decided by such a court operates as *res judicata* in a subsequent suit, provided that issue was within the competence of that court. It is no longer necessary that such a court was competent, at the time it decided that issue, to try the subsequent suit in which the same issue has been raised.

Summarising the above, we may say that in order that a decision in a former suit may operate as *res judicata*, the court which decided that suit must have been either—

- a civil court of competent jurisdiction;
- a court of *exclusive* jurisdiction; or
- a court of *concurrent* jurisdiction "competent to try the subsequent suit;" or
- court of limited jurisdiction competent to try the issue raised in the subsequent suit.

In a decision, the Calcutta High Court had to interpret the expression "court of limited jurisdiction" used in Explanation VIII. In rejecting the contention that a court of the *munsiff* by reason of its limited pecuniary jurisdiction is a court of limited jurisdiction, the court observed:

> If we are to interpret explanation VIII without referring to s 11, it may be said that a court of limited pecuniary jurisdiction is a court of limited jurisdiction. An explanation to a section is primarily meant for explaining the section itself. In our view, in order to ascertain the true meaning of the explanation VIII, it has to be read along with the provision of the section and not *de hors* it. It has already been stated that one of the conditions of the applicability of s 11 is that the court in which the former suit was instituted must be competent to try the subsequent suit. If the former court is unable to try the subsequent suit as it is beyond its pecuniary jurisdiction the decision of the former court will not be *res judicata* in the subsequent suit. If the legislature had really intended to remove the

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1619. *Kisore Singh v Bahadur Singh*, (1919) ILR 41 All 97; *Baljit v Mahipat*, (1919) ILR 41 All 203; *Ram Das v Dubri Koeri*, AIR 1922 All 336 : (1922) ILR 44 All 724; *Balwant Singh v Sarabjit*, AIR 1927 All 70 (FB) : (1926) ILR 48 All 774; *Mool Chand v S. Iltifat*, AIR 1929 Oudh 362, (1929) ILR 4 Luck 220; *Ubaid Ullah v Abdul Jalil*, AIR 1937 All 481 : (1937) ILR All 628; *Chandra Singh v Prithi Singh*, AIR 1937 Lah 19 : (1936) 17 Lah 787.
1620. *Mst Siraj Fatima v Mahomed Ali*, (1932) AIR 1932 All 293 (FB) : ILR 54 All 646.
1621. *Vithal v Sitabai*, (1912) ILR 36 Bom 548.
1622. *Edun v Bechun*, (1868) 8 WR 175; *Missir v Sheo Baksh*, (1883) ILR 9 Cal 439 : 9 IA 197.

condition relating to the competency of the former court, in that case, it would have removed the same from the section itself. In the face of the provision of s 11 retaining the said condition for the applicability of *res judicata*, that the former court must be competent to try the subsequent suit, it is difficult for us to accept the interpretation of explanation VIII as suggested on behalf of the applicant... In our view, courts of limited jurisdiction are courts other than the ordinary civil courts, insolvency courts, guardianship courts, probate courts *etc*. These courts are to try certain specific matters and in that sense they may be said to be courts of limited jurisdiction. These courts are also courts of exclusive jurisdiction in respect of the matters they are to try. The decisions of such courts operated as *res judicata* in subsequent suits not by virtue of s 11 but on the general principles of *res judicata*. By enacting explanation VIII, the legislature brought the decisions of such court within the purview of s 11... Under explanation VIII, the provisions of s 11 will apply to the subsequent suit when an issue has been heard and finally decided by a court of limited jurisdiction in a *former proceeding*. There is a clear indication in that regard in explanation VIII, for it does not say that the decision of an issue by a court of limited jurisdiction has to be made in a former suit. This is also an indication that explanation VIII does not contemplate that the two proceedings must be suits...so where both the former and subsequent proceedings are suits, to invoke the bar of *res judicata* the condition as to the competency of the former court to try the subsequent suit for want of pecuniary jurisdiction, s 11 will not apply.[1623]

In order to attract Explanation VIII, the decision in the former proceeding must be final and not subject to the concurrent jurisdiction of a civil court.[1624]

(b) Rules Governing Res Judicata.—The following are the principal rules as to concurrent jurisdiction:

1. Concurrent as to pecuniary limit and the subject matter—The jurisdiction of the two courts must be concurrent as regards the pecuniary limit as well as the subject matter. The rule was laid down by Sir Barnes Peacock in *Edun v Bechun*[1625] and it was approved by the Privy Council in *Misir v Sheo Baksh*.[1626] The learned Chief Justice said that there were in India many grades of courts with different pecuniary limits of jurisdiction presided over by judges whose qualification differed widely; that it would be improper that a finding as to the validity of an adoption or of a will in a petty suit in a *munsiff's* Court should be conclusive in a suit for a property of a large amount in a high court, and that by taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject matter, this evil or inconvenience is avoided. In *Run Bahadoor v Lucho Koer*,[1627] the Privy Council said that:

> if this construction of the law were not adopted, the lowest court in India might determine finally and without appeal to the High Court, the title to the greatest estate in the Indian empire.

It is essential therefore, that the first court was a court competent to try and decide not only the particular matter in issue but also the subsequent suit in which the issue is subsequently raised.[1628]

1623. *Nabin Majhi v Tela Majhi*, AIR 1978 Cal 440.
1624. *Kanta Devi v Surinder Kumar*, AIR 1978 Del 318.
1625. *Edun v Bechun*, (1868) 8 WR 175.
1626. *Misir v Sheo Baksh*, (1883) ILR 9 Cal 439 : 9 IA 197.
1627. *Run Bahadoor v Lucho Koer*, (1885) ILR 11 Cal 301 : 12 IA 23, p 38.
1628. *Misir v Sheo Baksh*, (1883) ILR 9 Cal 439 : 9 IA 197; *Gokul Mandar v Pudmanund*, (1902) ILR 29 Cal 707 : (1902) 29 IA 196, p 202; *Ramdayal v Jankidas*, (1900) ILR 24 Bom 456; *Gurpa v Subrayadu*, (1906) ILR 29 Mad 65; *Sheikh Hassu v Ram Kumar Singh*, (1894) ILR 16 All 183; *Venkat v Orsha*, AIR 1921 Bom 434 : (1921) ILR 45 Bom 805; *Shibo Rout v Baban Rout*, (1908) ILR 35 Cal 353; *Hub Lal v Gulzari Lal*, AIR 1927 All 297 : (1927) ILR 49 All 543, p 545; *Venkatasubba Rao v Vigneswara*, AIR 1928 Mad 840 : (1929) 56 Mad LJ 52; *Kesharbai v Amarchand*, AIR 1933 Bom 328 : (1938) ILR 57 Bom 456.

First, as to pecuniary limit—The jurisdiction of the court which decided the former suit, and that of the court in which the subsequent suit is brought, must be concurrent as regards the *pecuniary limit*.

A sues *B* in court *X* to recover *interest* due on a bond for Rs 12,000. For the defence it is alleged that the amount actually lent by *A* was Rs 4000, and that *A* was not entitled to interest on more than Rs 4000. The court finds that the amount actually lent was Rs 4000 and awards *A* interest on that sum only. court *X* is a court of which the jurisdiction is limited to suits of which the value *does not exceed* Rs 5000. *A* then sues *B* in a High court to recover the *principal* sum of Rs 12,000, alleging that that was the actual amount lent by him to *B*. *B* contends that the actual amount advanced was Rs 4,000, and that the question as to whether Rs 12,000 was lent or Rs 4,000 is *res judicata*. Section 11 (excluding Explanation VIII) envisages that the judgement in a former suit would operate as a *res judicata* if the court which decided the said suit was competent to try the same by virtue of its pecuniary jurisdiction and the subject matter to try the subsequent suit and that it is not necessary that the said court should have had territorial jurisdiction to decide the subsequent suit.[1629]

The question is not *res judicata*, for the jurisdiction of court *X* being limited to Rs 5,000, it was not a court competent to try the subsequent suit in which the amount claimed is Rs 12,000. Pecuniary jurisdiction is determined by the plaintiff's estimate of the value of his claim and if the court awards less, that does not show that the suit was brought in the wrong court.[1630] A decision given in an earlier suit which had pecuniary jurisdiction over it at the then valuation is *res judicata* in a later suit instituted in a court of higher jurisdiction owing to the rise in the valuation of properties.[1631]

The plaintiff however, cannot prevent a decision in a previous suit from operating as *res judicata* by overvaluing the second suit.[1632] *Res judicata* cannot be evaded if the former suit is brought in a court of inferior jurisdiction by artificially splitting up the cause of action.[1633] Where *A* brought two suits in a provincial small cause court for compensation in each suit for loss of one parcel and the suits were dismissed, and he subsequently brought a suit in the *munsiff's* court, joining together the claims in respect of both the parcels so as to bring the valuation above the Rs 500 limit, it was held that the suit was barred on the principle of *res judicata*.[1634] If a suit as to one parcel is dismissed in a *munsiff's* court, and then a suit is subsequently brought between the same parties on the same cause of action as to that parcel and several other parcels in the court of the subordinate judge, the second suit as to that one parcel will be barred by *res judicata*.[1635] The same principle would apply where the first suit instituted in the *munsiff's* court was in respect of a parcel of land and the subsequent suit brought in the subordinate judge's court related to the whole parcel, the basis of the claim in

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1629. *Church of South India Trust Assn v Telugu Church Council*, AIR 1996 SC 987 : (1996) 2 SCC 520.
1630. *Jay Chand v Dole Gobinda*, AIR 1944 Cal 272 : (1944) 48 Cal WN 454; *Lakshman v Babaji*, (1883) ILR 8 Bom 31; *Mahabir Singh v Behari Lal*, (1891) ILR 13 All 320.
1631. *Jeevantha v Hanumanthayya*, AIR 1954 SC 9; *Harihar Bhagat v Mossfir Pathal*, AIR 1966 Pat 268; *Nand Kishore v Prabhu Narain*, AIR 1976 Raj 20.
1632. *Teckchand v Birjabai*, AIR 1942 Ngp 119 : (1942) ILR Nag 721; *Tamizunnissa v Syed Mahammad*, AIR 1928 All 127 : (1928) 25 All LJ 1035; *Chhote Lal v Chandrabhan*, AIR 1923 All 176 : (1923) ILR 45 All 59; *Anthony v Vedamanickam*, (1959) 1 Mad LJ 346.
1633. *Yeshwant Bala Powar v Babai*, AIR 1945 Bom 67 : (1945) ILR Bom 38 : (1944) 46 Bom LR 728.
1634. *Mangan Lal v GIP Rly Co*, AIR 1924 All 849 : (1924) 22 All LJ 745; *Bhugwanbutti v Forbes*, (1901) ILR 28 Cal 78; as explained in *Shiba Rout v Baban Rout*, (1908) ILR 35 Cal 353.
1635. *Priyanath v Kali Charan*, AIR 1932 Cal 162 (1932) 35 Cal WN 773; *Shanker Sitaram v Balkrishna*, AIR 1954 SC 352 : [1955] 1 SCR 99 : (1954) SCJ 552; *Sarangapani v Venkata*, AIR 1952 Mad 384 : (1951) 2 Mad LJ 464.

both the suits being the same. The issue raised in the former suit would not, however, be *res judicata* so as to affect the portion which was not the subject matter of the first suit.[1636]

Secondly, as to subject matter—The jurisdiction of the two courts must be concurrent as regards subject matter. Thus, certain courts have no jurisdiction to adjudicate upon questions of *title*, though that question may be gone into *incidentally* in order to decide the principal question. A finding on a question of *title* by such courts cannot operate as *res judicata* in a subsequent suit on *title*. This generally happens in the three following cases:

(i) Where the first court is a civil court of limited jurisdiction.—A decision of a district *munsiff's* court in Madras in a suit for possession will not operate as *res judicata* in a suit for redemption of a mortgage, for a district *munsiff's* Court is not competent to try a mortgage suit.[1637] An order passed by the City Civil Court, Madras under section 69A of the Transfer of Property Act is no bar to a subsequent proceeding involving the question of title since the City Civil Court has limited jurisdiction under that section.[1638]

(ii) Where the first court is a Provincial Small Cause Court.—A decision in a suit for damages instituted in a provincial small cause court (a court not competent to try a suit on title) does not operate as *res judicata* in a subsequent suit for establishment of title[1639] and this is also the case when the small cause court decree is based on an arbitrator's award.[1640] A decision in a suit for rent in a provincial small cause court (a court not competent to try a suit for possession) does not operate as *res judicata* in a subsequent suit for possession.[1641]

(iii) Where the first court is a "revenue court" and the second court is a "civil court".—A decision of a revenue court on a question of *title* is no bar to the trial of the same question by the ordinary civil courts, unless the revenue court is empowered by the legislature to determine questions of title so as to constitute it *protanto*, a civil court.[1642] The reason is that courts of revenue are generally courts of jurisdiction limited to adjudicate upon questions of rent, tenure *etc*.[1643] There are, however, some matters of which, the decision by a revenue court is expressly declared by the Act constituting the court to have the force of decree in a civil suit,[1644] and some as to which it is declared that the decision shall be final.[1645] In such cases, the decision of a revenue court will operate as *res judicata* so as to bar the trial of the same matter in a civil

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1636. *Drupad v Bindu Mowi*, (1926) 43 Cal LJ 606.
1637. *Subba Rao v Bhimalingam*, AIR 1933 Mad 913 : (1933) 65 Mad LJ 761.
1638. *Venkatasubbiah v Thirupurasundari*, AIR 1965 Mad 185 : (1965) ILR 1 Mad 624.
1639. *Dulare Lal v Hazari Lal*, (1914) 12 All LJ 853. It is otherwise, where the first suit is tried as a regular suit: *Ram Faqir v Bindeshri Singh*, (1919) ILR 41 All 54.
1640. *Sreemati Purnima v Nana Lal*, AIR 1932 Pat 105 : (1932) ILR 11 Pat 50.
1641. *Rukmini v Rayaji*, AIR 1924 Bom 454 : (1924) ILR 48 Bom 541. See also the following decisions: *Ramkishen v Murlidhar*, AIR 1960 Pat 484; *Pateshwari Parshad v Gilani*, AIR 1959 P&H 420 : (1960) ILR Punj 1503.
1642. *Bed Saran v Bhagat Deo*, (1911) ILR 33 All 453; *Bihari v Sheobalak*, (1907) ILR 29 All 601; *Appa Rao v Gurraju*, (1920) ILR 43 Mad 859; *Thakur Hammat v Mt Jhamola*, AIR 1922 All 95 : (1922) 20 All LJ 340; *Baru Mal v Sunder Lal*, AIR 1924 All 10 : (1923) 21 All LJ 330; *Sarju Prasad v Mahadeo*, AIR 1932 All 483 : (1932) ILR 54 All 786; *Ramamurthi v Gajapathiraju*, AIR 1933 Mad 279 : (1933) ILR 56 Mad 366.
1643. *Khugowlee Singh v Hussein Bunkhan*, (1871) 7 Bom LR 673 : 15 WR (PC) 30; *Hurri Sunker v Mudeswar*, (1875) 15 Bom LR 238; *Rani Kishori v Raja Ram*, (1904) ILR 26 All 468; *Ashra v Ali Ahmad*, (1904) ILR 26 All 601; *Mahesh v Ranjor*, (1905) ILR 27 All 163; *Inayat Ali v Murad Ali*, (1905) ILR 27 All 569; *Dharani v Gaber*, (1903) ILR 30 Cal 339; *Rangayya v Ratnam*, (1897) ILR 20 Mad 392; *Padmalav v Lukmi Rani*, (1907) 12 Cal WN 8; *Asrafannessa Hemchandra*, AIR 1927 Cal 216 : (1927) ILR 54 Cal 114; *Mehnga Singh v Gurdial Singh*, AIR 2004 P&H 93.
1644. *Durga Churn v Hatem*, (1902) ILR 29 Cal 252; *Sheo Narain v Parmeshar*, (1896) ILR 18 All 270; *Kalka Prasad v Manmohan Lal*, (1916) 38 ILR All 302.
1645. *Mahendra v Girish Chandra*, (1918) 3 Pat LJ 379.

court. When the Revenue Act bars suits claiming an alteration of shares made on a partition by a revenue court, a party to such a partition cannot sue in a civil court for an enhanced share;[1646] but, if on a revenue partition one *mahal* has been allotted to several co-sharers jointly, a suit to declare the rights of such co-sharers *inter se* is not barred, for, it in no way interferes with the revenue petition;[1647] but, when a partition made by a Revenue Court has assigned to the plaintiff lands as under proprietor, a suit for a declaration that he is a superior proprietor, is barred.[1648] A decision of a revenue court in proceedings under section 3(4) of the Madras Cultivating Tenants Protection Act, 1955, that the tenant is not in arrears of rent is not *res judicata* in a suit in the civil court for recovery of rent, as the revenue court is not competent to try such a suit.[1649] The Supreme Court has held in *Bhagwan Dayal v Reoti Devi*[1650] that the decision on a question of title by a revenue court under the Agra Tenancy Act did not operate as *res judicata* in a suit in a civil court which was not within the exclusive jurisdiction of the revenue court. In a case under the Agra Tenancy Act, 1901,[1651] an occupancy tenant sued in a revenue court to evict the defendant alleging that he was a sub-tenant. The suit was dismissed on the ground that the defendant was not a sub-tenant but probably a sharer in the occupancy. The plaintiff then sued in the civil court to eject the defendant as a trespasser, but the suit was dismissed on the ground that its object was to reverse the decision of the revenue court. This decision, it is submitted, is incorrect. The finding of the revenue court that the defendant was not a sub-tenant was final; but, it had no such jurisdiction to declare who were sharers in the occupancy, and in any event, its finding on that point was only incidental. The decision of a revenue court would not bar a subsequent proceeding though it seeks the same relief if it is under a different Act;[1652] but, it would bar a subsequent proceeding in a civil court so far as the issue decided by the revenue court is concerned,[1653] provided of course that the issue was within the competence of the revenue court. See note "Where the Court which decided the former suit is a court of exclusive jurisdiction" above. For the other cases, see footnote.[1654]

In an application made before the tenancy authorities, for possession of land, was dismissed on the ground of want of jurisdiction, subsequent civil suit against the tenant for recovery of possession of land was filed. The case was remanded by the high court, for hearing by the trial court, with a direction to refer the issue regarding tenancy to tenancy authorities. Section 11 would not be a bar to the trial court in referring issues which were to be exclusively determined by a competent authority under the Act, to that authority. Nor should there arise any such question of *res judicata* in the competent authority deciding those issues, when referred to by the trial court. Earlier, the *mamlatdar* had declined to exercise jurisdiction, holding that the Act did not apply. If an issue was referred to it by the trial court under the Act, the question of

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1646. *Ram Rekha v Lallu*, AIR 1931 All 462 : (1931) ILR 53 All 568; *Muhammad Saduq v Laute Ram*, (1901) ILR 23 All 291.
1647. *Chandra Bali v Drigpal*, AIR 1931 Oudh 21 : (1931) 6 ILR Luck 419; *Lal Bihari v Parkali*, (1920) ILR 42 All 309.
1648. *Bajrang Bahadur v Beni Madho*, AIR 1932 Oudh 199 (FB) : (1932) ILR 7 Luck 716.
1649. *Venkatachala v Ramachandra*, AIR 1961 Mad 423; overruling *Narasimha v Muthuswamy*, (1958) 2 Mad LJ 216 : (1958) 71 Mad LW 521; *Venkataraya v Louis*, AIR 1960 Mys 209.
1650. *Bhagwan Dayal v Reoti Devi*, AIR 1962 SC 287 : (1962) 3 SCR 440 : (1962) 1 SCJ 343; approving *Venkatarama v Venkiah*, AIR 1954 Mad 788 (FB) : (1954) ILR Mad 715.
1651. *Balwant Singh v Sarabjit*, AIR 1927 All 70 (FB) : (1926) ILR 48 All 774.
1652. *Bhartiya Hotel v UOI*, AIR 1968 Pat 476.
1653. *Ram Sarup v Ram Chandar*, AIR 1976 P&H 246.
1654. *Kedambi v Lakshmi*, (1908) ILR 31 Mad 62; *Balijepalli v Balijepalli*, (1907) ILR 30 Mad 320; *Kanhai v Durga*, (1915) ILR 37 All 223; *Sundar v Dinanath*, (1915) ILR 37 All 280; *Mulo v Ram Lal*, (1920) ILR 43 All 191.

jurisdiction would not arise and there could be no question of *res judicata* as to jurisdiction of the *mamlatdar* on such reference.[1655]

Land tribunal decided the question of tenancy. Where the plea of fixity of tenure under the Kerala Land Reforms Act was taken against decision of the land tribunal, an appeal was pending. It was held that the decision had not become final because the pendency of an appeal against the same and the principles of *res judicata* and estoppel did not apply.[1656]

The law relating to impact of decisions of revenue authorities on the question of title and ownership of land stands settled by various authorities including the Apex Court. It has been held that entries in the revenue records do not confer title on a person whose name appears in the record of rights. The creation of Jamabandi neither created any right and title is favour of one or the other nor cancellation of Jamabandi extinguishes right and title of actual owner. The entries in the revenue records or Jamabandi have only "fiscal purpose" and no ownership is conferred by such entries.

It has been held by the Jharkhand High Court that such Revenue Authorities while deciding a mutation proceeding have been held to be not a court of law and the mutation proceeding before them are not judicial proceeding, an order passed therein are not order passed by a court of law. Therefore, provisions of section 11 of the code would not apply to such proceedings.[1657]

(iv) Where the first court is a "criminal court" and the second court is a "civil court".—Criminal proceedings are not a "suit"; hence, no finding of a Criminal Court can be *res judicata* in a subsequent suit. It has thus, been held, that a conviction or an acquittal in a criminal case is not conclusive in a civil suit for damages in respect of the act charged against the accused.[1658]

The principle that a decision in a criminal proceeding does not operate as *res judicata* in civil proceeding, or vice versa; cannot be made *ipso facto* and applicable to a decision under section 35 of the Advocates Act, 1961, because the nature of proceedings has been termed as quasi-judicial. The basic distinction between criminal proceedings and the proceedings under section 35 of the Act, which comes into existence as a result of a complaint is to be borne in mind. The proceedings against an accused for committing a crime is one in the name of the State in exercise of its sovereign power and in respect of breach of a public right and furthermore, duties which affect the whole community.[1659] On this principle, the finding of a criminal court that *A* assaulted or abducted *B* is not *res judicata* in a suit for damages against *A* for assault or abduction;[1660] nor is an acquittal a bar to a civil suit against the accused.[1661] A conviction by a criminal court does not bar an advocate from challenging the order in disciplinary proceedings before the civil court under the Advocates Act.[1662]

An application was filed by an accused that the complaint petition filed against her without obtaining requisite sanction under section 188 of the Code of Criminal Procedure was bad in law as the offence was committed outside India and she was not a citizen of India. The application of the accused was dismissed. Thereafter, she filed another petition raising the

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1655. *Pandurang Ramchandra Mandlik v Shantabai Ramchandra Ghatge*, AIR 1989 SC 2240 : (1989) 2 SCC 627.
1656. *Upperi Janki v Balakrishnan Nambiyar*, AIR 1981 Ker 52.
1657. *Jagdeo Mahto v Commr North Chotanagpur Division*, AIR 2009 Jhar 152 (DB).
1658. *Bishonath v Huro*, (1886) 5 WR 27; *Doorga v Doorga*, (1866) 6 WR Civ Ref 26.
1659. *Magraj Kala v Kjadimal*, AIR 1994 Raj 11.
1660. *Ali Buksh v Shaikh*, (1869) 12 WR 477; *Ram Lal v Tula Ram*, (1882) ILR 4 All 97. See also section 43 of the Evidence Act, 1872.
1661. *Keshab v Manirudin*, (1908) 1 Cal WN 501.
1662. *Adi Pherozshah v HM Seervai*, AIR 1971 SC 385 : (1971) 1 SCR 863 : (1970) 2 SCC 484.

contention that the order taking cognizance was bad in law. The Supreme Court held in the case that the second petition filed by her against the order taking cognizance cannot be dismissed on the ground of *res judicata*. The principles analogous to *res judicata*. The principles analogous to *res judicata* have no application with regard to criminal cases. It was observed that where jurisdictional issue is raised, save and except for certain categories of cases, the same may be permitted to be raised at any stage of the proceedings.[1663]

The High Court of Bombay has held that the judgment of a civil court may in a proper case be admissible in evidence in a criminal proceeding between the same parties. Thus, where *A* charged *B* with criminal breach of trust in respect of certain items, and it appeared that all those items had been dealt with by the civil court and the contention of the accused with reference to all of them had been found to be correct by that court, it was held that the judgment of the civil court was admissible in evidence in the criminal proceedings.[1664]

2. *Competency of the former court to be determined as on the date of the "former suit" and not as on the date of the "subsequent suit"*[1665]—The words "court competent to try such subsequent suit" refer to the jurisdiction of the court at the time when the first suit was brought. If at that time such court would have been competent to try the subsequent suit had it been then brought, the decision of such court would operate as *res judicata*, although on a subsequent date, by a rise in the value of the property, that court had ceased to be a proper court, so far as regards its pecuniary jurisdiction, to take cognizance of a suit relating to that very property. The leading case on the subject is *Gopi Nath v Bhugwat*.[1666] In that case, a suit was brought in the year 1860 to recover certain property of which the value at that time was less than Rs 1,000; therefore, the proper court to try it was that of the *munsiff*. A second suit was afterwards brought in the year 1880 between the same parties in the court of the subordinate judge to recover the same property which had then risen in value and became worth more than Rs 1,000. The matter directly and substantially in issue in both the suits was the same, and the question arose whether the decision of the *munsiff* in the first suit operated as *res judicata* in the second suit. It was contended that as the *munsiff* could not have tried the second suit in consequence of the value of the property being more than Rs 1,000, his decision could not have the effect of *res judicata*; but, it was held that the decision operated as *res judicata*, for if the second suit was instituted in the year 1860, that is, at the time when the first suit was brought, the *munsiff's* court would have been competent to try it. Mitter J ruled:

> The reasonable construction of the words "in a court of jurisdiction competent to try such subsequent suit," seems to us to be that it must refer to the jurisdiction of the court at the time when the first suit was brought, that is to say, if the court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such court would be conclusive under s 13 [of the Code of 1882], although on a subsequent date, by a rise in the value of such property or from any other cause the said court ceased to be the proper court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property.

1663. *Fatma Bibi Ahmad Patel v State of Gujarat*, AIR 2008 SC 2392 : (2008) 6 SCC 789.
1664. *Re Markur*, (1914) ILR 41 Bom 1.
1665. *Tekchand Kapurchand v Birzabai*, AIR 1942 Ngp 119 : (1942) ILR Nag 721; *Gopi Nath v Bhugwan*, (1884) ILR 10 Cal 697; *Raghunath v Issur Chunder*, (1885) ILR 11 Cal 153; *Kunj v Raman*, (1892) ILR 15 Mad 494; *Mohendra Nath v Shamsinnessa*, (1915) 19 Cal WN 1280.
1666. *Gopi Nath v Bhugwat*, (1884) ILR 10 Cal 697; *Nasib Khan v Kutubiunissa*, AIR 1941 All 18, (1940) ILR All 691; *Sarupa v Khem Lal*, AIR 1928 Lah 929 : (1929) ILR 10 Lah 528; *Lalmohan v Ramlakshmi*, AIR 1932 Cal 271 : (1932) ILR 59 Cal 636; *Debendra v Pramada*, AIR 1933 Cal 879 : (1933) 37 Cal WN 810.

The same view has been taken by the High Court of Madras.[1667] It has, however, been held by the court that the augmentation of a pecuniary claim by accrual of interest is not similar to a rise in the market-value of a property, and that though in the latter case the decision in the prior suit may operate as *res judicata*, it cannot in the former case;[1668] but, it will operate as *res judicata*, if the claim for interest is not *bona fide* and is clearly untenable.[1669]

In deciding the competency of the court (which had decided the former suit) to try the subsequent suit, regard must be had to the jurisdiction of the court on the date of the former suit. Suit property was valued in 1973 at Rs 60,000. No evidence was produced to show as to what was the value in 1960. Having regard to the steady rise of prices of property, it could not be assumed that the property would be more than Rs 50,000 in value in 1960. In the circumstances, the decision in the earlier suit was held to have been given by a court of competent jurisdiction.[1670]

3. *Competency of the trial court determination, not of the appellate or execution court.*—It is the competency of the trial court which determined the former "suit" that must be looked to, and not that of the appellate court in which that suit was ultimately decided on appeal[1671] or of the executing court[1672] A suit is instituted in a *munsiff's* court. An appeal from the decree in that suit is preferred to a district court. A subsequent suit relating to the same matter in issue is brought into in a district court. The decision in the first suit cannot operate as *res judicata* in the subsequent suit, for though the district court that heard the appeal may have jurisdiction to try the subsequent suit, the *munsiff's* court, that is the court which decided the former suit, is not a court of jurisdiction competent to try the subsequent suit.

Though an appeal lies from a decision of a *Talukdari* Settlement Officer to the district court, yet the decision does not operate as *res judicata* in a subsequent suit in the district court, for a settlement officer is not a court competent to try a civil suit; he is merely an administrative officer.[1673]

4. *Competence of court when there is a court with preferential jurisdiction.*—A court does not cease to be a "court of competent jurisdiction to try the subsequent suit," if its inability to entertain it arises not from incompetence, but from the existence of another court with a preferential jurisdiction.[1674] Thus, a finding by a *munsiff* in a suit for possession under section 9 of the Specific Relief Act, 1877 (Now Act 47 to 1963), instituted in his court that the plaintiff was wrongfully dispossessed by the defendant, in *res judicata* on the issue as to wrongful dispossession in a subsequent suit brought by the same plaintiff against the same defendant for damages for wrongful dispossession in a court of small causes. When a suit under section 9

1667. *Venkatachalam v Aiyamperumal*, (1919) ILR 42 Mad 702.
1668. *Giriya v Sabapathy*, (1906) ILR 29 Mad 65.
1669. *Velayuda v Sundara*, AIR 1926 Mad 829 : (1926) 51 Mad LJ 630.
1670. *MH Ravindranath v MI Hanumantha Rao*, AIR 1968 Mad 177.
1671. *Iopomidhee v Sreeputty*, (1880) ILR 5 Cal 832; *Bharasi v Sarat Chunder*, (1896) ILR 23 Cal 415; *Shibo Rout v Baban Rout*, (1908) ILR 85 Cal 353; *Malubhai v Sarangji*, (1906) ILR 30 Bom 220; *Valeswara Muthukrishna*, (1911) ILR 21 Mad 57; *Amarsangji v Deepsangji*, AIR 1925 Bom 241 : (1925) 49 ILR Bom 442; *Kammu v Musummat Rahiman*, AIR 1922 All 445 : (1922) ILR 44 All 712; *Kapuria v Ganga Devi*, AIR 1933 Lah 646 : (1933) ILR 14 Lah 437; dissenting from *Sahibzadi v Mahammad*, AIR 1926 Lah 603 : (1927) ILR 8 Lah 15; *Kochukutty v Bhavani*, AIR 1954 TC 169 : (1953) ILR TC 943.
1672. *Official Assignee of Madras v Arya Dikshithar*, AIR 1925 Mad 688 : (1925) 48 Mad LJ 530.
1673. *Malubhai v Sursangi*, (1906) ILR 30 Bom 220; *Amarsangji v Deepsangji*, AIR 1925 Bom 241 : (1925) ILR 49 Bom 442.
1674. *Ghulappa v Raghavendra*, (1904) ILR 28 Bom 38; *Raj Simhadri v Ramchandrudu*, (1902) ILR 27 Mad 63; *Bodku v Mohan Singh*, (1917) ILR 39 All 717; *Hinga v Ali Sher*, AIR 1952 All 628 : (1952) ILR 1 All 620.

of the Specific Relief Act, 1877 (Now Act 47 to 1963) is dismissed on the ground that the plaintiff was not in possession within six months of the institution of the suit, the finding operates as *res judicata* in a subsequent suit on title on the question whether the suit is barred by the special limitation under Article 3 of Sch III of the Bengal Tenancy Act, 1885.[1675]

5. *Both the suits are in revenue court, but appeals lie to different authorities.*—A decision on a matter directly and substantially in issue in a suit tried by a revenue court may operate as *res judicata* in a subsequent suit brought in the same court though the character of the suits may be such that in one case an appeal lies to the commissioner, and in the other, to a district court. The fact that in the two suits appeals lie to different courts does not affect the application of the rule of *res judicata*.[1676]

(i) Explanation II.—Under the Code of 1882, the high courts of Bombay[1677] and Madras[1678] held that a decision in a suit in which no second appeal was allowed by law, such as suits of a nature cognizable by court of small causes when the amount or value of the subject matter does not exceed Rs 500, could not operate as *res judicata* in a subsequent suit in which appeal was allowed. The High Court of Calcutta dissented, holding that a decision in a suit could operate as *res judicata*, notwithstanding that no second appeal was allowed by law in that suit.[1679] Explanation II affirms the view taken by the High Court of Calcutta that the competence of a court does not depend on the right of appeal from the decision of such court.[1680]

(ii) Judgment of court not competent to deliver it.—A judgment delivered by a court not competent to deliver it cannot operate as *res judicata*,[1681] since such a judgment is not of any effect.[1682] It is a well-settled position in law that if a decision has been rendered between the same parties by a court, which had no jurisdiction to entertain and decide the suit, does not operate as *res judicata* between the same parties in subsequent proceedings.[1683] The context, scheme and terms of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, show that the rent controller's decision on questions of title, is not final. Hence, that decision cannot be *res judicata*;[1684] and it has accordingly been held that a decree passed by a court in the *mofussil* with respect to lands situated within the ordinary original civil jurisdiction of the Calcutta High Court is not *res judicata* in a suit in the High Court of Calcutta.[1685] In the absence of a certificate from the collector, a civil court has no jurisdiction to try a suit relating to any pension or grant of money or land revenue made by the government, and a judgment of a civil court in such a suit without a certificate under section 6 of the Pensions Act cannot operate as *res judicata*.[1686] When a suit was brought in a court in district *X* on a mortgage of property situated in district *Y* and a decree was passed without any adjudication

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1675. *Hridoy Nath v Probodhchandra*, AIR 1933 Cal 923 : (1933) ILR 60 Cal 1171.
1676. *Beni Madho v Indar Sahai*, (1910) ILR 32 All 67.
1677. *Govind v Dhonbarav*, (1891) ILR 15 Bom 104.
1678. *Avanasi v Nachammal*, (1906) ILR 29 Mad 195.
1679. *Rai Charan Ghose v Kumud Mohan*, (1898) ILR 25 Cal 571; *Bhuqwanbutti v Forbes*, (1901) ILR 28 Cal 78.
1680. *Ram Faqir v Bindeshri Singh*, (1919) ILR 41 All 54.
1681. *Neelkanta v Kesavan*, AIR 1956 TC 161 (FB) : (1956) ILR TC 87); *Bhai Shakri v Babu Singhji*, AIR 1958 Bom 30 : (1957) ILR Bom 786; *Suraj Bai v Sadashiv*, AIR 1958 MP 100; *Rabi Ram v Dalip Singh*, AIR 1972 P&H 390; *UOI v Pramod Gupta (D) by LRs*, AIR 2005 SCW 4645 : (2005) (8) JT 203.
1682. *Tara Chand v Misrimal*, AIR 1970 Raj 53 : (1969) ILR 19 Raj 412.
1683. *Himatrao Ukha Mali v Popat Devram Patil*, AIR 1999 Bom 10; *Tulajappa v Subhas*, AIR 2003 Kant 118.
1684. *LIC v India Automobiles*, AIR 1991 SC 884 : (1990) 4 SCC 286.
1685. *Administrator General v Sulajini Debi*, AIR 1962 Cal 616.
1686. *Oudh Narain v Sukh Dulari*, AIR 1950 All 402; *Lakmi Chand v Madho Rao*, AIR 1930 All 681 : (1930) ILR 52 All 868.

a the question of jurisdiction, the decree did not operate as *res judicata* so as to bar a suit to set aside the decree for want of jurisdiction.[1687] (See in this connection, section 44 of the Indian Evidence Act, 1872). For this purpose, there is no distinction, so far as chartered high courts are concerned, between cases where a court has no jurisdiction at all to try a suit and cases where it cannot exercise jurisdiction unless leave to sue has been obtained under clause 12 of the charter. Therefore, a judgment delivered by a chartered high court in a suit which it has no jurisdiction to try unless leave to sue has been obtained, cannot operate as *res judicata*, if leave to sue was not obtained.[1688] A question of law which does not require a fresh investigation into facts may be allowed to be raised at a later stage of a proceeding, but that is subject to the qualification that the question is not concluded by a decision between the same parties.[1689] The observations or conclusions, however, it may be called, contained in a proceeding, if directly opposed to the mandatory provisions contained in Sick Textiles Undertaking Act, cannot be accorded in sanctity or finality, or given any binding force so as to constitute either estoppel or constructive *res judicata*. Such illegal directions directly opposed to the statute, will be void *ab initio*.[1690]

The Supreme Court has held that an order passed by a court without jurisdiction would be a nullity. It will be *coram non judice*. It is *non est* in the eye of law. Principles of *res judicata* would not apply in such cases.[1691]

Where a court assumes jurisdiction erroneously and in disregard of statutory provisions, the decision will still be *res judicata* if the party affected does not raise any objection.[1692]

The rule embodied in section 11 applies to declaratory suits also and therefore, a decision in a prior suit instituted in court *A* cannot bar a subsequent suit for declaration in court *B* if court *A* was not competent to try it. Hence, section 43 of the Specific Relief Act, 1877 (Now Act 47 to 1963), which is general in its terms must be read subject to the conditions enumerated in section 11.[1693] Where a contract provided for suits thereon being instituted in a specified court and contrary to its terms, a suit was instituted by a party in a different court and that resulted in a decree, it was held that it would not operate as *res judicata* in a suit subsequently filed in the court specified in the agreement.[1694] It is submitted that this decision is erroneous. When a suit is instituted in a court different from that specified in the agreement, that would be a ground for taking action under section 10 of the CPC; but, where that is not done and the suit is decreed, the decree is valid and will operate as *res judicata* as the court derives its jurisdiction from the CPC, and not from an agreement of parties.[1695]

(iii) Decision on a question of jurisdiction.—The principle of *res judicata* is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of *res judicata*. When an order is passed without jurisdiction, the same becomes a nullity. When an

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1687. *Raghubir v Hiralal*, AIR 1931 All 454 : (1931) ILR 53 All 560.
1688. *Abdul Kadir v Dolanbibi*, (1913) ILR 37 Bom 563.
1689. *Rajendra Jha v Presiding Officer*, (1984) Supp SCC 520.
1690. *National Textiles Corp v Bank of Madurai Ltd*, AIR 1998 Mad 113.
1691. *Chandrabhai K Bhoir v Krishna Arjun Bhoir*, AIR 2009 SC 1645 : (2009) 2 SCC 315 : (2009) 1 Civil Court C 295 (SC); *Raju Ramsing Vasave v Mahesh Deorao Bhivapurkar*, (2009) 1 Civil CC 561 (SC).
1692. *Sivanathanu Pillai v Lakshmi Rajamma*, AIR 1981 Ker 214.
1693. *Veeranna v Sayamma*, AIR 1958 AP 363 : (1958) ILR AP 281.
1694. *Gulab Chand v Anandan*, AIR 1954 Mad 11.
1695. See notes under heading "Contract providing for place of suing," under section 10 and "agreement as to choice of court," under section 20.

order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or *res judicata*.[1696]

The law is well-settled that a court which has no jurisdiction to try a cause cannot by its own erroneous decision confer on itself competence to decide it, and its decision on the question of jurisdiction cannot operate as *res judicata* in a subsequent suit between the parties.[1697] The court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of *res judicata*. It is well-settled that there can be no estoppel on a pure question of law.[1698]

Decision of rent controller under Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act (15 of 1960), section 8(5) and 20 (iv) in a petition under section 8(5) of the Act, on jurisdictional facts, is not conclusive and final and does not operate as *res judicata*.[1699] "In respect of reliefs that can be granted by the Tribunals under the Rent Act, their decisions are final. But in respect of a relief which cannot be granted under the provisions of the Rent Act and where questions are decided incidentally, they cannot be considered as final so as to oust the jurisdiction of civil court nor do such findings operate as *res judicata* as the decisions are not final."[1700] Conversely, the decision relating to jurisdiction cannot be said to constitute the bar of *res judicata* where the court by an erroneous interpretation of a statute holds that it has no jurisdiction.[1701] It is submitted that the decision of the High Court of Madhya Pradesh[1702] to the contrary requires reconsideration; but, where a court would have jurisdiction over the subject matter if certain facts existed, a decision given in a previous litigation between the parties as to the existence of those facts would be binding on them in a subsequent suit.[1703] The position is the same when a party alleges facts when if true, would give jurisdiction to the court, and they are not denied by the opposite party and a decree is passed. In that case, the question of jurisdiction must be held to have been decided by implication and the decree would be constructively *res judicata*;[1704] and so, where two suits in ejectment were filed in the small cause court, Calcutta, with reference to two different portions of a house and that court would have paid pecuniary jurisdiction to try them only if the two portions were demised under distinct leases and both the suits were decree, a plea by the tenant in a subsequent suit that both the portions were demised under one lease was held to be barred as *res judicata*.[1705]

In applying the principles of constructive *res judicata*, a distinction should be made between the decisions given by ordinary courts and those given by tribunals with limited jurisdiction.

1696. *Ashok Leyland Ltd v State of Tamil Nadu*, AIR 2004 SC 2836 : AIR 2004 SCW 1001 : (2004) 3 SCC 1. See also *Management of Sonepat Co-op Sugar Mills Ltd v Ajit Singh*, AIR 2005 SC 1050 : AIR 2005 SCW 1005 : (2005) 3 SCC 232; *Dwarka Prasad Agarwal (D) by LRs v BD Agarwal*, AIR 2003 SC 2686 : AIR 2003 SCW 3346 : (2003) 6 SCC 230; *Sri Ramnik Vallabhdas Madhvani v Taraben Pravinlal Madhvani*, AIR 2004 SC 1084 : AIR 2003 SCW 6839 : (2003) 9 Scale 412 : (2004) 1 SCC 497; *Chief Justice of AP v LVA Dikshitulu*, AIR 1979 SC 193 : (1979) 2 SCC 34 : (1978) LIC 1672.
1697. *Krishna v Ramachandra*, AIR 1956 Bom 268; *Panduranga v MRT Nagpur*, AIR 1974 Bom 20 : (1974) ILR Bom 816; *Rajendra Kumar v District Judge, Jaunpur*, AIR 1996 All 78.
1698. *Isabella Johnson v MA Susai*, (1991) 1 SCC 494.
1699. *Jeeth Kaur v P Kondalamma*, AIR 1983 AP 219 (DB). [See also *C Raghunandan v K Nageshwar Rao*, AIR 2009 AP 205 : (2009) 6 Andh LD 257 : (2009) 5 All LT 584].
1700. *Jeeth Kaur v P Kondalamma*, AIR 1983 AP 219 (DB).
1701. *Mathura Prasad v Dossibai*, AIR 1971 SC 2355 : (1970) 1 SCC 613 : (1970) 3 SCR 830 : (1971) 73 Bom LR 492; *Vrajlal v Jadavji*, AIR 1972 Guj 148 : (1972) 13 Guj LR 597.
1702. *Piarelal v Bhagwati Prasad*, AIR 1969 MP 35.
1703. *Murarilal v Madanlal*, AIR 1952 P&H 265.
1704. *Jnanchand v Jugal Kishore*, AIR 1960 Cal 331; *UOI v Siddique Ahmed*, AIR 1961 Cal 92 (FB); *Benares Ice Factory v Sukulal*, AIR 1961 Cal 422.
1705. *Newton v Official Trustee*, AIR 1954 Cal 506.

While ordinary courts would have jurisdiction to decide whether they have jurisdiction to try a cause, even if in the result they should come to the conclusion that they have not, tribunals are competent to decide the question of their jurisdiction only if they are authorised.[1706] If a tribunal for the purpose of deciding the question relating to its jurisdiction finds it necessary to decide another matter that matter, does not become a matter of its exclusive jurisdiction nor does it operate as *res judicata*.[1707] Where there is inherent lack of jurisdiction in the tribunal, even a failure to raise the objection before such tribunal is by itself no bar against raising it in a subsequent writ petition.[1708]

(iv) Judgment obtained by fraud or collusion.—A judgment obtained by fraud or collusion[1709] cannot operate as *res judicata* (Evidence Act, 1872, section 44). Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice. Lord Coke says,

> it avoids all judicial acts, ecclesiastical or temporal.[1710]

Where a decree is impeached on the ground of fraud, the fraud alleged must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and the obtaining of the decree by that contrivance. The mere fact that a decree has been obtained by perjured and false evidence is no ground for setting it aside on the ground of fraud.[1711] Mere negligence on the part of the manager of a joint Hindu family in conducting the suit would not ordinarily be a ground for excluding the operation of *res judicata*; but gross negligence may in such a case be evidence of fraud or collusion.[1712] It seems to us that when a finding as to title to immovable property is rendered by a court of small causes *res judicata* cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in an immovable property. In order to operate as *res judicata*, the finding must be one disposing off a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of *res judicata*. It has long been held that a question of title in a small cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised.[1713] The doctrine of *res judicata* must however be applied to co-defendants with great care and caution. The reason is that fraud is the extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practicing fraud or collusion he cannot be allowed to say that the matter is *res judicata* and cannot be reopened. There can

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1706. *Venkatachala v Ramachandra*, AIR 1961 Mad 423.
1707. *Sanyasi Prasad Rao v Lakshmayya*, AIR 1967 AP 143.
1708. *Balbir Singh v Sikh Gurdwaras, Judicial Commr*, AIR 1967 P&H 272 : (1967) ILR 2 Punj 494. See notes on "Decisions of tribunals on question of jurisdiction" under section 9.
1709. *Banzilal v Dhapo*, (1902) ILR 24 All 242; *Kunheema Umma v P Balakrishnan*, AIR 1967 Ker 97.
1710. *Duchess of Kingstone's*, case 2 Smith's LC 7, 13th Edn, pp 641, 651; *Nistarini Dassi v Nundo Lal*, (1899) ILR 26 Cal 891, p 908; *Fattma Bai v Dy Custodian General*, AIR 1970 Del 160 : (1970) 72 Punj LR 113.
1711. *Janki Kuar v Lachmi*, (1915) ILR 37 All 535; *Mahomed Golab v Mahomed Sulliman*, (1894) ILR 21 Cal 612, p 619; *Nand Kumar v Ramjiban*, (1914) ILR 41 Cal 990; *Chattu Singh v Rai Radha*, (1919) 4 Pat LJ 187; *Ram Ratan v Bhuri*, (1916) ILR 38 All 7; *Re Goculdas Odharji*, AIR 1924 Bom 100 : (1923) 25 Bom LR 893; *Muktamal v Ramachandra*, AIR 1927 Cal 84 : (1926) 31 Cal WN 258; *Kunja Bihari v Krishnadhan*, (1940) ILR 2 Cal 477 : (1940) 44 Cal WN 912; *Hasim Ali v Hamidi Begum*, AIR 1942 Cal 180 : (1941) 46 Cal WN 561, p 590 : (1941) 74 Cal LJ 261, p 303; *Besdwanand Gir v Shatanand*, AIR 1942 All 302.
1712. *PR Nallathambi v Raghavan*, AIR 1973 Mad 25 : (1972) 2 Mad LJ 535.
1713. *Gangabai v Chhabubai*, (1982) 1 SCC 494.

also be no question of *res judicata* in a case where signs of fraud or collusion are transparently pregnant from the facts on record. Therefore, in applying the doctrine of *res judicata* between co-defendants or co-plaintiffs care must, of necessity, be taken by the court to see that there must in fact be a conflict of interests between the co-defendants or the co-plaintiffs concerned and it is necessary to decide the conflict as in order to give relief which the plaintiff in the suit, claimed and, the question must have been directly and substantially in issue and was finally decided therein.[1714]

It has been held regularly by the Supreme Court that the correctness of a judicial decision has no bearing upon the question whether or not it operates as *res judicata*. This position was reiterated in *R Unnikrishnan v VK Mahanudevan*[1715] as well. In this case the Supreme Court further clarified that the matter in issue of fact decided in an earlier proceeding by a competent court must in any subsequent litigation between the same parties be recorded as finally decided and cannot be reopened. That principle extends also to mixed questions of law and fact determined in earlier proceedings between the same parties which cannot be reopened in a subsequent proceeding between the same parties. It was also held that the only exception to *res judicata* is "*fraud*" that vitiates the decision and renders it a nullity in the eye of the law.

(v) Court of limited jurisdiction: Explanation VIII.—Courts such as the small cause courts and courts with limited pecuniary jurisdiction are courts of limited jurisdiction. Before Explanation VIII was added in the section by the Amendment Act, 1976, the section required that the court which decided the former suit or the suit in which a particular issue has been subsequently raised must have been a court competent to try the subsequent suit or the suit in which the issue in question has been subsequently raised. The view till now held was that the word "suit" in the expression "such subsequent suit or the suit in which such issue has been subsequently raised" must be whole of the suit and not a part of it or any issue.[1716] If a suit was filed before a court of limited pecuniary jurisdiction and was decided by that court, Explanation VIII to section 11 of the CPC would be attracted.[1717] Explanation VIII now provides that if an issue has been heard and finally decided by a court of limited jurisdiction having jurisdiction to try such an issue, the finding on such issue will operate as *res judicata* in a subsequent suit although such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has subsequently been raised. The legislature has thus stepped in to extend the applicability of the section and to prefer the "liberal" instead of the "literal" interpretation of the word "suit".

Section 11 is not exhaustive of *res judicata*. The application of the doctrine is not restricted to the CPC but extends to all litigation including industrial cases. The main provision of section 11 is to be read in conjunction with Explanation VIII.

In the case of misconduct of a workman, the Management sought permission under section 33(2)(b) of the Industrial Disputes Act, 1947 for his dismissal. However, the domestic enquiry against the workman was set aside by the Industrial Tribunal. Thus, in the said proceeding the Tribunal decided the issue of misconduct of the workman on merit. Subsequently, the dismissal was challenged by the workman under section 10 of the Act. It was held by the Karnataka High Court that the issue of misconduct as decided earlier was substantive and cannot be treated as incidental. The findings of the proceeding under section 33 having not been challenged, attained finality and as such the same cannot be raised

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1714. *Mahboob Sahab v Syyad Ismail*, (1995) 3 SCC 693.
1715. *R Unnikrishnan v VK Mahanudevan*, AIR 2014 SC 1201 : (2014) 4 SCC 434 : (2014) 1 SCR 350.
1716. *Gulab Bai v Manphool Bai*, AIR 1962 SC 214.
1717. *Sulochana Amma v Narayanan Nair*, AIR 1993 SCW 3792 : (1994) 2 SCC 14.

and the same issue cannot be tried in a subsequent proceeding. The principle of *res judicata* is attracted.[1718]

The expression "courts of limited jurisdiction" occurring in Explanation VIII to section 11 means courts other than ordinary civil courts. Such Courts are also courts of exclusive jurisdiction in respect of matters they are to try. But all findings of such courts of limited jurisdiction will not operate as *res judicata*. Only those findings which that court had exclusive jurisdiction to render would operate as *res judicata*. Thus, it was held that Motor Accident claims Tribunal in a claim petition filed under section 166 of the M.V. Act did not have jurisdiction to decide the dispute regarding succession certificate. In that view of the matter such decision would not operate as *res judicata* in a subsequent suit.[1719]

[s 11.26.2.5] Condition V : Matter Must have been Heard and Finally Decided in "Former" Suit

(a) Decision May be Actual or Implict.—"*Res judicata*" by its very words means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter.[1720] The section requires that there should be a *final decision*.[1721] The expression "heard and finally decided" in section 11 means a matter on which the court had exercised its judicial mind and has after argument and consideration came to a decision on a contested matter. It is essential that it should have been heard and finally decided. What operates as *res judicata* is the product of what is fundamental to the decision but it cannot be ramified or expended by logical extension.[1722] If a dismissal of a prior suit was on the ground affecting the maintainability of the suit, any finding in the judgement adverse to the defendant would not operate as *res judicata* in a subsequent suit; but, if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause, a decision made in the suit on a vital issue involved therein would operate as *res judicata* in a subsequent suit between the same parties.[1723] Thus, where in the judgment and decree in the former suit, it is stated that it is to be subject to a decision of a higher court, the decision is not final one;[1724] or when the former suit is dismissed on the grounds of limitation, the question of title raised therein cannot be said to have been finally decided.[1725] Where the question in issue was whether the suit properties were ancestral, a decision in the negative in an earlier suit was held to be not *res judicata* as the court expressly stated that the result would be the same even if that issue were to be answered in the affirmative.[1726] The decision may not be *res judicata*, if what was decided was "incidentally" and "substantially" in issue, even if some sort of identity exists between the controversies raised at two different stages. Decision in an ejectment suit would not operate as *res judicata* in a subsequent suit for the redemption of a mortgage. In the earlier suit, where the claim for ejectment was based on rent note, the only "matter" which

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1718. *Management of Indian Aluminium Co Ltd v S Nagaiah*, AIR 2009 (NOC) 2004 (KAR) : 2009 (3) AIR Kar R 147 (DB) : ILR 2009 Kar 1902.
1719. *Bhagwandas Yadav v Rohit Tiwari*, AIR 2010 (NOC) 589 (MP).
1720. *Gur Prasad v Gur Prasad*, AIR 1944 Oudh 321; *Jenkins v Robertson*, (1867) 1 HL SC App 147; *STR Pillai v Dhanalakshmi*, AIR 1972 Mad 190.
1721. *Parsotam Gir v Narabada Gir*, (1899) ILR 21 All 505 : 26 IA 175.
1722. *Pandurang Ram Chandra Mandlik v Shanti Bai Ram Chandra Ghatge*, (1989) Supp 2 SCC 627.
1723. *Pawan Kumar Gupta v Rochi Ram Nagdeo*, (1999) 2 LRI 598.
1724. *Chandra Singh v Midnapore Zemindary Co*, AIR 1942 PC 8 : (1942) ILR 2 Cal 1.
1725. *Har Swarup v Anand Swarup*, AIR 1942 All 410 : (1942) ILR All 624. See also *Ajai Verma v Ram Bharosa*, AIR 1951 All 794 (FB).
1726. *Durga Das v Rodi*, AIR 1953 P&H 103 : (1954) ILR Punj 26; *Muhabanoo v Thoma*, (1955) ILR TC 1071.

could be said to be "directly and substantially in issue" was non-payment of rent. Merely because in the earlier suit, it was held that the present defendant mortgagee was entitled to legally claim payment of rent from the present plaintiff mortgagors and the suit was decreed for non-payment of rent, it cannot be said that the legality or validity of the claim to interest was in issue, or that the question was "decided".[1727] The revenue court, exercising authority under the relevant Act, can be said to be a court of limited jurisdiction within the meaning of section 11, Explanation VIII. The revenue court is vested with the jurisdiction over question relating to the existence or otherwise of the relationship of landlord and tenant, as to the status, as to the terms on which he held the tenancy and similar questions. The revenue court must be held to be competent to decide such issues. A decision by the revenue court on these issues, which is within its competence, will certainly operate as *res judicata* in view of Explanation VIII to section 11 of the CPC.[1728] The expression "Court of limited jurisdiction" covers civil courts also.[1729]

Plea of *res judicata* should not be allowed for the first time in first appeal. It is not pure law.[1730]

A question of fairness of price of a property arose in a case arising out of an agreement for sale of property. The Division Bench of the high court concluded the findings, which were confirmed by the Supreme Court, wherein it was held that this question cannot be raised again in subsequent proceedings.[1731] Property in the former suit for redemption was a part of the property in a subsequent suit for partition. The findings in the previous suit was to the effect that the plaintiff, who claimed by virtue of sale in his favour, had acquired no right to property in as much as the sale was not supported by legal necessity. This finding, though given by a court not competent to try the subsequent suit (for want of pecuniary jurisdiction) operates as *res judicata*.[1732] In a Patna case, the trial court had no pecuniary jurisdiction; but, the final decree was passed on second appeal and, throughout (up to second appeal) the losing party never raised any objection with regard to pecuniary jurisdiction of the trial court. It was held that the decree was *res judicata* and it was not non-permissible for the party who had lost in all the courts to argue that the trial court had no jurisdiction.[1733] One of the tests is to ascertain if the party aggrieved by the findings could challenge it. Observation made by the court, when there was no pleading nor evidence, could not operate as *res judicata*.[1734] Where the issue of *res judicata* was neither raised by the parties nor framed by the trial court, when the appellate court *suo motu* invoked and applied the principles of *res judicata*, it was held as not proper and the court was found to have no jurisdiction to answer the issue of *res judicata*, if it was not raised by the parties.[1735] The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit, is not sufficient to constitute the matter *res judicata;* it is also essential that it should have been heard and finally decided. This does not mean that there should be an *actual* finding on the issue in question; it is sufficient if the decree

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1727. *Bharosilal v Shiladevi*, AIR 1989 MP 122.
1728. *Saraswathi v Muthu Kumaraswamy*, AIR 1990 NOC 66 (Mad).
1729. *PVN Devki Amma v PK Kunti Raman Nair*, AIR 1980 Ker 230.
1730. *Ram Nagendra Tiwary v Jagadamba Vinal*, AIR 1984 Pat 316.
1731. *KM Madavkrishanan v SR Swami*, AIR 1995 Mad 318.
1732. *Kumarmoni Sa v Himachal Sahu*, AIR 1981 Ori 177.
1733. *Ram Swarath Singh v Mithila Sharan Singh*, AIR 1983 Pat 110 (DB).
1734. *Ramesh Chandra v Shri Charan Dass*, AIR 1991 SC 264 : 1990 Supp SCC 633.
1735. *Kalawati Kotla v Shokilal*, AIR 2013 Chh 12.

necessarily involves a finding of the issue.[1736] Unless there is such a finding, the question of *res judicata* does not arise. An assumption or inference that a finding is involved in the judgment or decree, is not permissible.[1737] In other words, what operates as *res judicata* is the ratio or what is fundamental to the decision.[1738] It has thus been held that an issue may be *res judicata* if the judgment of the appellate court shows that the issue was treated as material and was decided, although the decree passed merely affirms the decree of the lower court which did not deal with the issue;[1739] and the bar has been held to operate even with respect to a finding on an issue on which the parties had gone to trial without protest.[1740]

Where a court records findings on several issues, all of them will be *res judicata* if the judgment is based on all of them, but it must appear from the judgment that the findings are necessary for the decision.[1741] In *Vithal Yaswant v Shikandar Khan Mutumukhtan*,[1742] it has been held by the Supreme Court that when a court bases its decision, the decision on each one of those points would be sufficient for the ultimate decision, the decision on each one of those points would be *res judicata*. Where the decision of a court rests on alternative findings, all of them would be *res judicata*.[1743] It has been held that the findings given by a court on the merits after it holds that it has no jurisdiction over the cause cannot operate as *res judicata* in a subsequent suit between the parties.[1744] Likewise, where a former suit has been dismissed without contest but on a compromise and that compromise expressly states that the dismissal was without adjudication of the issues involved in the suit, the dismissal does not bar a subsequent suit on the ground of *res judicata*.[1745] On the same reasoning, where a writ application under Article 226 is rejected on the ground that the matter is one which should be tried in a suit, any expression of opinion on the merits of the case thereafter would be obiter and not *res judicata*.[1746] The finality spoken of in this section has nothing to do with the finality contemplated by Article 133 of the Constitution because although an order may not be a final order for the purposes of Article 133, it may still operate as *res judicata* on the ground that questions sought to be agitated in a later proceeding had either been decided or ought to have been decided in the earlier proceeding.[1747]

In dealing with questions under the present head it is important to note:

(i) that if a decree is specific, and is at variance with a statement in the judgment, regard must be had to the decree, in the judgment;[1748]

1736. *Guduru Ramarayudu v Mallela Makikya Rao*, AIR 1946 Mad 372; *Sitla Sahai v Gouri Nath*, AIR 1942 Pat 477; *Raja Chattar Singh v Diwan Roshan Singh*, AIR 1946 Ngp 277 : (1946) ILR Nag 159; *Soorjomonee Dasee v Suddanund*, (1874) 12 Bom LR 304 : IA Sup Vol 212; *Ram Krishna v Vithal*, (1891) ILR 15 Bom 89; *Apurba v Shyama*, (1919) 24 Cal WN 223; *Nikunja Bihari v Jathindranath*, AIR 1956 Cal 613; *Jiut Ram v Jagarnath Ram*, AIR 1956 Pat 489.
1737. *Hayatuddin v Abdul Gani*, AIR 1976 Bom 23.
1738. *Laxmichand v Ramkumar*, AIR 1967 Raj 272.
1739. *Midnapur Zamindary Co Ltd v Naresh Narayan Roy*, AIR 1924 PC 144 : (1924) ILR 51 Cal 631 : 51 IA 293.
1740. *Madhavan v Kumaran*, AIR 1952 TC 383 : (1952) ILR TC 175.
1741. *Laxman v Saraswathi*, AIR 1961 Bom 218.
1742. *Vithal Yaswant v Shikandar Khan Mutumukhtan*, AIR 1963 SC 385.
1743. *Lakshman Prakash v CIT*, AIR 1963 All 172 (FB) : (1962) ILR 2 All 790 : (1962) All LJ 938.
1744. *Chandra Singh v Executive Engineer*, AIR 1961 Assam 148; *Damodhar Rao v Bhima Rao*, AIR 1965 Mys 290.
1745. *Girjanand v Bhagwan*, AIR 1967 Pat 101.
1746. *State of Madhya Pradesh v Ladli Saran*, AIR 1958 MP 326.
1747. *H Investment Trust v Haridas Mundhra*, AIR 1971 Cal 182 : (1971) 75 Cal WN 517.
1748. *Indarjit v Richha*, (1893) ILR 15 All 3, p 5.

(ii) that neither an *obiter dictum* nor a mere expression of opinion in a judgment has the effect of *res judicata*;[1749]

(iii) that when a court merely for the purpose of preventing a remand records its finding on an issue not necessary for the decision of the case, it does not operate as *res judicata*;[1750]

(iv) it is the decision that operates as *res judicata* and not the reasoning in support of it.[1751]

(b) Finality of Decisions.—It is well settled that a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by law. It is in the interest of public at large that finality should attach to the binding decisions pronounced by a court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation.[1752] The principle of *res judicata* would apply only when the *lis* was inter-parties and had attained finality in respect of the issues involved. The said principle will, however, have no application inter alia in a case where the judgment and/or order had been passed by a court having no jurisdiction therefor and/or in a case involving pure question of law. It will also have no application in a case where the judgment is not a speaking one.[1753] Effect of non-filling of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from.[1754]

A matter will be said to have been "heard and finally decided" notwithstanding that the former suit was disposed off in any of the following ways:

(i) *ex parte*;[1755] or

(ii) by dismissal under O XVII, rule 3;[1756] but not when the dismissal is under O XVI, rule 1 for failure to pay adjournment cost;[1757] or

(iii) by a decree on an award;[1758] or

(iv) by oath tendered under section 8 of the Indian Oaths Act, 1873;[1759] or

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1749. *Devarakonda v Devarakonda*, (1881) ILR 4 Mad 134; *Jamaitunnissa v Lutfunnissa*, (1885) ILR 7 All 606; *Avala v Kuppu*, (1885) ILR 8 Mad 77; *Mohun v Ram Dial*, (1880) ILR 2 All 843; *Ramaswami v Alamelu*, AIR 1924 Mad 604 : (1924) 46 Mad LJ 298; *Rekhab Das v Mt Sheobai*, AIR 1923 All 495 : (1923) ILR 45 All 466, p 467.
1750. *Pitchi v Bharata*, AIR 1924 Mad 893 : (1924) 47 Mad LJ 532.
1751. *Province of Bombay v Municipal Corp, Ahmedabad*, AIR 1954 Bom 1 : (1953) ILR Bom 1081; *Jai Prakash v Bishambar Das*, AIR 1954 All 215; *Patna Zilla Track Owners' Assn v State of Bihar*, AIR 1963 Pat 16. See notes "Examination of Pleadings and Judgment," above.
1752. *TP Moideen Koya v Govt of Kerala*, AIR 2004 SC 4733 : (2004) 8 SCC 106.
1753. *UOI v Pramod Gupta*, AIR 2005 SC 3708 : (2005) 12 SCC 1.
1754. *Premier Tyres Ltd v Kerala State Road Transport Corp*, AIR 1993 SC 1202 : AIR 1992 SCW 3365 : (1993) Supp 2 SCC 146. See also *UOI v V Pundarikakshudu & Sons*, AIR 2003 SC 3209 : AIR 2003 SCW 4578 : (2003) 8 SCC 168.
1755. *Baldevdas v Mohanlal*, AIR 1948 Bom 232 : (1947) 49 Bom LR 902; *Radha Mohan v Eliza Jane Hilt*, AIR 1947 All 147 : (1947) ILR All 186; *Modhusudan v Brae*, (1889) ILR 16 Cal 300; *Bisheshar v Jafri Begum*, AIR 1937 All 251 : (1937) All LJ 536.
1756. *Venkatachalam v Mahalakshmamma*, (1887) ILR 10 Mad 272; *Shaik Saheb v Mahomed*, (1890) ILR 13 Mad 510; *Hingo v Jhuri*, (1918) ILR 40 All 590.
1757. *Gauhati Bank v Baliram Dutta*, AIR 1950 Ass 169.
1758. *Vyankatesh v Sakharam*, (1897) ILR 21 Bom 465.
1759. *Ahmed v Moidin*, (1901) ILR 24 Mad 444; *Sanyasi v Artaswaro*, (1913) ILR 36 Mad 287.

(v) by dismissal owing to plaintiff's failure to adduce evidence at the hearing.[1760]

It is true that an *ex parte* decree operates to render the matter decided *res judicata*, and the defendant's failure to appear will not deprive the plaintiff of the benefit of his decree; but, in the case of a suit in which a decree is passed *ex parte*, the only matter that can be "directly and substantially in issue" is the matter in respect of which relief has been claimed by the plaintiff in the plaint. A matter in respect of which no relief is claimed cannot be "directly and substantially in issue" in a suit in which a decree is passed *ex parte*, though the court may have gone out of its way and declared the plaintiff to be entitled to relief in respect of such matter.[1761]

When an *ex parte* decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the *ex parte* decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of O IX, rule 13 of the CPC. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the *ex parte* decree passed by the trial court merges with the order passed by the appellate court, having regard to explanation appended to O IX, rule 13 of the CPC a petition under O IX, rule 13 would not be maintainable. However, the Explanation 1 appended to said provision does not suggest that the converse is also true.[1762]

A preliminary decree in the suit for partition is not a tentative decree. In so far as the matters decided by it are concerned, it has to be regarded as conclusive and final. If a matter has not been finally decided, there is no point in allowing an appeal by the statutory provision. So, the decision of the court on disputed questions between the parties embodied in the judgment which is followed by a decree, is a "final" decision; in the sense, that it is no longer open to question by either party except in an appeal, review or revision as provided by law. Hence, the points decided in a preliminary judgment in a partition suit will estop the parties on the principles of *res judicata* from contesting the same point in a later suit.[1763] A writ petition was filed by a person claiming to have been selected as principal of a college, challenging the orders of the Vice-Chancellor and Chancellor of the University, refusing to accord approval to his selection. The petition was rejected *in limine*. Subsequent representation was made by the petitioner to the Vice-Chancellor and Chancellor. It was rejected. Subsequent writ petition challenging such rejection of representation on the same cause of action as in earlier writ petition is barred.[1764]

A Manager of a Co-operative Society was removed from service after departmental proceeding. Since the result of the departmental appeal was not communicated to him, he filed an application under section 55 of the Madhya Pradesh Co-operative Societies Act, 1960 to the Joint Registrar, Co-operative Societies, Raipur. At that time District Bastar/Jagdalpur was within the territorial jurisdiction of Raipur. A Joint Registrar than came to be appointed for District Bastar for Jagdalpur Area. Thus, it was held by the Supreme Court that the earlier application by the employee preferred to the Joint Registrar, Raipur, in the circumstances became infructuous. Such decision would not operate as *res judicata*.[1765]

The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in

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1760. *Watson v Collector of Rajshahye*, (1869) 13 MIA 160; *Kartick v Sridhar*, (1886) ILR 12 Cal 563.
1761. *Pandurang Ram Chandra Mandlik v Shanti Bai Ram Chandra Ghatge*, (1989) Supp 2 SCC 627.
1762. *Bhanu Kumar Jain v Archana Kumar*, AIR 2005 SC 626 : AIR 2005 SCW 270 : (2005) 1 SCC 787.
1763. *Laxmi v A Sankappa Alwa*, AIR 1989 Ker 289.
1764. *Ram Saran Tripathi v Chancellor, Gorakhpur University*, AIR 1990 All 96.
1765. *Nabarlal Verma v District Co-op Central Bank Ltd Jagdalpur*, AIR 2009 SC 664 : (2008) 14 SCC 445.

issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that the issues decided may not be reopened and has little to do with the merit of the decision.[1766]

It has been further observed in the above decision by the Division Bench in the above case that a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by law. It is in the interest of the public at large that finality should attach to the binding decision pronounced by a Court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over in the assessment of the same matter in issue. Even in case of a judgment passed *incurium* which is unchallenged, the efficacy and binding nature of the operative order is conclusive *inter partes*. The principle applies both to an order from which an appeal lies and no appeal is preferred and to an order from which no appeal is provided.[1767]

(c) The Decision in the Former Suit must have been on the Merits.—In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been one on the merits.[1768] Merely because subsequent transferee pendent lite had filed objection under section 47, the binding effect of the earlier order which had attained finality would not stand obliterated. Hence, a fresh objection petition in an execution proceeding would be barred by the principles of *res judicata*.[1769] So far as the plea of *res judicata* is concerned, if both the landlord and the firm had filed cross circuits against each other and both the courts came to a common conclusion that the parties should litigate their rights in execution proceedings and nothing was decided on merits of rights and claims of the parties, such a plea is no longer available to the parties against each other in the execution proceedings.[1770] Hence, it could not be said of a matter that it was "heard and finally decided," if the former suit was dismissed:

(i) for want of jurisdiction;[1771] or

(ii) for default of plaintiff's appearance under O IX, rule 8.[1772] (But, a fresh suit on the *same* cause of action may be barred under O IX, rule 9); or

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1766. *Indu Bhushan Jana v UOI*, AIR 2009 Cal 24 : (2009) 1 Cal LJ 786 (DB).
1767. *Indu Bhushan Jana v UOI*, AIR 2009 Cal 24, para 12 and 13 at pp 26-27 : (2009) 1 Cal LJ 786 (DB).
1768. *Sheodan Singh v Daryao Kunwar*, AIR 1966 SC 1332; *Srikakulam Municipality v Ranganadhan*, AIR 1970 AP 375; *Ram Gobinda v Bhakta Bala*, AIR 1971 SC 664 : (1971) 1 SCC 387; *UOI v Pramod Gupta*, AIR 2005 SC 3708 : (2005) 12 SCC 1.
1769. *Yashodhara Ameta v Vishnu Shankar Paliwal*, AIR 2011 Raj 43 : (2011) 1 Raj LW 379.
1770. *Arm Group Enterprises Ltd v Waldorf Restaurant*, AIR 2003 SC 4106 : 2003 AIR SCW 2088 : (2003) 6 SCC 423 : 2003 (3) JT 450.
1771. *Lakshman v Ramchandra*, (1881) ILR 5 Bom 48 : 7 IA 18; *Putali v Tulja*, (1879) ILR 3 Bom 223; *Bhukhandas v Lalubhai*, (1892) ILR 17 Bom 562; *Ram Govindjha v Mungur Ram*, (1883) 13 Cal LR 83; *Abdul Kadir v Doolanbibi*, (1913) ILR 37 Bom 563. See also section 44 of the Evidence Act 1872; *Omkara Singh v State of Madhya Pradesh*, (1957) Jab LJ 898; *Phuluwa v Lakshmi Chand*, AIR 1960 MP 138; *Shivashankar v Baikunth*, AIR 1969 SC 971 : (1969) 1 SCC 718.
1772. *Kempegowda v Annagowda*, AIR 1951 Mys 48; *Radha Prashad v Lal Saheb*, (1890) ILR 13 All 53 : 17 IA 150; *Chand Kour v Pratab Singh*, (1888) ILR 16 Cal 98 : 15 IA 156; *Ramchandra v Narsinhacharya*, (1900) ILR 24 Bom 251, p 254. As to suits for partition, see also *Bisheshar Das v Ram Prasad*, (1906) ILR 28 All 627; *Madon Mohon v Baikanta Nath*, (1906) 10 Cal WN 839; *Radhe Lal v Mulchand*, AIR 1924 All 905 : (1924) ILR 46 All 820, p 821; *Samarendranath v Pyareecharan*, AIR 1935 Cal 160 : (1934) ILR 61 Cal 1023; *Mukha Singh v Ram Chariter*, AIR 1956 Pat 143; *Kesava v Venkataram*, AIR 1957 AP 537; *IC Co v UOI*, AIR 1976 Pat 76; *Gujarat Electricity Board v Saurashtra Chemicals*, AIR 2001 Guj 83 (DB).

(iii) on the ground of non-joinder of parties,[1773] or misjoinder of parties,[1774] or multifariousness;[1775] or on the ground that the suit was badly framed;[1776] or on the ground of a technical mistake;[1777] or

(iv) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree;[1778] or

(v) for failure to furnish security for costs under O XXV, rule 2;[1779] or

(vi) on the ground of improper valuation,[1780] or for failure to pay additional court-fee on a plaint which was undervalued;[1781] or

(vii) for want of a cause of action;[1782] or

(viii) for want of notice;[1783] or

(ix) on the ground that it is premature;[1784]

(x) as not pressed;[1785]

(xi) as having become infructuous.[1786]

(xii) as having been settled,[1787] or ended by virtue of compromise.[1788]

(xiii) on the ground that the plaintiff did not summon or produce witnesses.[1789]

(xiv) as withdrawn with leave of court for filing of fresh suit.[1790]

(xv) as withdrawn.[1791]

Where a petition under Article 32 filed before the Supreme Court was dismissed as withdrawn and the order permitting withdrawal made it clear that the withdrawal of the petition would not prevent the petitioner from seeking redress before the appropriate forum, it

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1773. *Sheosagar v Sitaram*, (1897) ILR 24 Cal 616 : 14 IA 50; *Shankara v Devaki*, AIR 1922 Mad 259 : (1922) 43 Mad LJ 572; *Jadu Nath v Amulya*, AIR 1927 Cal 794 : (1927) 46 Cal LJ 118; *State of Maharashtra v National Construction Co*, AIR 1996 SC 2376 : (1996) 1 SCC 735 : JT 1996 (1) 156.
1774. *Muhammad v Nabian*, (1886) ILR 8 All 282.
1775. *Fatte Singh v Lachmi*, (1874) 13 Bom LR App 37.
1776. *Deodhari v Lala Seosaran*, (1878) 3 Cal LR 395.
1777. *Janakadular v Ambika Prasad*, (1917) 2 Pat LJ 313.
1778. *Pethaperumal v Murugandi*, (1895) ILR 18 Mad 466.
1779. *Hariram v Lalbai*, (1902) ILR 26 Bom 637.
1780. *Dullabh v Narayan*, (1868) 4 Bom HC AC 110.
1781. *Venkata Narashiman Reddy v Konda Reddi*, AIR 1951 Har 55; *Irawa v Satyappa*, (1911) ILR 35 Bom 38; *Muhammad v Nabian*, (1886) ILR 8 All 282.
1782. *Harihar v Chandra Kumar*, (1918) 23 Cal WN 91.
1783. *Ramaswami v Muradai*, AIR 1924 Mad 469 : (1924) ILR 47 Mad 453; *Gangappa v Rachawwa*, AIR 1971 SC 442.
1784. *Ramireddi v Subbareddi*, (1889) ILR 12 Mad 500.
1785. *MS Baliga v Mangalore City Corp*, AIR 1998 AP 76.
1786. *Seth Sranikbhai Kasturbhai v Seth Chandulal Kasturchand*, AIR 1997 Pat 179.
1787. *Shanmughasundaram v Janagarajan*, AIR 1976 Mad 19.
1788. *AA Associates v Prem Goel*, AIR 2002 Del 142. See also *Ganesh Patra v Banabihari Patra*, AIR 2004 Ori 23.
1789. *Selo v Munshi Ram*, AIR 1985 HP 85.
1790. *Kazhugumalai Raja v RPBISPN Fund*, AIR 2004 Mod 267.
1791. *Nahar Singh v Kaka Singh*, (2000) 4 Civ LJ 155 (Pand H) : (2000) 3 Rec Civ R (Civil) 310; *Bhaskar Parulkar v Mahesh Shivram Rege*, 2007 (5) Mah LJ 663 : 2007 (4) All MR 446 (DB).

was held that the writ petition filed under Article 226 of the Constitution would not be barred by *res judicata*.[1792]

A Division Bench of the Madhya Pradesh High Court held that where the earlier writ petition was dismissed *in limine* without any issue being heard and decided finally, bar of *res judicata* would not apply in determining subsequent writ petition raising the very same issues.[1793]

A claim raised before the court was later withdrawn by the petitioner. The court took note of the assurance made by the respondent and refused to adjudicate on the claim between the parties. It was held such a decision would not amount to the rejection of the claim and would not bar the raising of the claim in future.[1794] A decision of a suit under section 69 of the Partnership Act is not one on merits and therefore, cannot operate as *res judicata*.[1795] A direction in a preliminary decree under O XX, rule 12 (1)(c) does not operate either under this section or on general principle as *res judicata* as such a direction is not based on a decision of any matter in controversy between the parties.[1796] An order under O XXII, rule 5 involves only a summary inquiry and for that reason, does not constitute *res judicata*.[1797] In an earlier suit by the lessor, it was alleged by him that the lease had determined. He withdrew that suit. He then sued for recovery of *khas* possession of the premises, alleging (in the second suit) that the lease had determined by time. It was held that the first suit did not operate as *res judicata*, because, in the first suit: (i) there was *no decision on merits*; and (ii) the second suit was based on a new cause of action alleged to have arisen in the meantime.[1798] If a party having a contract with a firm fails to raise an objection that the firm has been reconstituted in two successive references to arbitration, he cannot raise that objection later. It is barred by constructive *res judicata*.[1799] In a Delhi case, the decree-holder took out execution for possession. One of the respondents (which was a firm), filed objections on the ground that the said firm had been a lawful tenant under the decree-holder for 15 years and its possession was not through the judgment-debtors. It was held that the objection filed by the objectors would be maintainable as the principle of *res judicata* would not apply to the facts of the case. In the earlier suit by the objectors for injunction, the disputes raised were never heard and decided by the court. On the contrary, the claim was given up against the decree-holder *etc.* Further, as the objections would require the taking of evidence, a warrant of possession would not be issued without deciding the objections.[1800] When there was nothing to show that the dismissal in revision was on any technical ground, the order in revision became final, and the appellant was estopped from raising that point on a second occasion on the same ground when it came up in appeal.[1801] Where the earlier award (on compromise) and decree in terms of the award, were based on surrender by the tenant himself, the person against whom the decree is passed (that is, the tenant), cannot plead in defence to execution of the decree, that it was an eviction decree.[1802] After a suit for partition of shops was decreed, the decree-holder applied for

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1792. *J&K National Panthers Party v UOI*, AIR 2010 JK 47 (DB).
1793. *Association of the Residents of Mhow v UOI*, AIR 2010 MP 40 : (2010) 3 MPHT 493 (DB).
1794. *Bharat Petroleum Corp Ltd Ex-employees Assn v Chairman and Managing Director, Bharat Petroleum Corp Ltd*, (1993) Supp 4 SCC 37.
1795. *Baba Commercial Syndicate v Channamasetti*, AIR 1968 AP 378.
1796. *Subbanna v Subbanna*, AIR 1965 SC 1325.
1797. *Suraj Mani v Kishori Lal*, AIR 1976 HP 74.
1798. *Thakuruddin Ramjash v Sourendra Nath*, AIR 1982 Cal 133 (DB).
1799. *UOI v Bilas Singh and Co*, AIR 1984 Cal 261.
1800. *Hardit Singh v Surinder Nath*, AIR 1982 Del 588.
1801. *Gurubachan Singh v Arya Dhanna Sewa Sangh*, AIR 1981 Pat 318.
1802. *Kamlabai v Mangilal*, (1987) 4 SCC 585.

execution. Notice to the judgment-debtor was issued under O XXI, rule 22. The judgment-debtor initially appeared in execution, but later remained absent. The decree was held to be executable. It was held that in appeal, the judgment-debtor could not challenge the trial court's decision. Constructive *res judicata* applied.[1803] It was held that: (i) Finality of a judgment as *res judicata*; is not dependent on whether the suit was filed before or after the suit raising the same issue;[1804] (ii) even an *ex parte* decree becomes *res judicata*.[1805] The Municipal Corporation of Mysore enhanced the property tax, leading to filing of a writ petition by the group of citizens. The writ petition was dismissed on the ground that there was only revision and not enhancement of tax by the corporation, which was within the competence of the corporation. Issue of escalation was neither agitated nor decided by court. A subsequent suit challenging such escalation by another group of citizens was maintainable; more so, when there was a different line of challenge in the suit than in writ petition.[1806] In a proceeding for winding up, the court may order winding up once it is established that there is a "just and equitable ground"; however, in a petition under section 397 of the Indian Companies Act, 1956, one has to establish that there is oppression without which the question of grant of relief does not arise. The CLB held that the high court has decided against the petitioners on the ground that there was no deadlock in the management; hence, it would not be just and equitable to order winding up the company. The CLB observed that the high court did not examine whether the allegations of oppression had been established. It was held that the findings of the CLB cannot be overruled on the ground of *res judicata*.[1807]

Where the earlier suit was decreed *ex parte* but the *ex parte* decree was set aside and the suit was restored and later on the suit was dismissed under O IX, rule 8 of CPC, which was never challenged by anyone, it was held by the Patna High Court that suice the earlier suit was dismissed on technical grounds without going into the merits, it will not operate as *res judicata*.[1808]

The principle of *res judicata* applies as between the parties to a decision, so that parties bound by the decision cannot assail the same in any subsequent or collateral proceeding. Thus, where the high court did not finally decide the earlier writ petition but left it to the Election Commission to decide the matter and issue general directive, it was held by the Patna High Court that the same not being the subject matter on which any decision was given by the high court, the principle of *res judicata* would not apply to subsequent writ petition assailing the decision of the Election Commission.[1809]

For application of the rule of *res judicata* in case of dismissal of the earlier suit, the question has been fully explained in the case of *Sheodan Singh v Daryao Kunwar*.[1810] In this case the appeals were dismissed by the high court on the ground of limitation and for non-prosecution. The Supreme Court rejected the contention that the decision cannot operate as *res judicata*. The Supreme Court referred to instances where a former suit was dismissed by the trial court for want of jurisdiction or for default of the plaintiff; appearance *etc*. and it was pointed out that in respect of such class of cases, the decision, not being on merit, would not operate as *res judicata*. However, none of these considerations apply to a case where a decision is given

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1803. *Ummed Mal v Kundan Mal*, AIR 1981 Raj 202.
1804. *Isup Ali v Gour Chandra Deb*, AIR 1923 Cal 496.
1805. *Vishnu Sugar Mills v JSP Trading Co*, AIR 1984 Cal 246.
1806. *Corp of City of Mysore v Public Interest Litigation*, AIR 1997 Kant 70.
1807. *Shree Anupam Chemical (India) Pvt Ltd v Dipak G Mehta*, AIR 1999 Bom 349.
1808. *Niloufer Siddiqui v Indian Oil Corp Ltd*, AIR 2008 Pat 5 : (2007) 3 Pat LJR 589.
1809. *Meera Devi v Bihar State Election Commission*, AIR 2008 Pat 83 : 2008 (2) AIR Jhar R 958.
1810. *Sheodan Singh v Daryao Kunwar*, AIR 1966 SC 1332 : (1966) 3 SCR 300.

on merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing. It was held by the Supreme Court that such dismissals have the effect of confirming the decision of the trial court and it "amounts to the appeal being heard and finally decided on merits whatever be the ground of dismissal of the appeal".

(d) The Decision in the Former Suit must have been Necessary to the Determination of the Suit.—A matter directly and substantially in issue cannot be said to have been "heard and *finally decided*," unless the finding on the issue was *necessary to the determination of the suit*. The matter cannot be said to be heard and finally decided within the meaning of section 11 of the CPC when the finding on it was not at all necessary for the decision of the case;[1811] also, it must be *based upon* that finding;[1812] and a decision cannot be said to have been based upon a finding unless an *appeal can lie* against that finding. The reason is that "everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally, an appeal is not admissible on any point not having the authority of *res judicata*".[1813] It is not sufficient to attract the bar of *res judicata* that an issue has been framed on the question. It is further necessary that there must be a decision on the issue, express or implied which forms the basis of the decree.[1814] It was at one time thought that the test of *res judicata* was whether the finding was embodied in the decree. This, however, is not so, for *res judicata* is a matter of substance and not of form. It is the right of appeal which indicates whether a finding was incidental or necessary. This also is no longer universally so, firstly, because under section 2(2), as now amended, a decision in a proceeding under section 47 is not a decree; and secondly, because under the new Explanation VII, this section is extended to execution proceedings. In other words, a decision in a proceeding for execution, though not a decree, statutorily constitutes *res judicata* as regards the same question arising in a subsequent execution proceeding, although such decision is not a decree.

As regards suits, one of the tests to ascertain if the finding operates as *res judicata* is that the party aggrieved could challenge it.[1815] Section 11 of CPC operates against both the parties to a suit and not against the defendants alone. The principle of *res judicata* is an inhibition against the court.[1816] A finding given against a party in a litigation which terminates in his favour does not operate as a *res judicata* in a subsequent litigation in which a similar controversy arises.[1817] This is so because he had no opportunity to challenge the correctness of the finding in an appeal by reason of the litigation having ended in his favour. Hence, the following emerge:

Rule 1 : Findings on issues against defendant not res judicata where the suit is wholly dismissed.—If the plaintiff's suit is wholly dismissed, no issue decided against the defendant can operate as *res judicata* against him in a subsequent suit, for the defendant cannot appeal from a finding on any such issue, the decree being wholly in his favour;[1818] but, every issue decided against

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1811. *Askaran v Madan Lal*, AIR 1995 Raj 130.
1812. *Hafiz Mahammad Fateh Nasib v Swarup Chand*, AIR 1942 Cal 1 : (1914) ILR 2 Cal 434; *Hiralal Murarka v Mangtulal Bajoria*, AIR 1947 Cal 221 : (1944) ILR 2 Cal 513; affirmed by Privy Council sub-nominee *Shankarlal Patwari v Hiralal Murarka*, AIR 1950 PC 80.
1813. Sav Syst 293; *Narain Das v Faiz Shah*, (1889) PR 157 (FB).
1814. *Angayya v Vittal*, (1958) 1 Andh WR 524; *Mahalakshmi v Pammi Garamma*, AIR 1958 Ori 139.
1815. *Ramesh Chandra v Shiv Charan Dass*, (1990) Supp SCC 633.
1816. *R Govindasamy v Kasturi Ammal*, AIR 1998 Mad 218.
1817. *Sri Pal v Swami Nath*, AIR 1968 All 282.
1818. *Munsi Abdul Rahim v Fakir Mohammad*, AIR 1946 Ngp 401 : (1946) ILR Nag 518; *Run Bahadur v Lucho Koer*, (1885) ILR 11 Cal 301, p 306 : 12 IA 23, p 34; *Midnapur Zamindari Co Ltd v Naresh Narayan Roy*, AIR 1922 PC 241 : (1921) ILR 48 Cal 460 : 48 IA 49; *Ghela v Sankalchand*, (1894) ILR 18 Bom 597, p 602; *Shib Charan v Raghu*, (1895) ILR 17 All 174; *Nundo v Bidhoo*, (1886) ILR 13 Cal

[Footnote No. 1818 contd.]

the plaintiff may operate as *res judicata* against him in a subsequent suit, for the plaintiff can appeal from a finding on such issue, the decree being against him.[1819] With reference to the first branch of this rule, it is well-settled that when a plaintiff's suit is dismissed despite a finding on an issue in his favour, that finding does not operate as *res judicata* against the defendant.[1820] When an issue in the suit was found against the defendant, but the suit itself was dismissed with half costs, it was held that the findings operated as *res judicata* against the defendant in a subsequent suit, as it was open to him to challenge the correctness of the same in an appeal against the refusal to award full costs.[1821] With reference to the second branch of this rule, the Allahabad High Court has expressed the opinion that it does not apply to a case where the court after finding against the plaintiff on an issue which should in logical sequence have been decided first, proceeds to record its findings against the plaintiff on other issues; in such a case, according to that court, the finding on the other issues do not operate as *res judicata* against the plaintiff in a subsequent suit.[1822] A decree against which an appeal is already preferred does not operate as *res judicata*[1823]. The judgment of the Privy Council in *Annamalai Chetty v BA Therhill*,[1824] was referred to. Where a suit is dismissed, but there is on some issue, an adverse finding against the defendant, the finding does not operate as *res judicata* as the defendant could not have appealed.[1825]

ILLUSTRATIONS

(i) In a suit by A against B for ejectment, B contends : (a) that no notice to quit was given; and (b) that the land being majhes land, he is not liable to be evicted at all. The suit is dismissed on a finding that no notice to quit was given. The court, however, also finds that the land is not majhes land. A afterwards sues B to evict him from the land after giving notice to B. B contends that the land is majhes land and that he is not liable to be evicted. The finding in the first suit was that the land was not majhes land and that he is not liable to be evicted. The finding in the first suit that the land was not majhes land does not operate as *res judicata* so as to preclude B from raising the same contention in the subsequent suit, the reason being that A's suit having been dismissed, B could not have appealed from the finding that the land was not majhes land. The court having found in the first suit that A had not given notice to quit, it was not necessary for the determination of the suit to decide whether the land was majhes land or not. The first suit was dismissed in spite of the finding in A's favour that the land was not majhes land.[1826]

Suppose that in the above illustration *B* had not raised the defence that the land was *majhes* land in the first suit. Would he be precluded from raising that defence in the second suit on the ground that he *might and ought* to have raised that defence in the first suit? No,

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[Footnote No. 1818 contd.]
17; *Thakur Magandeo v Thakur Mahadeo*, (1891) ILR 18 Cal 647; *Parbati v Mathura*, (1913) ILR 40 Cal 29; *Daudbhai v Dayaram*, (1919) ILR 43 Bom 568; *Bai Nathu v Narsi*, (1920) ILR 44 Bom 321; *Ramasami v Marudai*, AIR 1924 Mad 469 : (1924) ILR 47 Mad 453; *Firm Kanhaiyalal v Paramsukh*, AIR 1956 Ngp 273 : (1956) ILR Nag 539. See Illustrations (i) and (iii).

1819. *Peary v Ambica*, (1897) ILR 24 Cal 900; *Venkataraju v Ramanamma*, (1915) ILR 38 Mad 158; *Babu Lal v Hari Baksh*, (1918) PR 13, p 60; *Dinkar v Anant*, AIR 1928 Bom 349 : (1928) 30 Bom LR 902. See Illustration (iii).

1820. *Nundo v Bidhoo*, (1886) ILR 13 Cal 17; *Thakur Magandeo v Thakur Mahadeo*, (1891) ILR 18 Cal 647; *Shib Charan v Raghunath*, (1895) ILR 17 Cal 174; *Rungo v Mudiyeppa*, (1899) ILR 23 Bom 296; *Parbatti v Mathura*, (1912) ILR 40 Cal 29; *Daudbhai v Dayaram*, (1919) ILR 43 Bom 568, p 571; *Waris Khan v Ahmadulla Khan*, AIR 1952 Ngp 238.

1821. *Mahadeva v Sriramamurthy*, AIR 1955 AP 282.

1822. *Shib Charan v Raghu*, (1895) ILR 17 All 174, p 195; commented upon in *Dinkar v Anant*, AIR 1928 Bom 349 : (1928) 30 Bom LR 902, p 906.

1823. *Nana Tukram v Sonabai*, AIR 1982 Bom 437.

1824. *Annamalai Chetty v BA Therhill*, AIR 1931 PC 263.

1825. *Nana Tukram v Sonabai*, AIR 1982 Bom 437. See notes to section 96, "Who may appeal."

1826. *Thakur Magandeo v Thakur Mahadeo*, (1891) ILR 81 Cal 647; *Nundo v Bidhoo*, (1886) ILR 13 Cal 17; *Ramasami Reddi v Thalawasal Marudai*, (1924) ILR 47 Mad 453.

the reason being that when a point of defence that has been actually raised and disallowed cannot operate as *res judicata* against a defendant, it certainly cannot operate as such when it has not been raised at all though it might and ought to have been raised.[1827]

(ii) *A* sues *B* for possession of certain lands after the expiry of a lease granted by him to *B*. *B* pleads: (1) an occupancy right; and (2) that the suit is premature as he (*B*) had a right of renewal. The trial judge finds that there was no occupancy right, but that the suit was premature and the suit is dismissed. *A* files an appeal to the high court. *B* files a cross-objection to the finding against him, namely, that he had no occupancy. The high court affirms the decree on the ground that the suit was premature and upon the cross-objection affirms the finding that *B* had no occupancy right. After some years *A*, after giving notice to *B*, again sues *B* for possession. *B* again pleads an occupancy right. *A* contends that the finding of the high court in the previous suit that *B* had no occupancy right is *res judicata*. It was held by the judicial committee that the finding is not *res judicata*, the reason being that *B* having succeeded on the plea that the suit was premature, he had no occasion to go further as to the finding against him.[1828] The decision to the contrary in *Mota v Vithal*[1829] is not good law.

(iii) In a suit by *A* against *B* for damages for not removing filth from *A*'s land, *B* contends: (a) that no notice was given as required by the Bengal Municipal Act; and (b) that he was not bound to remove the filth. The suit is dismissed upon two grounds, namely, that no notice was given as required by the Act, and that *B* was not bound to remove the filth. *A* then sues *B* for damages for not removing filth during a subsequent period after giving notice to *B*. *B* contends that he is not liable to remove the filth, and that the question of his liability is *res judicata* by reason of its having been decided against *A* in the first suit. *A* contends that the question is not *res judicata* by reason of its having been decided against *A* in the first suit. *A* also contends that the question is not *res judicata* for the court, having decided in the former suit that the suit must fail for want of notice, it was not necessary for the court to decide the issue as to *B*'s liability to remove the filth. *Held* by the Calcutta High Court that the question is *res judicata*, and *A* cannot raise it again in the second suit.[1830] The Allahabad High Court would seem to take a different view.[1831]

(iv) *A* sues *B*, a manager appointed by the court in an administration suit, for a declaration, that he had validly surrendered his lease. *B*'s defence is that the suit was not maintainable for want of notice under section 80 of the CPC and that the surrender was not valid. The court of first instance decided both the issues against *A*. *B* then sued *A* for royalty due under that lease. It was held that the finding in the former suit that the lease was not validly surrendered was not *res judicata* as that finding was not necessary, after the court had held that the suit was not maintainable for want of notice under section 80.[1832]

(v) A landlord sued to eject a tenant on the ground that he had failed to pay rent and that therefore, the lease had become forfeited as provided in the deed. The tenant pleaded that he was an agriculturist and further prayed to be relieved against forfeiture. The court granted the latter, relief and also recorded a finding that the lessee was a non-agriculturist tenant. It was held in a subsequent suit between the parties that the latter finding was not *res judicata* as the tenant could not on the previous litigation appeal against the finding that he was a non-agriculturist tenant by reason of relief having been granted against forfeiture.[1833]

Rule II : Findings on issues against plaintiff not res judicata where suit is decreed in its entirety.— If the plaintiff's suit is decreed in its entirety, no issue decided against the plaintiff can be *res*

1827. *Abdullakhan v Khammia*, (1908) ILR 32 Bom 315.
1828. *Midnapur Zamindari Co Ltd v Naresh Narayan Roy*, AIR 1922 PC 241 : (1921) ILR 48 Cal 460 : 48 IA 4964 IC 231.
1829. *Mota v Vithal*, (1916) ILR 40 Bom 662, 36 IC 74.
1830. *Peary v Ambica*, (1897) ILR 24 Cal 900; *Mahomed Ismail v Sharfutullah*, AIR 1930 Cal 810 : (1930) ILR 57 Cal 872 : 129 IC 310.
1831. *Shib Charan v Raghu*, (1895) ILR 17 All 174, p 195.
1832. *Hiralal Murarka v Mangtulal Bajoria*, AIR 1947 Cal 221 : (1944) ILR 2 Cal 513; affirmed by the Privy Council sub-nominee *Shankarlal Patwari v Hiralal Murarka*, AIR 1950 PC 80.
1833. *Raraknath v Kalisankar*, AIR 1960 Cal 440.

judicata, for the plaintiff cannot appeal from a finding on any such issue, the decree being wholly in his favour;[1834] but, every issue decided against the defendant is *res judicata*, for the defendant can appeal from a finding on such issue, the decree being against him.[1835]

ILLUSTRATION

A, alleging that he is the adopted son of *X*, sues *B* to recover certain property granted to him by *X* under a deed and forming part of the estate of *X*. The court finds that *A* is not the adopted son of *X*, but that he is entitled to the property under the deed and a decree is passed for *A*. The finding that *A* is not the adopted son of *X*, will not operate as *res judicata* in a subsequent suit between *A* and *B* in which the question of adoption is again put in issue; for the decree being in favour of *A*, *A* could not have appealed from that finding. The court having found that A was entitled to the property under the deed, the finding on the question of adoption was not necessary to the determination of the suit. The decree, far from being based on the finding as to adoption, was made in spite of it.[1836]

(e) "Finality" of Decrees in Redemption Suits.—If the mortgagor files a suit for redemption and no order for foreclosure extinguishing the right of redemption in default of payment is made, the preliminary decree for redemption does not have that effect. The right of redemption continues until a decree absolute for foreclosure, is passed,[1837] or the sale is confirmed.[1838] In such a case, there is a conflict of decisions as to whether the mortgagor can enforce his right of redemption by a second suit, after a preliminary decree on which no further proceedings have been taken. According to Allahabad, Bombay, Lahore, Patna and Rajasthan decisions, he can;[1839] on the other hand, according to Calcutta and Madras decisions, he cannot.[1840] The Chief Court of Oudh holds that the question is one of interpretation of the decree in the first redemption suit. If it provides for the extinction of the relation of mortgagee and mortgagor, the second suit is barred, but not otherwise,[1841] but though according to the Allahabad and Bombay high courts, a second suit for redemption is not barred, the same high courts have held that any matter decided in the earlier suit, eg, the amount of the mortgage-debt, cannot be re-opened in the subsequent suit.[1842] As an analogy, it may be added that a preliminary decree in a suit for accounts finally decides the issues which the court in such a suit is required to decide at the stage. If that decree is allowed to be final, it is no longer open to the defendants to raise at a later stage a plea such as non-maintainability under section 83 of the Transfer of Property Act.[1843] In *Raghunath Singh v Hansraj Kunwar*, the judicial committee held

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1834. *LR Scott v Mahammad Din*, AIR 1944 Ngp 154 : (1944) ILR Nag 465; *Rango v Mudiyeppa*, (1899) ILR 23 Bom 296; *Abdul Rahim v Ojamshee*, (1929) ILR 56 Cal 639.
1835. *Barjorji v Shripatprasadji*, AIR 1927 Bom 145 : (1927) 29 Bom LR 215; *Bai Sada v Gangaram*, AIR 1932 Bom 484 : (1932) 34 Bom LR 936.
1836. *Rungo v Mudiyeppa*, (1899) ILR 23 Bom 296.
1837. *Somesh v Ramkrishna*, (1900) ILR 27 Cal 705.
1838. *Faiyaz v Prag Narain*, (1907) ILR 29 All 339 : 34 IA 102.
1839. *Sita Ram v Madho Lal*, (1902) ILR 24 All 44 (FB); *Hari Ram v Indraj*, AIR 1922 All 377 : (1922) ILR 44 All 730; *Mahamdi Begum v Tirfail Hasan*, AIR 1926 All 20 : (1926) ILR 48 All 17; *Raghunath Singh v Sheo Pratap Singh*, AIR 1929 All 409 : (1929) 27 All LJ 761; *Ramji v Pandharnath*, (1919) ILR 43 Bom 334 (FB); *Ramchandra v Balbhim*, AIR 1923 Bom 217 : (1923) 25 Bom LR 211; *Hanmanta v Shidu*, AIR 1923 Bom 300 : (1923) ILR 47 Bom 692; *Govind v Narayan*, AIR 1931 Bom 480 : (1931) 33 Bom LR 844; *Aruna v Bur Singh*, AIR 1925 Lah 31, (1924) 5 Lah 371; *Nahru Ram v Chiranji Lal*, (1910) ILR 32 All 215; *Joti Lal v Sheodhayan*, AIR 1936 Pat 420 : (1936) ILR 15 Pat 607; *Loknath Missir v Daulat Kuer*, AIR 1953 All 503; *Ambala v Amabala*, AIR 1957 Raj 321; *Ismail Nathabai Khartri v Muljibhai Shaukenbhai Brahambhatt*, AIR 1994 Guj 8.
1840. *Siva v Nundo*, (1891) ILR 18 Cal 139; *Vadapuratti v Vallabha*, (1902) ILR 25 Mad 300.
1841. *Irshad v Saidunnissa*, AIR 1930 Oudh 465 : (1931) ILR 6 Luck 275.
1842. *Ramji v Pandharnath*, (1919) ILR 43 Bom 334 (FB); *Raghunath Singh v Sheo Pratap Singh*, AIR 1929 All 409 : (1929) 27 All LJ 761; *Irshad v Saidunnissa*, AIR 1930 Oudh 465 : (1931) ILR 6 Luck 275.
1843. *Manickchand v Saleh Mohd*, AIR 1969 SC 751 : (1969) 1 SCC 206.

that if the decree for redemption in the first suit did not extinguish the right of redemption, the second suit to redeem is not barred.[1844]

In the converse case of the mortgagee not taking further proceedings on his decree for sale, there is also a conflict of decisions as to whether the mortgagor, if he does not redeem under the decree, may file a redemption suit. The Bombay High Court says that he can,[1845] but the Madras High Court holds that he is barred by this section.[1846]

(f) Appellate Decree Operates as *Res Judicata*.—Where a decree is appealed from, it is the appellate decree that must be looked to, to determine the question of *res judicata*, and not the decree appealed from—A decision *liable to appeal* may be "final" within the meaning of this section *until* the appeal is preferred; but, once that appeal is filed, the decision loses its character of "finality", and what was once *res judicata* again becomes *res sub judice,* that is, matter under judicial inquiry. Where the entire matter was still in appeal and any part of the findings could be varied by the appellate court, it is idle to contend that the same had become final. So also, when the matter had not attained finality and was still in dispute, the principle of *res judicata* could not arise.[1847] With reference to section 207 of the Ceylon Civil Procedure Code which is in *pari materia* with this section, the Privy Council said:

> Where an appeal lies the finality of the decree, on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* as between the parties.

In this case,[1848] the effect of non-filing of appeal against a judgment or decree is that it becomes final. The finality can be taken away only in accordance with law. Same consequences follow when a judgement or decree in a connected suit is not appealed from. Thus, the finality of finding recorded in the connected suit, due to non-filing of appeal, precluded the court from proceeding with appeal in the other suit.[1849] *A* in 1924 sues *B* on an account and obtained a decree on 17 January 1927. *B* filed an appeal on 19 January 1927 and *A* to avoid a possible bar of limitation, filed a fresh suit on the same cause of action on 2 June 1927. The suit was dismissed as *res judicata* although *B*'s appeal in the first suit was pending. The Privy Council reversed this decision and said that the proper course was to have stayed the second suit pending the decision of the appeal in the first suit. The appeal destroys the finality of the decision, the decree of the lower Court is superseded by the decree of the appellate Court, and it is the latter decree that should be looked into to determine the question of *res judicata*.[1850] In an Allahabad case,[1851] the court passed a decree for costs and in an application for execution this decree was construed as not making the defendant personally liable. Subsequently, the

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1844. *Raghunath Singh v Hansraj Kunwar*, AIR 1934 PC 205 : (1934) ILR 56 All 561 : 61 IA 362; *Thota China Subba Rao v Mattapali Raju*, AIR 1950 FC 1 : (1949) FCR 484; *Edumban Chettiar v Ramalakshmi*, AIR 1965 Ker 153.
1845. *Rama v Bhagchand*, (1915) ILR 39 Bom 41; *Badruddin v Sitaram*, AIR 1930 Bom 401 : (1930) 32 Bom LR 933.
1846. *Ranga v Narayana*, (1935) ILR 39 Mad 896; *Ellarayan v Rangaswami*, AIR 1926 Mad 816 : (1926) ILR 49 Mad 691.
1847. *K Muthuswami Gounder v N Palaniappa Gounder*, (1998) 7 SCC 327.
1848. *Annamalay v Thornhill*, AIR 1931 PC 263 : (1932) 36 Cal WN 1 : (1931) 61 Mad LJ 420.
1849. *Premier Tyres Ltd v Kerala State Road Transport Corp*, (1993) Supp 2 SCC 146.
1850. *Sheosagar v Sitaram*, (1897) ILR 24 Cal 616 : 24 IA 50; *Abdullah v Ganesh Das*, (1918) ILR 45 Cal 442 : 44 IA 214; *Nilvaru v Nilvaru*, (1882) ILR 6 Bom 110; *Chunder v Shibo*, (1882) 11 Cal LR 22; *Kailash v Girija*, (1912) ILR 39 Cal 925; *Balkishen v Kishan Lal*, (1888) ILR 11 All 148; *Chengalavala v Venkateshwar*, (1916) 30 Mad LJ 379; *Satyanarayana v Diana Engg Co*, AIR 1952 Cal 124 : (1952) ILR 1 Cal 305; *Venkateshwarlu v Venkatanarasimham*, AIR 1957 AP 557; *Parshotham v Bai Moti*, AIR 1963 Guj 30; *Bhavani v Narayana*, AIR 1963 Mys 120.
1851. *Lachman v Lakshmi*, AIR 1932 All 288 : (1932) 54 ILR All 44.

decree was confirmed by the court of appeal. In a second execution application of the decree of the appellate court, the construction of the decree in the first application did not operate as *res judicata.* When an award was set aside by a court on the grounds of misconduct of the *arbitrator* and an appeal against that order was dismissed as settled out of court, it was held that its effect was to render operative the order which was appealed against, and, it operates as *res judicata* in a subsequent suit between the parties.[1852]

A sues *B* for damages for cutting and removing trees from his land. The suit is dismissed on the grounds: (a) that the land did not belong to *A*; and (b) that *B* did not cut the trees. *A* appeals from the decree on both these grounds, but the appeal is dismissed on the ground that *A* had failed to prove that *B* had cut the trees. Note that the appellate court does not decide the question of *A*'s title. *A* then sues *B* for possession of land, claiming that the land belongs to him. *B* contends that the suit is barred as *res judicata* as the first court had found in the former suit that the land did not belong to *A*. The suit is not barred, for the question of *A*'s title became *res sub judice* when the appeal was preferred, and it did not become *res judicata* as the appellate court did not adjudicate upon the question;[1853] but, a judgement of an appellate court will operate as *res judicata* as regards all findings of the lower court which, though not referred to in it, are adopted by a decree which grants a relief that is possible only on such findings,[1854] as also, where the appeal is struck off as having abated.[1855] The doctrine that when there is an appeal, it is the judgement of the appellate court that must be looked into for determining the question of *res judicata*, has no application to judgements in writ proceedings preferred against orders of tribunals.[1856] An issue, again, is *res judicata* where the judgment of the appellate court shows that the issue was treated as material, and was decided, although the decree passed merely affirms the decree of the lower court which did not deal with the issue.[1857]

Where a plaintiff filed a suit for *declaration of title, partition* and *recovery of possession of property* and also filed a petition under section 373 of the Indian Succession Act, 1925, for issue of succession certificate, there was a joint trial of both the proceedings and the court granted a decree, declaring that the plaintiff was the sole heir of the deceased and was entitled to the property. Relief of partition was also granted. The court also held that the plaintiff was entitled to a succession certificate. The defendant filed appeals; which were tried jointly and the matter was remanded. Defendant filed a second appeal against the decree in the suit, but did not file any proceeding against the decision on the petition under section 373 of the Indian Succession Act, 1925, which therefore, became final. It was held that the decision in the petition would operate as *res judicata* and bar a fresh decision in second appeal.[1858]

The bar of *res judicata* is not created by a decree, but by decision or judgment. Where the suits or appeals raise common issues for decision and there has been one trial, one finding and one decision, or an appeal against the decree in one suit, the appeal will not be barred by *res judicata,* by not filing an appeal against the decree in the other suit or appeal. However, the position would be different if the subject matter in each suit or appeal is different.[1859]

1852. *Annapurna Bai v Pyari Bai*, AIR 1960 MP 222.
1853. *Burdwan Electric Supply Co v Srimati Kumud Kumari Choudhary*, AIR 1932 Cal 14.
1854. *Narayanan v Kannammai*, (1905) ILR 28 Mad 335; *Gokul v Shrimal*, (1904) 6 Bom LR 288; *Muthammal v Secretary of State of India*, (1916) ILR 21 Mad 1202.
1855. *Raja Syed Ahmad Ali v Hingalal*, AIR 1947 Oudh 74 : (1946) ILR 21 Luck 586.
1856. *Burmah Shell Co v Labour Appellate Tribunal*, AIR 1957 Mad 60.
1857. *Midnapur Zamindary Co Ltd v Naresh Narayan Roy*, AIR 1924 PC 144 : (1924) ILR 51 Cal 631 : 51 IA 293; *Nawab v Punjaba*, AIR 1921 Lah 187 : (1922) 4 Lah LJ 442.
1858. *Madhvi Amma Bhavani Amma v Velu Pillai*, AIR 1990 Ker 144.
1859. *Karunaker Panda v Dureabati Bewa*, AIR 1981 Ori 23.

Suits by plaintiff and defendants were filed in the same court. Issues involved in both the suits were substantially the same. Suits were disposed of, by a common judgment. Appeal was filed by the plaintiff against the judgment in his case. Judgment in the suit by the defendant was held to operate as *res judicata*.[1860]

Certain estates were taken over by the State Government, which then applied to the tribunal (constituted under the relevant Act) for the recovery of endowed amounts and interest at 6% till the date of payment. The tribunal gave a finding that the state government was entitled to the entire amount claimed which would mean the principal as well as interest. It was held that the mere fact that the tribunal had not used the word "interest" did not mean that it had rejected the claim for interest.[1861]

Finality does not depend on executability. A court may declare the rights of the parties without an executable mandate. Matters decided in a preliminary decree should be regarded as embodying the final decision on the matters decided by the court. This much is indicated by section 97 of the Code. The Code provides for an appeal against a preliminary decree. If a matter has not been finally decided, there is no point in allowing an appeal by statute. Hence, points directed in a preliminary decree in a partition suit will estop the parties by *res judicata* from contracting the same point in a later suit.[1862]

Where the question of title, as *maurasidar* of land in the defendant's possession could not have been raised in the earlier suit, then the earlier decision cannot operate as *res judicata* against the defendant on that point.[1863]

A suit was filed for specific performance of an agreement of sale of undivided one-third share of defendant. During its pendency, share of the defendant was determined to be less than one-third. It was held that the partition decree (passed during the pendency of the suit for specific performance), could not operate as *res judicata*. Even if it be held that the plaintiff's suit was premature, that could only disentitle him to costs.[1864]

The Rangoon High Court has held that a decree may be final as regards a party *A* who has not appealed, although another party *B* has appealed, if *A* has not been made party by *B* in his appeal. The mere possibility that the appellate court might make *A*, a party and proceed under O XLI, rule 33, does not make it less final.[1865]

In a Gauhati case in an appeal, the Deputy Commissioner, by his order dated 14 November 1955, directed that the disputed land should be divided equally between the parties and the sub-divisional officer was directed to demarcate the land within a month. As there was no appeal against the order by any of the parties, it became final. The land was never demarcated by the sub-divisional officer. Constant disputes arose, and when one of the parties petitioned to the Deputy Commissioner to execute the order, he (instead of demarcating the land) treated it as a new dispute and decided the claim of the parties afresh, by the impugned order. It was held that though the code as such, was not applicable in Nagaland, the spirit of sections 11 and 12 of the Code was applicable. The Deputy Commissioner is barred by the principles of *res judicata* from trying the dispute afresh. The impugned order was set aside.[1866]

1860. *Aneappa Gounder v Rajavelu Gounder*, AIR 1981 Mad 282.
1861. *PVG Raja Garu v State of Andhra Pradesh*, AIR 1990 SC 650 : (1990) SCR 1 134.
1862. *Laxmi v A Sankappa Alivee*, AIR 1989 Ker 289.
1863. *Nagta Singh v Shiv Singh*, AIR 1981 All 75.
1864. *Ram Niwas v Omkari*, AIR 1983 All 310 (DB).
1865. *Chokkalingam v Maung Tha O*, AIR 1926 Rang 122 : (1926) ILR 4 Rang 8.
1866. *Humtse Village v Yikhuman Village*, AIR 1983 Gau 19 (DB).

If only a part of a decree is appended from, the rest of the decree may become final and operate as res judicata.—The defendant had obtained a decree on a mortgage. The plaintiff who had paid off a prior mortgage filed a suit claiming to be subrogated to the prior mortgagee and to recover the amount he had paid, from the defendant. The original court found that the plaintiff was subrogated and awarded him the principal sum he had paid with interest. The defendant on appeal claimed that the plaintiff was not entitled to interest. The defendant could not on second appeal dispute plaintiff's right of subrogation which was *res judicata* by reason of the decree of the original court, that part which had not been appealed against.[1867]

(g) Consent Decree and Estoppel.—The present section does not apply in terms to consent decrees; for it cannot be said in the case of such decrees that the matters in issue between the parties "have been heard and finally decided" within the meaning of this section.[1868] A compromise decree or order does not operate as *res judicata,* because the compromise decree or order is merely the record of a contract between the parties to a suit, to which is superadded the seal of the court and the court does not decide anything.[1869] A consent decree, however, has to all intents and purposes the same effect as *res judicata*, as a decree passed *in invitum*.[1870] It raises an estoppel as much as a decree passed *in invitum*.[1871] The words "in writing and signed by the parties", inserted in O XXIII, rule 3 of the CPC by the Civil Procedure Code (Amendment) Act, 1976, necessarily mean and include only authorised representative and counsel. Thus, a compromise in writing and signed by counsel representing the parties, but not signed by the parties in person, is valid and binding on the parties and is executable, even if the compromise relates to matters concerning the parties, but extending beyond the subject matter of the suit. A judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment.[1872] Therefore, so long as a consent decree stands, it is not open to either party thereto to give it the go by, even if it

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1867. *Narendra v Mahosay Ganesh Prasad*, AIR 1946 Pat 408; *Pichai Konar v Narasimha*, AIR 1930 Mad 471 : (1930) 58 Mad LJ 343; *Kandasami v Annamalai*, (1905) ILR 28 Mad 67.

1868. *Baldevdas v Filmistan Distributors*, AIR 1970 SC 406 : (1969) 2 SCC 201 : (1970) 1 SCR 435 : (1970) 11 Guj LR 158; *Bhanwarlal v Raja Babu*, AIR 1970 Raj 104 : (1969) ILR 19 Raj 393; *Bhaishanker v Morarji*, (1912) ILR 36 Bom 283, where it is said that in the case even of a consent-decree, the matters in issue in the suit cannot but be said to have been "heard and finally decided". If so, why is it said in the judgment (p 286) that a consent decree has to all intents and purposes the same effect as *Res Judicata*?. See also *Parasuram v Pandu*, AIR 1956 Hyd 178 : (1956) ILR Hyd 29.

1869. *Uphras Lapasam v Ka Esiboll Lyngdoh*, AIR 1986 Gau 55.

1870. *Thakur Durga Baksh Singh v Rama Umanath*, AIR 1944 Oudh 94 : (1943) 19 Luck 428; *Rama Rao Sham Rao v Dattadayal*, AIR 1948 Ngp 304 : (1947) ILR Nag 889; *Laxmi Nayain Gododia v Modh Shafi Bari*, AIR 1949 EP 141 : (1948) ILR EP 113; *Committee of Management of Bunga Sarkar v Sardar Raghubit Singh*, AIR 1951 Sim 257; *Bhaishanker v Morarji*, (1912) ILR 36 Bom 283, p 286; *Re South American and Mexican Co*, (1895) 1 Ch 37; *Bikram Prakash v Narendra*, AIR 1961 All 266; *Nader Mal v Ugar Sain*, AIR 1966 P&H 509 : (1965) ILR 2 Supp (2) Punj 609.

1871. *Nasib Khan v Kutubunissa*, AIR 1941 Ngp 346 : (1940) ILR All 691; *Nicholas v Asphur*, (1897) ILR 24 Cal 216, p 237; *Lakshmishankar v Vishnuram*, (1900) ILR 24 Bom 77; *Raj Kumara v Thatha*, (1912) ILR 35 Mad 75; *Tiruvambala v Manikkavachaka*, (1917) ILR 40 Mad 177, p 189; *Sivadas v Birendra*, AIR 1926 Cal 672 : (1926) 43 Cal LJ 116; *Durga Prasad v Narain*, AIR 1929 Oudh 63 : (1929) ILR 4 Luck 181; *Sunder Bai v Devaji*, AIR 1954 SC 82 : (1953) SCJ 693, wherein the above statement of law was quoted and adopted. *Sailendra Narain v State of Orissa*, AIR 1956 SC 346 : (1956) SCR 72; *Kailash Chandra v Kulamani*, AIR 1956 Ori 210; *Krishna Subala v Danapathi Dutta*, AIR 1957 Cal 59; *Chandi Charan v Naba Gopal*, AIR 1957 Pat 365; *Sadsukh v Jugal Kishore*, (1957) 61 Cal WN 67; *Kesavan v Padmanabhen*, AIR 1971 Ker 234; *Gajraj Narain v Babulal*, AIR 1975 Pat 58 : (1974) ILR 53 Pat 543; *Indira Bai v BA Patel*, AIR 1974 AP 303; *Mariam Bai v Modi IAR Sait*, AIR 1978 Mad 191; *Jagan Nath v Abdul Aziz*, AIR 1973 Del 9.

1872. *Byram Pestonji Gariwala v UOI*, AIR 1991 SC 2234 : (1992) 1 SCC 31.

contains clauses that are bad in law.[1873] Where, however, the parties consent to divide pension in contravention of section 12 of the Pensions Act, 1873, a decree passed in terms thereof is void and cannot operate as *res judicata*.[1874] Also, where a new amending Act has conferred new rights including one of reopening of decrees where they have not been fully executed, a party to such a decree can take advantage of such an amendment.[1875] A consent decree, however, is a mere creature of the agreement on which it is founded, and it may be set aside on any ground which would invalidate an agreement between the parties;[1876] but, such a decree cannot be attacked collaterally on such grounds, but only by direct proceedings attacking it.[1877] A consent decree until set aside by a proper proceeding therefore is binding on the parties and cannot be ignored on the ground that it contains a term which is not lawful.[1878] Once the original tenant entered into compromise and admitted in the said compromise that he was never a protected tenant of the suit land and was not in possession of the suit land at any time as a protected tenant then, this admission and subsequent withdrawal of petition under section 98 by the original tenant operates as *res judicata*.[1879]

Unless all the parties agree, an application cannot be made to the court of first instance in the original suit to set aside the decree,[1880] though it may be done in the case of an interlocutory order.[1881] A decree by consent can be passed against a minor in accordance with the provisions of O XXXII, and such a decree will be *res judicata* unless it is set aside in appropriate proceedings.[1882] A decree passed on an award will operate as *res judicata* in the same manner as a decree passed by the court on contest.[1883] A compromise decree if not vitiated by fraud, misrepresentation, misunderstanding or mistake is binding and operates as *res judicata* as also estoppel between the parties.[1884]

(h) Explanation V: Relief Claimed but not Expressly Granted.—If a relief is claimed in a suit, but is not expressly granted in the decree, it will be deemed to have been refused, and the matter in respect of which the relief is claimed will be *res judicata*.[1885] Thus, where in a suit by a mortgagee: (i) for a money decree; and (ii) in default of payment for sale of the mortgaged property, the mortgagee was content to take a money-decree only, it was held that a subsequent suit by him, on failure of the mortgagor to satisfy the decree, to have the amount of the mortgage-debt paid to him by the sale of the property, was barred by *res judicata*. The relief as to sale having been claimed by the mortgagee. but not having been expressly granted in the former suit, must be deemed to have been refused so as to bar the subsequent suit.[1886]

1873. *Ramrao Shamrao v Dattadayal*, AIR 1948 Ngp 304 : (1947) ILR Nag 889; *Cowasji v Kisandas*, (1911) ILR 35 Bom 371; *Basangouda v Basalingappa*, AIR 1936 Bom 301 : (1936) 38 Bom LR 593; *Budhumal v Ratialal*, AIR 1952 Sau 110.
1874. *Baldev Jha v Ganga Prasad*, AIR 1959 Pat 17 : (1935) ILR 37 Pat 1391.
1875. *Subba Rao v Jagannath Rao*, AIR 1967 SC 591 : [1964] 2 SCR 310.
1876. *Huddersfield Banking Co v Henry Lister and Son*, [1895] 2 Ch 273; *Kandarpa v Banvari*, (1921) 33 Cal LJ 244; *Nibaran v Motilal*, (1935) 39 Cal WN 938; *State of Punjab v Amar Singh*, AIR 1974 SC 994 : (1974) 2 SCC 170.
1877. *Wilding v Sanderson*, [1897] 2 Ch 534, p 543; *Nibaran Chandra v Motilal*, (1935) 39 Cal WN 938.
1878. *Bhima Rama v Abdul Rahid*, AIR 1968 Mys 184.
1879. *Dnyanoba Deorao Ugle v Shaikh Hussain*, AIR 1999 Bom 5.
1880. *Harrison v Rumsey*, (1752) 2 Ves Sen 488; *Stanard v Harrison*, (1871) 19 WR 811; *Ainsworth v Wilding*, [1896] 1 Ch 673.
1881. *Mullins v Howell*, (1879) 11 Ch D 763.
1882. *Nirmal Chand v Parameswari Devi*, AIR 1958 MP 333.
1883. *Mahindra v Commr of Chota Nagpur Division*, AIR 1958 Pat 603 : (1958) ILR 37 Pat 699.
1884. See notes to section 96, "Procedure for setting aside consent decree". *Byram Pestonji Gariwala v UOI*, (1992) 1 SCC 31.
1885. *Rock Tyres, Chandigarh v Ajit Jain*, AIR 1998 P&H 202.
1886. *Shibu v Chandra Mohan*, (1906) ILR 33 Cal 849; *Piari Lal v Nand Ram*, (1909) ILR 31 All 19.

If a relief claimed in the plaint is not granted by the decree, the fact that it is not mentioned in the judgment would not bar the application of this explanation and it would be deemed to have been refused.[1887] In a case where the prayer is a combined one, and prayer for grant of certificate has not been considered specifically, the only conclusion possible is that the prayer has been rejected by application of the principles contained in section 11.[1888] Where the decree grants specific performance of an agreement to sell immovable property, it impliedly grants the relief of possession. Relief of possession cannot be said to have been refused.[1889] If a landlord sues for the eviction of joint tenants and the interests of joint tenants are not conflicting in that suit, then the decree does not become *res judicata* in a later suit between the joint tenants.[1890] Where in an application for fixation of fair rent, an issue was framed as to who was the tenant, i.e., tenant in his personal capacity or in capacity of a firm and there was no decision on the point, but it was impliedly held that the tenant in his personal capacity was a tenant and fair rent was fixed, the issue would be taken to have been decided against the tenant and subsequently, in the proceedings for eviction, the same issue cannot be raised by the tenant.[1891]

The Nagpur High Court has held that Explanation V would not apply where the omission to grant the particular relief is due to a misapprehension on the part of the court relating to the nature of relief claimed in the suit.[1892]

(i) Liberty to bring a Fresh Suit.—Where a former suit between the same parties in the same court and for the same relief results in a decree of dismissal, but the judgment leaves it open to the plaintiff to bring a fresh suit and leaves "open, untouched and undecided all matters" affecting the rights of the parties, the decree does not constitute *res judicata,* as such matters cannot be said to have been "heard and finally decided" within the meaning of this section;[1893] but, if the court has in the particular circumstances of a case, no power to reserve liberty to a party to bring a fresh suit, the subsequent suit may be barred as *res judicata*, notwithstanding the liberty to bring a fresh suit. Thus, in *Watson v Collector of Rajshahye*[1894] the former suit was dismissed for the plaintiff's failure to produce evidence, but a direction was given that the plaintiff could institute a fresh proceeding as if no suit had been brought. Nevertheless, the Privy Council held that the subsequent suit was barred by *res judicata* for the reservation was of no effect. Again, *Fateh Singh v Jagannath Baksh*,[1895] is a case directly on this point. In that case, the plaintiffs brought a suit to set aside a gift made by a Hindu widow out of her husband's estate; they alleged that they were presumptive heirs. The widow died pending the suit. After her death the plaintiffs applied to amend the plaint by setting up a family custom of inheritance. Upon that application failing and the plaintiffs admitting that apart from the alleged custom, they could not succeed, the trial court dismissed the suit, but gave them liberty to file a fresh suit for possession. Subsequently, the plaintiffs brought another

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1887. *Venkatasubbiah v Veeriah*, AIR 1957 AP 981.
1888. *Gaya Prasad Bhoi v Lok Nath Budhi Bhoi*, AIR 1996 Ori 444.
1889. *Hemchand v Karelal*, AIR 1987 Raj 117.
1890. *Sher Singh v Mohd Ismaili*, AIR 1981 All 114.
1891. *M/s Globe Publications v Madan Gopal*, AIR 1996 P&H 115.
1892. *Abdeli Abdulhussain v Taiyabali*, AIR 1951 Ngp 355.
1893. *Parsotam Gir v Narabada Gir*, (1899) ILR 21 All 505 : 26 IA 175; *Babu Lal v Ishri Prasad*, (1878) ILR 2 All 582, pp 586–88; *Devaditta v Nathu*, (1912) PR 16, p 209. The result is the same if the court has expressly excluded a matter from decision, though liberty to bring a fresh suit is not reserved. *Ram Charan v Rezzuddin*, (1884) ILR 10 Cal 856; *Madan Mohan v Boroaah*, (1918) PR 70, p 232; *Bhimana Gouda v Sangappa*, AIR 1960 Mys 178.
1894. *Watson v Collector of Rajshahye*, (1869) 13 MIA 160 : 12 WR 43 PC.
1895. *Fateh Singh v Jagannath Baksh*, AIR 1925 PC 55 : (1925) ILR 47 All 158 : 52 IA 100; *Ramchandra v Krishna*, AIR 1931 Bom 417 : (1931) 33 Bom LR 613; *Sukh Lal v Bhikhi*, (1889) ILR 11 All 187 (FB).

suit to recover from parties to the former suit a share in the property basing their claim upon family custom. It was held that the suit was barred by *res judicata* since the custom was a matter which might and ought to have been set up in the former suit, and, further, that the trial court having dismissed the suit, it had no power under O XXIII, rule 1(1), to give liberty to bring a fresh suit. A writ petition was withdrawn by the petitioner without taking a decision on its merits. Since, the legality or otherwise of the impugned decree of the court below having not been adjudicated upon in the said writ petition, its mere dismissal as not pressed cannot be treated operating as *res judicata* against the plaintiff, thereby precluding him from bringing a fresh suit against the defendant seeking restoration of possession of the suit property.[1896] Both the suits concededly, were dismissed as withdrawn with liberty to file fresh suit on the same cause of action. The third suit on the same cause of action could not have been barred by any principle, be it section 11 or O II, rule 2 or O XXIII of the CPC. Even though the cause of action might have been based on the title of the suit land but after the land was acquired under the provisions of the Land Acquisition Act, 1894, the plaintiff was left with no choice but to file a suit for recovery. Assuming, the cause of action in both the suits was based upon title in the suit land and was akin in all the cases, yet as referred to above, in as much as the earliest, two suits were dismissed as withdrawn with permission to file a fresh suit on the same cause of action, the third suit will not be barred by any principle of law.[1897]

The principle of these decisions has been extended to a plea set up in defence to a previous action and it has been held that where the court declines to decide it reserving at the same time the right of the defendant to put it forward in a separate suit, such a suit will be barred;[1898] But where in a suit under section 33 of the UP Agriculturists' Relief Act, the creditor-defendant was held not entitled to put forward a certain claim, a suit by him to enforce that claim is not barred as *res judicata.*[1899]

(j) When Explanation V Applies.—Explanation V does not apply, unless the "relief" claimed is : (i) *substantial relief*; and (ii) it is such as it is *obligatory* on a court to grant. We proceed to consider these conditions in order.

(i) The relief claimed must have been substantial and not merely auxiliary.—*A* sues *B*: (1) to recover her share in the estate of *D*, claiming the same as *D*'s widow; and (2) for a declaration that she was lawfully married to *D*, a fact which *B* had denied. A decree is made by consent awarding Rs 55,000 to *A* in full satisfaction of her claim against the estate of *D*. The decree does not contain any declaration as to *A*'s marriage with *D*. This circumstance will not bar a subsequent suit by *A* as *D*'s widow, against *B*, to recover her share in the estate of a deceased relative; for the relief claimed in the former suit in respect of the legality of marriage was not claimed as a "specific" or "substantial" relief. It was "auxiliary" to the principal relief in respect of her share in the estate of *D*.[1900]

(ii) The relief claimed must be one which is obligatory and not merely discretionary for the court to grant.—Cases under this head relate principally to *mesne* profits. It was enacted by section 244 of the Code of 1882 that, "nothing in this section shall be deemed to bar a separate suit for *mesne* profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree." That clause has been

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1896. *MS Baliga v Bangalore City Corp*, AIR 1998 Kant 76.
1897. *Harbhagwan v Punni Devi*, AIR 1999 P&H 223.
1898. *Ganesh Jha v Baidyanath*, AIR 1958 All 270 : (1958) ILR 37 Pat 201.
1899. *Ram Kishan v Jagadeeswar*, AIR 1956 Pat 13 : (1956) ILR 1 All 395.
1900. *Fatmabai v Aishabai*, (1889) ILR 13 Bom 242.

omitted in the present CPC, and under O XX, rule 12, *mesne* profits subsequent to the date of the suit are to be ascertained and provided for in the final decree.

A sues *B* for possession and for *mesne* profits both prior and subsequent to the suit. A decree is passed in *A*'s favour for possession. The decree is silent as to *mesne* profits.

In the case put above, there is no doubt as to *mesne* profits prior to the date of the suit, that the plaintiff having claimed a relief in respect thereof and the relief not having been granted by the decree, the matter is *res judicata* and *A* cannot institute a fresh suit for such profits.[1901]

As to *mesne* profits *subsequent* to the date of the suit, it was held in cases under the Code of 1882, that it being discretionary with the court to grant such relief, the fact of the decree being silent as to such *mesne* profits did not operate as a bar to a fresh suit.[1902] In cases under the present Code, it has been held by the high courts of Madras,[1903] Calcutta,[1904] Allahabad,[1905] Bombay,[1906] Orissa[1907] and Patna,[1908] that where in a suit for possession and for past and future *mesne* profits, the court gives a decree for *mesne* profits up to the date of the suit and says nothing about subsequent *mesne* profits, a fresh suit to recover subsequent *mesne* profits is not barred under the present Code any more than under the Code of 1882. In the Madras case, Wallis CJ said:

> The word "relief" in the explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought and did not include relief such as *mesne* profits accruing after the date of suit as to which no cause of action had then arisen, but which the court was nevertheless expressly empowered to grant. The explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect. I do not find any sufficient indication to rebut this presumption in the fact that sections 211 and 212 of the old Code were amalgamated to form O 20, r 12. The change introduced by the new rule is that the award of *mesne* profits in all cases is to be by preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under sections 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of explanation V to s 11, nor do I think it is effected by the omission in s 47 of the new Code of the proviso to the corresponding s 244 of the old Code.

When a plaint in a mortgage suit contains a prayer for a personal decree, but the preliminary decree is silent about it, the plaintiff is not precluded from applying for a personal decree under O XXXIV, rule 6, for the balance of the mortgage claim after the sale of the mortgaged property, as such a decree could not properly be passed until after sale.[1909] A suit for specific performance of contract with an alternate relief of money decree was filed. The court granted a decree for money and rejected a decree for specific performance. The plaintiff not filing any

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1901. *Jiban v Durga*, (1894) ILR 21 Cal 252; *Kachu v Lakshmansingh*, (1901) ILR 25 Bom 115.
1902. *Mon Mohan v Secretary of State*, (1890) ILR 17 Cal 968; *Bhivrav v Sitaram*, (1895) ILR 19 Bom 532; *Ram Dayal v Madan*, (1899) ILR 21 All 425; *Hays v Padmanand*, (1905) ILR 32 Cal 118; *Kuppusamy v Venkataramier*, (1905) 15 Mad LJ 462.
1903. *Doraiswami v Subramania*, (1918) ILR 41 Mad 188 (FB).
1904. *Bipulbihari v Nikilchandra*, AIR 1929 Cal 566 : (1930) ILR 57 Cal 381; *Kalidas v Keshablal*, AIR 1931 Cal 788 : (1931) 58 ILR Cal 1040.
1905. *Muhammad Ishaq v Muhammad Rustam*, (1918) ILR 40 All 292.
1906. *Gangadhar v Sripad*, AIR 1938 Bom 231 (FB) : (1938) ILR Bom 655 : (1938) 40 Bom LR 324; overruling *Atmaram v Parashram*, AIR 1920 Bom 39 : (1920) ILR 44 Bom 954; *Lakshmibai v Jagannath*, AIR 1932 Bom 222 : (1932) ILR 56 Bom 292; *Rama v Saidappa*, AIR 1935 Bom 306 : (1935) ILR 59 Bom 454.
1907. *Mukunda Krupa Sindu*, AIR 1954 Ori 202.
1908. *Bansari Prasad v Awadh Bihari*, AIR 1952 Pat 475 : (1952) ILR 31 Pat 731.
1909. *Govindaswami v Kandaswami*, AIR 1927 Mad 779 : (1927) 53 Mad LJ 489; *Babu Ram v Imamullah*, AIR 1935 All 411 : (1935) ILR 57 All 797.

appeal against the decree, but a subsequent suit involving the above issue was filed later. It was held it was not barred by the principle of *res judicata.*[1910]

[s 11.27] Section not Exhaustive—Principle of *Res Judicata* Applicable apart from Section

The section is not exhaustive of the circumstances in which an issue may be *res judicata.*[1911] In *Kalipada v Dwijapada,*[1912] the Privy Council quoted with approval a passage from the judgment of Sir Lawrence Jenkins in *Sheoparsan v Ramnandan*[1913] where his Lordship said that "the application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law." Again in *Hook v Administrator-General,*[1914] the judicial committee said that the plea of *res judicata* still remains apart from the limited provisions of the Code, and referred to the decision of the Board in *Ram Kirpal v Rup Kuari*[1915] which held that the binding force of an interlocutory judgment even in execution proceedings depends not upon the section of the CPC but upon general principles of law. The Privy Council have also held that a decision on a dispute between rival claimants as to compensation deposited in a court under section 31(2) of the Land Acquisition Act, 1894, operates as *res judicata* in a subsequent suit between the same parties. Their Lordships said:

> It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by the Board in *Hook v Administrator-General*[1916] that the principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect.[1917]

The Supreme Court has reaffirmed this view and observed that the principles underlying section 11 are that there should be finality in litigation and that a person should not be vexed twice over in respect of the same matter and that these principles are applicable even when the case does not fall within the strict terms of section 11.[1918] On this principle, it has been held that a decision given by a court at one stage is binding on it at later stages.[1919] The decision

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1910. *Kewal Singh v Gurjant Singh*, AIR 2000 P&H 60.
1911. *Mancharam v Kalidas*, (1894) ILR 19 Bom 826.
1912. *Kalipada v Dwijapada*, AIR 1930 PC 22 : 57 IA 24 : (1930) 34 Cal WN 201.
1913. *Sheoparsan v Ramnandan*, (1916) ILR 43 Cal 694 : 43 IA 91.
1914. *Hook v Administrator-General*, AIR 1921 PC 11 : (1921) ILR 48 Cal 499 : 48 IA 187; *Abdul Sobhan v Beni Madhab*, AIR 1934 Cal 430 : (1934) ILR 61 Cal 1.
1915. *Ram Kirpal v Rup Kuari*, (1884) ILR 6 All 269 : 11 IA 37.
1916. *Hook v Administrator-General*, AIR 1921 PC 11 : (1921) 48 Cal 499 : 48 IA 187.
1917. *Apprnanath v Kanailal*, AIR 1950 Cal 300; *Ramchandra v Ramchandra*, AIR 1922 PC 80 : (1922) ILR 45 Mad 320 : 49 IA 129, p 138; *Maharajadhiraj Sir Rameshwar Singh v Hitendra Singh*, (1925) 29 Cal WN 413 (PC); *Bank of Baroda v Fischo*, AIR 1975 Cal 225 : (1974) 78 Cal WN 535; *Suryanarayanrao v Rajeshwari*, AIR 1966 AP 269; *Abdul Ghani v Mahant Ram Saran*, AIR 1976 J&K 72.
1918. *Rajalakshmi v Banamali*, AIR 1953 SC 33 : (1953) SCR 154; *Burn and Co v Employees*, AIR 1957 SC 38 : (1956) SCR 781 : (1957) SCJ 28 : (1957) SCA 1175; *MSM Sarma v Sir Krishna Sinha*, AIR 1960 SC 1186 : (1961) 1 SCR 96 : (1961) 2 SCJ 73 : (1961) 2 SCA 582; *Daryao v State of Uttar Pradesh*, AIR 1961 SC 1457 : (1962) 1 SCR 574 : (1962) 1 SCJ 702.
1919. *Staya Dhyan v Deo Ranjini Debi*, AIR 1960 SC 941 : (1960) 3 SCR 590 : (1961) 1 SCA 10; *Abdul Shukur v Kotwaleshwar*, AIR 1958 All 54; *Corp of Calcutta v Sirajuddin and Co*, AIR 1957 Cal 399 : (1957) 61 Cal WN 1009; *Benode Behari v State of West Bengal*, AIR 1971 Cal 400; *Braj Bhushan v Nigendra Singh*, AIR 1977 Pat 129; *YB Patil v YL Patil*, AIR 1977 SC 392 : (1977) 1 SCR 320.

given at the earlier stage must be final.[1920] Thus, if the name of a party is struck off under O I, rule 10(2) as having been improperly joined a second application to join him as a party would not be permissible; but, this would not be the case where thereis dismissal of the suit under O IX, rule (5) since there has been no adjudication.[1921] Authorities under the Consolidation of Holdings Acts perform judicial acts; hence their decisions at each stage bind the parties for the purpose of subsequent stages.[1922] On the same principle, a decision given on a part of the matter in controversy between the parties at an earlier stage of the litigation would bar its re-agitation at a later stage.[1923] An order of remand made by a court is binding on it and cannot be reopened when the matter comes before it after remand;[1924] and, so when an appeal was presented in *forma pauperis* beyond the prescribed period, and no objection was taken on the score of limitation when the appeal was admitted, it was held that this objection was not available to the respondent at the hearing of the appeal.[1925] The remedy of a party who is aggrieved by an order disallowing costs is to appeal against it; and where that has not been done and the order becomes final, a suit for costs is barred;[1926] but, an appeal to the Supreme Court makes the entire subject matter available for adjudication including interlocutory orders passed either by the trial court or the high court. Such orders have only a provisional finality.[1927]

Res judicata applies also between two stages in the same litigation. Where a court, (whether a trial court or a higher court) has, at an earlier stage, decided the matter in one way, the parties cannot re-agitate the matter at a subsequent stage of the same proceeding.[1928] However: (i) interlocutory orders which have the force of a decree and terminate the proceedings, are distinct from (ii) those which are a mere step towards the decision of the dispute between the parties, i.e., towards decision by way of a decree or a final report.[1929] An order substituting the transferee of a decree in place of the original decree-holder was passed on the plea of the judgment-debtor. It was held that the judgment-debtor could not later take the plea that the transferee could not execute the decree. *Res judicata* applied.[1930] Where it is the general doctrine of *res judicata* that is to be applied, then the technical aspects of section 11, do not apply. Customary rights of a community, established by a decree of a competent court operates as *res judicata* in subsequent proceedings.[1931] Application was made for framing additional issues. Question in issue had been already considered and decided when an amendment of the plaint was refused. Application for the additional issue was held to be barred by *res judicata*.[1932]

The principle of *res judicata* has been held applicable to decisions given under the UP Agriculturists' Relief Act,[1933] under the Madras Agriculturists' Relief Act[1934] and under the East Punjab Urban Rent Restriction Act.[1935] Decisions given in suits or proceedings under

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1920. *Prabhu Halwai v Fulchand*, AIR 1969 Pat 16.
1921. *Setabai Dei v Ramdhani*, AIR 1966 Cal 60.
1922. *Sita v State*, AIR 1969 All 342 : (1967) ILR 2 All 775; *Kanizan v Ghulam Nabi*, AIR 1965 All 296 : (1964) All LJ 112.
1923. *Mohammad Khalid v Chief Commr*, AIR 1968 Del 13 : (1967) 69 Punj LR 279.
1924. *Lalbati v Satchitanand*, AIR 1960 Pat 418.
1925. *Jalkaur v Pala Singh*, AIR 1961 P&H 391.
1926. *Bhagavati v Md Ismail*, AIR 1959 AP 601.
1927. *Jasraj v Hemraj*, AIR 1977 SC 1011 : (1977) 2 SCC 155.
1928. *Puranmal Bajoria v Nagarmal*, AIR 1980 Pat 143.
1929. *Khurai Jam Ongbe Thoibisana Devi v Ambubi Singh*, AIR 1982 Gau 100.
1930. *Ramakanta Das v Gita Devi Choudhury*, AIR 1991 Ori 279.
1931. *Gulam Abbas v State of Uttar Pradesh*, AIR 1981 SC 2198 : (1982) 1 SCC 71.
1932. *Ghanshyam Das Agarwal v Ram Chander*, AIR 1988 All 303.
1933. *Munshi v Chiranji Singh*, AIR 1956 All 237.
1934. *Seshamma v Gangaraju*, AIR 1957 AP 841 : (1956) Andh LT 717.
1935. *Krishna Bansi v Gopichand*, AIR 1963 P&H 163.

the Bengal Money Lenders Act, 1940, would likewise be *res judicata*.[1936] So also, the decisions determining liability to pay octroi under municipal rules.[1937]

The question in this case before the Supreme Court was, whether a decision rendered by an Assistant Settlement Officer in a previous proceedings, *viz* a *suo motu* inquiry under section 15 of Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into *Ryotwari*) Act, 1948, would operate as *res judicata* in a subsequent proceedings initiated by one of the rival claimant taking his claim as *ryot* under section 56 of the Act. In a proceedings under section 15, settlement officer can grant a *patta* if he is satisfied that the landholder is entitled to it. He cannot do more than this. If the settlement officer does so, he oversteps the outer limits of his jurisdiction and his decision is of no value because he does something beyond, outside or in excess of the authority conferred on him by section 15. Any decision or order beyond the scope of section 15 is totally without jurisdiction and cannot operate as *res judicata*.[1938] Under the scheme of Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into *Ryotwari*) Act, 1948, the tribunal was required to apportion the amount according to the priorities depending upon the amount of compensation at the time of giving of the direction in question. It was, therefore, only to be expected that the tribunal would first give directions with regard to the payment of the principal amount and defer the payment of interest to a future date to the claims. In these circumstances, the issue with regard for interest in the subsequent application were not barred by *res judicata*.[1939] A person who received compensation under the Land Acquisition Act, under protest and secured a reference but was unsuccessful or partially successful, does come within the embargo created by section 18(1) of the Act and the second provision to sub-section (2) of section 31 and the non-obstante clause in section 28(A)(1) does not relive him from it. The doctrine of *res judicata* under section 11 of the CPC operates against such person.[1940] The word "revised" under sub-section 1 of section 44 of the WB Estates Acquisition Act, 1953, indicates that the state government or its officers shall be entitled to revise from time to time, the record of rights and to make necessary entries or corrections in the relevant column of record of rights in its settlement operations or as per exigency envisaged under the Act and the rules made therein. The order under section 44(3) becomes final, so long as there is no revision affected, the question of *res judicata*, therefore, does not arise and the previous appellate order does not preclude the authorities from revising the record of rights.[1941] The failure of the first plaintiff to claim the benefit under the Cochin Proclamation or under section 5 of the Kerala Land Reforms Act before the second preliminary decree was passed, is fatal; and he is precluded from raising the same contention in the proceedings for passing a final decree. The plaintiff, having failed to raise a defence which was available to him at the time of passing a preliminary decree, is precluded by principles of constructive *res judicata* from raising the same defence in the final decree proceedings.[1942]

The principles of *res judicata* are also applicable to petitions under Article 32[1943] and under Article 226[1944] even when the prior decisions have been given in writ proceedings in other

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1936. *Nikunja Behari v Jithendranath*, AIR 1956 Cal 613.
1937. *K Manilal and Co v Belgaum Muni Borough*, AIR 1968 Mys 323.
1938. *Mangu Ram v M Venketaraman*, (1987) 2 SCC 228.
1939. *PVG Rajugaru v State of Andhra Pradesh*, (1990) 2 SCC 61.
1940. *Babua Ram v State of Uttar Pradesh*, (1995) 2 SCC 689.
1941. *State of West Bengal v Suburban Agriculture Diary and Fisheries Pvt Ltd*, (1993) Supp 4 SCC 674.
1942. *Madhavan Nair v Rama Kutty Menon*, AIR 1994 Ker 75.
1943. *Daryao v State of Uttar Pradesh*, AIR 1961 SC 1457 : (1962) 1 SCR 574; *Raja Jagannath v State of Uttar Pradesh*, AIR 1962 SC 1563; *Phool Chand v Chandra Sankar*, AIR 1964 SC 782.
1944. *Radha Shyam v Patna Municipal Corp*, AIR 1956 Pat 182; *Shamsul v Asst Custodian of Evacuee Property*, AIR 1958 MP 82; *Maolraj v Bafindgan*, AIR 1960 P&H 602; *Manaben v UOI*, AIR 1960 Bom 196;

[Footnote No. 1944 contd.]

courts,[1945] provided they are on the merits.[1946] Dismissal of a writ petition under Article 32 by the Supreme Court even if *in limine* and without any speaking order where such dismissal is not on the ground of laches must be presumed to be on the ground that no fundamental right was violated and would bar a similar petition under Article 226.[1947] *In Hindustan Twyfords Ltd v Daulat Ram*,[1948] the Punjab High court held that a decision in an earlier writ petition under Article 226 could not bar a subsequent civil suit even though the question raised in the suit was based on the same right claimed in the writ petition. In another case, however, the same high court said that in view of *Daryoo v State of Uttar Pradesh*[1949] the general principle of *res judicata* would be attracted where a decision in a writ petition is pleaded as a bar against a subsequent suit if the other conditions are satisfied.[1950] The question before the Supreme Court was, whether the dispute relating to dismissal of an employee decided by the Deputy Registrar of Madhya Pradesh, Co-operative Societies Act, could be re-agitated before a labour court under the Industrial Disputes Act, 1947. It was held, that no doubt section 11 of the CPC does not in terms apply to Deputy Registrar of Madhya Pradesh, Co-operative Societies Act because it is not a court, but a tribunal constituted under the Societies Act is given special jurisdiction. So, the principles laid down thereunder *mutatis mutandis* squarely apply to the procedure provided under the Act, hence, operates as *res judicata*.[1951]

The decision in *Hindustan Twyfords* case must be considered as not correct in view *of Gulab Chand v State of Gujarat*[1952] where the Supreme Court observed that there was no good reason to preclude such decision on matters of controversy in writ proceedings under Articles 226 or 32 of the Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties.[1953] Where a writ petition has failed and the petitioner therein has not been given leave to appeal to the Supreme Court the dismissal of the writ petition by the high court would bar a subsequent writ petition on the same grounds.[1954] Where a writ petition was filed at an intermediate stage of administrative proceedings against the petitioner, but was dismissed, such dismissal was held not to be a bar against another writ petition filed after the termination of the proceedings.[1955] In this case, the Supreme Court had given permission to file the subsequent petition; but, such permission would not have been granted if the earlier dismissal was a bar against a subsequent petition. It is only the issue raised in a prior petition to which the principle of *res judicata* would apply if raised in the

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[Footnote No. 1944 contd.]
Makhan Lal v State of West Bengal, AIR 1963 Cal 6; *Nagabhushanam v Ankam Ankaiah*, AIR 1968 AP 74; *TV Setty v Bangalore Municipality*, AIR 1968 Mys 251; *Bansi v Addl Director, Consolidation of Holdings*, AIR 1967 P&H 28 : (1966) ILR 2 Punj 824; *HA Sarkies v Dist Magistrate, Meerut*, AIR 1966 All 458; *Mohd Fiazuddin v Custodian, EPAP*, AIR 1969 AP 158; *Padmanabhan v State*, AIR 1966 Ker 110; *A Subhan v UOI*, AIR 1966 Cal 570.

1945. *Daryao v State of Uttar Pradesh*, AIR 1961 SC 1457 : (1962) 1 SCR 574; *Jyothi Prakash v Chief Justice, Calcutta High Court*, (1963) 67 Cal WN 16.
1946. *Piara Singh v State of Punjab*, AIR 1962 P&H 498; *PD Sharma v State Bank of India*, AIR 1968 SC 958; *SR Mills, Virudhunagar v Government of Madras*, AIR 1968 SC 1196; *KVS Co Ltd v UOI*, AIR 1976 Del 51; *Super Surgical Co v Desikan*, AIR 1969 Mad 406; *R Pandhubai v Bombay Cycle Importing Co*, AIR 1970 Mad 474; *Bijay Cotton Mills v RMM Singh*, AIR 1965 Raj 213 : (1965) ILR 15 Raj 756.
1947. *Metal Corp of India v UOI*, AIR 1970 Cal 15 : (1969) 73 Cal WN 676.
1948. *Hindustan Twyfords Ltd v Daulat Ram*, AIR 1965 P&H 50 : (1964) 66 Punj LR 759.
1949. *Daryoo v State of Uttar Pradesh*, AIR 1961 SC 1457.
1950. *B Dass v State of Punjab*, AIR 1965 P&H 342.
1951. *RC Tiwari v MP State Co-op Marketing Federation Ltd*, (1997) 5 SCC 125.
1952. *Gulab Chand v State of Gujarat*, AIR 1965 SC 1153 : (1965) 67 Bom LR 673.
1953. *UOI v Nanak Singh*, AIR 1968 SC 1370.
1954. *Har Swarup v General Manager, Central Railway*, AIR 1975 SC 202 : (1975) 3 SCC 621.
1955. *State v BN Singh*, AIR 1971 All 359 : (1971) All LJ 90.

subsequent petition. Thus, where no plea was raised as regards the validity of dismissal from service on the ground of incompetence of the dismissing authority, it would be competent for the party to raise it in a subsequent suit.[1956] There is no bar of *res judicata* to a petition under Article 32 in a case where the high court has earlier dismissed a petition under Article 226.[1957] The general principle of *res judicata* has been applied to petitions for *habeas corpus*.[1958] (But see *SP Sharma v UOI*).[1959] The principle of *res judicata* has been applied to adjudications by industrial tribunals in a large number of decisions.[1960]

The Supreme Court in some if its recent decisions has expressed doubt about the extension of the sophisticated doctrine of constructive *res judicata* to industrial law which is governed by special methodology of conciliation, adjudication and considerations of peaceful industrial relations where collective bargaining and pragmatic justice claims precedence over formalised rules of decision based on individual contests, specific causes of action and findings on particular issues.[1961] In *NR Co-op Society v Industrial Tribunal, Rajasthan*,[1962] the Supreme Court has, however, held that the decision of the high court holding that the dispute in question was an industrial dispute would operate as *res judicata* in a subsequent proceeding. In *Workmen v Straw Board Mfg Co*,[1963] the Supreme Court assumed that the general principle of *res judicata* would apply to industrial adjudications. In *Punjab Co-op Bank Ltd v RS Bhatia*,[1964] the Supreme Court held that a finding by the labour court on the question whether the respondent was a workman or not would be a bar to the same issue raised in a subsequent proceeding under the Industrial Disputes Act, 1947. The recent trend in the decisions of the Supreme Court appears to be in favour of the view that the general principle of *res judicata* would apply to industrial adjudications. Where the question was as to whether a person is or is not a workman as defined in the Industrial Disputes Act, 1947, a decision therein by the tribunal is not *res judicata* in subsequent proceedings under Payment of Wages Act, 1936.[1965] The general principle of *res judicata* has been extended to proceedings under other statutes, such as Santhal Parganas Settlement Regulation 3 of 1872 under section 11, of which a decision by the settlement officer has the force of a decree[1966] and operates as a decision of quasi-judicial authorities.[1967]

While thus, the law is settled that the principles of *res judicata* can be applied to cases which do not fall within the four corners of section 11, it is equally well-settled that where a case does fall within its scope, the conditions laid down therein must be strictly complied with and that, if they are not, it is not permissible to hold that the matter is *res judicata* on general principles, as that would render the section nugatory; but, in cases where neither of the two proceedings

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1956. *Nawab Hussain v State*, AIR 1969 All 466.
1957. *Niranjan Singh v State of Madhya Pradesh*, AIR 1972 SC 2215 : (1972) 2 SCC 542.
1958. *PL Lakhanpal v UOI*, AIR 1967 SC 908 : [1967] 1 SCR 433.
1959. *SP Sharma v UOI*, AIR 1968 Del 156.
1960. *Burn and Co v Employees*, AIR 1957 SC 38 : (1957) SCJ 28 : (1957) SCA 1175; *Walford Transport Ltd v First Industrial Tribunal*, AIR 1963 Cal 275; *River Steam Navigation Co v Labour Court*, AIR 1963 Ass 86.
1961. *Mumbai Kamgar Sabha v Abdulbhai*, AIR 1976 SC 1455 : (1976) 3 SCC 832 : (1976) SCR 3 591; *SS Rly Co v Workers' Union*, AIR 1969 SC 513 : (1969) 2 SCR 131 : (1969) 1 LLJ 734; *Agra Electric Supply Co v Alladin*, AIR 1970 SC 512 : (1970) 1 SCR 808 : (1969) 2 SCC 598; *Workmen v Balmer Lawrie and Co*, AIR 1964 SC 728 : (1964) 5 SCR 344; *Sahadara Sahranpur Light Rly v Workers Union*, AIR 1969 SC 513 : (1969) 2 SCR 131 : (1969) 1 LLJ 734.
1962. *NR Co-op Society v Industrial Tribunal, Rajasthan*, AIR 1967 SC 1182.
1963. *Workmen v Straw Board Mfg Co*, AIR 1974 SC 1132 : (1974) SCC 681.
1964. *Punjab Co-op Bank Ltd v RS Bhatia*, AIR 1975 SC 1898 : (1975) SCC 399.
1965. *National Tobacco Co v Kalidas*, AIR 1962 AP 160.
1966. *Ram Kisto v Dhankristo*, AIR 1969 SC 204.
1967. *Lalchand v Radhakishan*, AIR 1977 SC 789 : (1977) 2 SCR 522.

or only one of them is a suit, the general principle of *res judicata* shorn of the limitations of this section, is to be applied.[1968] Section 11 prescribes the conditions under which the decision in a suit can be *res judicata* and where it fails to satisfy those conditions, it cannot be held to be *res judicata* on general principles.[1969] So when the prior suit was tried by a court not competent to entertain it, its decision could not be held to be *res judicata* on general principles.[1970] The rule that a decision on jurisdiction in a suit does not operate as *res judicata* applies also to decisions by administrative tribunals.[1971] When findings of a rent controller are allowed to become final, tenant is barred by principal analogous to *res judicata* to take a contrary stand in subsequent proceedings.[1972] When the first respondent retired from government service, the state moved the prescribed authority under the Act for an order of eviction under section 5 of UP Public Premises (Eviction of Unauthorised Occupant) Act, 1972. On 22 March 1978, the prescribed authority passed an order for eviction dismissing the application by observing that "it is not possible to hold that the house in question is public premises or that the opposite party is unauthorised occupant of it". After the said order, the appellant sent notice to the first respondent determining the lease, and on the expiry of the period specified in that notice, the appellant moved a fresh application under section 4 of the Act, before the prescribed authority, even this time the application dismissed on the principle of *res judicata* in that earlier order dated 22 March 1978, would operate as barred against the appellant from seeking eviction of the first respondent under the provisions of the said Act.

As per the order dated 22 March 1978, the prescribed authority found that the building belonged to the government estate and that there was no evidence that the tenancy was terminated before filing the application. In the present proceedings, there was no dispute that the notice was subsequently served on the first respondent determining the lease. If so, can the respondent be treated as an unauthorised occupant even if it is true that the building belongs to a government estate. It was held that there is no question of any bar of *res judicata* on the strength of the order dated 22 March 1978, particularly because there was a finding in that order that the building belonged to a government estate.[1973] Section 15 of Kerala Buildings (Lease and Rent Control) Act is a provision specifically incorporated to ensure finality of the decisions once rendered under the Act and to prohibit re-opening of such decisions which had become final. The object of this provision and that of section 11 of the CPC was more or less the same, namely that there should be end to litigation and no man should be vexed twice over for the same cause.[1974] Once the question of stay of the proceedings before the debt recovery tribunal having been agitated before the tribunal and having been already decided by the tribunal against the petitioner, it could not be re-agitated at the instance of the Petitioner by a separate application. A person cannot be allowed to agitate the same matter again before the same tribunal.[1975] The Gauhati High Court, relying upon *Guda Vijayaluxmi v Guda Ramchandra Sekhara Sastry*[1976] held that the principle of *res judicata* applies in certain cases also in a matter

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1968. *Jodhan v Board of Revenue*, AIR 1967 All 442.
1969. *Janakiramier v Neelakantier*, AIR 1962 SC 633; *Radhey Shyam v Beni Ram*, AIR 1967 All 28.
1970. *Sheik Md Ali v Hunter*, AIR 1943 Oudh 338 (FB); *Premchand v Dhanmal*, AIR 1954 Mad 384 : (1953) ILR Raj 505; *Neelkanta v Kesavan*, AIR 1956 TC 161 (FB) : (1956) ILR TC 87; *Vishu v Bhagadu*, (1957) 99 Cal LJ 72; *Rajalakshmi Dasi v Banamali*, AIR 1953 SC 33 : (1953) SCR 154.
1971. *Sushil Kumar Ghosh v Revenue Officer*, AIR 1976 Cal 1.
1972. *Prahba Mfg Industrial Co-op Society v Banwari Lal*, (1989) 2 SCC 69.
1973. *State of Uttar Pradesh v Roop Lal Sharma*, (1997) 2 SCC 62.
1974. *PN Govindan v Abdul Kri Subaida Beevi*, AIR 1998 Ker 50.
1975. *Tapan Kumar Mukhoty v Bank of Madura Ltd*, AIR 1999 Cal 305.
1976. *Guda Vijayaluxmi v Guda Ramchandra Sekhara Sastry*, AIR 1981 SC 1143 : (1981) 2 SCC 646.

under the Hindu Marriage Act.[1977] When the only son of the first wife accepted for a long time two—fifth share as a rightful share in the land in one village, and the Deputy Director of Consolidation, ordered accordingly, that decision becomes *res judicata*, it has to be so for all intents and purposes in the second village as well.[1978] The question of maintainability of the eviction petition on the ground of non-compliance of the statutory provisions as aforesaid was not heard and decided by the court. It was rather ordered to be considered along with other issues. It was held that the principle of *res judicata* does not apply.[1979] Where the respondent—claimant was neither a party to previous proceedings under Motor Vehicles Act, 1939, and nor he was impleaded in the previous proceedings, and as there was non-compliance of specific provisions contained in the proviso to section 110A(I) to the effect that the person who has not joined the application in a claim for compensation, shall be impleaded as respondents, then the judgement in previous proceedings cannot operate as *res judicata* as against him.[1980] Where a complaint under the Advocates Act, 1961 filed by a client against his advocate alleging that the advocate was negligent in discharge of his duties qua the client and had failed to act with due diligence and promptitude, was dismissed by the State Bar Council and its decision was affirmed by the Bar Council of India by a speaking order on merits, the decision of the Bar Council of India would operate as *res judicata* in the subsequent civil suit filed by the client against the advocate claiming damages on ground that the advocate was negligent.[1981]

The expression "former suit" does not exclude the application of the rule when suits are tried together. (See note "Suits tried together : One judgment" above.)

The general principle of *res judicata* has been extended to proceedings in a probate court, interlocutory orders in the same suit, proceedings under the Madras Religious Endowments Act, applications under section 26F of the Bengal Tenancy Act,[1982] judgments under the Land Acquisition Act[1983] and to awards made under the Arbitration Act, 1940 provided the subject matter is the same in both the earlier and the later reference.[1984] An award by an arbitrator is valid and binding until it is set aside and will operate as *res judicata* in subsequent proceedings between the same parties either in court or in a later arbitration proceeding.[1985] The question whether the principle of constructive *res judicata* applies to arbitration proceedings, is not yet settled. However, if an arbitrator decides not to go into a dispute on the ground that he has no jurisdiction, a subsequent reference on that dispute is not barred;[1986] but, the principle, though widely extended, does not apply to Orders made in exercise of administrative power.[1987] Nor

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1977. *Basu Deb Nath v Diptikona Nath*, AIR 1998 Gau 107.
1978. *Hardan Singh v Deputy Director of Consolidation*, (1993) Supp 1 SCC 457.
1979. *Prafulla Chandra Chadhoi v Sarat Rout*, AIR 1998 Ori 41.
1980. *United India Insurance Ltd v Sharda Adyanathaya*, AIR 1998 Kant 141 (FB).
1981. *Maghraj Calla v Kajodimal*, AIR 1994 Raj 11.
1982. *Mangal Pershad Dichit v Girija*, (1882) ILR 8 Cal 51; *Akhoy Kumari v Nalini Ranjan*, AIR 1950 Cal 493 : (1950) 54 Cal WN 815 (execution proceedings); *Balai v Nibaram*, AIR 1947 Cal 410 : (1947) 51 Cal WN 644. See also section 26F of the Bengal Tenancy Act 1885. *Ankapada v Yadlapalli*, AIR 1946 Mad 509 : (1946) ILR Mad 566. See also Madras Religious Endowments Act, 1959. *Krishnabai v Baburao*, AIR 1978 Bom 290. See section 38, Order of the Bombay Tenancy Act 1885; *A Thakurdas v A Venilal*, AIR 1977 Kant 60 (Introductory Orders); *Koran v Kamala Shetty*, AIR 1978 Ker 172; *Govindan v Raman*, AIR 1978 Ker 217 (deserver of tribunals under Kerala Law Reforms Act, 1963).
1983. *State of Jammu and Kashmir v Sanna Ullah*, AIR 1966 J&K 45.
1984. *Ashoka Construction Co v UOI*, AIR 1969 Tri 19.
1985. *PC Ray and Co v UOI*, AIR 1971 Cal 512.
1986. *Jiwnani Eng Works v UOI*, AIR 1978 Cal 228; *Talchar Coal Fields v Central Coal Fields*, AIR 1978 Cal 449.
1987. *Abhinav Vidyatrith v Charity Commr*, AIR 1967 Bom 194 : (1964) ILR Bom 819 : (1963) 65 Bom LR 459; *Rewa Coal Fields v Central Govt*, AIR 1969 MP 174.

can it be invoked where a statutory provision such as section 64A of the Andhra Pradesh Estates Abolition Act lays down cases wherein it is to be applied.[1988] (For execution proceedings, see comments on "Orders in Execution Proceedings" below.)

[s 11.28] Probate proceedings

When a question of the relationship of parties has been decided in a probate proceeding, a subsequent suit between the same parties involving the same question is barred by the rule of *res judicata*, although the words of the section are not strictly applicable. This was decided by the Privy Council in the case of *Kalipada v Dwijapada*[1989] confirming a decision of the Calcutta High Court[1990] and approving that court's dissent from previous decisions to the contrary.[1991] The under-noted cases[1992] though not expressly mentioned, must be treated as overruled. Any order passed after contention in a probate proceeding is *res judicata* in any subsequent proceeding against the caveators who contested it.[1993] In a Bombay case,[1994] *A*, alleging himself to be the executor of *B*'s Will applied for probate of the will, but *C*, *B*'s widow, opposed the application and the probate was refused on the ground that the Will was not proved. *C* then sued *A* to recover her husband's property and *A* was precluded from contending that he was entitled to possession as *B*'s executor. The court observed that though the judgment of the probate court refusing probate to *A* does not operate as a judgment in rem yet it operates as *res judicata* between *A* and *C* under section 83 of the Probate and Administration Act, 1881 (now replaced by section 295, Indian Succession Act, 1925, read with section 11 of the Code).

A decision on a question of relationship in a proceeding on an application for letters of administration after trial of an issue is binding as *res judicata* in a subsequent suit between the same parties.[1995] Conversely, the opinion expressed by the ordinary civil Courts on the question of genuineness of a Will is not *res judicata* in proceedings for probate or letters of administration-cum-*testamento annexo* in courts having exclusive jurisdiction to grant the same.[1996] It is not within the province of a probate court to decide questions of title to properties disposed off by the Will and consequently, where an application for letters of administration was dismissed under O XVII, rule 1 for non-appearance of the applicant, the expression of an opinion by the court on an issue as to estoppel with respect to the title to the properties would not be *res judicata* on the rights of the parties thereto.[1997]

[s 11.29] Succession Proceedings

Sections 372 to 384 of the Indian Succession Act, 1925 deals with issuance of succession certificates and require that the question arising under these sections should be determined

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1988. *M Venkataratnam v M Ramdas*, AIR 1971 AP 281.
1989. *Kalipada v Dwijapada*, AIR 1930 PC 22 : 57 IA 24 : (1930) 34 Cal WN 201.
1990. *Dwijapada Das v Kalipada Das*, AIR 1927 Cal 421 : (1926) 31 Cal WN 898.
1991. *Arunmoyi v Mohendra Nath*, (1893) ILR 20 Cal 888; *Lalit Mohan v Radharaman*, (1911) 15 Cal WN 1021.
1992. *Chintaman v Ramchandra*, (1910) ILR 34 Bom 589; *Maqubal Shah v Muhammad*, (1918) PR 49, p 167.
1993. *Nazbatuddown v Mirza Kurratulain*, (1903) ILR 31 Cal 186; *Venkaturatnam v Yanamadra*, AIR 1924 Mad 578 : (1924) 46 Mad LJ 383; *Babu Lal v Hari Baksh*, (1918) PR 13, p 60.
1994. *Kalyanchand v Sitabai*, (1914) ILR 38 Bom 309. See also *Brendon v Sundrabai*, (1914) ILR 38 Bom 272.
1995. *Maung Hmat v Ma Htay*, AIR 1923 Rang 257 : (1923) 1 Rang 258.
1996. *Rustomji v Manekba*, AIR 1955 Bom 447 : (1955) ILR Bom 821; *Avadh Narain v Sahi Dube*, (1958) ILR 2 All 1; *Chintamoni v Chari*, AIR 1962 Ori 224.
1997. *Hen Nolini v Isolye Saroj Bashini*, AIR 1962 SC 1471.

by summary proceeding. By summary proceeding, it is meant that the court should decide the question by a short inquiry leading up to and resulting in a rapid decision. The nature of this inquiry must depend on circumstances of each case. Thus, where the court feels that the question involved is not capable of decision in summary proceeding under the Indian Succession Act, 1925, it can leave the parties to establish their rights in a regular suit. Section 387 of the Act also enables the unsuccessful party to file a suit. The proceeding for grant of succession certificate being summary in nature, the finding arrived at in the said proceeding cannot operate as *res judicata* in subsequent proceeding.[1998]

The findings recorded regarding will, in an application for grant of succession certificate, cannot operate *res judicata* in subsequent suit by the same applicant praying for mandatory injunction against the defendant, that the defendant be directed to supply him locker number obtained by the defendant on the basis of the alleged will as set up by the defendant, giving him the right to operate the locker. The fact that the issues were raised and evidence was recorded in the succession certificate proceedings is not relevant.[1999]

[s 11.30] Orders in Execution Proceedings and Explanation VII

Prior to the insertion of Explanation VII into the section by the Amendment Act, 1976, it was well-settled that though the section in terms did not apply to execution proceedings and the orders made therein the general principle of *res judicata*; which is apart from the provisions of the section, applied, and that therefore, an order made in an execution proceeding bound the parties and those claiming through them and operate, as *res judicata* in a subsequent execution proceeding or a subsequent suit between the same parties. The new Explanation VII does two things: (i) it applies in express terms the provisions of this section to execution proceedings; and (ii) provides an artificial construction by laying down that references in the section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, a question arising in such proceeding and the former proceeding for the execution of the decree. Two results would follow:

(i) that in view of the express extension of the section to execution proceedings, the general principle of *res judicata* which used to be invoked apart from the provisions of the section can no longer be invoked; and

(ii) that the conditions for the application of the section set out earlier, must be satisfied. Such a compliance was also held to be necessary in a number of decisions which applied the general principle of *res judicata* to execution proceedings.

The leading case on the application of the general principle of *res judicata* to execution proceedings and from which the later decisions stem is *Ram Kirpal v Rup Kuari,*[2000] decided in 1883 by the Privy Council. The principle therein laid down was that this section was not exhaustive and that the principle of *res judicata* still remained distinct from the limited provisions of the section. Prior to that decision, the judicial opinion generally was that section 13 of the Code of Civil Procedure 1882 (corresponding to the present section), was not applicable to execution proceedings, presumably because the application of the section was confined to suits. The Privy Council held that though the section in terms did not apply to execution proceedings, the principle of *res judicata* applied to such proceedings. The question

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1998. *Binod Sahu v Chandrama Sahu*, AIR 2003 Ori 11. See Also *Savitri Devi v Manorama Bai*, AIR 1998 MP 114; *VK Kamalam v Panchali Amma*, AIR 1988 Ker 265.
1999. *District Red Cross Society v Joginder Pal*, AIR 2002 P&H 5.
2000. *Ram Kirpal v Rup Kuari*, (1884) ILR 6 All 269 : (1983) 11 IA 37.

in that case was whether a decision in the course of execution proceedings, that the decree which according to its true construction awarded future *mesne* profits, operated as *res judicata* so as to preclude the court from trying the question over again at a subsequent stage of the proceedings. The High Court of Allahabad held that it did not. The Privy Council reversed that view and observed:

> The matter decided by Mr Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. *The binding force of such a judgment depends not upon s* 13, Act 10 of 1877 (s 11 of the present Code), but upon general principles of law. If it were not binding, *there would be no end to litigation.* The parties were bound by the decision of Mr Probyn, who, whether right or wrong, had decided that it did (that is, that the decree awarded future *mesne* profits): a decision which, not having been appealed, was final and binding upon the parties and those claiming under them.

The ratio decidendi of *Ram Kirpal*'s case is that if a particular construction is put on a decree in proceedings on a former application for execution, it is not competent to the court to treat that construction as erroneous and put another construction on it as a subsequent stage of the execution proceedings.[2001] Parties cannot raise a second time, in the same suit or execution proceedings an issue that has already been determined either expressly or by necessary implication.[2002] This is so even if the question is about jurisdiction of the court.[2003] The judicial committee held in *Mungul Pershad v Girja Kant*,[2004] that a decision on an application for execution after hearing both the parties that the application is not barred by the law of limitation, though erroneous, is binding on the parties in subsequent proceedings in execution. Their Lordships said:

> The order was made by a court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it... Admitting for the sake of argument, but only for the sake of argument, that the decree was barred when the...application was made,...still his order, though erroneous, was valid, not having been reversed.

Similarly, a decision that an application for execution is barred by limitation, though erroneous, is conclusive between the parties and the question cannot be re-tried on a subsequent application for execution,[2005] but not the decision of the transferee court, after it had sent a return of non-satisfaction on the ground that it had been *functus officio.* Where the judgment-debtors did not raise any objection as to limitation against execution of the decree against them nor to the revival of the execution proceedings, they would be debarred at a subsequent stage to

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2001. *Beni Ram v Nandu Mal*, (1885) ILR 7 All 102 : (1885) 11 IA 181; *Venkatanarsimha v Papammah*, (1896) ILR 19 Mad 54.
2002. *Venkamamidi v Nannapaneni*, AIR 1943 Mad 449 : (1943) ILR Mad 804; *Sadashiv v Raja Kishtappa Naik*, AIR 1950 Hyd 15; *Behari Lal v Majid*, (1901) II R 24 All 138; *Bhawanishankar v Narainshankar*, (1899) ILR 23 Bom 536; *Doorvas v Govindaswamy*, AIR 1921 Mad 315 : (1921) 40 Mad LJ 556.
2003. *Prahlad Dora v State*, AIR 1969 Ori 21; *Gauranga Chandra v Naba Kumar Dey*, AIR 1965 Tri 1.
2004. *Akay Kumari v Nalini Ranjan*, AIR 1950 Cal 493 : (1950) 54 Cal WN 815; *Raja Ramand v Hussain Tewar*, AIR 1921 PC 23 : (1917) 40 Mad LJ 197 : 48 IA 45; *Sheoraj v Kameshar*, (1902) ILR 24 All 282; *Prokash Chandra v Baradakishore*, AIR 1934 Cal 282 : (1934) 61 ILR Cal 234; *Delhi and London Bank v Orchard*, (1877) 3 Cal 47 : 4 IA 127, is not inconsistent with the later decisions. See also Mr Leith's reply as reported in (1877) ILR 3 Cal 47.
2005. *Manjunath v Venkatesh*, (1892) ILR 6 Bom 54; *Bandey v Ramesh Chandra*, (1883) ILR 9 Cal 65.

challenge the sale on the ground that the revival was bad.[2006] A decision by the execution court on the question of the liability of the property of a judgment-debtor for attachment and sale will be *res judicata* and binding on the parties.[2007]

The principle laid down in *Ram Kirpal*'s case referred to above is that when a question has been raised in an execution proceeding and decided, the decision, even if erroneous, is binding on the parties, and the same question cannot be retried in subsequent proceeding in execution or in a subsequent suit between the same parties;[2008] in other words, that the principle of *res judicata* is applicable to proceedings in execution. This principle has been followed by the high courts of India.[2009] The question of constructive *res judicata* in execution proceedings came before the Supreme Court in *Mohan Lal Goenka v Binoy Krishan Mukherjee*[2010] wherein the Hon'ble Supreme Court following the earlier decision of Privy Council held that the principles of constructive *res judicata* will be applicable even in execution proceedings;[2011] but, this principle does not apply, unless the parties to the subsequent proceeding were also parties to the former proceeding[2012] and had litigated under the same title.[2013] Nor does it apply, unless the former application was heard and decided. Hence, an order dismissing an application for execution for default of appearance,[2014] or allowing it to be struck off "for the present",[2015] or allowing it to be withdrawn with liberty to present a fresh application,[2016] is no bar to a fresh application for execution. Similarly, where an application for execution under O XXI, rule 32 is dismissed on the ground that the decree-holder had not given the judgment-debtor an opportunity of obeying it, a second application for execution after such opportunity had been given is not barred as *res judicata*;[2017] but, dismissal of an execution application for default of appearance by the decree-holder after a notice to the opposite party who appears in response

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2006. *Prem Lata v Lakshman Prasad*, AIR 1970 SC 1525 : (1970) 3 SCC 440; *Pushpa v Ganpat Singh*, AIR 1977 Raj 216.
2007. *Bhagwat Pershad v Abdul Basit*, AIR 1962 P&H 379.
2008. *Shyam Sunder v Mathura Prasad*, AIR 1948 Pat 192; *Benny Krishna v Mohanlal*, AIR 1950 Cal 287; *Bal Mukund v Firm Prithiraj*, AIR 1951 Pat 333; *Habibur Rahman v Vijaya Charan*, AIR 1959 Pat 31.
2009. *Shyam Sunder v Ramdas*, (1946) ILR 25 Pat 297; *Dunna Venkata Rao v Surya Rao*, AIR 1950 Mad 2 : (1950) ILR Mad 39; *Kapur Chand v Kanhaiya Lal*, AIR 1924 All 34 : (1923) ILR 45 All 735; in appeal from AIR 1922 All 247 : (1922) ILR 44 All 130 (decision as to which persons are liable in execution and what property is liable to be taken in execution); *Doorvas v Govindaswami*, AIR 1921 Mad 315 : (1921) 40 Mad LJ 556 (erroneous finding of application to wrong court); *Shamrao v Malkarajun*, AIR 1931 Bom 451 : (1931) 33 Bom LR 797 (finding that a judgment-debtor is not an agriculturist); *Mir Hassan Ali v Sanli Begum*, AIR 1931 Bom 507 : (1931) 33 Bom LR 1139; *Venkatachalapathi v Venkatapapayya*, AIR 1932 Mad 86 : (1932) ILR 55 Mad 495; *Rangappa v Rindawa*, AIR 1954 Bom 139 : (1953) ILR Bom 993, where it was further observed that the word "suit" might in certain circumstances include 'execution proceedings'; *Sadhucharan v Sudarashan*, AIR 1965 Ori 2; *Girdharan Prasad v State of Bihar*, AIR 1968 Pat 77; *Maqbool Alam v Khodaija*, AIR 1966 SC 1194; *Presidency Industrial Bank v LH Industries*, AIR 1969 Bom 84 : (1968) 70 Bom LR 373; *R Rajamma v A Saraswathamma*, AIR 1973 AP 132; *Jambu Anna v Shri Bapu*, AIR 1972 Bom 141 : (1971) ILR Bom 772 : (1971) 73 Bom LR 606; *Revati Devi v Khilali Ram*, AIR 1967 Del 199.
2010. *Mohan Lal Goenka v Binoy Krishan Mukherjee*, AIR 1953 SC 65.
2011. *Kamla Bai v Mangi Lal Dulli Chand*, (1987) 4 SCC 585.
2012. *Gnanambal v Parvathi*, (1892) ILR 15 Mad 477; *Harendra Lal v Sham Lal*, (1900) ILR 27 Cal 210.
2013. *Gourmoni v Jugat Chandra*, (1890) ILR 17 Cal 57, p 63.
2014. *Ram Nardin v Basudeo*, AIR 1947 Pat 298 : (1946) ILR 25 Pat 595; *Lakshmibai v Ravji*, AIR 1929 Bom 217 : (1929) 31 Bom LR 400; *Hazura Singh v Jewon Singh*, AIR 1958 P&H 339; *Jethmul v Sakina*, AIR 1961 Raj 59.
2015. *Thakur Persha v Sheikah Fakirullah*, (1895) ILR 17 All 106 : 22 IA 44.
2016. *Hari v Yamunabai*, (1899) ILR 23 Bom 35.
2017. *Kishore Bun Mohunt v Prosunno Coomar*, (1894) 21 Cal 784 : 21 IA 89.

to it, would amount to abandonment and bar a subsequent application.[2018] On the other hand, where the judgment-debtor despite of notice under O XXI, rule 66 absents himself and this does not raise any objection to the sale, he would be barred at a subsequent stage to raise such objections against the sale which were available to him and which he might and ought to have raised.[2019]

There can be no doubt that when an application for setting aside the sale is made, the order passed by the executing court either allowing or dismissing the application, will be final and effective, subject to an appeal that may be made under the provisions of the CPC. It is inconceivable that even though no appeal has been filed against an order dismissing an application for setting aside the sale, another application for setting aside the sale can be made without first having the orders set aside. Such an application will be barred by the principle of *res judicata*.[2020] An order for arrest of the judgment-debtor made after notice to him and inquiry has been held to mean a finding that he has had since the date of the decree means to pay. That finding is binding in a subsequent proceeding.[2021] Further, the decision in the former application must have been necessary for the determination of the application. Thus, if *A* applies for execution, and *B* pleads limitation, and neither party appears on the date fixed for the hearing of the objection, and or, *A*'s application is dismissed and *B*'s objection is disallowed, *B* is not precluded from raising the plea of limitation on a fresh application for execution made by *A*, the reason being that *A*'s application being dismissed for default, it was not necessary for the court to decide the question of limitation.[2022] Where the execution case is dismissed for default after the failure of the judgment-debtor to show cause after a notice under O XXI, rule 22 had been served on him and an order is passed which had the effect that the decree was now capable for execution.[2023] Where without adopting the special procedure prescribed in O XXI, rule 53, a money decree was sold in execution and the auction-purchaser applied to execute the decree, and his application was ordered after hearing the judgment-debtor, it is not open to the latter at a later stage to raise the objection as to the validity of the sale as the same must be deemed to be constructively *res judicata*.[2024] Where a judgment-debtor filed a petition objecting to execution on the ground that it was barred by limitation and that was dismissed for default and an application to restore the same was also dismissed, he is barred by principles of *res judicata* from raising the question of limitation in a fresh objection petition.[2025] But, where, in the execution proceedings, an application for reviewing of shares of parties in the property as determined in preliminary decree for partition of suit property is rejected by the executing court on the ground that it had no jurisdiction to modify the decree, the subsequent fresh application by the parties for modification of judgment and decree filed before the court which passed the judgment is not barred by *res judicata*.[2026]

2018. *Ram Chandra Nahaka v Bharat Ram*, AIR 1967 Ori 38 : (1964) ILR Cut 494.
2019. *Ghanshyamdas v Ghambir Mal*, AIR 1965 Raj 155 : (1964) ILR 14 Raj 431.
2020. *Ganpat Singh v Kailash Shanker*, (1987) 3 SCC 146.
2021. *Ulahannan Job v The Prudential Trust*, AIR 1965 Ker 16 : (1964) ILR 2 Ker 200.
2022. *Bholanath v Prafulla*, (1901) ILR 10 Cal 122; *Kashinath v Ramchandra*, (1883) ILR 7 Bom 408; *Nageshwar v Jai Bahadur*, AIR 1932 Pat 357 : (1932) ILR 11 Pat 607.
2023. *Aswini Kumar v Karamat Ali*, AIR 1948 Cal 165 : (1948) 82 Cal LJ 278.
2024. *Shanmugavelu v Karuppanna Swami*, AIR 1954 Mad 1071.
2025. *Soni Dibya v Kanhucharan*, AIR 1961 Ori 86; *Ram Narain v Basudev*, AIR 1947 Pat 298 : (1946) ILR 25 Pat 595. See also *Bhagwati v Radhakishan*, AIR 1950 Pat 354; *Biswanath v Subala Dasi*, AIR 1962 Cal 272.
2026. *Jagdish Chand Gupta v Rajinder Parshad*, AIR 2002 P&H 251.

[s 11.30.1] Constructive Res Judicata in Execution Proceedings

Where an assignee of a decree applied for execution under O XXI, rule 16, and the judgment-debtor took no objection to the validity of the decree, it was held that he was not debarred on the principle of Explanation IV from impeaching the validity of the decree in a subsequent suit;[2027] but, the principle of Explanation IV has been applied to a subsequent stage of the execution proceeding. Thus, if the judgment-debtor, being entitled and having an opportunity to raise a plea in bar of execution, eg, a plea of limitation, fails to do so and execution is ordered, he will be precluded from raising the same plea at a subsequent stage of the execution proceedings[2028] unless the case falls within the rule that there cannot be an estoppel against statute.[2029] Where a plea of limitation was raised and subsequently given up, the judgment-debtor was held to be precluded from raising the same at a later stage.[2030] The same rule would apply to the case where the decree-holder fails to raise a question which would have sustained his attachment but which he did not raise in the former execution proceedings where objection to the attachment was taken by the judgment-debtor.[2031] His legal representative who did not have proper notice of the execution proceedings would not be so precluded on the ground that he had no opportunity to raise the plea.[2032] Also, where *A* applies for execution of a decree against *B*, and an order is made directing execution to issue, *B* cannot in a subsequent application for execution raise the plea that the first application for execution was barred by limitation.[2033] Where the heirs of a deceased judgment-debtor were brought on record and orders passed directing execution and transferring the proceedings to another court, it was held that it was not open to the legal representative to challenge the correctness of those orders at a later stage of the execution.[2034] Again, when a judgment-debtor objected in

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2027. *Ram Charan v Salik Ram*, AIR 1930 All 628 : (1930) ILR 52 All 217; *Mangat Rai v Duli Chand*, AIR 1933 All 57 : (1933) ILR 55 All 735.
2028. *Sankar Ramkrishna v Daga Tanaji*, AIR 1949 Bom 79 : (1948) ILR Bom 517 : (1948) 50 Bom LR 610; *Sham Sundar v Dhiruendra*, AIR 1950 Pat 465 : (1950) ILR 29 Pat 732; *Promotha v Babu*, AIR 1945 Cal 335 : (1945) 49 Cal WN 260; *Harishchandra v Dinesh*, AIR 1946 Cal 375 : (1946) 50 Cal WN 667; *Venkoteranga v Sithama*, AIR 1941 Mad 440; *Nanda Rai v Raghunandan*, (1885) ILR 7 All 282 (limitation); *Desaiappa v Dundappa*, (1920) ILR Bom 44 227 (limitation); *Gadigappa v Shidappa*, AIR 1924 Bom 495 : (1924) ILR 48 Bom 638 (limitation); *Prabhulingappa v Gurunath*, (1920) 22 Bom LR 1389 (limitation); *Raghubar v Gokaran*, AIR 1926 Oudh 291 : (1926) 1 Luck 171; *Rajitagiripathy v Bhanani*, AIR 1924 Mad 673 : (1924) ILR 47 Mad 641 (transfer of decree, limitation); *Sher Singh v Daya Ram*, (1891) ILR 13 All 564 (execution barred under O XXIII, rule 1); *Dambar Singh v Kaliansingh*, AIR 1922 All 27 : (1922) ILR 44 All 350 (decree not capable of execution); *Brajlal v Atkinson*, (1920) 5 Pat LJ 639 (non-service of notice on transfer or under O XXI, rule 16); *Taj Singh v Jagan Lal*, (1916) ILR 38 All 289 (validity of transfer of decree); *Govinda v Krishna*, AIR 1923 Mad 649 : (1923) 45 Mad LJ 71 (whether decree capable of execution); *Makund v Saraswati*, (1919) 29 Cal LJ 245 (claim for mesne profits); *Madilidi v Satti*, (1918) 35 Mad LJ 312 (propriety of order of attachment). See also *Ramchandra v Shrinivas*, AIR 1922 Bom 238 : (1922) ILR 46 Bom 467; *Mahadeo v Trimbakbhat*, (1919) 21 Bom LR 344; *Dip Prakash v Bohra Dwarka Prasad*, AIR 1926 All 71 : (1926) ILR 48 All 201 (disobedience to decree for injunction); *Daw Ohn Bwin v U Ba*, AIR 1930 Rang 213 : (1930) ILR 8 Rang 302; *Lalit Mohan v Sarat Chandra*, AIR 1933 Cal 855 : (1933) 37 Cal WN 752; *Venkappa v Lakshmi Kant*, AIR 1956 Hyd 7 (FB) : (1955) ILR Hyd 797; *Abdul Aziz v Official Receiver*, (1958) 2 Mad LJ 526; *Karana Kodan Gowda v Manika Pai*, AIR 1959 Ker 384 : (1958) ILR Ker 314.
2029. *Sham Sundar v Dhirendra*, AIR 1950 Pat 465 : (1950) ILR 29 Pat 465; *Kameshwar v Krishnanand*, AIR 1955 Pat 423.
2030. *Lakkarji v Bhagavati Deem*, (1957) ILR 2 All 118.
2031. *Sha Shivara v Edappakath Ayissa Bi*, AIR 1949 PC 302 : (1949) 54 Cal WN 55 (PC).
2032. *Adisesha Ayyar v Pappammal*, AIR 1950 Mad 341.
2033. *Drigbijay v Bhagwan*, AIR 1930 Oudh 65 : (1885) ILR 7 All 282 : (1930) 5 Luck 458; *Rama Adhar v Nemkumar*, AIR 1953 All 139.
2034. *Akshoy Kumari v Nalini Rajan*, AIR 1950 Cal 493 : (1951) ILR 2 Cal 240.

an execution proceeding that an attachment was not legal and proper, only because the decree was declaratory, it was not open to him to object to the sale on the ground that the property was not liable under section 60 to attachment and sale.[2035] An order for sale after service of notice to the judgment-debtor implies the finding that the property was saleable. It is not then open to the judgment-debtor, whether before or after the sale, to object that the property is not saleable by reason of section 49(M) of the Bihar Tenancy Act.[2036] If the decree has been executed on previous applications, the judgment-debtor cannot in a subsequent application object that the decree is merely declaratory.[2037] An objection to execution on the ground that the decree sought to be executed is a nullity is one which the court executing it can decide and if such an objection is not taken and there is an order directing execution, the question is *res judicata* and it is not open to the judgment-debtor to raise the objection at a later stage.[2038] When properties are sold in execution of a decree in contravention of some provisions of law, the question has been raised whether the judgment-debtor is barred by principles of *res judicata* from raising the question of the validity of the sale subsequently. The preponderance of judicial opinion is in favour of the view that he is barred.[2039]

The principle of *res judicata* including constructive *res judicata* operates in execution proceedings and the order made under rule 22, clauses (1) and (2) of O XXI, CPC, which results in closure of preliminary stage and commencement of next stage operates as *res judicata*, and precludes the judgment-debtor from raising objections to continuance of proceeding thereafter unless such order is appealed against as a decree. O XXI, rule 22 culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under O XXI, rule 23 can only be taken if the executing court either finds that after issuing notice under O XXI, rule 21 the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing court. The sub-rule (1) as well as sub-rule (2) under O XXI, rule 22 operates simultaneously on the same field. Sub-rule (1) operates when no objection is filed, and then the court proceeds and clears the way for going to the next stage of the proceedings, namely, attachment of the property and if the court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been overruled. Whether the order is made under sub-rule (1) or sub-rule (2), it has the effect of determining the preliminary stage before the attachment process is set in motion. In this background, the order of the court to proceed with attachment on finding that no objection has been raised also operates as an order deciding the preliminary stage of the execution proceedings and operates as if the judgment-debtor has no objection to file. If thereafter, the judgment-debtor wants to raise an objection in the same proceedings in the absence of any modification of order passed under O XXI, rule 22, sub-rule (1) or (2) he has to take recourse to get rid of the order by way of appeal. If it has not been agitated and since the order for proceeding by the judgment under O XXI, rule 22 amounts to a decree under section 47 of the CPC and is appealable as a decree, i.e., to say it is not an appeal against the interim order but an appeal against the decree which is provided against the final order only

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2035. *Birju Safdar Ali v The Ideal Bank*, AIR 1949 EP 94 (FB); *Alagappa Chettiar Muthukaruppa Chettiar*, AIR 1947 Mad 305; but see *Sham Sundar v Dhirendra*, AIR 1950 Pat 465 : (1950) ILR 29 Pat 465; *Gangadhar v Jagmohan*, AIR 1931 Bom 446 : (1931) 33 Bom LR 781.
2036. *Jayanand v Dukhia*, AIR 1965 Pat 86.
2037. *Bibi Ved v Balkrishna*, AIR 1933 Lah 594 : (1933) ILR 14 Lah 409.
2038. *Dadu Raghu Patil v Tukaram*, AIR 1959 Bom 221 : (1958) ILR Bom 592.
2039. *Venkateshaiah v Veeraiah*, AIR 1958 AP 1 (FB) : AIR 1957 AP 326; *Raman Lal v Shanti Lal*, AIR 1961 All 178; *Baijnath Prasad v Ram Phal*, AIR 1962 Pat 72 (FB). See also contra *Gowri v Ude*, AIR 1942 Lah 153 : (1942) ILR Lah 559; *Mohanram v Sundararamier*, AIR 1960 Mad 377 : (1960) ILR Mad 747.

means that at the different stages of the execution orders passed by the executing court have been attached finality, unless they are set aside by way of appeal before the higher forum, else, they bind the parties at the subsequent stage of the execution proceedings so that the smooth progress of execution is not jeopardised and the stage which reached the finality by dint of various orders of O XXI operates as *res judicata* for the subsequent stage of the proceedings. Since the order passed at different stage itself operates as decree and appealable as such, the same cannot be challenged in appeal against subsequent orders also, because appeal against an order passed under O XXI, rule 22 does not fall as appeal against order at initial stage but amounts to a decree finally determining the question. That is why no appeal against orders made under O XXI have been provided under O XLIII. In this background where a judgment-debtor has an opportunity to raise objection which he could have raised but failed to take and allowed the preliminary stage to come to an end for taking up the matter to the next stage for attachment of property and sale of the property under O XXI, rule 23 which fell within the above principle, the judgment-debtor thereafter cannot raise such objections subsequently and revert back to earlier stage of proceedings unless the order resulting in termination of preliminary stage which amounts to a decree is appealed against and order is set aside or modified.[2040]

In execution of a decree for eviction against a tenant, in a proceeding under O XXI, rule 27, the executing court held that the sub-tenant had become direct tenant under the landlord, in view of section 20 of the Delhi and Ajmer Rent Control Act, 1952. The said order was neither challenged in appeal or revision, nor any suit was filed for setting aside the order. It was held that the order had become final and was binding on the tenant. In a subsequent suit filed by the tenant for eviction of the sub-tenant, it could not be contended that the order was a nullity and should, therefore, be ignored. Merely because the executing court had wrongly applied the provisions of section 20 of the Delhi and Ajmer Rent Control Act (which stood repealed), it did not mean that the order passed by the executing court was a nullity. The executing court had the jurisdiction to decide the application submitted by the decree-holder under O XXI, rule 97of the CPC. The mere fact that while deciding the said application the executing court acted wrongly, did not mean that the said order of the executing court was without jurisdiction and a nullity.[2041] If an application under O XXI, rule 97 has been decided on the merits after adjudication and determination of the questions involved in O XXI, rule 101 of O XXI, CPC as also other grounds raised in the application, then of course, that would furnish a ground for the application of the principle of constructive *res judicata*, but if it is not adjudicated and determined after due application of mind, the order passed on such an application does not acquire the character of a decree. The dismissal of the application under O XXI, rule 97 of the CPC passed on the request for withdrawal of the application, cannot acquire the character of a decree and, therefore, the principle of constructive *res judicata* cannot be made applicable to such proceedings.[2042]

Where a transferee court had returned the execution papers to the court which passed the decree with a certificate of non-satisfaction and thereafter the decree-holder filed a fresh application for execution in the transferee court itself and no objection was taken by the judgment-debtor on the ground that there had been no fresh order transferring the decree for execution, it was held that such an objection could not be taken at a later stage of the

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2040. *Barkat Ali v Badrinarain*, AIR 2001 Raj 51 (DB).
2041. *Gopal Krishan v Ram Lal*, AIR 1989 Raj 24.
2042. *Jaiprakash v Khimaraj*, AIR 1991 Raj 136.

execution.[2043] Similarly, a decree-holder would be precluded from raising an objection that a non-satisfaction, certificate was not sent to the transferor court even though infact such certificate had not been sent.[2044] The principle of constructive *res judicata* will apply even when a question of jurisdiction is involved and a contention therefore that the executing court had no jurisdiction to execute the decree will, if not taken at earlier stages, not be open to the judgment-debtor later.[2045] Where the judgment-debtor resisted execution on the ground that he was entitled to protection under a Rent Act and that was overruled, it is not open to him in a subsequent execution application to raise the plea that civil courts had, under the provisions of the said Act, no jurisdiction over the matter.[2046] A decision that the decree is executable not only against the property charged, but also against other properties will be *res judicata* at later stages of execution.[2047]

Where the amount claimed by the decree-holder in his execution petition is more than what is due to him on the terms of the decree, the judgment-debtor is not barred by principles of constructive *res judicata* from raising the question of the correct amount due by reason of his failure to object to the amounts claimed at the earlier stages.[2048] To hold otherwise would be to recognise a power in the execution court to supersede the decree by its own orders.[2049] It is really a case for the court to correct what is clearly a clerical mistake. Where the point is something more than a mere calculation of interest in terms of a decree and involves judicial determination of the rights of the parties as for example liability for *mesne* profits, interest and the like, different considerations might arise and where a decree-holder had not claimed interest in his execution application and it was dismissed, part-satisfaction being recorded, it was held that he was barred from claiming interest in a subsequent application;[2050] but, a judgment-debtor himself has been held not to be precluded by principles of constructive *res judicata* from disputing his liability to pay interest on the ground of his failure to object to it at earlier stages when the principal amount still remained payable.[2051] After a decree was scaled down under the provisions of the Madras Agriculturists' Relief Act, 1933, it is not open to the judgment-debtor in answer to an application for execution subsequently filed by the decree-holder to plead payments alleged to have been made prior to the scaling.[2052] The under-mentioned cases[2053] contain observations to the effect that Explanation IV should not be extended to execution proceedings and that an order made in execution proceedings should not have the force of *res judicata* unless the point raised in a subsequent proceedings

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2043. *Mohanlal v Binoi Krishna*, AIR 1953 SC 65 : [1953] SCR 377 : (1953) SCJ 130.
2044. *Pannalal v Appalabhuktala*, AIR 1969 Ori 147 : (1968) ILR Cut 899.
2045. *Direndranath v Satishchandra*, AIR 1956 Pat 4 : (1955) ILR 34 Pat 746; *Jagannath Ramasami v Lakshmi Narain*, AIR 1960 Ori 197 (FB) : (1961) ILR Cut 9; *Sathappa Siddappa v Heerachand Atmaram*, AIR 1961 Mys 54; *Raman v Ambujakshi Amma*, AIR 1962 Ker 15.
2046. *Usha Devi v Devidas*, AIR 1955 Bom 239 : (1955) ILR Bom 546.
2047. *Lakshmi Narayana v Lakshmi Venkiamma*, AIR 1957 AP 207.
2048. *Kalyan Singh v Jagan Prasad*, (1951) ILR 37 All 589; *Sheo Mangal v Hulsa*, AIR 1922 All 413 : (1921) ILR 44 All 159; *Phul Chand v Kanhaiya Lal*, AIR 1922 All 247 : (1922) ILR 44 All 130; *Ulaganath v Alagappa*, AIR 1929 Mad 903; *Alagappa v Ramanatha*, AIR 1933 Mad 466; *Kailash Tevar v Ramaswami*, AIR 1949 Mad 238; *Bapanna v Vengiah*, AIR 1937 Mad 511; *Subbarao v Satyanarayana*, AIR 1953 Mad 948; *Rajababu v Syed Muhammad*, AIR 1961 Raj 227.
2049. *Ulaganatha v Alagappa*, AIR 1929 Mad 903.
2050. *Haranath v Hirdai Narain*, AIR 1953 Pat 242.
2051. *Prakashmal v Thikana Khatu*, AIR 1954 Raj 54 : (1952) ILR Raj 224.
2052. *Nunna Seshamma v Kalla Gangaraju*, AIR 1957 AP 841.
2053. *Prithi v Jamshad*, AIR 1922 Pat 289 : (1922) ILR 1 Pat 593; *Gourmoni v Jughat Chandra*, (1890) ILR 17 Cal 57, p 63; *Somasundaram v Chokkalingam*, (1917) ILR 40 Mad 780; *Subramania v Rajeswara*, (1917) ILR 40 Mad 1016; dissented from in *Raghubar v Gokaran*, AIR 1926 Oudh 291 : (1926) 1 Luck 171.

was actually raised in the former proceedings and decided. The Allahabad High Court has held that the principle of constructive *res judicata* is not applicable in execution proceedings unless the prior execution application has been infructuous, i.e., unless the decree holder by that application has obtained some relief which the judgment-debtor's objection in the subsequent application would, if successful, have prevented him from obtaining.[2054] Having regard to the observations of their Lordships of the Privy Council in *Ram Kirpal*'s case, it is submitted that there is no reason for limiting the scope of the application of the principle underlying this section to execution proceedings, subject of course to the conditions set out in the section. This question has since been considered in a number of decisions and the view has generally been accepted that the bar of *res judicata* will apply even if the execution application was infructuous, provided the other conditions are satisfied.[2055]

Where the question whether the award of interest to the decree-holder was governed by section 34 of the Code had been decided in the suit, it is not open to the judgment-debtor to re-agitate that question in the course of execution proceedings.[2056] So also, where a question whether a particular plot of land was *ryoti* or not was in issue in the suit and a decree was passed on a finding that it was not *ryoti*, it is not open to the judgment-debtor in proceedings in execution for the sale of the land to raise the contention that it was not *ryoti* land, the sale of which is prohibited by sections 46 and 47 of the Chota Nagpur Tenancy Act;[2057] but, this principle would not apply to the case of a successful judgment-debtor against a finding adverse to him since he had no right to challenge such a finding in appeal.[2058]

Though the said explanation may not *stricto sensu* apply to the trial stage, the principle couched in it must gain application thereto. It is immaterial that the writ petition was filed only subsequently because the findings made therein became final as no appeal was filed against the judgement. The basic idea in the rule of *res judicata* has sprouted from the maxim *nemo debet bis vexari pro una et eadem causa*. The principle of *res judicata* can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of proceeding becomes final, it would be binding at the subsequent stage of that proceeding.[2059] When once a decree is passed, it is obvious that the defendant in the suit, or the judgement- debtor would be precluded from carrying on blasting operations in his property. To say, when he is succeeded by other, they would be bound by the restraint relating to the enjoyment of the particular property, is to derogate from the principle of public policy and that there shall be no second litigation in respect of the same right and the same property. It cannot be the policy of law that every time an assignment of the decree of the schedule property takes place, the decree-holder should

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2054. *Mannu Singh v Hanuman Singh*, AIR 1951 All 398. See also *Ajimuddin v Budheswar Sarma*, AIR 1951 Assam 75 : (1950) ILR 2 Assam 215; *Nizamuddin v Ikramul Haq*, AIR 1947 All 143 : (1946) ILR All 843; *Gendalal v Hazari Lal*, AIR 1936 All 21 (FB) : (1936) ILR 58 All 313; *Ali Rasul v Balkishan*, AIR 1937 All 446 : (1937) All LJ 482.
2055. *Venkatarama v Chinnaseethamma*, AIR 1941 Mad 440 (FB) : (1941) 1 Mad LJ 270; *Adilakshmi v Srinivasa*, AIR 1944 Mad 193; *Vairavan Chetty v Rayaloo Iyer*, AIR 1951 Mad 844 : (1951) 1 Mad LJ 298; *Sadashiv v Radhakistappa*, AIR 1950 Hyd 15; *Ashvini Kumar v Karamat Ali*, AIR 1948 Cal 165; *Amar Singh v Gulabchand*, AIR 1960 Raj 218 : (1960) ILR 10 Raj 835; dissenting from *Surjan Singh v Gindorilal*, AIR 1957 Raj 398; contra *Gendalal v Hazarilal*, AIR 1936 All 21 : (1936) ILR 58 All 313; *Appaiah v Venkataratnam*, AIR 1954 Mad 1 : (1953) 2 Mad LJ 225; *K Kalabhai v CC Sodagar*, AIR 1973 Guj 19 : 14 Guj LR 136.
2056. *Palai Bank v Ramaswami Nadar*, AIR 1959 Ker 194.
2057. *Chintamani v Zahiruddin*, AIR 1956 Pat 57.
2058. *Tarabai v UOI*, AIR 1971 Cal 225 : (1970) 74 Cal WN 789.
2059. *Ashok Kumar Srivastava v National Insurance Co Ltd*, (1998) 4 SCC 361.

institute a fresh suit against the assignee so as to prevent him from disobeying the decree obtained by the decree-holder against the original owner of the property.[2060]

When along with application under O IX, rule 13, CPC, an interim application is filed by judgment debtor for stay of execution proceeding, another application seeking stay of execution of decree was filed earlier by judgment debtor and was dismissed by the court and the said order had attained finality, the subsequent interim application in question would be hit by doctrine of *res judicata*.[2061]

It is clear that it is not that once a person is detention in civil prison, he cannot be proceeded with on second occasion for the fresh breach of injunction committed by him. Each breach is independent and is actionable in law. Merely by putting a person in civil prison the decree does not get wiped out or satisfied. The court of execution cannot apply the doctrine of constructive *res judicata* and hold that the judgment-debtor cannot be imprisonment on second occasion.[2062]

[s 11.30.2] *Ex parte* Orders

An *ex parte* order in execution proceedings passed after issue of notice and after the court is satisfied that the notice was served, is on general principles, binding as *res judicata* where the order would necessarily imply that the decree is capable of execution;[2063] but, the order will not have the force of *res judicata* if no notice is issued;[2064] or if the notice is not duly served,[2065] or if the notice does not clearly specify the nature of the claim.[2066] An order in an execution application which prays for a relief not granted by the decree[2067] is not *res judicata*, nor an order on an application of the decree-holder to sell properties not mentioned in the execution petition,[2068] unless the judgment-debtor had specific notice of the matter or knowledge thereof. An *ex parte* order that an application for execution is in time, will not operate as *res judicata*.[2069] If the judgment-debtor omits to appear on notice under O XXI, rule 22, he will not be debarred from objecting in a subsequent execution application that the prior application was not in the form prescribed by law and did not afford a starting point for limitation.[2070] Where no notice was issued to the judgment-debtor under O XXI, rule 22, but one was served for settlement of sale proclamation under O XXI, rule 66, and he did not appear, it was held that he was not barred from raising the contention that the property was not saleable under

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2060. *Chothy Theyyathan v John Thomas*, AIR 1997 Ker 249.
2061. *Subbiah v Sakthi Finance Ltd*, AIR 2006 (NOC) 1296 (Mad).
2062. *Yashodabai Ganesh Naik Gauvekar v Gopi Mukund Naik*, AIR 2003 Bom 77.
2063. *Bangsidar v Jagmohan*, AIR 1945 Oudh 21 : (1944) ILR 19 Luck 93; *Venkataranga v Sithamana*, AIR 1941 Mad 440 : (1941) 1 Mad LJ 270; *Subbiah v Ramanathan*, (1914) ILR 37 Mad 462; *Lakshmanan v Kuttayan*, (1901) ILR 24 Mad 669.
2064. *Noor Mahomed v Mahomed Khan*, AIR 1930 All 699 : (1930) ILR 52 All 1054; *Sarala Bala Devi v Shyam Prasad*, AIR 1953 Cal 765.
2065. *Azagappa v Ramanathan*, AIR 1933 Mad 466 : (1933) 64 Mad LJ 629; *Pramatha Nath v Mackey*, AIR 1933 Pat 208 : (1933) ILR 12 Pat 179; *Kuruvilla v Ouseph Joseph*, AIR 1957 TC 40 : (1956) ILR T C 726.
2066. *Mittasaheb v Gurunath*, AIR 1943 Bom 252 : (1943) 45 Bom LR 519; *Narayan v Gopal Krishna*, (1905) ILR 28 Mad 355; *Sheik Budan v Ramchandra*, (1887) ILR 11 Bom 537; *Chidambaram v Thaivanai*, AIR 1924 Mad 1 : (1923) ILR 46 Mad 768.
2067. *Kuruvilla v Ouseph Joseph*, AIR 1957 TC 40 : (1956) ILR TC 726.
2068. *Banchha Nidhi Naik v Collector of Balasore*, AIR 1957 Ori 274 : (1957) ILR Cut 446.
2069. *Rafatulla v Kundarmal*, AIR 1935 Cal 727 : (1935) 38 Cal WN 1144; *Bir Bikram v Khalida*, AIR 1935 Cal 646 : (1935) 39 Cal WN 1206.
2070. *Mittasaheb v Gurunath*, AIR 1943 Bom 252 : (1943) 45 Bom LR 519; *Official Receiver v Hira Lal*, AIR 1935 All 727 : (1935) All LJ 642.

section 60 as that was not a matter for decision under O XXI, rule 66;[2071] but, it has been held that when a judgment-debtor who has no notice under O XXI, rule 22, is subsequently served with notice in the execution application and fails to take objection that he had not been served with notice under O XXI, rule 22, he is barred from raising that objection thereafter.[2072] Where a judgment-debtor who was served with notice under O XXI, rule 22 did not appear to show cause why the decree should not be executed and where an order for execution was made under rule 23, it was held that he was barred from raising thereafter the plea that execution was barred by limitation.[2073]

Notice of intended execution was issued to the judgment-debtor under O XXI, rule 22 of the CPC. The court passed an order under O XXI, rule 23(1), directing attachment. Judgment-debtor did not appeal against the above order. It was held that the order operated as *res judicata* and the judgment-debtor could not later file an independent application raising the objection of limitation.[2074]

Dismissal of a suit for default cannot operate as *res judicata*, though, in such circumstances, O IX, rule 9 bars a fresh suit.[2075]

A judgment-debtor who does not claim exemption under section 60(1)(c) when he receives notice of attachment, cannot claim such exemption at the time of proclamation of sale. Constructive *res judicata* applies under section 11, Explanation IV in such circumstances.[2076]

[s 11.30.3] Consent Orders

An order made by consent of parties in an execution proceeding is as binding on the parties as an order after a contentious trial.[2077]

Notice to show cause under O XXII, rule 22 was made absolute and an order for execution passed under O XXI, rule 23(1). It was held that subsequent objection by the defendant, that the decree was a nullity, was barred by *res judicata*. The same position was obtained even before the insertion of Explanation VII to section 11, on the principle of constructive *res judicata*. Where a consent decree is sought to be challenged on the grounds of contravention of O XXIII, rule 3, the only remedy is an appeal against the decree.[2078]

It is clear from the discussion above that right from the date of the Privy Council decision in *Ram Kirpal v Rup Kuari*[2079] the courts have consistently applied the principles of *res judicata* to proceedings in execution including the principle of constructive *res judicata* embodied in Explanation IV. There are also a number of decisions wherein it has been held that before the principle was applied it had to be seen that the conditions laid down in the section were satisfied. What the new Explanation VII, therefore, does is to do legislatively what the courts had hitherto done judicially. The decisions so far rendered in regard to proceedings in execution would therefore, still have validity.

2071. *Raghava Reddi v Krishnayya*, AIR 1960 AP 631.
2072. *Shyam v Venkata*, AIR 1951 Mys 118 : (1952) ILR Mys 24.
2073. *Gandhi Lakshmi Chand v Tulsidas*, AIR 1963 Guj 1; *Chandra Choor v Krishnawati*, AIR 1969 Pat 251.
2074. *P Sainath Reddy v G Narayana Reddy*, AIR 1982 AP 247 (DB).
2075. *Ram Awadh v Deputy Director, Consolidation*, AIR 1986 All 15.
2076. *Bhaskar Traders v Minikipacha Kunhiraman*, AIR 1988 Ker 227.
2077. *Kalidas v Prasanna*, (1920) ILR 47 Cal 446; *Coventry v Tulsi*, (1904) ILR 31 Cal 822.
2078. *UOI v Byram Pestonji Gariwala*, AIR 1991 Bom 185.
2079. *Ram Kirpal v Rup Kuari*, (1884) ILR 6 All 269 : (1883) 11 IA 87.

[s 11.30.4] Interlocutory Orders

In *Ram Kirpal v Rup Kuari* above, the Privy Council said that upon general principles of law, interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit. A decision in an administration suit as to the validity of a gift will be *res judicata* in a subsequent proceeding in the same suit.[2080] Where a defendant government takes a plea in a notice of motion of its being a sovereign foreign state but that plea is rejected at the hearing of the notice of motion, the same plea cannot be re-agitated subsequently at the time of the hearing of the suit.[2081] In a Lahore case,[2082] the court ordered an agreement to refer to arbitration to be filed. A party applied that the reference should be cancelled as the court had no jurisdiction. The court decided that it had jurisdiction and dismissed the application. The party was debarred from raising the same point as an objection to the award. Where a court orders attachment of properties before judgment after satisfying itself that there are sufficient grounds therefore, and that order has become final, an application for compensation under section 95 of the CPC is barred on general principle of *res judicata*, but in order to have that effect, it must have been passed after notice and on the merits.[2083] Thus, an order staying an interim injunction does not operate as *res judicata* as such an order does not purport to decide the merits on the controversy between the parties.[2084] An order of remand which is interlocutory in nature also does not decide the dispute between the parties.[2085]

In a suit for specific performance an interlocutory application for sending the disputed document for comparison by an expert was dismissed. Before the revision against the said order could be filed, the suit was decreed. During the appeal against the decree an interlocutory application with the same prayer for sending the disputed document for comparison was allowed. In the revision against the order allowing the interlocutory application, it was held that the earlier interlocutory application was not decided on merits and it neither finally decided the matter involved in the case nor terminated the suit so as to apply the rule of *res judicata*.[2086]

Again, in *Louis Dreyfus v Arunachala*,[2087] an order was made on 20 July, 1922, setting aside an award, under the Arbitration Act, 1899, made between *D* and *A* and remitting the matter back to an umpire, *A* appealed from the order but the appeal was ultimately dismissed by the Privy Council. After a fresh award was made by the umpire *A* objected that he was not bound by the submission to arbitration. The Privy Council said:

> Under the order of 20th July, 1922 the appeal from which to His Majesty in Council was dismissed, the matter was remitted to the umpire. This could have been done only upon the footing that the respondent (*A*) was bound by the submission to arbitration.

Their Lordships, accordingly, held that the question as to the umpire's jurisdiction over the parties was *res judicata*.

2080. *Hook v AG of Bengal*, AIR 1921 PC 11 : (1921) ILR 48 Cal 499 : 48 IA 187; *Badar Bee v Habib Merican Noordin*, AIR 1909 Cal 615.
2081. *German Democratic Republic v DIU Ltd*, AIR 1972 Bom 27 : (1972) ILR 74 Bom 731 : (1971) 73 Bom LR 183.
2082. *Asa v Ganesh*, AIR 1930 Lah 836 : (1930) ILR 11 Lah 470.
2083. *Khalilur Rahman v Syed Husaini*, AIR 1961 Mad 220.
2084. *Punjab University v PC Handa*, AIR 1971 P&H 177.
2085. *UP Supply Co v TN Chatterjee*, AIR 1972 SC 1201.
2086. *Kalaiselvan v Velusamy*, (2007) 4 Mad LJ 866 (Madu-Mal).
2087. *Louis Dreyfus v Arunachala*, AIR 1931 PC 289 : (1931) 35 Cal WN 1287 : 58 IA 381; *Md Naim v Rowraffic and Far Eastern Ltd*, AIR 1960 Cal 146.

[s 11.31] Insolvency Proceedings

The principle of the section has been applied in insolvency proceedings.[2088] In *Vaithilingam v Lakshmana*,[2089] the Madras High Court has held that if the insolvency court decides to pass and does pass an order of adjudication of title under section 4 of the Presidency Towns Insolvency Act, such an order operates as *res judicata* in a subsequent dispute between the same parties. When an official receiver dismissed an application under section 54 of the Provincial Insolvency Act, 1920, holding that a sale was not a fraudulent preference, a creditor was debarred by the rule of *res judicata* from applying under sections 4 and 56 of the Act to set aside a sale as being in fraud or creditors.[2090] An order winding up a company on the application of a person who claims to be a creditor with respect to a specified debt, was held to operate as *res judicata* on the question as to the truth and amount of the debt.[2091] If a question had been decided in a civil court and the decision thereon is such that it would have operated as *res judicata* in another subsequent matter before a civil court, it would operate as *res judicata* also before the Insolvency Court.[2092]

[s 11.32] Summary Proceedings

The Calcutta High Court holds that the question of *res judicata* can arise even in consequence of antecedent summary proceedings. Thus, it was held by that court that the decision on the question of nature and extent of the tenure which was directly in issue between the parties and finally decided in the proceedings taken under section 26J of the Bengal Tenancy Act, 1885 operated as *res judicata* to bar a subsequent suit for determining the nature of tenancy;[2093] but the Lahore High Court held that the decision of a district judge in proceedings of a summary nature cannot operate as *res judicata* to bar a subsequent suit for the determination of the same question.[2094] In *Babu Bhagwan Din v Gir Har Saroop*[2095] the Privy Council accepted the view of the Lahore High Court. It has since been held by the High Court of Calcutta that the rule of *res judicata* does not apply to summary and extra judicial proceedings.[2096] The scope of an inquiry in an application under section 34 of the Arbitration Act, 1940, is limited to a decision whether the dispute between the parties is covered by the arbitration clause. Any opinion therefore, expressed in the order on the application of the rights of parties, cannot operate as *res judicata* in a suit between them in which they are in issue.[2097] A decision under section 38 of the Bengal Money Lenders Act, 1940, has been held, having regard to its scope and nature, not to operate as *res judicata* in a subsequent suit or proceedings between the parties.[2098] Orders passed under the Marwari Patta Act or the Rajasthan Protection of Tenants Act, 1949, have been held not to operate as *res judicata* in subsequent suits between the parties

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2088. *Lahori Singh v Official Receiver*, AIR 1937 Lah 4; *MRMS Chettiar Firm v Official Assignee*, (1937) ILR 14 Rang 652; contra *Gannamani v Donga*, AIR 1950 Mad 184.
2089. *Vaithilingam v Lakshmana*, AIR 1965 Mad 331 : (1965) ILR 1 Mad 34 : (1965) 1 Mad LJ 242.
2090. *Rangappa v Rangappa*, AIR 1933 Mad 9 : (1933) ILR 56 Mad 395; contra *Bhalchandra Gangadhar v GB Pasule*, AIR 1947 Ngp 76 : (1946) ILR Nag 937.
2091. *Atmaram v Chitra Production, Co*, AIR 1952 P&H 99.
2092. *Kishan Piarey v Ram Dei*, AIR 1965 All 248.
2093. *Krishna Chandra v Manik Lal*, AIR 1939 Cal 169 : (1938) ILR 2 Cal 418.
2094. *Secunderabad Commercial and Banking Co v Indermull*, AIR 1950 Hyd 59; *Prem Nath v Har Ram*, AIR 1934 Lah 771.
2095. *Babu Bhagwan Din v Gir Har Saroop*, 67 IA 1, p 5.
2096. *Kiron Chandra v Bijoy Chandra*, AIR 1950 Cal 123.
2097. *Sailendranath v Chillarram*, AIR 1955 Cal 251.
2098. *Subose Chandra v Manoram*, (1956) ILR 1 Cal 150.

as the proceedings are summary.[2099] A decision given by revenue authorities in mutation proceedings has similarly been held not to be *res judicata*.[2100] A decision under O XXII, rule 5, whether a person is or is not the legal representative of a deceased party to a proceeding is only for the purpose of that litigation and does not operate as *res judicata* in a suit where the right to represent is directly in issue.[2101] A decision given in a miscellaneous case not on the merits but on a technical grounds does not operate as *res judicata* in a regular suit.[2102]

[s 11.33] Application for Amendment of Decree

Though an application for amendment of a decree is not a "suit" within the meaning of this section, yet if such an application is heard and finally decided, it will debar a subsequent application for the same purpose upon general principles of law analogous to those of *res judicata*.[2103] If the application has been dismissed for default and there has been no adjudication on the merits, the dismissal will not operate as *res judicata*.[2104] The dismissal of an application for amendment of a decree on the ground of mistake does not operate as a bar to a party establishing his right in a suit, as the grant of relief by way of amendment is purely discretionary.[2105]

In a suit the plaintiff had not claimed the relief of *mesne* profits in the plaint but by way of amendment he tried to add the said relief in the plaint which was refused. Consequently, the relief with regard to *mesne* profits was not granted. It was held by the Patna High Court that the incorporation of the relief of *mesne* profits in the judgment and decree at a later stage was not wholly without jurisdiction as the Court was empowered to decide what proper relief should have been granted to the plaintiff on the basis of materials available on the record. Thus, it was held that the petition for amendment of judgment and decree was not barred under Explanation (V) of section 11 of the Code.[2106]

[s 11.34] Application for Review

Where an application is made for a review of judgment, and the application is refused, it does not operate as *res judicata* so as to bar a subsequent suit for the same relief and on the same grounds as those put forward in the application for review. Neither section 11 nor any doctrine of constructive *res judicata* can rightly be applied to such a case.[2107] An issue lost in Article 136 proceedings, sought to be re-agitated under Article 32, it was held the factual question could not be re-agitated in a petition under Article 32 of the Constitution. However, it is open to the petitioner to seek a review of the order of the Supreme Court in the special leave petition, if such review has not already been invoked and lost.[2108] The scope of that appeal

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2099. *Jaikishan v State of Rajasthan*, AIR 1958 Raj 56 : (1958) ILR Raj 72; *Hanuman Prasad v Board of Revenue*, AIR 1957 Raj 281 : (1957) ILR Raj 1; *Panna v Board of Revenue*, AIR 1958 Raj 74 : (1958) ILR 8 Raj 80.
2100. *Venkataraya v Louis*, AIR 1960 Mys 209; differing from *Narasimha v Muthuswami*, (1958) 2 Mad LJ 216 : 1958 Mad WN 603.
2101. *Bhudev Pandey v Gupteswar*, AIR 1951 Pat 537 : (1949) ILR 28 Pat 814.
2102. *Tribeni Missir v Gopal Misra*, AIR 1963 Pat 60.
2103. *Langat Singh v Janki Koer*, (1911) ILR 39 Cal 265; *A Chettiar v Kanthimathi Ammal*, AIR 1966 Mad 319 : (1966) ILR 2 Mad 295 : (1965) 2 Mad LJ 551.
2104. *Pramath Nath v Mackey*, AIR 1933 Pat 208 : (1933) ILR 12 Pat 179.
2105. *Subbiah Nadar v Champaka Pillai*, AIR 1961 Mad 413; *Bechelal v Hem Singh*, AIR 1953 All 485.
2106. *Umesh Chandra Karan v Shail Kumari Devi*, AIR 2007 Pat 10 : (2006) 3 Pat LJR 552.
2107. *Srish Chandra v Triguna*, (1913) ILR 40 Cal 541.
2108. *Sanjay Kedia v State of Bihar*, (1994) Supp 1 SCC 509.

was the determination of the amount of compensation and not to declare the whole of the land acquisition proceedings a nullity. Whatever, therefore, was set by the high court either on the question of adverse possession or while rejecting the review petition was outside the scope of land acquisition appeal. It could not operate as *res judicata* in a subsequent suit.[2109]

[s 11.35] Plea of *Res Judicata*

It is essential that the plea of *res judicata* be properly raised. In *Jagadish Chandra v Gour Hari*,[2110] the Privy Council upheld the decision of the Calcutta High Court which had declined to go into the question of *res judicata* on the ground that it had not been properly raised by the pleadings or in the issues, particularly in the issues. The Privy Council further observed that it was necessary to identify the subjects in dispute in the subsequent litigation with the subjects in disputes in the previous litigation. This case was distinguished in *Shib Singh v Gaura*.[2111] In *Narasamma v Venkataratnam*,[2112] the Andhra Pradesh High Court held that the opening words of the section required that the issue as to *res judicata* should be tried at the earlier stage of the suit and not at the end along with the rest of the issues; but, the Bombay view is that such an issue is not ordinarily to be tried as a preliminary issue but must be tried along with the rest of the issues.[2113] According to the Patna High Court, the question of *res judicata* is a mixed question of law and fact and can be raised at any stage of the proceeding, even at the stage of the second appeal, if it does not involve a fresh investigation of facts.[2114] It is well-known that *res judicata* is a mixed question of fact and law. It has to be specifically pleaded and parties relies on the principle of *res judicata* should place before the court all material particulars which would be sufficient to give a finding whether the particular case is barred by the principle of *res judicata*. The court relied upon the decisions reported as *Gurrala Jaggarao v Gopisetti Bhaskara Ramchandra Rao Dora*,[2115] wherein it was held that a plea of *res judicata* which was never raised before the court, nor the pleadings of the parties were before the court, such a new plea could not be allowed to be raised at the appellate stage, when further materials may be necessary for the purpose of determination of issue. Another judgement relied on was *Sahadeb Nayak v Satyabadi Nayak*,[2116] wherein it was laid down that the plea of *res judicata* has to be specifically pleaded and proved and such a plea would not be available for the first time in second appeal.[2117] No plea of *res judicata* raised before any other court, can now be raised before the Supreme Court. It was too late in the day now to permit the appellant to raise a plea of *res judicata* and that too without any basis.[2118]

When, from the pleadings and the documents produced, the court had reason to think that the suit or any issue was barred by *res judicata*, the absence of a specific plea to that effect should not stand in the way.[2119] Jurisdiction of the court to try suit or an issue is always there

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2109. *State of Jammu and Kashmir v Sanahullah Meer*, (1980) 3 SCC 272.
2110. *Zingu Deorao v Mahadeo Parashranji*, AIR 1948 Ngp 358 : (1948) ILR Nag 747; *Surayya v Gangadhara Ram Krishna*, AIR 1936 PC 258; *Ravesh Chand v Board of Revenue*, AIR 1973 All 120.
2111. *Shib Singh v Gaura*, AIR 1944 Mad 601 : AIR 1945 All 76.
2112. *Narasamma v Venkataratnam*, AIR 1965 AP 12.
2113. *Nagnath v Kishan*, AIR 1972 Bom 228 : (1972) 74 Bom LR 41; *Sorojini v Bhaskar*, AIR 1977 Ori 42 : (1976) ILR Cut 1482.
2114. *Narayan Chandra v Nath Bank Ltd*, AIR 1967 Pat 124 : (1965) ILR 44 Pat 87; *K Subbarao v Sri Ramulu*, AIR 1970 AP 258.
2115. *Gurrala Jaggarao v Gopisetti Bhaskara Ramchandra Rao Dora*, AIR 1958 Ori 58.
2116. *Sahadeb Nayak v Satyabadi Nayak*, AIR 1984 Ori 30.
2117. *Krishana Chandra Naiyak v Nilakantha Mohanty*, AIR 1996 Ori 1.
2118. *Ajmer Central Co-op Bank Ltd v Prescribed Authority*, AIR 1996 SC 2911.
2119. *Puthiyottil Kunhava v Kaniattichalil Mammadukully*, AIR 1990 Ker 132.

and *res judicata*, only bars investigation and decision on the matters finally decided *inter partes* earlier. If the defendants omit to plead and prove *res judicata* and the court investigates and decides matters already concluded between the parties without knowing about such a decision, the decision is not void, for want of jurisdiction. Plea of *res judicata* is one which might be, and ought to be, raised as a defence and established, in order to operate as a bar in the exercise of jurisdiction to try and dispose off the matter subsequently. Otherwise, the later decision will prevail and the plea of *res judicata* itself will be barred by constructive *res judicata* and the later decision (though overlooking the bar of *res judicata* alone), will prevail.[2120]

Deputy Commissioner's Land Acquisition, is neither a "court" nor can his award be deemed to be a "decree".[2121] The defendant's plea that he was a tenant was negatived by the lower court. In revision, the defendant for the first time pleaded: (i) that he had been declared to be a tenant in earlier proceedings on a reference to the land tribunal; and (ii) that the earlier decision was *res judicata*. It was held that *res judicata* could not be pleaded so late.[2122] However, a court can go into the question of *res judicata* even if the plea is not taken in the pleadings, if the documents on record show that the matter has already been decided. At the same time, if, because of absence of the plea, the court decides a matter already decided, the later decision prevails.[2123]

Res judicata is a question of law. It constitutes a bar to suit, and the bar is created by law. A suit can be disposed off, on this preliminary point, under O XIV, rule 2(2)(b).[2124] As the plea of *res judicata* involves mixed questions of law and fact, the factual foundation for raising the plea should definitely find a place in the pleadings. Failure to do so is detrimental to the belated plea of *res judicata* taken at a subsequent stage. The onus is on the person who sets up the plea of *res judicata*, to establish it. He must definitely place all the materials before the court, to enable it to consider whether the said plea has been established or not. A party who fails to raise the plea before the Land tribunal and the appellate authority, cannot raise it for the first time in the revisional court.[2125] A judgment which either fails to deal with the plea of *res judicata* or deals with it in an ineffective and erroneous manner, does not, in law, deserve to be maintained. The doctrine of *res judicata* rests on sound principles of public policy; its importance cannot be under-rated.[2126] This golden rule acquires magnified dimensions in the present day context of the administration of justice. The doctrine of *res judicata* has therefore, to be interpreted and applied liberally. Its application should be influenced by no technical considerations as to form, but by matter of substance within the limits allowed by law. The court has to go into a plea of *res judicata* as any other plea of law and then to decide whether the issue or the claim is barred or not.[2127] An appeal filed under section 13 of the Orissa House Rent Control Act against the order of the House Rent Controller, refusing to decide the question of *res judicata* as a preliminary issue, would not be maintainable. The position would have been different if the controller had decided that the application was barred by *res judicata*. The right of the landlord to prosecute the case would then have been affected, as the whole proceeding would have failed on that finding;[2128] but, as the order of the controller did

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2120. *Puthiyottil Kunhava v Kaniattichalil Mammadukully*, AIR 1990 Ker 132.
2121. *HG Shiranandappa v State of Karnataka*, AIR 1991 NOC 83 (Kant).
2122. *Iyatteri Shanmughan v Palhiyotil Radha*, AIR 1989 Ker 227.
2123. *Puthiyottil Kunhava v Kaniattichalil Mammadukully*, AIR 1990 Ker 132.
2124. *Laxmi Mani Dasi v Manik Chandra Das*, AIR 1991 Cal 231.
2125. *Iyatteri Shanmughan v Palhiyotil Radha*, AIR 1992 Ker 227.
2126. *Mohammad v Nemichand*, AIR 1986 MP 155.
2127. *Mohammad v Nemichand*, AIR 1986 MP 155.
2128. *Binay Kumar Das v Sunil Kumar Patra*, AIR 1989 Ori 156 (FB).

not affect the right or liability of either party, it was simply an innocuous order and was not appealable.[2129]

[s 11.36] Waiver of Plea of *Res Judicata*

The plea of *res judicata* is not one which affects the jurisdiction of the court. It is a plea in bar which a party may waive. If a party does not raise the plea of *res judicata*, it will be deemed to be a matter directly and substantially in issue and decided against him.[2130]

[s 11.37] Conflicting Decrees

Where there are two or more conflicting decrees, the last decree alone is the effective decree, and it is this decree and not any other which can operate as *res judicata*.[2131] It is observed in *Pritam Kaur v State of Pepsu*[2132] that a decision given by a court on a matter which had been settled by a previous decision is without jurisdiction and cannot operate as *res judicata*. If that is the correct position, the rule that in the case of conflicting decisions, the later prevails, must be held to be erroneous. The decision of the Privy Council in *Joychand Babu v Kamalaksha Chowdhry*[2133] on which the above view rests, does not lay down any such proposition.

A court has jurisdiction to decide wrong as well as right and the later decision therefore, though erroneous, must be held to prevail. *Res judicata* applies if two conflicting decrees are passed by two competent courts. The irresistible conclusion that can be arrived at is, that the final decision in the first decree concludes the dispute between the parties relating to the same subject matter. Therefore, a subsequent decision is definitely hit by the provision of section 11, CPC. The finality of the earlier decision cannot be lost sight of, nor can it be brushed aside, even though there is a subsequent conflicting decree passed by some other competent court relating to the same subject matter between the same parties.[2134]

[s 11.38] Maintenance Order

An order refusing to enforce a maintenance order under section 488 of the Code of Criminal Procedure for one period will not bar a subsequent application for a different period.[2135] The Hindu law recognises that the right of maintenance is a substantive and continuing right and the quantum of maintenance is variable from time to time. Neither section 11 of the Code, nor the principle of *res judicata*, nor the doctrine of estoppel, can be involved to defeat the wife's claim to a higher rate of maintenance allowance under altered circumstances. This is so even though, on an earlier occasion, a maintenance decree had been passed and a certain rate of maintenance had been fixed thereunder.[2136] When the foreign judgement is a nullity,

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2129. *Binay Kumar Das v Sunil Kumar Patra*, AIR 1989 Ori 156 (FB).
2130. *Moturi v Sri Rajah Venkatadri*, (1916) 31 Mad LJ 219; *Rajani v Ajmuddin*, AIR 1929 Cal 163 : (1928) 48 Cal lj 577; contra *Raja of Venkatagiri v Province of Madras*, AIR 1947 Mad 5 : (1947) ILR Mad 190. See also *K Subbarao v Sri Ramalu*, AIR 1970 AP 258.
2131. *Rajani v Ajmuddin*, AIR 1929 Cal 163 : (1928) 48 Cal LJ 577; *Madappa v Basava Lingappa*, (1951) ILR Mys 396; *Padmanabha Krishna v Madhavan Pillai*, AIR 1952 TC 294 : (1952) ILR TC 252; *Meewa Ram v Deo Prakash*, AIR 1954 All 770; *Subbarayudu v Balaramayya*, AIR 1955 AP 194; *Raman v Narayan*, AIR 1957 Ker 31.
2132. *Pritam Kaur v State of Pepsu*, AIR 1963 P&H 9.
2133. *Joychand Babu v Kamalaksha Chowdhry*, AIR 1949 PC 239 : 76 IA 131.
2134. *Bharat Chandra Das v Pran Gopal Das*, AIR 1983 Gau 78 (DB).
2135. *Maung Tin v Ma Hmin*, AIR 1933 Rang 138 : (1933) ILR 11 Rang 226 (FB).
2136. *Ram Shanker Rastogi v Vinay Rastogi*, AIR 1991 All 255 (DB).

the parties will be continue to be husband and wife, unless a decree for divorce is granted in accordance with law. By acceptance of the maintenance, the wife cannot be deemed to have accepted the foreign judgement and would not be estopped from filing any petition for divorce. The principle of *res judicata* does not bar the petitioner from filing the petition for divorce.[2137]

The Orissa High Court has held that claim of maintenance under section 18 of the Hindu Adoption and Maintenance Act, 1956, can be renewed on fresh cause of action. Where is an earlier case, maintenance claim of wife was rejected on the ground that she voluntarily deserted her husband, the subsequent claim of maintenance on the ground of non-implementation of a decree of restitution of conjugal rights by husband, was held to be not barred by *res judicata*.[2138]

[s 11.39] Income-tax Proceedings

The principle of *res judicata* does not apply to matters of taxation as each year's assessment is final only for the particular assessment year and does not govern the subsequent assessment years.[2139] Each assessment year being a unit, what is decided in one year may not apply in the following year; but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.[2140] This was also held to be so under the Income tax Act, 1922 (Now repealed by the Income Tax Act, 1961). Therefore, it is open to an Income-tax officer to depart from his decision in an assessment for an earlier year.[2141] This would be so even if the decision in the assessment for a particular year is the decision of the high court in an Income-tax reference.[2142] Failure of an assessee to raise a particular objection does not bar him from raising the same objection in a subsequent assessment proceeding on the ground that he might and ought to have raised it in the earlier assessment.[2143]

[s 11.40] Sales Tax Proceedings

Bar of *res judicata* does not apply in matters pertaining to tax for different assessment years because *res judicata* applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of *res judicata* but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is *per incuriam*. However, these

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2137. *Veena Kalia v Jitender Nath Kalia*, AIR 1996 Del 54.
2138. *Dilip Kumar Barik v Smt. Ushrani Barik*, AIR 2007 Ori 83 : 2006 (102) Cut LT 813 (DB).
2139. *MM Ipoh v CIT, Madras*, AIR 1968 SC 317 : (1968) 67 ITR 106; *Municipal Corpn. Delhi v Madan Mohan*, AIR 1976 Del 43; *CIT v Punjabhai*, AIR 1968 MP 103; *CIT v DP Mora*, AIR 1971 SC 2439; *CIT v SC Bose*, AIR 1969 Cal 4.
2140. *Radhasoami Satsang, Saomi Bagh Agra v CIT*, (1992) 1 SCC 659.
2141. *Udayan Chinubhai v CIT*, AIR 1967 SC 762 : (1967) 1 SCR 913.
2142. *BI Corp Ltd v CIT*, AIR 1967 All 362 : (1966) 60 ITR 793.
2143. *Jwala Prasad v CIT*, (1964) 52 ITR 392.

are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.[2144]

Ruma Pal J speaking in the three-Judge Bench decision for herself and for Dalveer Bhandari J observed as follows:

> The Court will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of *res judicata* but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is *per incuriam*. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.[2145]

[s 11.41] Writs

Section 11 of the CPC does not in terms apply to any proceedings under Article 226 of the Constitution. The principle of *res judicata* does apply to all writ petitions under Article 226.[2146] It is well-nigh settled that a decision on an issue raised in a writ petition under Article 226 or Article 32 of the Constitution would also operate as *res judicata* in subsequent judicial proceedings. The only exception is that the rule of *res judicata* would not operate to the detriment or impairment of a fundamental right.[2147] The doctrine of *res judicata* is a universal doctrine laying down the finality of litigation between the parties. When a particular decision has become final and binding between the parties, it cannot be set at naught on the ground that such a decision is violative of Article 14 of the Constitution. So far as the parties are concerned, they will always be bound by the said decision. In other words, either of the parties will not be permitted to re-open the issue decided by such a decision on the ground that such decision violates the equality clause under the Constitution.[2148]

It is well-settled that judgments rendered by a competent court (like a high court in writ petition), are binding on the parties and operate as *res judicata*, so that the same question cannot be the subject of any other action like the suit. It would be most improper, in exercising civil jurisdiction for the high court to permit inquiries into the questions gone into by the high court while exercising its admittedly competent writ jurisdiction.[2149] Once the writ petition was dismissed and the said judgment was not challenged before the superior Court, the assessment order passed against the appellant attained finality. The assessment order having attained finality, the levy could not have been challenged by means of a separate suit in the civil court.[2150] If a writ petition is decided on merits by a speaking order, the question decided in

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2144. *Bharat Sanchar Nigam Ltd v UOI*, AIR 2006 SC 1383 : (2006) 3 SCC 1.
2145. *Bharat Sanchar Nigam Ltd v UOI*, AIR 2006 SC 1383, para 20 at p 1390 : (2006) 3 SCC 1.
2146. *GK Dudani v SD Sharma*, (1985) Supp SCC 239; *Centre of Indian Trade Union v UOI*, AIR 1997 Bom 79; *Sumermal v State of Rajasthan*, AIR 2000 Raj 1; *State of Tamil Nadu v SS Jawahar*, AIR 1998 Mad 303.
2147. *Ashok Kumar Srivastava v National Insurance Co Ltd*, (1998) 4 SCC 361.
2148. *Supreme Court Employees Welfare Association v UOI*, (1989) 4 SCC 187.
2149. *Rabindra Nath Biswas v General Manager, NF Rly*, AIR 1988 Pat 138.
2150. *Premier Cable Co Ltd v Govt of India*, AIR 2002 SC 2418 : (2002) 10 SCC 207.

that petition would operate as *res judicata*; but, a dismissal: (i) *in limine*; or (ii) on the ground of laches; or (iii) by reason of availability of alternative remedy, is not barred by *res judicata*.[2151] If a writ petition is dismissed upon merits, it operates as *res judicata*. It makes no difference that the writ court has expressed that the writ petition was not maintainable and that the proper remedy was to file a suit. Where the writ court chooses to decide even disputed questions of fact, then it is a decision of a court of competent jurisdiction. If the writ court proceeds to determine the merits, then it has heard and finally decided the case and its decision is *res judicata*. This is particularly so where the party never questioned the jurisdiction of the writ court to decide the petition on the merits.[2152]

A writ petition was filed in the Orissa High Court challenging the decision about the mode of allocation of new a coal block in the coal-fields area. In an earlier writ petition filed before the Delhi High Court, same issue had been raised. The Delhi High Court, in the earlier writ petition had finally adjudicated upon the issue and had upheld the impugned decision. The subsequent writ petition filed before the Orissa High Court was held to be barred by the principle of *res judicata*.[2153]

A Full Bench decision of the high court in a writ petition relating to a dispute between the "mergerists" of the service and the direct recruits, ordered that the rights accrued and the benefits conferred or derived by assigning the year of allotment, should not be disturbed. It was based on an understanding of the local conditions and the history of the service. The decision had become final, as the special leave petition against it was dismissed by the Supreme Court. It was held that the position settled by that decision and the tradition followed for decades in the service of the state, could not be disturbed and the principle of year of allotment, could not be challenged in the Supreme Court vicariously, by way of a civil appeal or a writ petition.[2154]

It is well-established that the principle of the *res judicata* are applicable to writ petitions.[2155] The second writ petition on the same cause of action is not maintainable when it was open for the petitioner to claim the relief in the first writ petition which has been claimed in second writ petition.[2156] In this case, the Hon'ble Supreme Court was called upon to consider the effect of withdrawal of writ petitions filed under Article 226 or Article 227 of the Constitution of India, without the permission of the high court to file a fresh petition. It was held that the provisions of the CPC are not in terms applicable to the writ proceedings, although the procedure prescribed therein as far as it can be made applicable is followed by the high court in disposing off the writ petitions.[2157] In this case, the Hon'ble Supreme Court was called upon to consider the effect of withdrawal of writ petitions filed under Article 226 or Article 227 of the Constitution of India without the permission of the high court to file a fresh petition. It was held that the provisions of the CPC are not in terms applicable to writ proceedings, although the procedure prescribed therein as far as it can be made applicable is followed by the high court in disposing off the writ petitions.[2158] In the facts and circumstances of this case, the same conditions were challenged before the high court which were under challenge before

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2151. *Pujari Bai v Madan Gopal*, AIR 1989 SC 1764 : (1989) 3 SCC 433 : (1989) 3 SCR 383.
2152. *Vivek Jain v UOI*, AIR 1989 Del 301 (DB).
2153. *Adhunik Metaliks Ltd v UOI*, 2007 (103) Cut LT 617 (DB).
2154. *Nityanandakar v State of Orissa*, AIR 1991 SC 1134 : (1991) Supp 2 SCC 516 : (1992) 19 ATC 236.
2155. *Direct Recruit Class II Engineering Officers Assn v State of Maharashtra*, (1990) 2 SCC 715.
2156. *Awadhesh Narain Pandey v District Inspector of Schools, Varanasi*, AIR 2006 (NOC) 1266 (All) : (2006) AIHC 1825.
2157. *Sarguja Transport Service v State Transport Appellate Tribunal, MP*, (1987) 1 SCC 5; *Avinash Nagara v Navodhya Vidhayala Samiti*, (1997) 2 SCC 534.
2158. *Sarguja Transport Service v State Transport Appellate Tribunal, MP*, (1987) 1 SCC 5.

the Rajasthan Taxation Tribunal and the contentions raised by the petitioner were negatived by the tax tribunal. The challenge to the order of the tax tribunal by way of writ petition, was withdrawn without getting the liberty to file another writ petition. A subsequent writ petition on the same grounds is barred on the principle of *res judicata*.[2159] The respondent had appeared for the written test conducted by the appellant for selection to 150 posts of civil judges. The respondent secured less than 145 marks, and hence, was not called for interview. The respondent filed a writ petition praying that the examination be quashed, that the answer-book of the respondent should be placed before the high court and his answer-book should be re-evaluated. By an interim order, the answer–sheet of the respondent re-evaluated, as a result of which respondent secured 147 marks. The respondent was called for an interview but was not placed in the select list. Thereafter, the respondent filed a second writ petition praying that he should be selected for the post of civil judge. In the second writ petition, the respondent filed an application for amendment in which he expressed doubt regarding the key answers used in the evaluation of the written test. It was held, after taking the advantage of the interim orders and getting his papers re-evaluated, that the respondent cannot now contest by filing another writ petition, that the key answer-paper is wrong. If at all such a plea had to be raised, it should have been raised in the first writ petition. The contentions sought to be raised in a writ petition after the disposal of the earlier writ petition, are barred by the principles analogous to *res judicata*.[2160] As regards the principle of *res judicata*, it is clear that the court had applied its mind to the facts of the case and passed a speaking order in an earlier petition on the same cause of action, the second petition will not lie. The order howsoever short or precise, shall be treated to be passed on merits. It cannot be branded as a non-speaking order or an order which was passed without considering the merits of the case.[2161] Where a writ petition was filed claiming directions to authorities to give effect to coal linkage system and for supply of coal to petitioner, and the high court disposed off the writ petition by directing the authorities to dispose off the representation of the petitioner, thus, impliedly refusing the relief prayed for, the second writ petition based, on the same facts, is barred by the principle of *res judicata* and promissory estoppel. Further, during pendency of the second writ petition, the third writ petition praying for the same relief was also not maintainable.[2162] The question of correctness or validity of the judgement passed on the writ petition could not be raised in a contempt proceedings.[2163]

If a writ petition was withdrawn without liberty to file a fresh petition, fresh petition on the same cause of action is barred even if the petitioner had come into possession of some more particulars about the cause of action.[2164] A writ petition challenging the petitioner's dismissal from service, was dismissed in limine with reasoned order in respect of a ground raised in petition. Subsequent suit on the same ground plus new ground is barred. In respect of the ground raised earlier in the writ petition, it was held that so far as a reasoned order was given in the earlier writ petition which was dismissed in limine, the facts decided by that reasoned order operated as *res judicata* in the subsequent suit. Thus, the question regarding prejudice on account of non-supply of the copy of the statement of witnesses to the petitioner, clearly operated as *res judicata* in the subsequent suit. However, the subsequent suit was not barred

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2159. *Rajasthan Art Emporium v Rajasthan State Industrial and Investment Corp*, AIR 1998 Raj 277.
2160. *Madhya Pradesh Public Service Commission v Om Prakash Gupta*, (1997) 6 SCC 645. See also *Lal Singh Ram Singh Rajput v Assistant Executive Engineer*, AIR 2005 SC 2175 : (2005) 11 SCC 204.
2161. *Swatantra Kumar Aggarwal v Managing Director, UPFC, Kanpur*, AIR 1994 All 187.
2162. *Munna Industries v State of Uttar Pradesh*, AIR 1994 All 391.
2163. *Comorin Match Industries Pvt Ltd v State of Tamil Nadu*, AIR 1996 SC 1916 : (1996) 4 SCC 281.
2164. *Krashn Kumar Balakram Pande v Municipal Corp, Baroda*, AIR 1990 Guj 20 (DB).

in respect of the issue regarding refusal of the railways to allow its employees to appear as witnesses in support of the petitioner, since there was no adjudication on this issue in the earlier writ petition.[2165]

Decision of high court in a writ petition holding that authorities under Hyderabad Atiyat Enquiries Act, 1952, were competent to pass orders for possession in inquiries held under section 3A of the Act, cannot be re-agitated *inter partes*, by filing a suit.[2166]

Validity of a government notification was challenged through a writ petition by *A* on the ground that the notification under the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1964, had not been duly published. Here, the court held that the notification had been duly published. Thereafter, *B* filed a suit, challenging the notification on the same ground. It was held that the earlier determination did not operate as *res judicata*.[2167] Where the plaintiff earlier filed writ petition challenging the validity of UP Sugar Undertaking Acquisition Ordinance (Ordinance No. 13 of 1971) which was dismissed, the subsequent suit for permanent injunction filed by the plaintiff against the authorities restraining them from interfering in possession, *etc.* of the company and further seeking declaration that properties mentioned in plaint were outside the preview of ordinance not being scheduled undertakings, the suit was found not barred by *res judicata* as in the earlier writ petition, the court was not considering as to which of the properties of the plaintiff was covered under the definition of scheduled undertaking.[2168] Where an ejectment suit is filed on the basis of permission obtained from the rent controller as required by the Rent Control Order passed in Central Provinces and Berar, and no plea of the tenancy being void was raised before the rent controller, then such a plea is not open in a subsequent suit.[2169] Where a writ court first expressing reservation as to the desirability of going into the merits of the case, subsequently considers the merits and decides the question of discrimination and departure from the norms, the decision on the merits becomes *res judicata*, as that of a civil court.[2170] Constructive *res judicata* applies to writ petitions also.[2171]

Where the writ petition was filed challenging the order of the authority regarding appointment of Administrative Board under section 73-H of the Maharashtra Co-operative Societies Act, 1961, it was held by a Division Bench of the Bombay High Court that dismissal of the same would not operate as *res judicata* in subsequent writ petition challenging the term of that Administrative Board.[2172]

In *Narmada Bachao Andolan v Narmada Hydroelectric Development Corp*,[2173] Dipak Misra J (as he then was), repelled the contention of the respondents that the writ petition is hit by the principles of *res judicata* as the issues raised herein were in earlier litigation. It was observed:

> In the earlier case the controversy was quite different. The issues that are raised by the petitioner are in different realm. In the present litigation number of issues emerged and there is frontal attack to the policy, awards passed by the Land Acquisition Officer. Role of

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2165. *Rabindra Nath Biswas v General Manager, NF Rly*, AIR 1988 Pat 138.
2166. *Attar Singh v Nanded Sikh Gurudwara*, AIR 1981 Bom 24.
2167. *Bhausaheb Tavnappa v State*, AIR 1982 Bom 284.
2168. *UP State Sugar Corp Ltd v Raza Buland Sugar Co Ltd*, AIR 2001 All 100. See also *Sri Krishna Salt works, Vishakhapatnam v State of Andhra Pradesh*, AIR 2004 AP 66 (DB).
2169. *Prabhakar v Dev Ashish Co-op Housing Society*, AIR 1984 Bom 65.
2170. *Vivek Jain v UOI*, 1989 ILR Del 301 (DB).
2171. *Shiv Shakti Contractors v Commrs, Allahabad Division*, Allahabad AIR 1991 NOC 54 (DB).
2172. *Maroti Vishnu Borkar v State of Maharashtra*, AIR 2008 (NOC) 2776 (Bom) : 2008 (5) All MR 309 (DB) (Aurangabad Bench).
2173. *Narmada Bachao Andolan v Narmada Hydroelectric Development Corp*, AIR 2008 MP 258 (DB).

> Narmada Control Authority and such other facts. When issues are not same and there is no adjudication in that regard, it is futile to say that the writ petition is barred by doctrine of *res judicata*...

In a writ petition challenging resumption of land was taken on the ground of decision of the high court in earlier writ petition. However, the Division Bench of the Orissa High Court found that the earlier writ petition was disposed towards granting liberty to petitioner to make representation before Industrial Infrastructure Development Corporation and the high court had not entered into the dispute raised between the parties. The principles of *res judicata*/ constructive *res judicata* has, therefore, no application.[2174]

Through a chain of authorities, the law stands settled that even if the provisions of the CPC are not applicable in writ jurisdiction, the principles enshrined in section 11 can be resorted to because they are founded on public policy and therefore, required to be extended and made applicable in writ jurisdiction also in the interest of administration of justice. Thus, where successive writ petitions were filed for quashing a notice under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, it was held that successive writ petitions claiming the same relief would be barred by the principles of *res judicata*. Even if the same relief is not claimed, but could have been claimed, the petition would be barred by constructive *res judicata*.[2175] BS Chauhan CJ (as he then was), speaking for the Division Bench in the above case quoted with approval a passage from the decision of the Supreme Court in the case of *Burn & Co v Their Employees,*[2176] wherein it has been observed as follows:

> That would be contrary to the well recognised principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. It is on this principle that the rule of *res judicata* enacted in section 11 of the Civil Procedure Code is based. That section is, no doubt, in terms inapplicable to the present matter, but the principle underlying it, expressed in the maxim "*interest rei publicae ut sit finis litium*", is founded on sound public policy and is of universal application. (*Vide* Broom's Legal Maxims, Tenth Edition, page 218). "The rule of *res judicata* is dictated" observed Sir Lawrence Jenkins, *C.J. in Sheoparsan Singh v Ramnandan Prasad Singh* "by a wisdom which is for all time".

Where the writ petition was not for declaration of any status or right between the parties, but for quashing the order of mutation passed by the revenue authorities, a subsequent suit by the petitioner, involving a dispute pertaining to the rights of parties, was not barred by the principle of *res judicata*. The jurisdiction of the high court in that writ petition was confined to the grounds raised for quashing the order of mutation. Since the jurisdiction of civil court had been specifically conferred by the statute, it cannot be taken away on filing a writ petition. Since the question raised by the plaintiffs required evidence to prove them, the decision in the writ petition would not operate as *res judicata* in the subsequent suit.[2177] If a point became non-issue in earlier writ petition because of fraudulent submission of authorities the decision does not bar a consideration of the question, in subsequent petition for writ.[2178] Where a writ petition earlier filed by the present plaintiff was dismissed in limine by a one word order, it cannot be *res judicata*. When a petition after contest is disposed on the merits by a speaking order, then the question decided therein is *res judicata*; but in limine or dismissal on the ground

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2174. *Mesco Kalinga Steel Ltd v Orissa Industrial Infrastructure Development Corp*, AIR 2008 (NOC) 837 (Ori) : 2008 (105) Cut LT 149 (DB).
2175. *Tilak Rice & Oil Mills Pvt Ltd v DGM, Union Bank of India*, AIR 2009 Ori 26 (DB).
2176. *Burn & Co v Their Employees*, AIR 1957 SC 38 : (1956) SCR 781, at p 789 (of SCR).
2177. *Shyam Sunder v Hudibai*, AIR 1989 MP 316.
2178. *Katwe Jaggery Traders, Hubli v State of Karnataka*, AIR 1991 Kant 63 (HG Balakrishna J).

of laches or availability of alternative remedy is not *res judicata*.[2179] (See also *Workmen v Board of Esteem of Cochin Port Trust*[2180] followed). A writ petition filed earlier for mutation of revenue records does not bar a subsequent suit involving a dispute pertaining to the rights of the parties.[2181] Whereas in the earlier petition the question raised challenged the action of the state government in attaching bags of sugar from petitioner-Company's godown and order of *Tahasildar* proposing recovery of sum of over Rs 5 crores, the subsequent petition raised a question regarding powers of State Government for fixing price for purchase of sugar cane higher than one fixed by Central Government. Thus, the question now raised was not at all considered or decided in earlier petition and thus the subsequent petition cannot be dismissed on ground of *res judicata*.[2182]

[s 11.41.1] *Habeas corpus*

The bar of *res judicata* or constructive *res judicata* would apply even to a petition under Article 32 of the Constitution where a similar petition seeking the same relief has been filed under Article 226 of the Constitution before the high court and the decision rendered against the petitioner therein has not been challenged by filing an appeal in the Supreme Court and has been allowed to become final. However, this principle, namely, the bar of *res judicata* or principles analogous thereto would not apply to a writ of *habeas corpus* where the petitioner prays for setting him at liberty. If a person under detention files a writ of *habeas corpus* under Article 226 of the Constitution before the high court and the writ petition is dismissed (whether by a detailed order after considering the case on merits or by a non-speaking order) and the said decision is not challenged by preferring a Special Leave Petition under Article 136 of the Constitution and is allowed to become final, it would still be open to him to file an independent petition under Article 32 of the Constitution seeking a writ of *habeas corpus*.[2183]

[s 11.41.2] Service Matters

A seniority list of a cadre should not be made the subject matter of the debate too often. However, the findings arrived at in one of challenge cannot be binding to a party, who had neither received nor had voluntarily appeared in the earlier case.[2184] Where, in the matter of selection for appointment, the first writ petition filed on the ground of apprehended bias was dismissed as withdrawn, the second writ petition filed on allegation of actual bias was found not barred by *res judicata*, more so, when the subject matter of the second writ petition was different.[2185] The question is whether a person like the General Manager, Telecommunication, under Article 12 of the Constitution can adopt different standards for the same class of people. If in a previous judgement, the franchisees who have executed agreement before 14 August 1992, are entitled to deduct a commission of 20 paise, there is no reason to single out the petitioners merely because they approached the court and failed. It was held that the judgement of the previous writ petition was a declaratory one.

2179. *Pujari Bai v Madan Gopal*, AIR 1989 SC 1764 : (1989) 3 SCC 433 : (1989) 3 SCR 383.
2180. *Workmen v Board of Esteem of Cochin Port Trust*, AIR 1978 SC 1283 : (1978) 3 SCC 119.
2181. *Shyam Sunder v Hudibai*, AIR 1989 MP 316.
2182. *Gwalior Sugar Co Ltd v State of Madhya Pradesh*, AIR 2006 MP 218.
2183. *TP Moideen Koya v Govt of Kerala*, AIR 2004 SC 4733 : 2004 AIR SCW 5364 : (2004) 8 SCC 106 : 2004 SCR 904 : JT 2004 (8) SC 383.
2184. *Dwaraka Nath v UOI*, (1989) Supp 2 SCC 225.
2185. *GN Nayak v Goa University*, AIR 2002 SC 790 : (2002) 2 SCC 712 : JT 2002 (1) 526 : 2002 (1) SCR 636.

If it is a declaratory judgement, then that is binding on the department with respect to every subscriber coming under it. Hence, the question of *res judicata* does not arise.[2186] In service matters, an order passed by the court, which achieves finality, is binding on the department. If the court is satisfied that any employee has been prejudiced or his right under Article 14 has been violated, it may interfere in his favour; but, the department is precluded from challenging the interpretation given by the court.[2187] In a case of Himachal Pradesh Electricity Board, the Respondent–employee had all along been continuing in clerical line since 23 August 1974. Subsequent to the decision of the high court in CWP No. 336/1976 and the recommendation of the department promotion committee which considered the case of the respondent, pursuant to the directions given by the high court in the aforesaid writ petition, the Board passed an order on 11 August, 1982, reverting the respondent to the scale of junior stenographer w.e.f. 8 June, 1976 and by yet another office order, the respondent was again promoted to the post of head clerk, the respondent filed a writ petition No. 431/84 but withdrew the same on 12 September, 85. On the facts and circumstances of the present case, the Hon'ble Supreme Court was of the opinion that the respondent could not have re-agitated the claim by filing a fresh application before the tribunal challenging the very same cause of action which arose on 11 August, 82 against which Respondent filed a writ petition which was later on withdrawn.[2188] In a writ petition challenging the validity of Regulation 7 of New Bank of India (Officers Service) Regulations and certain provision of the promotion policy of the bank instituted before the high court, the single judge upheld Regulation 7 but annulled the impugned provisions of promotion policy. The petitioner did not challenge the decision but the bank challenged a part of the decision relating to promotion before the Division Bench. The Division Bench allowed the appeal of the bank. In such circumstances, the decision of a single judge in respect of the validity of Regulation 7 having reached finality, was held, as not to be challenged by the original writ petitioners in their appeal to the Supreme Court from the said decision of the Division Bench.[2189]

In a case relating to promotion and seniority the appellants pursued their remedy under the law and filed a writ petition which was allowed in their favour. The said order attained finality. Thus, the matter which has attained finality cannot be reopened again. Belated plea of the State that the promotion granted to some of the appellants were not in accordance with law cannot be allowed to be raised. Such contention raised too late is barred by the principle of *res judicata*.[2190] Explaining the point of law, SB Sinha J speaking for the Supreme Court Bench in the above case, observed as follows:

> 23. We appreciate the anxiety on the part of the State that if the entire seniority list is directed to be reopened, it may give rise to many more litigations. It must think itself therefor. But it is the State alone who is responsible for such a situation. The appellants herein have been pursuing their remedies under the law. They had been granted relief as orders were passed in their favour. The said order, admittedly attained finality, and thus, cannot be reopened. It is thus, too late in the day for the state now to urge that promotions granted to some of the appellants herein in the post of Assistant Engineer (Elect.) were not in accordance with law. Such a contention is barred under the principle of *res judicata*.[2191]

2186. *Suma Mathew v General Manager, Telecommunication*, AIR 1998 Ker 182.
2187. *Dharan Kallat v UOI*, (1995) 4 SCC 207.
2188. *HP State Electricity Board v KR Gulati*, (1998) 2 SCC 624.
2189. *KB Sharma v UOI*, (1998) 9 SCC 38.
2190. *N Birendra Singh v Priyo Kumar Singh*, AIR 2006 SC 2228 : (2006) 9 SCC 650.
2191. *N Birendra Singh v Priyo Kumar Singh*, AIR 2006 SC 2228, para 23 at p 2233 : (2006) 9 SCC 650.

[s 11.41.3] Representative Suits

The principle of *res judicata* is not applicable where earlier writ petitions were filed by the petitioners in an individual capacity and the subsequent petition is filed in a representative capacity.[2192] A judgment *inter partes* of a competent court in a previous writ petition, would operate as *res judicata*, in a subsequent suit between the same parties, where the issues directly involved in the two proceedings are the same. This is irrespective of the fact whether or not the decision in the earlier writ petition was founded on a view contrary to the one subsequently expressed by the Supreme Court in a different case. The correctness or otherwise of the earlier decision is wholly irrelevant where the conditions for the application of the rule of *res judicata* are satisfied in the latter case.[2193]

[s 11.42] Arbitration

Principles of *res judicata* apply to arbitration proceedings.[2194] Section 41 of the Arbitration Act, 1940 (Now repealed by the Arbitration & Conciliation Act, 1996), provides that the provisions of the CPC will apply to an arbitration proceeding. The provisions of *res judicata* are based on the principle that there shall be no multiplicity of proceedings and that there shall be finality to proceedings.[2195] *res judicata* is applicable to arbitration proceedings as well. Claimant raised some of the issues arising out of termination of contract in the first claim petition. It was held that he was precluded from seeking a second reference for remaining issues.[2196]

When the court does not modify the award with regard to grant of interest from the date of the award up to the date of payment, the effect would be as if the court itself has granted interest from the date of the decree till the payment at the rate which was determined by the arbitrator. The future interest would be regarded as having been ordered to be paid under section 29 of the Arbitration Act, 1940 when the court does not modify the award in this respect.[2197]

Supreme Court has made it clear that the existence, validity or effect of an arbitration agreement can be determined by the court at three stages: (1) before the arbitration proceedings commence, (2) during their pendency, and (3) after the award is made and filed in the court. If that is so and the question in this regard was raised before the court in a proceeding and that aspect was determined by the court, it cannot be said that such decision is not binding on the parties. Decision in arbitration suit was treated as arbitration petition under section 33 of Arbitration Act, 1940 holding that there was an arbitration agreement between parties which is binding on parties and operates as *res judicata* in matter of enforcement of foreign award. Independent of application of the principle of *res judicata*, one can spell out the existence of an arbitration clause between the parties in terms of the New York Convention to result in an arbitration and that further gets reinforced by the decision of the high court in the original suit in as much as that high court took the view that there is an arbitration agreement between the parties which is enforceable.[2198]

2192. *Gulam Abbas v State of Uttar Pradesh*, (1982) 1 SCC 71.
2193. *Abdul Salam v State Bank of J&K*, AIR 1981 J&K 21.
2194. *DR Gupta v Steel Authority of India Ltd*, AIR 1985 Ori 224.
2195. *KV George v Secretary to Government, Trivandrum*, AIR 1990 SC 53.
2196. *KV George v Secretary to Government, Trivandrum*, AIR 1990 SC 53.
2197. *State of Orissa v BN Agarwalla*, AIR 1997 SC 925 : AIR 1997 SCW 824 : (1997) 2 SCC 469. See also *Greater Cochin Development Authority v Leelamma Vilson*, AIR 2002 SC 952 : (2002) 2 SCC 573.
2198. *Smita Conductors Ltd v Euro Alloys Ltd*, AIR 2001 SC 3730 : 2001 AIR SCW 3517 : (2001) 7 SCC 728 : JT (2001) 7 SC 135.

Where the arbitration award in respect of fixing price for sale of land was set aside by the civil court on two grounds *viz.*, violation of rules of natural justice and for not joining all the co-owners of land, i.e., sisters of vendees as parties to the agreement and the second ground of invalidity of the award was not expressly challenged in the appeal preferred to the high court against the order setting aside the award and the high court had confirmed judgment of the civil court setting aside the award and the same has attained finality, it would operate as *res judicata* between the parties. In the subsequent proceedings initiated on the same arbitration agreement, therefore, it is not open to the party to contend that the award was set aside only on ground of breach of natural justice and not on the ground of its invalidity that the sisters were not parties to the arbitration agreement and not bound either by agreement of sale of fixation of price at the instance of the brothers. By ignoring the two grounds of setting aside the award, the civil court could not have allowed revival of arbitration proceedings on the same agreement, by permitting substitution of another arbitrator to the panel in place of the deceased arbitrator.[2199]

For the applicability of *res judicata* parties should be common or they shall be holding under the same title of the parties which were before the court. But when plaintiffs 3 and 4 claimed to be the trustees of plaintiff No. 1, they were not parties to arbitration agreement. The rights of the trustees are different and cannot be merged with that of the individual rights that a person may have. In that view of the matter when there were not parties as trustees to the arbitration agreement (some of them not even parties), the decision of the arbitrator which has been made a rule of the court and decree passed will not operate as *res judicata* so as to bind the plaintiffs *vis-a-vis* the nature of the suit that has been filed and the claim that they are the trustees and not the defendants 1 to 4.[2200]

A suit filed by the plaintiff was withdrawn in view of the arbitration agreement entered into between parties. However, when the counter-claim of the defendant was entertained by the court, then immediately on the next date the plaintiff filed an application and submitted his objection under section 8 of the Arbitration and Conciliation Act, 1996 to refer the parties to arbitration. It was held by the Madhya Pradesh High Court that section 8 of the Act of 1996 is a departure from section 34 of the Arbitration Act, 1940 and the plea of waiver or the ground of approbate or reprobate relief are not permissible under the New Act. It is imperative for the Court to refer the matter for arbitration. The principle of *res judicata* applies to bring a fresh suit for the same cause of action.[2201]

In another case from Madhya Pradesh a peculiar circumstance arose when the order passed by the district judge was in accordance with the decision of the Supreme Court, but that decision was overruled by a larger Bench of the Apex Court. The facts of the case are than an application was filed in the court of the district judge for appointment of arbitrator. The said application was dismissed on merit. At that time the district judge had jurisdiction to decide the matter. The said dismissal order was not challenged in higher forum. It was held by the Madhya Pradesh High Court the subsequent application cannot be entertained merely on the ground that now the jurisdiction vested in the high court and not with the district judge. At the time when the application for constitution of Arbitral Tribunal was decided by the district judge, he had competence to decide the matter in view of the decision of Supreme Court in

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2199. *Shanmughasundaram v Diravia Nadar*, AIR 2005 SC 1836 : 2005 AIR SCW 1426 : (2005) 10 SCC 728 : (2005) 2 SCR 649 : JT 2005 (3) SC 186.
2200. *Bhai Hospital Trust v Parvinder Singh*, AIR 2002 Del 311.
2201. *Charanjit Kaur v SR Cable*, AIR 2009 MP 66 : (2008) 4 MPLJ 221 (Indore Bench).

Konkan Railway Corp v Rani Construction Ltd,[2202] which decision was later overruled by a seven-Judge Bench in *SBP & Co v Patel Engineering Ltd*[2203] But the Supreme Court in the latter case also observed that the earlier orders passed by the district judge as delegate of the Chief Justice would be saved and would remain unaffected.[2204]

[s 11.43] Appeal

It is not possible to accept that the principle of *res judicata* will apply to bar the appeal. Section 11 of the CPC would bar the court from trying any suit or issue in which the matter "directly and substantially in issue" between the same parties or between the parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or suit in which such issue has been subsequently raised, has been "heard and finally decided by such court".[2205]

The plea of *res judicata* cannot be raised for the first time in appeal before the Supreme Court.[2206]

The contention that the first appeal filed producing the copy of the order sent by the Land Tribunal was not a valid appeal and the appeal filed for the second time along with certified copy of the order of the land tribunal is a valid appeal and therefore, the appellate authority committed an error by dismissing the second appeal, is wholly untenable and deserves rejection. When the first appeal itself was dismissed on the ground of limitation, the appeal filed for the second time is in a worse position as the same was much more belated than the first appeal. Even assuming that the contention is correct, when the first appeal itself was dismissed on the ground of limitation, the second appeal is also liable to be dismissed on the same ground. Thus, in any event the appeal filed for the second time deserves dismissal. Consequently, it makes no difference for the petitioners if the same is dismissed on the ground of *res judicata* or on the ground of limitation. In any event, having suffered an adverse order in the first appeal, the appeal filed for the second time is not maintainable and the same was bad in law. On this ground also the order under revision is legal and valid and no interference is warranted.[2207] Even in law, so far as Supreme Court is concerned, it is not bound by the finding of the Tribunal rendered in the first instance while remanding the case to the lower authorities because Supreme Court is now hearing an appeal against the order of the tribunal in which the earlier order has merged.[2208]

In an appeal against the high court's finding, the Supreme Court is not bound by what the high court might have held in its remand order. It is true that a subordinate court is bound by the direction of the high court. It is equally true that the same high court, hearing the matter on a second occasion or any other court of coordinate authority hearing the matter cannot discard the earlier holding but a finding in a remand order cannot bind a higher court when it hears the matter in appeal.[2209]

2202. *Konkan Railway Corp v Rani Construction Ltd*, AIR 2002 SC 778 : (2002) 2 SCC 388.
2203. *SBP & Co v Patel Engineering Ltd*, AIR 2006 SC 450 : (2005) 8 SCC 618.
2204. *Chandreshwar Jha (Engineers & Contractors) v Northern Coalfields Ltd*, AIR 2009 MP 21 : (2009) 1 MPLJ 214.
2205. *Bajranglal Shivchandrai Ruia v Shashikant N Ruia*, AIR 2004 SC 2546 : (2004) 5 SCC 272.
2206. *ITC Ltd v Commr of Central Excise, New Delhi*, AIR 2005 SC 1370 : (2004) 7 SCC 591 : (2004) 7 JT 409 : (2004) 171 ELT 433.
2207. *Shivarama Bhat v Thimma Poojary*, AIR 2003 Kant 455.
2208. *Collector of Central Excise v Hindustan Lever Ltd*, AIR 2000 SC 2907 : (2000) 6 SCC 614. See also *N Chandrasekharan Nair v Kalliani Amma Gomathi Amma*, AIR 2001 Ker 210.
2209. *Jasraj Inder Singh v Hemraj Multanchand*, AIR 1977 SC 1011 : (1977) 2 SCC 155.

When the remand order passed by the lower appellate court remanding the case in the trial court is not challenged it will bind only lower appellate court and not the high court in second appeal, which is superior court.[2210]

Where, the three suits involving various issues were decided by the trial court on merit, including common issue, one appeal by the plaintiff and 3 appeals by the defendants were filed. The appeal filed by the plaintiff abated on the ground of death of sole respondent who was also one of the respondents in other appeals, resulting in conformation of decision on common issue by trial court in that appeal. The hearing of common issue over again in the remaining appeals would be barred by *res judicata*.[2211]

Order XXI rule 22 culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under O XXI rule 23 can only be taken if the executing court either finds that after issuing notice under O XXI rule 21 the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing court. The sub-rule (1) as well as sub-rule (2) under O XXI rule 22 operates simultaneously on the same field. Sub-rule (1) operates when no objection is filed; then the court proceeds and clears the way for going to the next stage of the proceedings namely attachment of the property and if the court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been overruled. Whether the order is made under sub-rule (1) or sub-rule (2) it has the effect of determining the preliminary stage before the attachment process is set in motion. In this background, the order of the court to proceed with attachment on finding that no objection has been raised also operates as an order deciding the preliminary stage of the execution proceedings and operates as if the judgment-debtor has no objection to file. If thereafter, the judgment-debtor wants to raise an objection in the same proceedings in the absence of any modification of order passed under O XXI rule 22 sub-rules (1) or (2) he has to take recourse to get rid of the order by way of appeal. There is no dispute that the order for proceeding by the judgment under O XXI rule 22 amounts to a decree under section 47 of the CPC and is appealable as a decree, i.e., to say it is not an appeal against the interim order but an appeal against the decree which is provided against the final order only means that at the different stages of the execution orders passed by the executing court have been attached finality unless they are set aside by way of appeal before the higher forum else they bind the parties at the subsequent stage of the execution proceedings so that the smooth progress of execution is not jeopardised and the stage which reached the finality by dint of various orders of the O XXI operates as *res judicata* for the subsequent stage of the proceedings. Since the order passed at different stage itself operates as decree and appealable as such, the same cannot be challenged in appeal against subsequent orders also, because appeal against an order passed under O XXI, rule 22 does not fall as appeal against order at initial stage but amounts to a decree finally determining the question. That is why no appeal against orders made under O XXI have been provided under O XLIII. In this background where a judgment-debtor has an opportunity to raise objection which he could have raised but failed to take and allowed the preliminary stage to come to an end for taking up the matter to the next stage for attachment of property and sale of the property under O XXI rule 23 which fell within the above principle, the judgment-debtor thereafter cannot raise such objections subsequently and revert back to earlier stage of proceedings unless the order resulting in termination of preliminary stage which amounts to a decree is appealed against and order is set aside or modified.

2210. *N Chandrasekharan Nair v Kalliani Amma Gomathi Amma*, AIR 2001 Ker 210.
2211. *Alwar Chettiar v Natarajan Pillai*, AIR 2001 Mad 151.

In view of the aforesaid conclusions that the principle of *res judicata* including constructive *res judicata* operates in execution proceedings and that the order made under rule 22, clauses (1) and (2) of O XXI CPC, which result in closure of preliminary stage and commencement of next stage operates as *res judicata*, and precludes the judgment-debtor from raising objections to continuance of proceeding thereafter unless such order is appealed against as a decree.[2212]

An appeal cannot be entertained against an order dismissing a suit for default. The appeal being incompetent, order of remand passed therein is also without jurisdiction and cannot attract *res judicata*.[2213]

[s 11.44] Special Leave Petition

In the instant case, one *V*, died in the year 1936, leaving behind two sons. The dispute arose in respect of the residential house which was an arbitration. On 29 August, 1939, the arbitrator gave an award in respect of the partition of the house in question. On an application being filed on behalf of the defendant–appellant, the said award was set aside. However, on an appeal being filed before the high court, the award was directed to be made rule of the court. Thereafter, a suit was filed in the year 1963 by the plaintiff–respondent for partition of land adjoining the *pucca* house. The defendant-appellant resisted the suit for partition on the ground that even the land adjoining the *pucca* house had already been partitioned on the basis of the award dated 29 August, 1939. The high court in its order for making the award a rule of the court clearly recorded a finding that the award was in respect of the *pucca* house only and did not cover the area adjoining the house, which had not been partitioned. The findings arrived at by the high court became final and binding between the parties.[2214] A decision on an abstract question of law, unrelated to facts which give rise to a right, cannot operate as *res judicata*; nor also can a decision on the question of jurisdiction be *res judicata* in a subsequent suit or proceedings; but, if the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as *res judicata* between the parties in a subsequent suit or proceedings, if the cause of action is the same.[2215] Since the claims of the petitioners and the respondents has arisen from the same cause of action and the findings of the appellate court that damage has accrued to the Respondents, the decree which is the subject matter of the special leave petition cannot be assailed. The same question was directly in issue and was the subject matter of the suits. The same having been allowed to become final. it could not be gone into, since the same had attained finality, the petitioner not having filed any appeal against the appeal dismissing the suit.[2216] It is settled law that even the dismissal of special leave petition *in limine* operates as a final order between the parties and any order passed by the high court or the tribunal, subsequently operates as a *res judicata* as the parties thereto are concerned.[2217] An issue of non-joinder of a party tried as a preliminary issue and negatived by trial court where the high court on revision confirmed the same; in appeal, before the Supreme Court, the issue cannot be allowed to be raised as being barred by the principle of *res judicata*.[2218] A dispute raised by an application under Article 32 of the Constitution, must be held as barred by principle of *res judicata* and constructive *res judicata* if the same

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2212. *Barkat Ali v Badrinarain*, AIR 2001 Raj 51 (DB).
2213. *Superintendent of Police, Cachar v Abdul Rashid*, AIR 1980 Gau 8.
2214. *Badrinarain Upadhyaya v Jagdish Narain Upadhyaya*, (1998) 8 SCC 728.
2215. *Supreme Court Employees, Welfare Association v UOI*, (1989) 4 SCC 187.
2216. *Ram Prakash v Charan Kaur*, (1997) 9 SCC 543.
2217. *Shree Narayan Dharmasanghom Trust v Swami Prakashnanda*, (1997) 6 SCC 78.
2218. *Fennar (India) Ltd v Punjab and Sindh Bank*, (1997) 7 SCC 89.

has been earlier decided by a competent court and has become final. The dismissal of special leave petition is not ordinarily a seal of total approval of the view of the high court in arriving in its decision.[2219] Dismissal of a special leave petition in limine cannot preclude the Supreme Court from considering on merits, the same issues involved in a subsequent appeal.[2220] An order dismissing special leave petition in limine does not constitute *res judicata*, particularly in a dispute which was not between the same parties.[2221] A dismissal of a special leave petition by the Supreme Court by non-speaking order, would not operate as bar against a party filing writ petitions in the high court.[2222] Since, the appellant in its earlier special leave petition had also questioned the grant of solatium at 15% and interest at 6% in the Supreme Court and their plea failed on 19 December 1985, it is not permissible for them now to re-open the issue relating to the grant of solatium at 15% and interest of 6%. The principle of *res judicata* applies.[2223]

Where a government circular and fresh gradation list was held to be illegal by the tribunal, the special leave petition against the decision was filed by one appellant and was dismissed as infructuous in view of government circular issued as per the tribunal's decision, the liberty however was given by Supreme Court to the appellant to assail the government's action on different cause. Since no liberty was given to the appellants to re-open the question as regards the validity of the gradation list of 1984, which became final and binding, the principle of *res judicata* was made applicable and the tribunal had no jurisdiction to re-open the issue.[2224]

Following the decision in the case of *Kunhayammed*,[2225] that the dismissal of the special leave petition against the main judgment of the high court would not constitute *res judicata* when a special leave petition is filed against the order passed in the review petition provided the review petition was filed prior to filing of special leave petition against the main judgment of the high court. The position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of special leave petition. In such a situation of filing of review would be an abuse of the process of the law. The view taken in *Abbai Maligai Partnership Firm*,[2226] that if high court allows the review petition filed after the special leave petition was dismissed after condoning the delay, it would be treated as affront to the order of the Supreme Court. The review petition was filed well within time and since the review petition was not being decided by the high court, the appellant filed the special leave petition against the main judgment of the high court. The appeal arising out of special leave petition is maintainable.[2227]

The Supreme Court, while remanding the matter to the tribunal, categorically stated that all these matters should be sent to the State Transport Appellate Tribunal which shall treat the writ petitions filed in the high court as appeals and after hearing all the parties, dispose of the matters in accordance with law. The Supreme Court never expressed any opinion on the merits

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2219. *Nityanandkar v State of Orissa*, (1991) Supp 2 SCC 516.
2220. *Scientific Adviser to the Ministry of Defence v S Daniel*, (1990) Supp SCC 374.
2221. *UOI v Sube Ram*, (1997) 9 SCC 69.
2222. *Sahi Ram v Avtar Singh*, AIR 1999 Del 96.
2223. *UOI v Asha Sharma*, (1998) 2 SCC 698.
2224. *Sarat Chandra Mishra v State of Orissa*, AIR 2006 SC 861 : (2006) 1 SCC 638 : (2006) 1 SCR 116.
2225. *Kunhayammed v State of Kerela*, AIR 2000 SC 2587 : AIR 2000 SCW 2608 : (2000) 6 SCC 359.
2226. *Abbai Maligai Partnership Firm v K Santhakumaran*, AIR 1999 SC 1486 : AIR 1998 SCW 4061 : (1998) 7 SCC 386.
2227. *K Rajamouli v AVKN Swamy*, AIR 2001 SC 2316 : AIR 2001 SCW 2146 : (2001) 5 SCC 37. See also *Green View Tea and Industries v Collector, Golaghat*, AIR 2004 SC 1738 : AIR 2004 SCW 1347 : (2004) 4 SCC 122 : JT 2004 (2) 556.

of the case whatsoever. Therefore, the dismissal of special leave petitions pertaining to the route in question by various orders of Supreme Court neither amounts to *res judicata* nor does it amount that order passed by the high court amounts to upholding the law propounded in the decision sought to be appealed against.[2228]

[s 11.45] Land Acquisition

Where the Land Acquisition Officer decides the question of a title, the decision becomes *res judicata*;[2229] but where the revenue officer does not have jurisdiction to decide whether the claimant was the landlord and, as such, entitled to eject a tenant, then decision is not *res judicata*.[2230] Where the relief sought in the land acquisition proceeding and in the subsequent suit are different, then there is no question of *res judicata*.[2231]

It is not very often that question of title is decided in a proceeding under the Land Acquisition Act. In some proceedings like one for injunction, the question of title does sometimes crop up, but they appear as ancillary issues. However, where the right to receive compensation for property acquired in land acquisition proceedings as between rival claimants depends on the title to the property acquired and the dispute as to title is raised by the parties and is decided by the Land Acquisition Judge after contest, the decision as to title operates as *res judicata* in a subsequent suit between the same parties on the question of title. The binding force of a judgment delivered under the Land Acquisition Act depends on general principles of law and not on section 11 of the Civil Procedure Code and the decision of the Land Acquisition Judge would operate as *res judicata* even though he was not competent to try the subsequent suit. The fact that the judgment of the Privy Council in appeal is the above case was given in default of appearance, was held to be in material as the judgments in the first two Courts were given after full contest.[2232]

[s 11.46] Ceiling Act and *Res Judicata*

Proceedings under the Ceiling Act, are not adversarial as are proceedings in suit. The Ceiling Act is a legislation to give effect to the directive principles contained in clauses (b) and (c) of Article 39 of the Constitution. The state is advised by the directive principles contained in Constitution to take necessary legislative measures so as to ensure social justice by equitable distribution of ownership and control of material resources and avoid concentration of wealth and means of production in few hands. The laudable social objectives sought to be achieved by the ceiling legislation is to take surplus land from the holders and distribute the same to the landless agricultural labourers and peasants surviving on agriculture. In applying the principles of *res judicata*, therefore, to the ceiling proceedings, the object of the Act cannot be lost sight of. All principles of *res judicata* contained in section 11 of the CPC cannot be strictly and rigorously made applicable to ceiling proceedings. Section 38-B introduced by Amendment Act of 1976 with the transitory provisions made both in the Amendment Act No 18 of 1973 and Act No 20 of 1976 is a departure from the provisions of section 11 of the CPC and indicate non-applicability of bar of *res judicata* in ceiling proceedings under the Act.[2233]

2228. *UP SRTC v Omaditya Verma*, AIR 2005 SC 2250 : (2005) 4 SCC 424.
2229. *Rajlakshmidasi v Banmali Sen*, AIR 1953 SC 33 : 1953 SCR 154.
2230. *Richpal Singh v Dalip*, (1987) 4 SCC 410.
2231. *State of Jammu and Kashmir v Sahahallu Mir*, AIR 1980 SC 1349 : (1980) 3 SCC 272.
2232. *Rajlakshmi Dasi v Banmali Sen*, AIR 1953 SC 33 : 1953 SCR 154.
2233. *Escorts Farms Ltd v Commr, Kumanon Division, Nainital*, AIR 2004 SC 2186 : AIR 2004 SCW 1960 : (2004) 4 SCC 281.

[s 11.47] Exceptions to *Res Judicata*

The doctrine of *res judicata*, has certain notable exceptions. The doctrine cannot be invoked to confer finality to:

(i) An erroneous decision on the jurisdiction of the court.

(ii) An erroneous judgment on a pure question of law.

In *Canara Bank v NG Subbaraya Setty,*[2234] the Supreme Court dealt with issues concerning application of the second exception. After comprehensive analysis of the doctrine, the statutory provisions embodying it and the case law, the court cleared the ambiguities concerning its application. It held that the general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are *res judicata* in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.

This general rule, the court said, has certain exceptions when it comes to issues of law. The court elucidated them holding that where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not *res judicata* in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. An issue of law which arises between the same parties in a subsequent suit or proceeding is not *res judicata* if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute interpartes), as the public policy contained in the statutory prohibition cannot be set at naught.

Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding. Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different.

[S 12] Bar to further suit.—Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

[s 12.1] Rules Precluding Institution of a Further Suit in Respect of the Same Cause of Action

This section was necessitated by the transfer of certain of the provisions of the Code of 1882 to the Rules. The following is a list of the rules that bar a fresh suit in respect of the same cause of action:

2234. *Canara Bank v NG SubbarayaSetty,* (2018) 16 SCC 228.

Order II, rule 2 — Omission to sue in respect of part of a claim.

Order IX, rule 9 — Decree against plaintiff by default bars a fresh suit.

Order XXII, rule 9 — Abatement of suit bars a fresh suit.

Order XXIII, rule 1 — Withdrawal of suit without leave of court bars a fresh suit.

The word "rules" means rules contained in the First Schedule or made under section 122 or section 125. Hence, the section applies to suits precluded under the rules and not on account of some provision in some other statute.[2235] If plaintiff withdraws a suit without the leave of the Court, i.e., against the mandate provided under Order XXXIII rule 1, then the plaintiff would have no right to file "further suit" in respect of cause of action, which was the same cause of action in a previous suit.[2236]

[S 13] When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(*a*) where it has not been pronounced by a Court of competent jurisdiction;

(*b*) where it has not been given on the merits of the case;

(*c*) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [2237][India] in cases in which such law is applicable;

(*d*) where the proceedings in which judgment was obtained are opposed to natural justice;

(*e*) where it has been obtained by fraud;

(*f*) where it sustains a claim founded on a breach of any law in force in [45][India].

SYNOPSIS

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[s 13.1] Alterations in the Section

Clause (a) was inserted in 1908. The last clause of section 14 of the Act of 1882 was then omitted. (See note below, "How a foreign judgment may be enforced in India".) Other alterations were only verbal.

[s 13.2] Principle of Territorial Sovereignty

It is a well settled principle of international law, that owing to the principle of territorial sovereignty a judgment delivered in one country, in the absence of international agreement, cannot have a direct operation of its own in another. It is also well settled that all individuals and all properties within a territory of a state are within its dominion and sway (*quidquid est in territorio es etiam de territorio*). The municipal courts are under a constitutional compulsion to give effect to the law of their own sovereign legislature.[2238]

[s 13.3] International Law (Private)—Meaning of

What is called private international law is not law governing relations between independent states; private international law, or as it is sometimes called "conflict of laws", is simply a branch of the civil law of the state evolved to do justice between litigating parties in respect of transactions or personal status involving a foreign element. The rules of private international law of each state must therefore in the very nature of things differ, but by the comity of nations certain rules are recognised as common to civilised jurisdictions. Through part of the judicial system of each state, these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign courts in certain matters, or as a result of international conventions.[2239]

There is a well-recognised distinction in private international law between a judgment in rem and a judgment in *personam*. A foreign judgment which purports to operate *in rem* will not attract extra territorial recognition unless it has been given by a court internationally competent in this respect. In other words, such a court must have jurisdiction to give a judgment binding all persons generally.[2240]

2238. *Sagoon Jayaidee Dhond v Sociedade Civill e Particular dos Toris of Volooi, Ponda Concelhe*, AIR 1966 Goa, Daman and Diu 38 (FB).
2239. *R Visnanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
2240. *Duggamma v Ganeshayya*, AIR 1965 Mys 97.

[s 13.4] Act of State

An "act of state" is not a judgment, and it cannot, therefore, have the effect of *res judicata.* Thus, it has been held before Independence that an order of the political agent of Meywar and the Maharana of Udepore deposing a high priest from his *gadi* was not a foreign judgment, but merely an "act of state", and it cannot therefore, operate as *res judicata.*[2241]

[s 13.5] Foreign Judgment

The expression "foreign judgment" is defined in section 2(6) as meaning the judgments of a foreign court, that is, a court situated beyond the limits of India which has no authority in India and is not established or continued by the President of the Indian Union. The definition of judgment as given in section 2(9) is inapplicable to foreign judgments. A foreign judgment must be understood to mean "an adjudication by a foreign court upon a matter before it" and not the reasons for the order made by it, or otherwise section 13 would not be applicable to an order made by it where no reasons are given.[2242] The present section provides that a foreign judgment may operate as *res judicata* except in the six cases specified in the section, and of course, in order to so operate the other conditions, section 11 must be fulfilled.[2243] The foreign court must be competent to try the suit, not only as regards pecuniary limits of its jurisdiction and the subject matter of the suit, but also with reference to its territorial jurisdiction and the competency of the jurisdiction of the foreign court which is to be judged not by the territorial law of the foreign state, but by the rules of private international law. That is, the foreign court must have competence in an international sense and not merely according to the law of the state in which the court is functioning.[2244] In matrimonial matters, an order for the custody of minor children by a West German court with the consent of the parents, both residing at the time within the jurisdiction of the court was held to be one which would be recognised and enforced by courts in India.[2245] Similarly, a decree of a foreign court, within whose jurisdiction the husband's domicile was annulling a Hindu marriage solemnised in India will be recognised by courts in India. It is not as if such a marriage can be dissolved only in conformity with the provisions of the Hindu Marriage Act, 1955, and on grounds provided therein or by courts in India only.[2246] Courts of one country have no jurisdiction to decide questions of title to immovable property situated in another country nor pass a decree capable of enforcement against the same, but they have jurisdiction over all persons residing within its borders and can pass a decree as regards movables situated outside the state, provided it can effectively be enforced by process against the judgment-debtor within the state. Thus, a decree of the Madras High Court directing the defendant residing within the state to transfer shares in a company whose registered office was outside the state was held to be valid[2247] but a decree creating a charge over immovable properties in a foreign state is without jurisdiction.[2248] So, a decision of a Kathiawar Court as to a custom governing partition will not be *res judicata* in a

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2241. *Goswami Govardhanlalji v Goswami Shri Girdharlalji*, (1893) ILR 17 Bom 620.
2242. *Brijlal Ramjidas v Govindram Gobordhandas*, AIR 1947 PC 192 : 74 IA 203 : (1948) 52 Cal WN 82 : (1948) 50 Bom LR 556.
2243. *Indar v Thakur*, AIR 1921 Lah 20.
2244. *Viswanathan v Abdul Wajid*, AIR 1963 SC 1; *Chormal Balchand v Kasturchand*, (1936) ILR 63 Cal 1033 : (1936) 40 Cal WN 59; *Panchapakesa v Hussain*, AIR 1934 Mad 35 : (1934) 64 Mad LJ 209.
2245. *Marggarate M Pulparampil v Dr Chacko Pulparampil*, AIR 1970 Ker 1 : (1969) ILR 1 Ker 293.
2246. *S Teja Singh v Smt Satya*, AIR 1971 P&H 80; reversed on appeal in *Satya v Teja Singh*, AIR 1975 SC 105.
2247. *Viswanathan v Abdul Majid*, AIR 1963 SC 1.
2248. *Sivaramakrishnan v Mammu*, AIR 1957 Mad 214; *Duggamma v Ganeshayya*, AIR 1965 Mys 97.

suit for partition between the same parties of lands in British territory.[2249] In matters of foreign judgments, the courts here are guided by very much the same principles as those adopted by the courts of England.[2250] As in England, the foreign judgment must be final and conclusive in the court in which it is passed and it may be final although it is subject to appeal to a higher court.[2251]

[s 13.6] "shall be conclusive"

A foreign judgment is conclusive as to any matter directly adjudicated upon thereby, but it does not include the reasons for the judgment given by the foreign court. What is conclusive under section 13 is the judgment, i.e., the final adjudication, and not the reasons. Section 13 in essence enacts a branch of the rule of *res judicata* in its relation to foreign judgments, but not every foreign judgment is made conclusive in the Indian courts by section 13.[2252]

The rule of conclusiveness of a foreign judgment, as enacted in section 18, is somewhat different in its operation from the rule of *res judicata*.[2253]

Manifestly, therefore, every issue heard and finally decided in a foreign court is not conclusive between the parties. What is conclusive is the judgment, again, the competence of a court for the application of the rule of *res judicata* fails to be determined strictly by the municipal law, but the competence of the foreign tribunal must satisfy a dual test of competence by the laws of the state in which the court functions, and also in an international sense. Title to immovable property may be determined directly or indirectly only by the law of the state, and by the court of the state in which it is situated.[2254]

Under section 31 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, a suit for recovery of money due to Bank based on foreign judgment cannot be transferred to Debt Recovery Tribunal without findings as to the conclusive nature of foreign judgment. The conclusive nature of foreign judgment is to be decided by civil court and this function cannot be delegated to the Debt Recovery Tribunal.[2255] Discussing the applicability of section 31 of the Act, it was observed in the above case as follows:

> Section 31 of the Act is intended for transfer of suits or other proceedings pending for recovery of debts due to banks and financial institutions. By taking recourse to Section 31, the civil court cannot delegate its power to adjudicate the question, set out in Section 13 of the Code of Civil Procedure to a Tribunal constituted under the Act. The rules laid down in s 13 are rules of substantive law and not merely the procedure and therefore the only authority rested with the jurisdiction to adjudicate the questions enumerated under s 13 is the civil court. Even otherwise, in view of the bar under s 22 of the Act on the observance of the procedure under the Code, the Tribunal cannot apply s 13 of the code.[2256]

The authority vested with jurisdiction to decide as to the conclusive nature of a foreign judgment is the civil court under section 13 of the Code. Therefore, where a husband filed a suit in India for grant of injunction to restrain his wife from continuing with complaint for

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2249. *Prithisingi v Umedsingi*, (1903) 6 Bom LR 98, doubting *Babahbat v Narharbhat*, (1888) ILR 13 Bom 224.
2250. *Nalla v Mahomed*, (1897) ILR 20 Mad 112, p 114; *Duggamma v Ganeshayya*, AIR 1965 Mys 97.
2251. *Baijnath v Vallabhadas*, AIR 1933 Mad 511 : (1933) ILR 56 Mad 951; *Nauvion v Freeman*, [1890] 15 AC 1.
2252. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
2253. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
2254. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
2255. *TK Shahal Hassan Musaliyar v Bank of Baroda, Kollam*, AIR 2008 Ker 21 : (2007) 4 Ker LT 90.
2256. *TK Shahal Hassan Musaliyar v Bank of Baroda, Kollam*, AIR 2008 Ker 21, p 23 : (2007) 4 Ker LT 90.

divorce in a foreign Court, it was held by the Punjab and Haryana High Court that the wife being not amenable to the jurisdiction of the Court where the suit was filed, injunction cannot be granted. It was also held that foreign Court cannot be treated as a Court subordinate to civil court in India and decree of divorce, even if granted, would be required to be examined as binding on the husband in terms of section 13 of the Code.[2257]

When an issue is decided or adjudicated upon, it would mean that the issue has been conclusively decided between the parties.[2258]

Where the issue or the "matter" which the chamber judge was required to consider and to adjudicate upon between the parties was forum *non-con-veniens*, both the parties were heard by the chamber judge *in extenso*. Costs were awarded after hearing both the counsel, who appeared before the chamber judge. The court of appeal also passed an order upon reading notices filed on behalf of defendant, the order of the chamber judge was affirmed and the libel action was stayed by the appeal court while directing the plaintiffs to pay costs to defendant, it cannot be said that since no evidence was led while delivering the order, it is not a judgment which is conclusive as it has not been given on merits of the case as required under section 13(b) of the CPC.[2259]

[s 13.7] "any matter"

The expression "matter" in section 13 is not equivalent to subject-matter, it means the right claimed.[2260]

The term "matter" used in section 13 of the Civil Procedure Code refers to an issue to be decided. It is not as if the entire case has to be adjudicated upon and only then can the decision be executed.[2261]

The language of section 13 speaks not of the judgment but "any matter thereby directly adjudicated upon" and the word "any" shows that all the adjudicative parts of the judgment are equally conclusive.[2262]

[s 13.8] "directly adjudicated upon"

Adjudication in every case does not mean that evidence must be led. The term "adjudication" means to decide on, pronounce, sit in judgment. This decision or pronouncement can be made without evidence being led by the parties if there is sufficient material for the adjudicating authority to draw any conclusion in respect of the issue involved between the parties. Therefore, the adjudication of a matter on merits would not necessarily mean that evidence must be led. In fact, if the parties agree that no evidence need be led in particular case and merely rely on the pleadings and submissions made, it could not be said that a decision in such a case would not be on merits.[2263]

2257. *Rakesh Kumar v Ashima Kumar*, AIR 2007 P&H 63.
2258. *Janardhan Mohandas Rajan Pillai v Madhubhai Patel*, AIR 2003 Bom 490.
2259. *Janardhan Mohandas Rajan Pillai v Madhubhai Patel*, AIR 2003 Bom 490.
2260. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
2261. *Janardhan Mohandas Rajan Pillai v Madhubhai Patel*, AIR 2003 Bom 490.
2262. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
2263. *Janardhan Mohandas Rajan Pillai v Madhubhai Patel*, AIR 2003 Bom 490.

[s 13.9] "the same parties or between parties under whom they or any of them claim"

See notes to condition II, "The same parties or parties under whom any of them claim" in section 11.

[s 13.10] "litigating under the same title"

See notes to condition III to section 11, "litigating under the same title".

[s 13.11] Enforcement of foreign judgments in India

A judgment of an Indian court can only be enforced by proceedings in execution. A foreign judgment, however, may be enforced by proceedings in execution in certain specified cases only (sections 44 and 44A). In other cases, a foreign judgment can only be enforced by a suit upon the judgment. That is to say, if *A* has obtained a decree against *B* for Rs 5,000 in a French court at Pondicherry, and if *B* has got no property in Pondicherry to satisfy the decree, but has got property in Bombay, *A* may bring a suit against *B* in Bombay to recover the amount of the judgment. The suit may be brought within three years from the date of the judgment,[2264] and if a decree is passed in favour of *A*, he may proceed to execute it by attachment and sale of *B*'s property in Bombay. A foreign judgment is not affected by any of the defects mentioned in clause (a)–(f) of the section wherein creates a new obligation and so, the court will not inquire whether the foreign judgment is correct in fact or in law;[2265] but the original cause of action does not merge in such a judgment, so that a party has the option either to sue on the foreign judgment or on the original cause of action in a domestic court.[2266] Where a suit on a foreign judgment has been dismissed on merits, no application will thereafter lie to execute that judgment as it had become merged in the decree dismissing the suit thereon.[2267] A decree passed *ex parte* by a foreign court, merely on the pleading without taking any evidence is not a judgment on merits.[2268] .

There was at one time difference of opinion as to whether a suit could be maintained in British India as it was then upon the judgment of a court of an Indian state or whether the plaintiff could sue only upon the original cause of action. The Madras High Court held that a suit could be maintained on the judgment,[2269] while the Bombay High Court held that no such suit was maintainable[2270] and that the only remedy was by way of a suit on the original cause of action. It is submitted that the Bombay view was not correct since it was contrary to the general rule that a court which entertains a suit on a foreign judgment cannot institute an inquiry into the merits of the original claim or the propriety of decision.[2271] With a view to resolve the conflict of views, a clause was added to section 14 of the Code of 1882, by section 5

2264. The Indian Limitation Act, 1963, Sch 1, Article 101.
2265. *Popat v Damodar*, AIR 1934 Bom 390 : (1934) 36 Bom LR 844.
2266. *Nilratan Cooch Behar Loan Office*, AIR 1941 Cal 64 : 45 Cal WN 113 : 72 Cal LJ 148 : (1941) ILR 1 Cal 171; *Setabgang Sugar Mills v Benazir Ahmed*, AIR 1952 Cal 116; *East India Trading Co v Badat and Co*, AIR 1959 Bom 414 : (1959) ILR Bom 1004; *Gopal Singh v Punjab National Bank*, AIR 1976 Del 115.
2267. *Gena v Birdhichand*, AIR 1958 Raj 189 : (1958) ILR Raj 374.
2268. *Gurdas Mann v Mohinder Singh Brar*, AIR 1993 P&H 92; followed *Algemene Bank Nederland NV v Satish Dayalal Choksi*, AIR 1990 Bom 170.
2269. *Sama Rayar v Annamalai*, (1884) ILR 7 Mad 164.
2270. *Himmat Lall v Shivajirav*, (1884) ILR 8 Bom 593.
2271. *Ganga Prasad v Ganeshi Lal*, AIR 1924 All 161 : (1924) ILR 46 All 119.

of Act 7 of 1888, but that clause was deleted in 1908 as the *raison desire* for such a clause was no longer tenable.[2272] The result is that the Madras view prevails.

Though a foreign judgment may be enforced by a suit in India, it is not to be supposed that Indian courts are bound in all cases to take cognizance of the suit, and they may refuse to entertain it on grounds of expediency.[2273] The scope, operation, and effect of foreign judgments will be found explained in the under-mentioned cases.[2274]

[s 13.12] Enforcement of decrees passed by Courts of Indian States after merger

The merger of the Indian states in the Indian Union under the Constitution has given rise to a new problem as to the enforceability of decrees passed by the courts in those states prior to merger. Before Independence, the Indian states held, as already noted, sovereign status and they continued to retain it, even after independence. The fact that they acceded to the Indian Union did not by itself affect their status because they had thereby surrendered only some of their sovereign rights and the position was precisely what it was when the British had paramount over them. It was only when they merged in the Indian Union on 26 January, 1950, that they were completely divested of their sovereign status and ceased to be foreign states. Prior to merger, the only mode of enforcing judgments of courts in those states would be by suit under section 13 or by execution under sections 44 and 44A. The point that came to be debated was whether that position had been altered by merger and the decrees became executable under the Code. In *Bhagwan v Rajaram*,[2275] a Full Bench of the Bombay High Court held that a decree passed on a personal action against a non-resident foreigner was a nullity only in the sense that it could not be enforced in the foreign state but that it was capable of execution within the state itself and that when a foreign state has ceased to be foreign, there was no impediment to the decree being executed by the courts in those territories. This view has been adopted in some decisions.[2276] A different view was taken in several decisions and it was held that the character of a decree and the rights flowing therefrom must be determined as on the date of the decree and that in consequence decrees passed in Indian states prior to merger were incapable of execution under sections 44 and 44A.[2277] The question is now concluded by the decision of the Supreme Court in *Maloji Nar Singh Rao v Shankar Saran*.[2278]

2272. *Gurdyal Singh v Raja of Faridkot*, (1895) ILR 22 Cal 222, 237 : 21 IA 171; *Mayaram v Raoji*, (1900) ILR 24 Bom 86.
2273. *Murugesa v Annamalai*, (1900) ILR 23 Mad 458.
2274. *Mallappa v Raghavendra*, AIR 1938 Bom 173 : (1938) ILR Bom 16; *Chormal Balchand v Kasturichand*, AIR 1938 Cal 511 : (1938) ILR 63 Cal 1003.
2275. *Bhagwan v Rajaram*, AIR 1951 Bom 125 : 53 Beng LR 198.
2276. *Kala Bechar v Mohan Bhagwan*, AIR 1953 Sau 16 (FB); *Meherunnissa Begum v Venkat Murh*, AIR 1955 MB 1 : (1955) ILR Hyd 464.
2277. *Vareed v Gopal Bai*, AIR 1954 Tr and Coch 358 : (1954) ILR Tr and Coch 694; *Ram Kisan v Harmukharai*, AIR 1955 Ngp 103 : (1955) ILR Nag 194; *Firm Kanhaiyalal Somani v Param Sukh*, AIR 1956 Ngp 273 : (1956) ILR Nag 539; *Firm Radhesham v Kundanlal*, AIR 1956 P&H 193 : (1956) ILR Punj 434; *Lakshmi Chand v Tripur*, AIR 1956 Raj 81 : 1956 ILR Raj 236; *Variath Augusthi v Subramanya Iyer*, AIR 1958 Ker 15 : (1957) ILR Ker 1036 (FB); *Gena v Birdhichand* supra; *Gauri Lal Firm v Jugal Kishore*, AIR 1959 P&H 265; *Metal Corp of India v P Colombi*, AIR 1960 Mys 1; *Kishendas v Indocarnatic Bank*, AIR 1958 AP 407.
2278. *Maloji Nar Singh Rao v Shankar Saran*, AIR 1962 SC 1737; affirming AIR 1958 All 175; *Laxmidas v L Chandraphan*, AIR 1969 Guj 23 : 10 Guj LR 93.

On 18 January, 1948, an *ex parte* decree was passed against a non-resident foreigner by a court in Gwalior and after merger, an order was made on 14 September 1951 under sections 38 and 39 of the Code transferring the decree for execution to a court in Allahabad. Dealing with the question of the maintainability of the execution application, the Supreme Court held that the nationality of a decree should be judged as on the date when it was passed and that therefore, the decree dated 18 November 1948, was a foreign decree, that having been passed against a non-resident foreigner, it was a nullity in an international sense and not merely unenforceable in a foreign state and that the right and obligations created by it stood unaffected by subsequent changes. It was further held that sections 38 and 39 of the Code had no application as they had reference to decrees passed by courts to which the Code applied and that the decree passed by the Gwalior court therefore, fell outside their operation. In view of this pronouncement, it is unnecessary to review the previous case law on the subject.

It may be noted that the above decision relates to execution of a decree passed by a court in the Indian states by a court in what was British India. The same reasoning must apply to execution of an *ex parte* decree passed by a court in British India against a non-resident subject of an Indian state when it is sought to be executed in a court within that state.[2279]

Where as a result of merger, the territory once belonging to an Indian state has become part of the Union of India and this Code has been made applicable to it a transfer for execution of a decree formerly passed by a court in that territory from that court to another court is valid and effective.[2280]

[s 13.13] Decree passed by Court fallen into Pakistan

A decree passed before partition of India by a court having territorial jurisdiction over land which has fallen into Pakistan would be considered to be a foreign judgment. It cannot be executed in the Indian dominion, but a suit will have to be brought upon it.[2281]

[s 13.14] Operation of the section

The operation of the section may be illustrated by the following cases:

(i) *A* sues *B* in a foreign court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by *A* in India on the original cause of action, unless the decision is inoperative by reason of one or more of the circumstances specified in the section.[2282] If a decree is passed in favour of *A* in the foreign court and *A* sues *B* on the judgment in India, *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign court, unless the decision of the foreign court is inoperative on any one of the six grounds specified in the section.

(ii) *A* obtained a decree against *B* in the Cochin court which was then a foreign court and applied for execution of the decree in the High Court of Bombay. (Decrees of the Cochin Court may be executed in India under section 44.) It was proved that

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2279. *Vareed v Gopalbai* supra; *Variath Augusthi v Subramanya Iyer* supra; *Kishendas v Indo-carnatic Bank* supra; *Mental Corp of India v P Colombi* supra; *Narhari Shivram v Pannalal Unediram*, AIR 1977 SC 164 (case of transfer to Goa Court) : (1976) 3 SCC 203 : (1976) SCR 3 149.
2280. *Shaligram v Firm Daulatram Kundanmal*, AIR 1967 SC 739 : [1963] 2 SCR 574 : 65 Bom LR 331.
2281. *SS Said-ul-Hamid v Federal Indian Assurance Co*, AIR 1951 Simla 255.
2282. *Bababhat v Narharbhat*, (1889) ILR 13 Bom 224.

A obtained the decree at Cochin by concealment of essential facts and by fraud. (See clause (e) of the section). It was held that execution of the decree should be refused.[2283]

[s 13.15] Foreign judgment pronounced by a Court without jurisdiction not enforceable

The leading case on the subject is *Gurdyal v Raja of Faridkot*.[2284] In that case, *A* sued *B* in the court of the Indian state of Faridkot claiming Rs 60,000 alleged to have been misappropriated by *B* while in *A*'s service at Faridkot. B did not appear at the hearing, and an *ex parte* decree was passed against him. B was a native of another Indian state, Jind. In 1869, he left Jind and went to Faridkot to take up service under *A*. In 1874, he left *A*'s service, and returned to Jind. The suit was brought against him in 1879. At the date of the suit *B* neither resided in Faridkot nor was he a domiciled subject of the Faridkot state nor did he owe allegiance to that state. On these facts, the Faridkot state had on general principles of international law, no jurisdiction to entertain the suit against B in respect of the claim, which, it should be noted, was a mere personal claim as distinguished from a claim relating to land or movables.[2285] The decree of the Faridkot court was therefore, an absolute nullity. *A* then sued *B* in a British Indian court on the judgment of the Faridkot court. The court of first instance dismissed the suit on the ground that the Faridkot court had no jurisdiction to entertain the suit. This decision was upheld by their Lordships of the Privy Council. The mere fact that the alleged *embezzlement* took place at Faridkot was not sufficient to give jurisdiction to the Faridkot court. The result would be the same if the suit were for damages for breach of a contract entered into by *B* with *A* at Faridkot.[2286] In other words, a foreign court cannot assume jurisdiction in cases where the claim is a personal one merely because the cause on action arose within its jurisdiction. But if *B* was residing at Faridkot at the date of the suit, the Faridkot court would have had complete jurisdiction. In the case of personal claims, it is the residence at the time when the action began that gives jurisdiction in a suit to a foreign court[2287] unless: (i) The defendant was a subject of that foreign state;[2288] (ii) where the defendant in the character of a plaintiff had elected the forum in which he is afterwards sued; or (iii) where he, the defendant, had voluntarily appeared in that court and had submitted to its jurisdiction, or (iv) where he had contracted to submit himself to that foreign forum.[2289] On this rule, a decree passed by a court in Pakistan was held to be a nullity and not enforceable under this section on the ground that the defendant was neither a national nor a person having a domicile there at the date of commencement of the suit, nor was he served with the summons when he was there, nor had he submitted himself to the jurisdiction of that court.[2290] The same rule applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same sovereign. Thus, a decree passed by the Ceylon Court (which is a foreign court within

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2283. *Hajimusa v Purmanand*, (1891) ILR 15 Bom 216.
2284. *Gurdyal v Raja of Faridkot*, (1895) ILR 22 Cal 222 : 1895 IA 171.
2285. *Lakshmishankar v Vishnuram*, (1900) 24 Bom 77; *Nalla v Mahomed*, (1897) ILR 20 Mad 112.
2286. *Mathapa v Chellappa*, (1876) ILR Mad 196.
2287. *Chunilal Kasturchand v Dundappa Damappa*, AIR 1951 Bom 190 : (1950) ILR Bom 640; *Jivappa v Iverg*, (1916) ILR 40 Bom 551; *Kassim v Isuf*, (1902) ILR 29 Cal 500; *Ishri Prasad v Sri Ram*, AIR 1927 All 510 : (1927) 25 All LJ 887.
2288. *Ramalinga v Swaminatha*, AIR 1941 Mad 688 : (1941) ILR Mad 891.
2289. *Chormal Balchand v Kasturchand*, ILR 63 Cal 1033 : 40 Cal WN 591; *Vithalbhai v Laibhai*, AIR 1942 Bom 189 : 44 Beng LR 380 : 202 IC 286 : (1942) ILR Bom 688.
2290. *Bharat Nidhi Ltd v Megh Raj*, AIR 1967 Del 22 : 69 Punj LR 88.

the meaning of section 21 in a suit on a contract), against a native of India, who was not at the time of the action residing in Ceylon is a nullity and it cannot be enforced by a suit in an Indian court.[2291]

Suppose that in the above case the Faridkot Legislature had passed an Act empowering the courts of Faridkot to entertain suits in cases where the cause of action had arisen in Faridkot though the defendant was a foreigner neither residing in Faridkot nor owing any allegiance or obedience to the Faridkot state. Could effect be then given to the judgment of the Faridkot court in a suit brought upon the judgment in a court in India? Jurisdiction conferred against the general principles of international law is not recognized and no one state can by its legislation confer jurisdiction upon its court to entertain a suit in respect of a personal claim against foreigners who at the date of the suit were neither resident in that state nor owed any allegiance or obedience to that state;[2292] but, such a decree is not an absolute nullity if its domestic courts have jurisdiction over foreigners either generally or under specified circumstances. Section 20(c) of this Code confers jurisdiction on courts in India over foreigners if the cause of action arises within the jurisdiction of a particular court in India even in the absence of the foreigner and even where he has not submitted to its jurisdiction. To say that such a decree is an absolute nullity is not apposite; it is more appropriate to say that it is not executable in a court outside this country.[2293] This is so because the municipal courts of a country are under a constitutional compulsion to give effect to the laws made by their own legislature.[2294] Indian subjects before Independence owed allegiance to the sovereign of Great Britain and the British Parliament could therefore by legislation confer jurisdiction upon the courts of England, as it has in fact done, against British Indian subjects in British India.[2295] Hence, a judgment, passed by the Queen's Bench Division of the High Court of Justice of England (a foreign court) against a British Indian subject residing in British India in an action founded on a breach of a contract committed within the jurisdiction of that court, was not a nullity, and a suit might be brought on the judgment in British India.[2296]

[s 13.16] Submission to the jurisdiction of foreign Courts

Where a suit is instituted in India on the judgment of a foreign court, effect will be given to the judgment, though that court had no jurisdiction over the defendant, if the defendant appears and defends the suit brought against him in that court without making any objection to its jurisdiction,[2297] for, having taken a chance of judgment in his favour, it is not right that he should take exception to jurisdiction when judgment goes against him;[2298] but, if he protests against the jurisdiction, and the suit is then proceeded with against him, the judgment is a nullity, and no effect will be given to it in a suit brought on the judgment. The protest against jurisdiction must be made at an early stage of proceedings hence, where no objection to the jurisdiction was made until the case had reached the stage of appeal, it was

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2291. *Shaik Atham v Davud*, (1909) ILR 32 Mad 469.
2292. *Christien v Deanney*, (1899) ILR 26 Cal 931; *Hinde v Ponnath*, (1882) ILR 4 Mad 359; *Chormal Balchand v Kasturichand*, 63 Cal 1033 : 40 Cal WN 591.
2293. *Lalji Raja and Sons v Hansraj Nathoram*, AIR 1971 SC 974.
2294. *Sagoon Jayaidee v Sociede Civil d and Dos Taris*, AIR 1966 Goa 38.
2295. See RSC, O XI, rule 1.
2296. *Hossein Khan v Paphael*, (1901) ILR 28 Cal 641; *Viswanadha Reddi v Keymer*, (1916) ILR 39 Mad 95, 100; affirmed 40 Mad 112 : 44 IA 6.
2297. *Ganga Prasad v Ganeshi Lal*, AIR 1924 All 161 : (1924) ILR 46 All 119; *Shaik Atham v Davud*, (1909) ILR 32 Mad 469.
2298. *Kandoth v N Abdul*, (1976) 8 Mad HC 14.

held that there was submission to jurisdiction.[2299] Nice questions sometimes arise as to what amounts to submission to jurisdiction. A person who appears in response to a summons of a foreign court and applies for leave to defend the suit without objecting to its jurisdiction has been held to have voluntarily submitted to the jurisdiction of such court.[2300] A defendant who employs a pleader in a suit in a foreign court will not be said to have submitted himself to the jurisdiction of that court if the pleader states at the hearing that he has no instructions from his client;[2301] but, if the defendant, while protesting against the jurisdiction, appears on the argument of the point of jurisdiction, thereby taking the chance of getting a decision in his favour, he will be deemed to have submitted himself to the jurisdiction of the court.[2302] A *fortiori*, it is so if he also pleads on the merits,[2303] or consents to have a decree passed in terms of an award.[2304] When the parties have appeared before the foreign court and have arrived at an agreement, eg, in regard to the custody of their children, courts in India would not allow that agreement to be flouted unilaterally by one of them. This is so even though the father is the natural guardian and is therefore, ordinarily entitled in law to the custody of the children.[2305] On the same principle, the Lahore High Court held that an application to a foreign court to set aside an *ex parte* decree is a submission to its jurisdiction;[2306] but, this has been dissented from on the ground that a submission after decree is of no effect; and when a defendant applied to a foreign court to set aside its decree passed without jurisdiction after the decree had been transferred for execution to a court in British India, the Madras High Court held that the decree continued to be a nullity and inexecutable.[2307] However, the submission is not voluntary if the appearance is made only to release property seized by a foreign tribunal in attachment or other proceedings; in such a case the judgment of the foreign tribunal is not binding on the party. Whether submission was voluntary or it was for the purpose of saving property is a pure question of fact.[2308]

A person who sues in a foreign court as plaintiff voluntarily submits to the jurisdiction and cannot afterwards dispute it.[2309] An *ex parte* decree was passed by a court of an Indian state against a native of British India who was not resident in that state. In 1926, the decree was transferred under section 44 to a British court for execution. The judgment-debtor's movable property was attached and the judgment-debtor paid Rs 100 into the British court and applied for further time. In 1928, the decree was again transferred to the same British court for execution, and the judgment-debtor then for the first time objected that the decree was a nullity for want of jurisdiction. It was held that the judgment-debtor's appearance in the British court did not amount to submission to the foreign court, and that the objection was not barred by *res judicata*.[2310] A suit was filed in a foreign court against a non-resident defendant who remained absent. However, during the course of the trial he asked for a concession with respect

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2299. *Kaliyugam v Chokalinga*, (1884) ILR 7 Mad 105.
2300. *Shaligram v Firm Daulatram Kumdanmmal*, supra.
2301. *Sivaraman v Ibrahim*, (1895) ILR 18 Mad 327.
2302. *Subramania v Annaswami*, AIR 1948 Mad 203; *Harris v Taylor*, [1915] 2 KB 580; *Wansborough Paper Co v Laughland*, (1920) WN 344; but see *Rajaratnam v Muthuswamy*, AIR 1958 Mad 203.
2303. *Subramania v Annaswami* supra; *Harchand v Gubalchand*, (1914) ILR 39 Bom 34; *Rama v Krishna*, (1916) ILR 39 Mad 733 (FB); overruling *Parry and Co v Appasami*, (1880) ILR 2 Mad 407.
2304. *Mallappa v Raghavendra*, AIR 1938 Bom 173 : (1938) ILR Bom 16.
2305. *Marggarate v Chacko*, AIR 1970 Ker 1 : (1969) ILR 1 Ker 293.
2306. *Hari Singh v Mahammad*, AIR 1927 Lah 200 : (1927) 8 Lah 54.
2307. *Narappa v Rangaswami*, AIR 1933 Mad 393 : (1933) 64 Mad LJ 531; *Firm Kanhaiyalal v Param Sukh*, AIR 1956 Ngp 273.
2308. *Veeraraghava Ayyar v Mugga Sait*, (1916) ILR 39 Mad 24.
2309. *Nallatambi v Ponnusami*, (1879) ILR 2 Mad 400, 404.
2310. *Sheo Tahal v Binaik*, AIR 1931 All 689 : (1931) ILR 53 All 747.

to a part of the claim, which was due to him and which had been attached before judgment in the course of the suit; but the request was refused, and the suit decreed *ex parte*. It was held that by his conduct the defendant must be deemed to have submitted to the jurisdiction of the foreign court.[2311] A minor cannot be said to have submitted to the jurisdiction of a foreign court through his guardian if such a guardian has not filed his appearance.[2312]

[s 13.16.1] Agreement to Submit to Foreign Jurisdiction

Where there is an *express* agreement to submit to the jurisdiction of a foreign court, a judgment pronounced by such court binds the parties, and effect will be given to such a judgment in Indian courts.[2313]

The mere fact of entering into a contract of partnership in a foreign country does not involve an agreement that all matters and disputes arising in connection with the partnership shall be submitted to, and therefore, lie within the jurisdiction of the courts of that country.[2314]

[s 13.16.2] Carrying on Business in a Foreign Country through an Agent

Persons who carry on business in a foreign country through an agent, submit to the jurisdiction of the courts of that country by giving the agent a general power of attorney including the right to institute or defend suits relating to matters connected with their business or otherwise.[2315]

[s 13.16.3] Possession of Immovable Property in a Foreign Country

The possession of immovable property in a foreign country gives the courts of that country jurisdiction to deal with the property itself,[2316] but not jurisdiction in *personam* over the possessor, even in regard to obligations connected with that property.[2317]

[s 13.17] Jurisdiction of foreign Courts over non-resident legal representatives in a pending action

Where a foreign court has jurisdiction with respect to a personal action instituted against a foreigner, either because he is resident within the state at the time of the suit or he has submitted to it, a decree passed by it in the suit is not without jurisdiction by reason of the fact that the defendant died pending the action and his legal representatives were neither residents within the state nor had submitted to its jurisdiction.[2318]

2311. *Oomer Hajee v Tirunavakkarasu*, AIR 1936 Mad 252 : (1936) ILR 59 Mad 618; *Sundaram v Kandaswami*, AIR 1941 Mad 387.
2312. *Sankaran v Lakshmi*, AIR 1974 SC 1764 : (1975) 3 SCC 351 : (1975) 1 SCR 57.
2313. *Austrian Lloyd Steamship Co v Gresham Life Assurance Society*, [1903] 1 KB 249; *Kirchner and Co v Grubban*, [1909] 1 Ch 413; *Burjor v Ellerman City Lines, Ltd*, AIR 1925 Bom 449 : (1925) ILR 49 Bom 854; *Haji Abdulla v Stamp*, AIR 1924 Bom 381 : (1924) 26 Bom LR 224.
2314. *Emanuel v Symon*, [1908] 1 KB 302; *Guruswami v Muhahhad Khan*, [1908] 1 KB 302; *Guruswami v Muhahhad Khan*, AIR 1933 Mad 112 : (1932) 63 Mad LJ 761.
2315. *Ramanathan v Kalimuthu*, (1912) ILR 37 Mad 163; *Janoo v Mahamad*, AIR 1925 Mad 155 : (1924) ILR 47 Mad 877.
2316. *Douglas v Forrest*, (1828) 4 Bing 686; *London and North-Western Ry Co v Linsay*, (1858) 3 Macq 99.
2317. *Emanuel v Symon*, [1908] 1 KB 302.
2318. *Andhra Bank v Srinivasan*, AIR 1962 SC 232.

[s 13.18] Irregularities not affecting jurisdiction

In cases where a foreign court has jurisdiction, or where the defendant has submitted himself to the jurisdiction of a foreign court, the judgment of such court is not vitiated by irregularities which do not affect the jurisdiction of the court even when they are such as would, in the view of the foreign court, render the judgment there a nullity.[2319] Where the constitution of a Full Bench of the Mysore High Court was not in strict accordance with the rules framed in that behalf, its judgment is not open to attack as without jurisdiction as it is a case of irregular assumption and not want of jurisdiction.[2320]

[s 13.19] Foreign judgment against a foreign firm

A, B and *C* carry on business at Singapore in partnership in the name of *X* and *Y*. *D*, a creditor of the firm, brings an action against the firm in the Supreme Court of Singapore, but *A* alone is served with the writ of summons. *B* and *C* are British Indian subjects, and they did not reside at Singapore at the date of the suit or at any other time. A decree is passed against the firm by the Singapore court. A suit is then brought by *D* in British India on the judgment of the Singapore Court against *A, B,* and *C* for a personal decree against them. No personal decree can be passed against *B* and *C* as they were not served, though such a decree may be passed against *A*.[2321] Compare O XXI, rule 50.

[s 13.20] Foreign judgment on a decree of an Indian Court

The judgment of a foreign court obtained on a decree of a court in India is no bar to the execution of the original decree in India.[2322]

[s 13.21] Foreign judgment as *Res Judicata*

The rule of conclusiveness of a foreign judgment as enacted in section 18 is somewhat different in its operation from the rule of *res judicata*.

Undoubtedly both the rules are founded upon the principle of sanctity of judgments competently rendered. But the rule of *res judicata* applied to all matters in issue in a former suit which have been heard and finally decided between the parties, and includes matters which might and ought to have been made ground of attack or defence in the former suit. The rule of conclusiveness of foreign judgments applied only to matters directly adjudicated upon.[2323]

In order that a foreign judgment may operate as *res judicata it* must have been given on the merits of the case, whether it was a judgment of a foreign court in Europe or America or a foreign court in Asia or Africa.[2324]

It is a well-established principle of private international law that if a foreign judgment was obtained by fraud, or if the proceedings in which it was obtained were opposed to natural justice, it will not operate as *res judicata*. An action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely that on the merits the decision was one

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2319. *Re Gudaru Marodugula*, (1907) ILR 30 Mad 292; *Pemberton v Hughes*, [1899] 1 Ch 781.
2320. *Vishwanathan v Abdul Majid*, supra.
2321. *Sahib Thambi v Hamid*, (1913) ILR 36 Mad 414.
2322. *Fakuruddeen v Official Trustee of Bengal*, (1881) ILR 7 Cal 82.
2323. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1.
2324. *Santa Singh v Ralla Singh*, (1919) PR 14, p 30; *RHMV Achi v RMAR Chettiar*, AIR 1973 Mad 141 : (1972) 2 Mad LJ 468.

which should not have been rendered, but it can be set aside if the Court was imposed upon or tricked into giving the judgment. A foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action or operate as *res judicata*.[2325]

This section applies not only to suits on foreign judgments, but also to cases in which the defendant relies on a foreign judgment as a bar to a suit in India[2326] and it has been held that a foreign judgment rendered after the institution of a suit would operate as a bar on principle of *res judicata* embodied in section 11.[2327]

An "act of State" is not a judgment, and it cannot, therefore, have the effect of *res judicata*. Thus, it has been held before Independence that an order of the political agent of Meywar and the Maharana of Udepore deposing a high priest from his *gadi* was not a foreign judgment, but merely an "act of state", and it cannot therefore, operate as *res judicata*.[2328]

[s 13.22] Clause (A) : Court of competent jurisdiction

Undoubtedly, a Court of a foreign country has jurisdiction to deliver a judgment *in rem* which may be enforced or recognised in the Indian court, provided that the subject-matter of the action is property whether movable or immovable within the foreign country. It is also well settled that a court of a foreign country has no jurisdiction to deliver a judgment capable of enforcement or recognition in another country in any proceeding the subject-matter of which is title to immovable property outside that country. But there is no general rule of private international law that a court can in no event exercise jurisdiction in relation to persons, matters or property outside jurisdiction. The courts of a country generally impose a threefold restriction upon the exercise of their jurisdiction: (1) jurisdiction *in rem* (binding not only the parties but the world at large) by a court over res (outside the jurisdiction) will not be exercised, because it will not be recognised by other courts; (2) The court will not deal directly with title to immovable property outside the jurisdiction of the state from which it derives its authority, and (3) court will not assist in the enforcement within its jurisdiction of foreign penal or revenue laws.[2329]

An action in *personam* lies normally where the defendant is personally within the jurisdiction or submits to the jurisdiction or though outside the jurisdiction may be reached by an order of the court. In an action in *personam* the court has jurisdiction to make an order for delivery of movables where the parties submit to the jurisdiction. A person who institutes a suit in a foreign court and claims a decree *in personam* cannot after the judgment is pronounced against him, say that the court had no jurisdiction which he invoked and which the court exercised, for it is well recognised that a party who is present within or who had submitted to jurisdiction cannot afterwards question it.[2330]

Unless a foreign court has jurisdiction in the international sense, a judgment delivered by that court would not be recognized or enforceable in India. The true basis of enforcement of a foreign judgment is that the judgment imposes an obligation upon the defendant and, therefore, there must be a connection between him and the forum sufficiently close to make it his duty to perform that obligation. It cannot be said that an order declaring the domicile of

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2325. *Sankaran Govindam v Lakshmi Bharathi*, AIR 1974 SC 1764 : (1975) 3 SCC 351 : (1975) 1 SCR 57.
2326. *Chockalinga v Duraiswami*, AIR 1928 Mad 327 : (1928) ILR 51 Mad 720.
2327. *R Vishwanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1 : (1963) 3 SCR 22.
2328. *Shriman Goswami Govardhanlalji v Goswami Shri Girdharlalji*, (1893) ILR 17 Bom 620.
2329. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1 : (1963) 3 SCR 22.
2330. *R Viswanathan v Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1 : (1963) 3 SCR 22.

a person under O XI of RSC of England is a judgment in rem. Persons affected by such order must submit to the jurisdiction of the foreign court which makes the declaration if otherwise they are not subject to its jurisdiction.[2331]

[s 13.23] Clause (B) : Merits of the case

It cannot be said that the expression "judgment on the merits" implies that it must have been passed after contest and after evidence had been let in by both sides. An *ex parte* judgment in favour of the plaintiff may be deemed to be a judgment given on merits if some evidence is adduced on behalf of the plaintiffs and the judgment, however, brief, is based on a consideration of that evidence. Where however no evidence is adduced on the plaintiffs' side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case.[2332]

The judgment of a foreign Court based on a settlement arrived at and with consent of parties is enforceable. The party giving consent and inviting the Court to pass judgment on terms of the consent is precluded from raising the defence subsequently that the said judgment is not on merits and hence not enforceable in view of section 13(b) of the Code.[2333] The Bombay High Court in the above case noticed the decision of the Supreme Court in *International Woollen Mills* case (supra) and observed that a consent order or consent decree by itself prevents the court from going into merits of the case. It has also been held by the Bombay High Court that where settlement agreement between the parties formed part of the suit proceedings in the foreign court, the Court in India can pass judgment on the basis of the said agreement under O XII, rule 6 of the Code.[2334]

Undoubtedly the burden of proving that the decree is not on merits would be on the party alleging it. However Courts never expect impossible proofs. It would never be possible for a party to lead evidence about the state of mind of the Judge who passed the decree. Of course, amongst other things, the party must show that the decree does not show that it is on merits, if necessary the rules of that court, the existence or lack of existence of material before the court when the decree was passed and the manner in which the decree is passed.[2335]

In order that a foreign judgment may operate as *res judicata* it must have been given on the merits of the case, whether it was a judgment of a foreign court in Europe or America or a foreign court in Asia or Africa.[2336] Courts in India have the right to examine a foreign judgment to see whether it has been given on merits.[2337] In *Keymer v Visvanathan*[2338] an action was brought in the King's Bench Division of the High Court of Justice in England to recover a liquidated amount. The defendant failed to comply with an order to answer interrogatories and his defence was struck off and judgment was entered for the amount claimed for the plaintiff under RSC, O XXXI, rule 21, corresponding to O XI, rule 21 below. The plaintiff subsequently instituted a suit on the judgment in the Madras High Court. It was held by the

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2331. *Sankaran Govindam v Lakshmi Bharathi*, AIR 1974 SC 1764: (1975) 3 SCC 351 : (1975) 1 SCR 57.
2332. *International Wollen Mills v Standard Wool (UK) Ltd*, AIR 2001 SC 2134 : (2001) 5 SCC 265.
2333. *HSBC Bank USA v Silverline Technologies Ltd*, AIR 2006 Bom 134 : (2006) 3 Mah LJ 107.
2334. *HSBC Bank USA v Silverline Technologies Ltd*, AIR 2006 Bom 134 : (2006) 3 Mah LJ 107.
2335. *HSBC Bank USA v Silverline Technologies Ltd*, AIR 2006 Bom 134 : (2006) 3 Mah LJ 107.
2336. *Santa Singh v Ralla Singh*, (1919) PR 14, p 30; *RHMV Achi v RMAR Chettiar*, AIR 1973 Mad 141 : (1972) 2 Mad LJ 468.
2337. *Mallappa v Raghavendra*, AIR 1938 Bom 173 : (1938) II R Bom 16; *International Woolen Mills v Standard Wool (UK) Ltd*, [2001] 2 LRI 765.
2338. *Keymer v Visvanatham*, AIR 1916 PC 121 : 21 Cal WN 308 : (1917) 44 IA 6 : 40 Mad 112, affirming 39 Mad 95.

Judicial Committee, affirming the judgment of the Madras High Court, that the judgment sued on was not given on the merits of the case and that the suit was not maintainable. It has also been held by the same tribunal that a judgment on an award obtained in England by default cannot be sued on in India, since it is not a judgment "on the merits of the case".[2339]

In the following sub-synopsis the foreign judgments passed in summary procedures, *ex parte*, dismissed in default, compromise *etc.* are evaluated by higher courts in India to ascertain if these can be treated as judgment on merit of the case within the meaning of clause (b) of section 13:

(i) Summary procedure.—A decree passed by a foreign court (Singapore court) under summary proceedings, after refusing leave to defend sought for by the defendant, is not a judgment on merits. Hence, the judgment cannot be considered as conclusive as contemplated by section 13(b).[2340] According to the Calcutta High Court a judgment given in England in summary procedure contemplated by O XIV, RSC is not a judgment on the merits for the purposes of section 13, CPC, there being no appearance or defence by the defendant and no consideration of plaintiffs evidence.[2341]

(ii) Dismissed in default.—Where a suit filed in a foreign court, by a creditor against the principal debtor is dismissed for default of appearance, the judgment is not one on the merits of the case, and cannot be availed of by the surety to resist his liability to the creditor.[2342]

(iii) Default on the part of defendant.—A foreign judgment passed on default of appearance of the defendant duly served with summons on the allegations contained in the plaint without any trial on evidence, is not one passed "on the merits of the case", and a suit cannot be brought on such judgment in any court in India.[2343]

So also, where a decree was passed in consequence of the default of the defendant in furnishing security, it is not one upon the merits.[2344]

(iv) Non-production of document by plaintiff.—Where a suit was dismissed even before the written statement was filed by the defendant on the ground of non-production of a document by the plaintiff, the order is not one of the merits of the case.[2345]

(v) Ex parte decree.—On the basis of presumption in section 114 of the Evidence Act that judicial acts have been regularly performed a decree given *ex parte* cannot be presumed to be on merits. Section 114 merely raises the presumption, under Illustration (e) thereof, that judicial acts have been regularly performed. To say that a decree has been passed regularly is completely different from saying that the decree has been passed on merits. An *ex parte* decree passed without consideration of merits may be decree passed regular if permitted by the rules of that Court. Such a decree would be valid in that country in which it is passed unless set aside by a Court of Appeal. However, even though it may be a valid and enforceable decree in that country, it would not enforceable in India if it has not been passed on merits. Therefore for a

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2339. *Oppenheim and Co v Mahomed Haneef*, AIR 1922 PC 120 : (1922) 49 IA 174 : 45 Mad 496.
2340. *KM Abdul Jabbar v Indo-Singapore Traders Pvt Ltd*, AIR 1981 Mad 118.
2341. *Middle East Bank Ltd v Rajendra Prasad Sethia*, AIR 1991 Cal 335.
2342. *Bharat National Bank v Thakur Das*, AIR 1935 Lah 729 : (1935) 16 Lah 757.
2343. *Moahomed Kasim v Seeni Pakir*, AIR 1927 Mad 265 (FB) : (1927) ILR 50 Mad 261; overruling *Janoo v Mahammad*, AIR 1925 Mad 155 : (1924) ILR 47 Mad 877; *Ishri Prasad v Sri Ram*, AIR 1927 All 510 : (1928) ILR 50 All 270; *Abdul Rahiman v Mahomed Ali*, AIR 1928 Rang 319 : (1928) 6 Rang 552; *Arunachellam v Mahomed*, AIR 1928 Mad 133; *Derby McIntyre v Mitter and Co*, 39 Cal WN 557.
2344. *Sivagaminatha v Natarajan*, AIR 1961 Mad 385.
2345. *Firm THFJKD Rajan Singh v Parmanand*, AIR 1959 P&H 306 : (1959) ILR Punj 613.

decision on the question whether a decree has been passed on merits or not, the presumption under section 114 would be of no help at all.[2346]

It would be relevant to quote here the following passage in Sir William Rattigan's Private International Law (1895).

> It would seem to be equally plain that, if, for instance, it should happen that by the law of a foreign country, a plaintiff was entitled to judgment simply on the non-appearance of a defendant who had been duly served, and without adducing any evidence whatever in support of his claim, or if the wrong-headedness of a foreign Judge should induce him to so decide, the plaintiff would not be entitled in an English Court to sue upon a judgment so obtained. If on no other ground, such a judgment of a foreign Court would, at all events, be so contrary to the fundamental principles of the Law of England as, for this reason alone, to be incapable of receiving any effect in a British Court." The above passage does not, however, as I read it, support the present appellant's position, as it cannot, in my opinion, be affirmed in this case that the plaintiff has obtained judgment from the High Court in England "simply on the non-appearance of the defendant without adducing any evidence whatever in support of his claim.[2347]

If a decree, though *ex parte,* is passed after hearing evidence adduced by the plaintiff,[2348] and the presumption would be that the *ex parte* decree was passed on evidence and so, the defendant must rebut the presumption by positive evidence.[2349]

The mere fact of the decree being *ex parte* will not justify a finding that it was not on the merits. The real test is whether it was merely formally passed, as a matter of course, or by way of penalty, or based upon a consideration of the truth or otherwise of the plaintiffs claim, though the evidence was led by him in the absence of the defendant.[2350]

Where, the *ex parte* decree of a foreign court in UK did not mention that the second affidavit filed by the plaintiff has been read, the judgment and decree not indicating whether the documents were looked into an/or, whether the merits of the case was at all considered, the plea about inferior quality of material raised by the defendant in his, reply to the notice was not dealt with, the judgment passed was held not a judgment on merits so not enforceable in India.[2351]

(vi) Settlement Compromise.—Where a suit in a foreign court is adjourned for settlement, and it is agreed between the parties that if the suit is not settled judgment should be passed for the plaintiff, and there being no settlement, the plaintiff appears on the adjourned date but the defendant does not appear and judgment is passed for the plaintiff according to the agreement, the judgment is one on the merits of the case, and a suit can be brought on such a judgment in a court in India.[2352] But in *China Appalaraju v Venkata Subba Rao*[2353] where it was held that

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2346. *International Wollen Mills v Standard Wool (UK) Ltd*, AIR 2001 SC 2134 : (2001) 5 SCC 265.
2347. *International Wollen Mills v Standard Wool (UK) Ltd*, AIR 2001 SC 2134 : (2001) 5 SCC 265.
2348. *Code v Harper*, (1910) ILR 41 All 521; *Meher Singh v Ishar Singh*, AIR 1932 Lah 649 : (1932) 14 Lah 58; *Gajanan v Shantabai*, AIR 1939 Bom 374 : (1939) 41 Bom LR 818; *Walker v Walker*, AIR 1935 Rang 284.
2349. *Sh Abdol Rahim v Mahamed Din*, AIR 1943 Cal 42 : 75 Cal LJ 271.
2350. *Wazir Sahu v Munishi Dass*, AIR 1941 Pat 109 : (1941) ILR 20 Pat 144; *Kulwant v Dhunraj*, AIR 1935 Lah 396 : (1935) 16 Lah 768; *Indian and General Investment Trust v Raja of Khalikote*, AIR 1952 Cal 508; *Jayaratnam v Muthusamy* supra; *East India Trading Co v Badat and Co*, supra; *Govindan v Sankaran*, AIR 1958 Ker 203 : (1958) ILR Ker 80; *Varma v Gebrilal*, AIR 1962 Raj 231 : (1961) ILR Raj 103; *Trilochan v Dayanidhi*, AIR 1961 Ori 158 : (1961) ILR Cut 150.
2351. *International Wollen Mills v Standard Wool (UK) Ltd*, AIR 2001 SC 2134.
2352. *Mohammad v Chinthamani*, AIR 1929 Mad 469 : (1929) ILR 52 Mad 503; *Satyanarain v Balkaran*, AIR 1955 Raj 59 : (1954) ILR Raj 905.
2353. *China Appalaraju v Venkata Subba Rao*, AIR 1946 Mad 296 : 225 IC 348.

a foreign judgment based on compromise is not one passed on merits. It cannot be said of a judgment that it was not given on merits merely because it proceeds on a wrong view as to the burden of proof or the legal liability of a party.[2354]

[s 13.24] Clause (C) : Law Applicable

The mistake must be apparent on the face of the proceedings. In England, it has been held that a mere mistake as to English law will not vitiate a foreign judgment, even though the mistake may appear on the face of the proceedings.[2355] In an old Madras case[2356] this clause was referred to where a foreign court had exercised jurisdiction contrary to the principles of international law. Where a foreign court in an inquiry before it in a probate proceeding refused to recognise the law of British India applicable to the deceased's immovable property in British India, it was held that the judgment of the foreign court was not one on which a suit will successfully lie.[2357] The judgment of a foreign court which awarded interest on costs does not become unenforceable under this section on the ground that there is no similar provision in the municipal law.[2358] So also, a decree of a Ceylon court awarding interest is not open to attack on the ground that the amount decreed is not in accordance with the provisions of the Madras Agriculturists' Relief Act, 1938.[2359]

It has been held that section 13 holds that, to be conclusive, an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity of hearing to all the proper and necessary parties. A foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law, except on limited grounds enunciated under section 13. In construing section 13, a court needs to look at the plain meaning of the words and expressions used therein and need not look at any other factors. Further, under section 14 there is a presumption that the foreign court which passed the order is a court of competent jurisdiction which is a rebuttable presumption. In the instant case, the appellant did not dispute the jurisdiction of the English Court but his grievance was that it was not executable on other grounds. It was contended that the English Court's order imposing costs was not given on merits and that it fell under section 13(c) making it inconclusive and consequently inexecutable. The Supreme Court held that a judgment can be considered as a judgment passed on merits when the court deciding the case gives opportunity to the parties to the case to advance their case and after considering rival submissions contended at the bar, gives its decision as an order or judgment, it shall be treated as an order on merits of the case for the purposes of interpretation of section 13(c).[2360]

[s 13.25] Clause (D) : Natural Justice

When applied to foreign judgments, the expression "contrary to natural justice" merely relates to the alleged irregularities in procedure adopted by the adjudicating court and has nothing to do with the merits of the case. If the proceedings be in accordance with the practice of the foreign court but that practice is not in accordance with natural justice, the court will not

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2354. *Rama Shenoi v Hallagna*, (1918) ILR 41 Mad 205.
2355. *Godard v Gray*, (1870) LR 6 QB 139.
2356. *Hinde v Ponnath*, (1881) ILR 4 Mad 359.
2357. *Panchpakesa Iyer v KN Husain*, AIR 1934 Mad 145 : (1934) 66 Mad LJ 209.
2358. *Barket Lal v Devi Das*, AIR 1953 Hyd 29 : (1952) ILR Hyd 233.
2359. *Kunhiman v Idoise Kutty*, AIR 1958 Ker 128 : (1958) ILR Ker 100.
2360. *M/s Alcon Electronics Pvt Ltd v Celem SA of Fos 34320 Roujan*, AIR 2017 SC 1 : (2016) 12 Scale 645 : (2017) 2 SCC 253.

allow it to be concluded by them. In other words the courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case. The wholesome maxim *audi alteram partem* is deemed to be universal and not merely of domestic application. All that is required by rules of natural justice is that in the case of minors they should be given an opportunity to contest through their natural guardians. Even if there was any breach of the rule of procedure prevailing in the forum where the proceedings were conducted, that would not be material, as what we have to see is whether the proceedings have been conducted in substantial compliance with the prevailing notion of fairplay. And, when the natural guardians evinced their intention not to contest the proceedings by not putting any appearance on behalf of the minors, the requirement of natural justice was satisfied when the court appointed an officer of the court to be guardian ad Item of the minors in the proceedings.[2361]

The expression "natural justice" in this clause refers rather to the form of procedure than to the merits of the particular case. The mere fact that a foreign judgment is wrong in law does not make it one opposed to "natural justice". There must be something in the procedure anterior to the judgment which is repugnant to natural justice.[2362] Thus, a foreign judgment obtained without notice of the suit to the defendant is contrary to natural justice, and a suit on such judgment is not maintainable in an Indian court.[2363] So also, a judgment based on a third review after two applications for review had been refused;[2364] or a judgment against a minor defendant for whom no guardian *ad litem* had been appointed,[2365] or a judgment against a minor defendant who was not properly represented.[2366] However, where notice is served on an agent empowered to sue and defend suits in the foreign court it is held as sufficient.[2367] As to sufficiency of notice, if the foreign court has held service of the notice to be sufficient, it must be taken to be correct in the absence of evidence to the contrary.[2368] The words "natural justice" are not limited to the plea that the defendant was not served or was not given an opportunity of being heard. It covers all matters forming part of the judicial process culminating in the judgment. A foreign judgment would be opposed to natural justice, if the judges who pronounced it are shown to have been biased or partial.[2369] But, a foreign judgment is not open to attack on the ground that in deciding on the validity of an adoption, the court had failed to apply the law of domicile by which the parties were governed,[2370] nor on the ground of a mere mistake even when that consists of error in calculation, nor on the ground that proper court fee has not been paid in the foreign court.[2371] The binding character of a foreign judgment can be displaced only on one of the grounds mentioned in clause (a)–(f) and not otherwise. It is not open to attack on the ground that it proceeds on an erroneous view of the evidence or of the law.[2372] If the proceedings be in accordance with the practice of the foreign court and that

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2361. *Sankaran Govindan v Lakshmi Bharathi*, AIR 1974 SC 1764 : (2001) 5 SCC 265 : (1975) 1 SCR 57.
2362. *Rama Shenoi v Hallagna*, (1918) ILR 41 Mad 205.
2363. *London Bank v Harmasji*, (1871) ILR 5 Bom 223; *London Bank v Govind*, (1881) ILR 5 Bom 223; *London Bank v Burjorji*, (1885) ILR 9 Bom 346; *Edulji v Manekji*, (1887) ILR 11 Bom 241; *Bangarusami v Balasubramaniam*, (1890) ILR 13 Mad 496; *Indian and General Investment Trust v Raja of Khalikote*, supra.
2364. *Hari Singh v Muhammad*, AIR 1927 Lah 200 : (1927) 8 Lah 54.
2365. *Hari Singh v Muhammad*, supra.
2366. *Popat v Damodar*, AIR 1934 Bom 390 : (1934) 36 Bom LR 844; *Gajanan v Shantabai*, supra.
2367. *Janoo v Mahamad*, AIR 1925 Mad 155 : (1924) ILR 47 Mad 877; overruled on another point in 50 Mad 261 supra.
2368. *Janoo v Mahamad*, supra; citing *Pemberton v Huges*, [1899] 1 Ch 781.
2369. *Viswanathan v Abdul Wajid*, supra.
2370. *Vasant v Dattoba*, AIR 1956 Bom 49.
2371. *Monoharlal v Raghunath*, AIR 1957 MB 74.
2372. *Viswanathan v Abdul Wajid*, supra.

practice is not in accordance with natural justice, the Indian court will not allow the matter to be concluded by them. In other words, the courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case. In a Bombay case, the defendant had been given sufficient opportunities both, by the Hong Kong Court and by Indian courts, to ensure that he gets adequate opportunity to defend his case. The defendant had not made proper use of such opportunities which were given to him. Hence, the principles of natural justice had not been violated in any manner and the proceedings in which a foreign judgment had been obtained, were not opposed to the principles of natural justice.[2373]

[s 13.26] Clause (E) : Fraud

The fraud relied upon must be extrinsic or collateral and not merely fraud which is imputed from alleged false statements made at the trial which were met with counter-statements and the whole adjudicated upon by Court and so passed into the limbo of estoppel by the judgment. That estoppel cannot be disturbed except upon allegation and proof of new and material facts which were not before the former Court and from which is to be deduced the new proposition that the former judgment was obtained by fraud. The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained.[2374]

All judgments, whether domestic or foreign, are void if obtained by fraud. Accordingly, a foreign decree procured by fraud bearing on jurisdictional facts would not be recognised under this section as being contrary to public policy and as offending against notions of substantial justice.[2375] In the case of domestic judgments, the fraud must be extrinsic to the matter tried but apparently, this rule does not apply to foreign judgments,[2376] but in *Sundaram Pillai v Kandeswami Pillai*,[2377] it was held that a foreign judgment said to have been obtained on perjured evidence could not be said to have been obtained by fraud.

Where, the deceased donor infact had expired long before the respondents fraudulently obtained mutation in their favour showing deceased as present and witnessing said mutation of immovable property, the mutation obtained by fraudulent means is non-est just like decree obtained by fraud is nullity.[2378] HK Sema J observed "fraud avoids all judicial acts. A decree obtained by playing fraud is a nullity and it can be challenged in any court, even in collateral proceedings."

[s 13.27] Clause (F) : Breach of any Law in India

Under section 47(3) of the Foreign Exchange Regulation Act, 1973, a suit for the enforcement of a guarantee for which permission of the Reserve Bank/Central Government would have been required under section 26(6) can be brought in India. Filing of a suit, therefore, on such a guarantee cannot be said to be contrary to any law in India because section 47(3) expressly permits such legal proceedings in India. Such proceedings abroad cannot be said to be violative of any law in India. However, no steps can be taken for the purpose of enforcing any judgment or order for the payment of any sum under such a guarantee except in respect of so much thereof as the Central Government or the Reserve Bank may permit to be paid. The result is

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2373. *Algemene Bank Nederland NV v Satish Dayalal Choksi*, AIR 1990 Bom 170.
2374. *Sankaran Govindan v Lakshmi Bharathi*, AIR 1974 SC 1764 : (2001) 5 SC 265 : (1975) 1 SCR 57.
2375. *Sayta v Teja Singh*, AIR 1975 SC 105 : (1975) 1 SCC 120.
2376. *Nistarini Dassi v Kundo Lal*, (1899) ILR 26 Cal 891, 910.
2377. *Sundaram Pillai v Kandeswami Pillai*, AIR 1941 Mad 387 : (1941) 1 Mad LJ 140.
2378. *N Khosla v Rajlakshmi*, AIR 2006 SC 1249 : (2006) 3 SCC 605.

that before a foreign decree passed on such a guarantee can be executed in India, permission of the Reserve Bank or the Central Government for realising such sum is necessary.[2379]

A claim sustained in a foreign judgment founded on a breach of any law in force in India makes the foreign judgment as inconclusive and inapplicable in India. The position in England appears to be similar which appears obvious from the following passage in Sir William Rattigan's *Private International Law* (1895).[2380]

> It would seem to be equally plain that, if, for instance, it should happen that by the law of a foreign country, a plaintiff was entitled to judgment simply on the non-appearance of a defendant who had been duly served, and without adducing any evidence whatever in support of his claim, or if the wrong-headedness of a foreign Judge should induce him to so decide, the plaintiff would not be entitled in an English Court to sue upon a judgment so obtained. If on no other ground, such a judgment of a foreign Court would, at all events, be so contrary to the fundamental principles of the Law of England as, for this reason alone, to be incapable of receiving any effect in a British Court.

Presumably, a foreign judgment for a gambling debt would not be enforced in India.

[s 13.28] Limitation

The period of limitation for a suit on a foreign judgment is six years from the date of the judgment. (See Limitation Act, 1963, Sch 1 Article 101.)

The pendency of an appeal in the foreign country will not bar a suit on a foreign judgment;[2381] but, if the appeal results in a decree dismissing the appeal, the appellate decree affords a fresh starting point for limitation.[2382]

Whereas in the case of a suit on a contract, limitation merely bars the remedy but does not extinguish the right, the judgment of a foreign court is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made.[2383]

Where the court of a foreign country holds, applying its own law, that a suit is not barred by the law of limitation, it cannot be said that it has refused to recognize the law of India because the suit was barred according to the law of India.[2384]

[s 13.29] Suits on foreign awards

An award given in a foreign state by arbitrators selected by the parties cannot be equated to a judgment given by the foreign court and its validity is not open to attack on the grounds mentioned in section 13.[2385] An award pronounced in a foreign state is not a judgment within this section and no suit will in consequence lie on it even if it was filed in a foreign court unless it was made a rule of court.[2386]

Section 9 of Foreign Awards (Recognition and Enforcement) Act, 1961 excludes the operation of the Act as to what may be regarded as a "domestic award" in the sense of the

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2379. *Algemene Bank Nederland NV v Satish Dayalal Choksi*, AIR 1990 Bom 170.
2380. *International Woollen Mills v Standard Wool (UK) Ltd.* AIR 2001 SC 2134 : (2001) 5 SCC 265 : (2001) 1 Mad LW 28 : (2001) 2 LR 1765.
2381. See *Hari Singh v Muhammad*, AIR 1927 Lah 200 : (1927) 8 Lah 54.
2382. *Baijnath v Vallabhdas*, AIR 1933 Mad 511 : (1933) ILR 56 Mad 951.
2383. *Nallatambi v Ponnusami*, (1879) ILR 2 Mad 400.
2384. *Ganga Prasad v Ganeshi Lal*, AIR 1924 All 161 : (1924) ILR 46 All 119.
2385. *East India Trading Co v Badat and Co*, supra; *Ganguli Engineering Co v Srimathi Sneha Bala*, AIR 1957 Cal 103 : 60 Cal WN 289.
2386. *Gopaldas v Dogduram*, AIR 1952 Hyd 49 : (1852) ILR Hyd 323.

award having been made on an arbitration agreement governed by the law of India, although the dispute was with a foreigner and the arbitration was held and the award was made in a foreign state. Such an award necessarily falls under the Arbitration Act, 1940 (Now repealed by the Arbitration & Conciliation Act, 1996), and is amenable to the jurisdiction of Indian courts and control by the Indian system of law just as in the case of any domestic award, except that the proceedings held abroad and leading to the award were in certain respect amendable to be controlled by the public policy and the mandatory requirements of the law of the place of arbitration and competent courts of that place.[2387] Where a foreign judgment in terms of a foreign award is passed, the award does not merge in the judgment. Application for filing the award in an Indian court and for judgment in accordance with the award, is maintainable.[2388] The following cases were cited.[2389]

[s 13.30] Execution of foreign judgments

Where a foreign judgment is sought to be enforced in execution under sections 44 and 44(A), it will be open to the judgment-debtor to raise all objections which would have been open to him under section 13 if a suit had been filed on the judgment.[2390]

Having regard to the provisions of section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993) which states that on and from the appointed day the jurisdiction, powers and authorities to entertain and decide application for recovery of debt due to such banks and financial institutions shall be exercised by the Tribunal and the scope of powers of the Tribunal under section 22 of the Recovery of Debts due to Banks and Financial Institutions Act execution of a foreign decree must be heard and tried by the Tribunal since it is within the jurisdiction of that Tribunal to do so. Therefore, the execution application, which falls within the jurisdiction of the debt recovery tribunal must be transferred to the said Tribunal immediately, if it is filed before civil court.[2391]

[s 13.31] Custody, divorce and maintenance

In matters relating to matrimony and custody, the law of that place must govern, which has the closest concern with the well-being of the spouses and the welfare of the marriage. In a case decided by the Supreme Court of India, the spouses had made England their home and a boy was born in England from the marriage. It was held that the father cannot deprive the English court of its jurisdiction to decide upon the custody of the child by fraudulently removing the boy to India.[2392] Foreign determinations of custody of children made in divorce jurisdiction or otherwise, by a foreign court, have occasionally figured in many other Indian cases during the recent years. A Rajasthan case is illustrative of the same where without holding that such determinations are conclusive, the high court noted that the foreign court had granted custody of the two daughters of the marriage to the mother, with visiting rights to the father. Later, the mother had obtained a decree from the foreign court, granting her exclusive custody of the

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2387. *National Thermal Power Corp v Singer Co*, (1992) 3 SCC 551.
2388. *Northern Sales Co Ltd v Reliable Extraction Industries*, AIR 1985 Bom 332, 334, paras 7–8 (Pendse J).
2389. *Oppenheim and Co v Haneef Mahomed*, AIR 1922 PC 120 : [1922] 1 AC 482; *Badal and Co v East India Trading Co*, AIR 1964 SC 538; *OP Verma v Lala Gehrilal*, AIR 1962 Raj 231; *East India Trading Co, New York v Badal and Co*, AIR 1959 Bom 414; *Setabganj Sugar Mills v Benazir Ahmad*, AIR 1959 Bom 414; *Gopal Singh Hira Singh v Punjab National Bank*, AIR 1976 Del 115.
2390. *Firm Gauri Lal v Jugal Kishore*, AIR 1958 P&H 265 (FB) : (1958) ILR Punj 1211.
2391. *Bank of India v Harshadrai Odhavji*, AIR 2002 Bom 449.
2392. *Surinder Kaur Sandhu v Harbans Singh Sandhu*, (1984) 3 SCC 698.

girls. In the circumstances, the Rajasthan High Court, in a writ petition by the mother, held that removal by the father of the girls from the United States to India in a "secret and furtive manner", and in disregard of the decrees of the American courts was illegal.[2393]

In a Punjab case, the children and parents were Canadians. The Canadian court had granted interim custody to the mother. The father had effected unauthorised removal of the children from Canada to India. Here, the mother was a graduate and financially sound and the father unemployed. It was held that the order of the Canadian court must be honoured. Mere allegation that the mother was living in adultery, was of no avail. Judgment of the foreign court should be given due regard.[2394] An order of the Supreme Court of Ontario (Canada) awarded custody of a child to the mother. The father illegally brought the child to India. It was held that Indian courts should respect the foreign judgment. Mere allegation that the mother is living in adultery, is of no avail.[2395] The above ruling was given in a writ petition wherein the under-noted decisions were cited. [2396]

In a case before the Supreme Court, legal proceedings had engaged the parties in a bitter battle for the custody of their only child, aged about 11 years, born in America and hence, a citizen of that country by birth. These proceedings included an action filed by the father before an American Court seeking divorce from his wife and custody of their only son. The order passed by the American Court eventually led to the issue of a red corner notice based on allegations of child abduction levelled against the mother who, like the father of the minor child, was a person of Indian origin living with her parents in Delhi. The mother took refuge under an order passed by ADJ's Court at Delhi in a petition under sections 7, 8, 10 and 11 of Guardians and Wards Act, 1890 granting interim custody of the minor to her. Aggrieved by the said order, the father of the minor filed a petition under Article 227 of the Constitution of India before Delhi High Court. The high court allowed the petition, set aside the order passed by the district court and dismissed the custody case filed by the mother primarily on the ground that the court at Delhi had no jurisdiction to entertain the same as the minor was not ordinarily residing at Delhi—a condition precedent for the Delhi Court to exercise jurisdiction. The high court further held that all issues relating to the custody of child ought to be agitated and decided by the Court in America not only because that Court had already passed an order in favour of the father, but also because all three parties, namely, the parents of the minor and the minor himself were American citizens. The high court based its decision on the principle of comity of courts.

On appeal, it was held by the Supreme Court that the "comity of courts" principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. The interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty-bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. The Supreme Court noticed that there were no proceedings between the parties in any court in America before they came to India with the minor. Such proceedings were instituted by the father only after he had agreed to leave the mother and the minor

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2393. *Isavell Singh v Ram Singh*, AIR 1985 Raj 30, 35, 36, para 18.
2394. *Kuldeep Sidhu v Chanan Singh*, AIR 1989 P&H 103.
2395. *Kuldeep Sidhu v Chanan Singh*, AIR 1989 P&H 103.
2396. *Elizabeth v Aruvand*, AIR 1987 SC 3 : (1987) 1 SCC 42; *Surinder Kaur v Harbax Singh*, AIR 1984 SC 1224 : (1984) 3 SCC 698; *Marilyn v Margaret*, AIR 1983 NOC 217 (P&H); *Re HC Infant*, [1966] 1 All ER 886 : (1966) 1 WLR 381 (QB).

behind in India, for the former to explore career options and the latter to get admitted to a school. The charge of abduction contrary to the valid order granting custody was, therefore, held to be untenable. The Supreme Court further observed that in the course of the hearing of the case, it had an occasion to interact with the minor in chambers and he appeared to be happy with his studies and school and did not evince any interest in returning to his school in America. His concern was largely related to the abduction charge and consequent harassment being faced by his mother and maternal grandparents. The Supreme Court further noticed that the father did not begrudge the appellant for getting custody of the minor, provided that she returned to America with the minor. All that the father wanted was that the minor be brought up and educated in America, instead of in India, as the minor would benefit from the same. The mother was not willing to accept that proposal, as she no intention of returning to that country in the foreseeable future especially after a very traumatic period on account of the matrimonial discord. In the light of all these circumstances, repatriation of the minor to the United States, on the principle of "comity of courts" was not held by Supreme Court to be an acceptable option worthy of being exercised at this stage. Dismissal of the application for custody with disregard to the attendant circumstances referred to above was held to be not a proper exercise of discretion by the high court. It was accordingly ordered that interest of the minor shall be better served if he continued to remain in the custody of his mother, especially when the father had contracted a second marriage and did not appear to be keen on having actual custody of the minor.[2397]

The petitioner is a German national, seeking the custody of the child from her divorced husband. A judgement was given in her favour by the family court and Higher Regional Court, Dusseldorf, Germany, after considering the welfare of the child. In the absence of any exceptions enumerated under sections 13 and 14 of CPC, the foreign judgement was held to be binding on the parties and the Petitioner was entitled to the custody of the minor child in view of the foreign judgment.[2398]

Applying the principle laid down in *V Ravi Chandran,*[2399] the Supreme Court has reiterated that in cases pertaining to custody of children where there is conflict of laws in private international law of two sovereign States, the jurisdiction of the State which has the most intimate contact with the issues arising shall be preferred.[2400] In *V Ravi Chandran,*[2401] the petitioner, who was of Indian origin, was a citizen of USA. He married and had a child while the couple was in USA. Subsequently, a dispute arose between the parties regarding custody of the child, and the parties obtained consent order from the court of competent jurisdiction in USA under which both the parents were to have alternate custody of the child on weekly basis. However, the mother, in violation of the said court's orders, removed the child to India for staying with her parents. The petitioner in turn moved the USA court for modification of custody order and for taking action against mother for violation of court order. The petitioner was granted temporary sole legal and physical custody of the minor child and mother was directed to immediately turn over the minor child and his passport to the petitioner. The order could not however be implemented in the USA because of removal of the child to India.

2397. *Ruchi Majoo v Sanjeev Majoo,* (2011) 6 SCC 479.
2398. *Jacqueline Kapoor v Surender Pal Kapoor,* AIR 1994 P&H 309; *Elizabeth Dinshaw v Arvand M Dinshaw,* (1987) 1 SCC 42.
2399. *V Ravi Chandran (2) v UOI,* (2010) 1 SCC 174.
2400. *Arathi Bandi v Bandi Jagadrakshaka Rao,* AIR 2014 SC 918 : 2013 AIR SCW 6571 : (2013) 15 SCC 790 : JT 2013 (11) SC 48; See also *Surya Vadnan v State of Tamil Nadu,* AIR 2015 SC 2243 : 2015 AIR SCW 3192 : (2015) 5 SCC 450 : JT 2015 (3) SC 85.
2401. *V Ravi Chandran (2) v UOI,* (2010) 1 SCC 174.

The petitioner thereafter filed habeas corpus petition under Article 32 of the Constitution in the Supreme Court for production of the minor child and for handing over his custody to the petitioner along with the child's passport. The Supreme Court specifically approved the modern theory of conflict of laws, which prefers the jurisdiction of the State which has the "most intimate contact with the issues arising in the case". The court also held that jurisdiction is not attracted *"by the operation or creation of fortuitous circumstances"*. It was held that it would be in accord with the principles of comity as well as on facts to return the child back to the USA from where he had been removed and enable the parties to establish the case before the courts there for modification of the existing custody orders.

There are two reasons why foreign decree of divorce cannot be challenged as invalid. Firstly because, consent of the respondent to the grant of relief by a foreign forum has been taken as curing the defect in the validity of the decree. If consent can cure the defect of jurisdiction of the forum, which grants the decree, by the same logic it should also place a decree granted by such a forum beyond challenge on the ground that the relief granted was not available to the parties as per the personal law prevalent in the country of their origin. If consent to the grant of relief is taken as a relevant circumstance, there is no reason to make a distinction between cases, where the defect to be cured is one relating to the jurisdiction of the forum and others, where the defect arises from the ground on which the relief has been granted.[2402]

A husband seeking to enforce a foreign decree must establish that judgment had been given on merits. Where the publication of the notice against wife was in the *Official Gazette* only and the husband never appeared before the Mexican court, a decree was passed without recording any evidence. It was held that judgment of the Mexican court was not given on merits.[2403] Decree of divorce obtained in the foreign court is binding, if none of the grounds mentioned in section 13 are proved to exist.[2404]

Domicile is a jurisdiction fact. A foreign decree of divorce is subject to collateral attack for fraud or for want of jurisdiction, even though jurisdictional facts are recited in the judgment. The courts in England were competent to entertain the petition for divorce filed by the husband (Indian) and the matter was set down for trial as a contested matter. The judge preferred the evidence of the husband to the evidence tendered by the wife and passed a *decree nisi*, which was made absolute. Thus, the decree was passed on the merits and the provision in Indian law, i.e., Hindu Marriage Act, covered the same ground as was covered by the similar provisions of the English Act under which the decree was granted. The party, i.e., the wife challenging the decision as null and void, had the opportunity to defend and the requirement as to conferment of jurisdiction was complied with. In these circumstances, the Delhi High Court held that the wife could not question conclusiveness of the judgment of the court of England, as the same did not suffer from any defects enumerated in section 13 of the CPC.[2405]

In a suit for maintenance by wife against husband (residing in USA), it was found first, that the husband had obtained a foreign decree of divorce from a Mexican court; secondly, that he could not be said to be a *bona fide* resident or domiciled in Mexico state; and thirdly, that he had obtained the judgment by misleading the court regarding his residence. It was held that the decree having been so obtained by making a false representation as to the jurisdictional

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2402. *Deva Prasad Reddy v Kamini Reddy*, AIR 2002 Kant 356.
2403. *Maganbhai Chotubhai Patel v Mani Ben*, AIR 1985 Guj 187.
2404. *Dr Padmini Mishra v Dr Ramesh Chandra Mishra*, AIR 1991 Ori 263.
2405. *Anoop Beniwal v Dr Jagbir Singh Beniwal*, AIR 1990 Del 305.

facts, it was obtained by fraud within section 13(b), CPC. In this case, it was held that the judgment was not given on the merits and publication of summons was only by notification in the *Official Gazette*.[2406] In this case, the Hon'ble Supreme Court advised examination of feasibility of legislation safe-guarding the interest of women by incorporating the following provisions as:

(a) no marriage between an NRI and an Indian woman which has taken place in India may be annulled by a foreign court;

(b) provisions may be made for adequate alimony to the wife in the property of the husband both, in India and abroad.

(c) A decree granted by an Indian court may be made executable in foreign courts both, on principle of comity and by entering into reciprocal agreements like section 44-A of the CPC, which makes a foreign decree executable as it would have been a decree passed by that court.[2407]

In a Gujarat case, the provisions of section 13, clauses (b), (d) and (e), CPC, were at issue. The wife had, in this case, sued for maintenance against the husband (residing in the United States). The husband, it seems, had obtained a decree of divorce in a Mexican court. The objection of the wife was, that the husband was not a *bona fide* resident of Mexico and had obtained the judgment by misleading the Mexican court and therefore, the decree of divorce was vitiated by fraud. Further, the decree was passed without recording any evidence and was not given on merits, and the wife was not heard personally by the Mexican court. The wife did not appear or submit to the jurisdiction of the Mexican court and the divorce decree was therefore, invalid for breach of natural justice. Upholding these objections, the Gujarat High Court declared the marriage to be subsisting and held that the wife was entitled to maintenance.[2408]

Where the ground on which the marriage of the defendant husband was dissolved is not available in the Hindu Marriage Act, the parties are Hindu, their marriage was solemnised according to the Hindu rites, their matrimonial disputes or relationship was, therefore, governable by the provisions of Hindu Marriage Act. Since the plaintiff wife did not submit to the jurisdiction of the USA Court nor did she consent for the grant of divorce in the USA Court the decree obtained by the defendant from the Connecticut Court of USA is neither recognizable nor enforceable in India.[2409]

[S 14] Presumption as to foreign judgments.—The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

SYNOPSIS

[s 14.1]	Scope	430	[s 14.3]	"foreign judgment"	430
[s 14.2]	"shall presume"	430	[s 14.4]	"Court of competent jurisdiction"	430

2406. *Maganbhai v Maniben*, AIR 1985 Guj 187.
2407. *Neeraja Saraph v Jayant Saraph*, (1994) 6 SCC 461.
2408. *Maganbhai v Maniben*, AIR 1985 Guj 187.
2409. *Anubha v Vikas Aggarwal*, AIR 2003 Del 175.

[s 14.1] Scope

The presumption under this section would stand rebutted as where the foreign judgment declares that the defendant was served within the jurisdiction of the court delivering such a judgment, if, it is shown that he was at the relevant time physically not within that foreign territory.[2410] (See section 13, clause (a), and the undermentioned cases).[2411]

In *Oren Bydorcarbons Pvt Ltd v MSC Mediterranean Shipping Co SA*, the Hon'ble Court noted that the plaintiff had participated in the proceedings before the London Court, and the London Court passed judgment on merits thus, plaintiff cannot reagitate the same issues already decided. Hence, the presumption of section 14 would apply as plaintiff failed to rebut the same.[2412]

(See notes to section 13 under the heading "clause (a) court of competent jurisdiction.")

[s 14.2] "shall presume"

(See Indian Evidence 1872, section 4.)[2413]

[s 14.3] "foreign judgment"

(See notes to section 13 under the same heading.)

[s 14.4] "Court of competent jurisdiction"

(See notes to section 13 under the same heading.)

Place of Suing

[S 15] Court in which suits to be instituted.—Every suit shall be instituted in the Court of the lowest grade competent to try it.

SYNOPSIS

[s 15.1]	Place of Suing	431
[s 15.2]	Scope and object of the section	431
[s 15.3]	Jurisdiction	432
[s 15.4]	Judgment of Court not competent to deliver it	434
[s 15.5]	Court of lowest grade competent to try a suit	434
[s 15.6]	Where a suit which ought to be instituted in a Court of lower grade is instituted in a Court of higher grade	435
[s 15.7]	Where a suit which ought to instituted in a Court of higher grade is instituted in a Court of lower grade	436
[s 15.8]	Principles regulating pecuniary jurisdiction	437
[s 15.9]	Over-valuation and under-valuation	437
[s 15.10]	Where the subject matter of a suit does not admit of being satisfactorily valued	439

2410. *Bharat Nidhi Ltd v Megh Raj*, AIR 1967 Del 22.
2411. *Ishri Prasad v Sri Ram*, AIR 1927 All 510 : (1927) 25 All LJ 887; *Mithalal v Kapoorchand*, AIR 1959 Raj 47 : (1958) ILR Raj 1140.
2412. *Oren Bydorcarbons Pvt Ltd v MSC Mediterranean Shipping Co. SA*, Civil Suit No. 319 of 2017, decided on 14 December 2019 (Madras HC).
2413. For further details see commentary on section 4, Indian Evidence by Woodroft and Amir Ali by LexisNexis.

[s 15.1] Place of Suing

The heading governs sections 15–25. The word "place" in its context means place in India, "the courts referred to therein mean courts in India and the immovable property referred to" also means immovable property in India. These sections thus, regulate the venue within India and apply only to those places where the Code is in force. They deal with matters of domestic concern and prescribe rules for the assumption of territorial jurisdiction by Indian courts in matters within their cognizance and do not govern claims against persons of things totally outside their jurisdiction.[2414] The question as to territorial jurisdiction is mixed question of law and fact.[2415]

One important aspect of the provisions of section 24 of the CPC is that the power of transfer is conferred on high court or the district court; Courts which normally exercise appellate or supervisory jurisdiction in the scheme of procedure envisaged under the provisions of the CPC. The power is conferred on a higher judicial forum. While it is an accepted judicial norm that the Judges of the higher Judiciary have the choice to hear a matter in the sense that the Judge himself can recuse from the case and direct the matter to be posted before any other Judges if the learned Judge has the feeling that one of the parties to the proceeding may have a reasonable apprehension of bias if the proceedings should go on before the particular Judge, may be for a variety of reasons such as a previous acquaintance of one of the parties to the proceedings with the Judge which may give rise to a reasonable apprehension of bias on the part of the other party, irrespective of the fact as to whether the Judge is really biased or not; the learned Judge having earlier dealt with the subject matter of the proceedings before the Court, having been involved in the proceedings at an earlier stage in any capacity. A classic example being a Judge shall not sit in appeal over his own judgment, order or decision or even the learned Judge having expressed his earlier in respect of the subject matter before him in any other context. But, in so far as the proceedings before the trial courts are concerned, it is strictly determined as per the provisions of the Code, particularly having regard to the provisions of sections 15, 16, 17, 18, 19 and 20 of the CPC. What needs to be observed and pointed out in the scheme of the CPC is that the Judge of the subordinate judiciary, do not have the power to recuse themselves from the suit or proceeding pending before the Court over which they preside.[2416]

[s 15.2] Scope and object of the section

Section 15 is enacted not merely to avoid overcrowding in the higher Court but also for the convenience for the parties and witnesses who may be examined by them.[2417]

The object of the section in requiring a suitor to bring his suit in the court of lowest grade competent to try it, is that courts of higher grades shall not be overcrowded with suits. This section is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the court of the lowest grade, it does not oust the jurisdiction of the courts of higher grades which they possess under the Acts constituting them.[2418]

2414. *Bhamboo v Ram Narain*, AIR 1928 Lah 297 : (1928) 9 Lah 455; *Venkatachallam v Surya Narayan Murti*, AIR 1941 Mad 129 : (1940) 2 Mad LJ 520.
2415. *Isha Distribution House Pvt Ltd v Aditya Birla Nuvo Ltd*, (2019) 12 SCC 205.
2416. *MV Ganesh Prasad v ML Vasndevamurthy*, AIR 2003 Kant 39.
2417. *Germanthangi v F Rokunga*, AIR 2004 Gau 42.
2418. *Mohini Mohan v Kunja Behari*, (1943) 47 Cal WN 720 : 77 Cal LJ 309; *Dakor Temple Committee v Shankerlal*, AIR 1944 Bom 300 : 46 Beng LR 653; *Nidhi Lal v Mazhar*, (1885) ILR 7 All 230; *Balgonda Appanna v Ramgonda*, (1969) 71 Bom LR 582; *Germanthangi v F Rokunga*, AIR 2004 Gau 42.

Although, therefore, as a matter of procedure, a suit below a certain value ought to be instituted in the court of the *munsiff*, the subordinate judge has still the jurisdiction to try it.[2419] Thus, when a subordinate Judge is invested by notification under the Madras Civil Courts Act, 1873, with power to take cognizance of any proceeding under the Succession Act, his jurisdiction over such matters is co-extensive with that of the district judge and the proceedings should accordingly be instituted in view of section 15 of the Code in the court of the subordinate judge as being the lower Court but this does not deprive the district judge of his jurisdiction to entertain them as the section enacts only a rule of procedure.[2420] As a matter of procedure, he ought not to entertain the suit, but should return the plaint to the plaintiff to be presented to the *munsiff* as provided by O VII, rule 10 of the Code of 1882, section 57.[2421] This is explained fully below.

[s 15.3] Jurisdiction

The word "competent" used in this section has reference to the jurisdiction of a court. Jurisdiction means the extent of the authority of a court to administer justice not only with reference to the subject matter of the suit but also to the local and pecuniary limits of its jurisdiction. Thus, A Presidency Small Cause court has no jurisdiction to try suits in which the amount or value of the subject matter exceeds the prescribed monetary value; this is said to be the jurisdiction of a court as regards its pecuniary limits. Nor can it try suits for specific performance of contracts or for an injunction, or for a dissolution of partnership; this is said to be the jurisdiction of a court as regards the subject matter of a suit. Nor can it try a suit on a cause of action that has arisen beyond the local limits of the original civil jurisdiction of the high court; this is said to be the local limits of its jurisdiction.

Vide the Delhi High Court (Amendment) Act, 2015 which came into force on 26 October 2015, the words Rs 20 lakhs were substituted with the words Rs 2 crores in section 5(2) of the Delhi High Court Act, thereby providing for ordinary original civil jurisdiction of the Delhi High Court in suits in which the value exceeded Rs 2 crores. Subsequently, Office Order dated 24 November 2015 was issued by the high court. In *Subhashini Malik,*[2422] a Full Bench of the Delhi High Court held that even after coming into force of the Amendment Act and the Office Order dated 24 November 2015, the high court can entertain and hear application for amendment of plaint in a suit, which in terms of the aforesaid Office Order had been administratively ordered to be transferred to the subordinate courts and where it finds the amendment enhancing the valuation of the suit for the purposes of pecuniary jurisdiction to be necessary for the purpose of determining the real question in controversy, the high court has jurisdiction to allow the said amendment. It was held that the Amendment Act was prospective in its nature and thus, did not affect the suits instituted prior to the coming into force thereof. It was further held that the suits, valuation whereof for the purposes of jurisdiction was in excess of Rs 20 lakhs and which as per the law in force at the time of the institution were filed before the high court, even

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2419. *Ratan Sen v Bhau*, AIR 1944 All 1 : (1944) ILR All 20; *Marta Mondal v Hari*, (1890) ILR 17 Cal 155; *Krishnasami v Kanakasabai*, (1891) ILR 14 Mad 183; *Augustine v Medly Cott*, (1892) ILR 15 Mad 241; *Goura Chandra v Vikrama Deo*, 23 Mad 367; *Ramamirtham v Rama Film Service*, (1951) 2 Mad LJ 121 : (1951) ILR Mad 93 (FB); *Venkateswarlu v Satyanarayana*, AIR 1957 AP 49 : 1956 And WR 117 (FB).
2420. *Ramasubbarayalu v Rangammal*, AIR 1962 Mad 450 : 75 LW 452 (FB) : (1962) ILR Mad 1001 : (1962) 2 Mad LJ 318.
2421. *Nidhi Lal v Mazhar*, (1885) ILR 7 All 230.
2422. *Subhashini Malik v SK Gandhi*, 233 (2016) DLT 83 : 2016 (160) DRJ 1.

after coming into force of the Amendment Act were to continue as would have continued before the high court, in spite of their valuation being less than Rs. 2 crores but for section 4 thereof, which empowered the Hon'ble Chief Justice to transfer any suit or other proceeding pending before the high court immediately before the commencement of the Amendment Act to such subordinate courts that would have jurisdiction to entertain such suit had the same been instituted post coming into force of the Amendment Act.

The Supreme Court has held that the question of jurisdiction is a question of law that needs to be adjudicated only on the basis of statutory provisions and not on considerations like quantum of filing of cases. As to the choice of forum, it cannot be a justification to state that the particular forum was chosen because less number of cases were filed therein and possibility of speedy disposal was higher. The court held that the principle under section 15 of the CPC cannot be invoked whilst interpreting section 2(1)(e) of the Arbitration and Conciliation Act, 1996. A high court therefore is not the "Principal civil court of original jurisdiction" as under section 2(1)(e) of the 1996 Act. The Supreme Court dealt with the question as to whether a challenge to an arbitration award (or arbitral agreement, or arbitral proceeding), wherein jurisdiction lies with more than one court, can be permitted to proceed simultaneously in two different courts? In the present case, both the parties had approached different courts on the same day. It became necessary for the Supreme Court to choose the jurisdiction of one of two courts, i.e., either the "ordinary original civil jurisdiction" of the High Court of Bombay or the "principal civil court of original jurisdiction" in the district of Thane. The court held that the legislative intent emerging from section 2(1)(e) makes it abundantly clear that legislative choice is clearly in favour of the high court. Accordingly, it was held that the high court had the exclusive jurisdiction in the circumstances of the case. The court also ruled that section 15 of the CPC, which provides that every suit shall be instituted in the court of the lowest grade competent to try it, cannot be invoked whilst interpreting section 2(1)(e) of the 1996 Act.[2423]

Section 92 of the CPC lays down specifically that suits relating to public trusts are to be instituted in "the principal civil court of original jurisdiction or in any other court empowered in that behalf by the State Government." The Supreme Court held that the word "or" used in section 92 denotes an alternative, giving a choice. Even if the State notified any other court for instituting a suit relating to Trusts, the jurisdiction of district court does not stand substituted.[2424]

In the above case, the State Government, acting under the Tamil Nadu Civil Courts Act, 1873, had fixed local limits of jurisdiction of any district court or subordinate Judge's Court and had also invested all Courts of Subordinate Judges with jurisdiction under the Code in respect of suits relating to Trusts. Explaining the point further, Raveendran J speaking for the Supreme Court Bench in the above case, observed as follows:

> Assuming that there was only need for applying the principles of interpretation, let us next consider whether the word "or" was used in section 92 of the Code in a substitutive sense. It is clear from section 92 of the Code that the legislature did not want to go by the general rule contained in section 15 of the Code that every suit shall be instituted in the court of the lowest grade competent to try it, in regard to suits relating to public Trusts. The intention of the law makers was that such suits should be tried by the District Court. At the same time, the law makers contemplated that if there was heavy work load on the District

2423. *State of Maharashtra v Atlanta Ltd,* (2014) 11 SCC 619.
2424. *Sri Jeyaram Educational Trust v AG Syed Mohideen*, AIR 2010 SC 671 : (2010) 2 SCC 513.

> Court, the State Government should be enabled to empower any other court (within the local limits of whose jurisdiction, the whole or any part of the subject-matter is situate), also to entertain such suits. Therefore, the word "or" is used in the ordinary and normal sense, that is to denote an alternative, giving a choice. The provisions of section 92 do not give room for interpreting the word "or" as a substitutive, so as to lead to an interpretation that when the Government notified any other court, such notified court alone will have jurisdiction and not the District Court.[2425]

The jurisdiction of a court may again be original or appellate. In the exercise of its original jurisdiction, a court entertains original suits. In the exercise of its appellate jurisdiction, it entertains appeals.

[s 15.4] Judgment of Court not competent to deliver it

See notes under section 11 under the same heading. See notes under heading "Contract providing for place of suing" under section 10 and "agreement as to choice of court" under section 20.

[s 15.5] Court of lowest grade competent to try a suit

There are in India a large number of courts. The high courts of Calcutta, Madras, Bombay, Allahabad, Patna and Nagpur each have been established by a Royal Charter. Under Article 214(1) of the Constitution, there is now a high court for each state. Under Article 214(2), high courts exercising jurisdiction in relation to any province immediately before the commencement of the Constitution have become high courts for the corresponding states. Article 225 preserves their existing jurisdiction, the powers of judges of these high courts and the laws administered in these high courts, subject to the provision of the Constitution and subject to the provisions of any law made by the appropriate legislature by virtue of the powers conferred on such legislature by the Constitution. The high courts of Orissa and Assam were established after the Independence but before the Constitution by Order of the Governor-General. Other courts in India have been established almost all by Local Acts and they are of various grades with different pecuniary limits of jurisdiction.

In each of the three Presidency-towns, there is a high court and a small cause court. high courts are empowered in the exercise of their ordinary original civil jurisdiction to try suits of any value except suits falling within the jurisdiction of Presidency Small Cause courts of which the value does not exceed Rs 100.[2426] The pecuniary jurisdiction of Presidency Small Cause courts is confined to suits of which the value does not exceed Rs 2,000.[2427] Thus, both a high court and a Presidency Small Cause court are competent to try a suit for Rs 500, for damages for breach of contract, but of these two courts it is the small cause court which is the "court of the lowest grade competent to try the suit". The suit, therefore, "shall" be instituted in the small cause court as required by the present section. This does not mean that the high court has no jurisdiction to entertain the suit. It has jurisdiction to try the suit, but in order that the high court may not be overcrowded with suits, the legislature has established small cause court, and the present section requires that suits which a Presidency Small Cause court is competent to try shall be brought in that court. There are, however, certain suits which a small cause court is not competent to try, such as suits for the recovery or partition of immovable property; or for the foreclosure or redemption of a mortgage of immovable property; or suits for injunction

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2425. *Sri Jeyaram Educational Trust v AG Syed Mohideen*, AIR 2010 SC 671, para 8 : (2010) 2 SCC 513
2426. See clause 12 of the Letters Patent, Appendix I.
2427. Presidency Small Cause Courts Act, 1882, section 18.

or for specific performance.[2428] These suits must be brought in the high court, though the value of the suits may be under Rs 100. There are in Calcutta, Madras and Bombay, courts of original jurisdiction established under special statutes called City Civil Courts with power to take cognizance of suits up to a pecuniary limit, not being matters relating to testamentary, intestate, or matrimonial jurisdiction. It has been held that where there is a conflict between the original jurisdiction of the high court under Letters Patent and that of the City Civil Court, section 15 has no application and that proceedings could be taken in the high court even though they could also be instituted in the City Civil Court.[2429] The Hindu Marriage Act, 1955, confers on the district court exclusive jurisdiction to try petitions presented under that Act and its operation is not controlled by section 15. It has accordingly been held that a petition for declaration of nullity of marriage should be filed in the City Civil Court and not in the high court in its original side even though the value of the relief claimed in the petition exceeds the pecuniary limits of its jurisdiction.[2430] A suit challenging an order of suspension against the employee of a panchayat was filed in the court of civil judge, junior division. The suit cannot be held to be not maintainable on the ground that it should have been filed in the Court of Civil Judge, Senior Division according to section 32 of the Bombay civil courts Act. Section 15 of the CPC requires that the suit should be filed in the court of the lowest grade competent to try it and, in view of the provisions of section 24 of the Bombay Civil Courts Act, 1869, the suit could have been, and should have been filed in the Court of Civil Judge only. Panchayat is not "government".[2431]

Plaintiff's valuation of a leasehold on the basis of rent would ordinarily be regarded as reasonable.[2432] The plaintiff's valuation (unless he has grossly over-valued or under-valued the suit) should be accepted. *mesne* profits claimed at Rs 7800 per month for premises of the nature in question in Calcutta cannot be regarded as fanciful.[2433]

[s 15.6] Where a suit which ought to be instituted in a Court of lower grade is instituted in a Court of higher grade

Section 15 of CPC enacts on rule of procedure but it does not affect the jurisdiction of a Court of higher grade to try the suit entertainable by a Court of lower grade.[2434] Section 15 of the Civil Procedure Code lays down the rule of procedure only and does not affect the jurisdiction of the Courts of higher grades to try a suit entertainable by courts of lower grades. In cases, when such plaints are presented before the Court of higher grade, there would be a discretion caused on that Court either to try the suit itself or return the plaint for presentation before the Court of lower grade.[2435]

When a suit triable by a Court of lower grade is instituted in a Court of higher grade, the latter Court may return the plaint. It is only discretionary on the part of such latter Court (i.e., to say the Court of higher grade) either to try the suit itself or to return the plaint for presentation in the Court of the lower grade. Section 15 is enacted not merely to avoid

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2428. Presidency Small Cause Courts Act, 1882, section 19.
2429. *Ramavatharam v Rama Films Service* supra; *Bank of Chettinad v SPS KRV Firm*, AIR 1935 Rang 517; *Manindra v Lal Mohan*, (1929) ILR 56 Cal 940.
2430. *Monika Das v Promode Kumar*, AIR 1960 Cal 577.
2431. *Natvarlal Khodidas Parmar v District Panchayat, Jamnagar*, AIR 1990 Guj 142.
2432. *Tara Devi v Sri Thakur Radha Krishna Maharaj*, (1987) 4 SCC 69.
2433. *Nandita Bose v Ratanlal Nahata*, (1987) 3 SCC 705.
2434. *Germanthangi v F Rokunga*, AIR 2004 Gau 42.
2435. *Thulasimani v Maheswari*, CRP (PD) No. 3109/2015 and MP No. 1/2015 decided on 19 January 2019 by the Madras High Court.

overcrowding in the higher Court but also for the convenience for the parties and witnesses who may be examined by them.[2436]

If a suit which under this section ought to have been instituted in a *munsiff's* court is brought in the court of a subordinate judge and the subordinate judge, instead of returning the plaint under O VII, rule 10, tries it and passes a decree against the defendant, notwithstanding an objection taken by the defendant, the decree is not a nullity as the subordinate judge has jurisdiction to try the suit. It is a case of irregularity, not affecting the jurisdiction of the court within the meaning of section 99.[2437] The language of O VII, rule 10, though imperative, is addressed to the suitor and not to the court, which has under this section a discretion either to return the plaint to be presented to the court of the lowest jurisdiction or to try it itself.[2438] The fact that the court of lowest grade has no jurisdiction to try a suit by summary jurisdiction provided by O XXXVII, rule 2(1) does not mean that court is not competent to try that suit if it is otherwise within its jurisdiction nor does that fact enable the plaintiff to have his suits tried by a higher court. O XXXVII, rule 2(1) has no bearing on the jurisdiction of that court or on the nature of the suit.[2439] If a suit under O XXI, rule 103 is for declaration of title and possession, the question of jurisdiction in regard to it would be determined by the market value of the property. If such market value is within the jurisdiction of lower court, the suit would lie in that court, although the effect of the decree passed therein would be to upset an order passed by the high court in favour of an obstructionist.[2440] If a court has jurisdiction to entertain a claim, it has the jurisdiction also to pass all appropriate orders in that suit including even an order staying execution of a decree passed by the Supreme Court.[2441]

[s 15.7] Where a suit which ought to instituted in a Court of higher grade is instituted in a Court of lower grade

In such a case, the court of lower grade ought to return the plaint to the plaintiff to be presented to the court of higher grade (O VII, rule 10). If this is not done, and the suit is heard by the court of lower grade, the decree is one passed without jurisdiction. This a case of want of jurisdiction as distinguished from a mere irregularity within the meaning of section 99 below.[2442] Where a suit which ought to be instituted in a court of higher grade is instituted in a court of lower grade and subsequently thereto, the pecuniary jurisdiction of the lower court is raised so as to cover the suit previously instituted, that does not cure the defect of want of jurisdiction at the time of the institution.[2443] In *Bansilal v Dadus*,[2444] it was held that when once a suit has been validly instituted in a Court, its jurisdiction to try it is not affected by subsequent legislation, unless it is express. (As to cases where a suit is by reason

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2436. *Thulasimani v Maheswari*, CRP (PD) No. 3109/2015 and MP No. 1/2015 decided on 19 January 2019 by the Madras High Court.
2437. *Nidhi Lal v Mazhar Hisain*, (1885) ILR 7 All 230; *Matra Mondal v Hari*, (1890) ILR 17 Cal 155, both cases of overvaluation; but decided without reference to the Suits Valuation Act, 1887; *Bishambar Dayal v Girdharlal*, AIR 1953 All 158; *Krishnamurthi v Ramamurthi*, AIR 1951 AP 654; *Vidyamba v Venkayamma*, AIR 1958 AP 218; *Arya Pratinidhi Sabha v Devaraj*, AIR 1963 P&H 208.
2438. *Bhuvaneswari v Raghubansh*, AIR 1954 Pat 34; *Bipan Kumar v Sham Sunder*, AIR 1977 HP 90.
2439. *JK Sharma v Ram Chandra Setty*, AIR 1965 Mys 248.
2440. *Paul Vaz v Elizabeth*, AIR 1967 Bom 389.
2441. *Kurella Ratnam v Mokhamatla Bhadriah*, AIR 1969 AP 236.
2442. *Matra Mondal v Hari*, (1890) ILR 17 Cal 155, 160; a case of over-valuation, but decided without reference to the Suits Valuation Act, 1887.
2443. *Kesarimal v Bansilal*, AIR 1952 MB 196.
2444. *Bansilal v Dadus*, (1957) ILR Raj 241; but see *Sri Bhagwan v Omkarmal*, AIR 1952 Bom 365, *Fazal Hussein v Yusuf Ali*, AIR 1955 Bom 55. It is submitted that these decisions require reconsideration.

of under-valuation brought in a court of lower grade, see notes below: "Over-valuation and under-valuation".)

[s 15.8] Principles regulating pecuniary jurisdiction

It is the plaintiff's valuation in his plaint which fixes the jurisdiction of the court, and not the amount which may be found and decreed by the court.[2445] Thus, where in a suit for accounts the plaintiff values has claim at less than Rs 5,000 which is the maximum pecuniary jurisdiction of the court in which the suit is filed and the amount found due on taking the accounts exceeds Rs 5,000, the court has power to pass a decree for that amount,[2446] and the court can entertain an application for execution of the decree.[2447] On this principle if, in a suit for partition, valuation given by the plaintiff is such that the suit is within the jurisdiction of the court in which it is filed, that court can pass a decree in terms of an award of an arbitrator to whom the parties have, after the filing of the suit, referred the disputes in the suit for arbitration, even though the award is for an amount exceeding the pecuniary jurisdiction of that court;[2448] but jurisdiction may be destroyed if the plaint is so amended as to exceed the pecuniary limits of the court in which the suit is instituted.[2449] Where on the allegations in the plaint, the court has pecuniary jurisdiction to try a suit, any decree or order passed thereon is not open to attack on the ground that on its true valuation, the claim was beyond the jurisdiction of the court. It is a defect which is not fundamental and could be waived.[2450]

[s 15.9] Over-valuation and under-valuation

Although ordinarily, it is the value put by the plaintiff on his suit that prima facie determines jurisdiction, it does not follow that a plaintiff is in every case at liberty to assign any arbitrary value to the suit and thus be free to choose the court in which he should bring the suit.[2451] In a suit for accounts, the correct amount payable by one party to the other can be ascertained only when the accounts are examined and it is not possible to give an accurate valuation of the claim at the inception of the suit. The plaintiff is, therefore, allowed to give his own tentative valuation. Ordinarily, the court shall not examine the correctness of the valuation chosen, but the plaintiff cannot act arbitrarily in this matter. If a plaintiff chooses whimsically, a ridiculous figure, it is tantamount to not exercising his right in this regard. In such a case, it is not only open to the court, but, its duty is to reject such a valuation.[2452] The principles which regulate the pecuniary jurisdiction of civil courts are well-settled. Ordinarily, the valuation of a suit depends upon the relief claimed therein and the plaintiff's valuation in his plaint determines the court in which it can be presented; but the plaintiff cannot invoke the jurisdiction of a

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2445. *Lakshman v Babaji*, (1883) ILR 8 Bom 31; *Mahabir Singh v Behari Lal*, (1891) ILR 13 All 320; *Madho Das v Ramji*, (1894) ILR 16 All 286; *Ishwarappa v Dhanji*, AIR 1932 Bom 337 : (1932) ILR 56 Bom 23; *Ishwar Din v Md Ishaq*, AIR 1952 All 496; *Debi Sahai v Ganga Sahai*, AIR 1954 All 749; *Radha Charan Das v Th Mohni Behariji*, AIR 1975 All 368.
2446. *Krishnaji v Motilal*, AIR 1929 Bom 337 : (1929) 31 Bom LR 476; *Chidambarum v Muthia*, AIR 1937 Rang 320 : (1937) Rang 214.
2447. *U Po Mya v Father Rionpreyt*, AIR 1939 Rang 115 : (1939) Rang 134.
2448. *Mahadeo v Hanumanmal*, AIR 1969 Raj 304.
2449. *Chandu v Kombi*, (1886) ILR 9 Mad 208.
2450. *Syam Nandan v Danpati Kauer*, AIR 1960 Pat 244 : (1960) Pat LR 4.
2451. *Boidya Nath v Makhan Lal*, (1890) ILR 17 Cal 680, 683; *Dayaram v Gordhandas*, (1906) ILR 31 Bom 73, 78; *Raj Krishna v Bipin*, (1912) ILR 40 Cal 245, 249; *Balgonda Appanna v Ramgonda*, (1969) 71 Bom LR 582.
2452. *Abdul Hamid Shamsi v Abdul Nazid*, (1988) 2 SCC 575.

court by either grossly over-valuing or grossly under-valuing a suit. The court always has the jurisdiction to prevent the abuse of the process of law.[2453]

The Delhi High Court has held that if the plaintiff is allowed to over-value a suit in such a way as to file the suit in the Court he prefers, then section 15 would become redundant and would result in "forum shopping".[2454]

Cases do occur in which a plaintiff over-values his suit or he under-values it. The over-valuation or under-valuation may be erroneous, or it may be done intentionally by the plaintiff for the purpose of bringing the suit in a court different from that in which it would lie if it were properly valued. If the over-valuation or under-valuation is patent on the face of the plaint, it is the duty of the court to which the plaint is presented to return it to the plaintiff to be presented to the proper court under O VII, rule 10. If it is not patent on the face of the plaint, but objection is taken by the defendant that it is over-valued or under-valued, the court may require the plaintiff to show that the suit has been properly valued if there are prima facie grounds for believing that the suit has not been properly valued,[2455] but not otherwise.[2456] Where there is an amendment in the valuation clause of a plaint, the plaint should be returned for presentation to the proper court having pecuniary jurisdiction, even if a higher court fee is paid. The court below had committed a manifest error of law and had illegally held that even by giving a higher valuation by the deponent, the jurisdiction of the court would remain the same.[2457]

If a suit is over-valued or under-valued so that it is brought in a court whose grade is higher or lower than that of the court which would have been competent to try it if it had been properly valued, the decree passed is such a suit is not liable to be set aside or reversed by the appellate court unless: (i) the objection as to jurisdiction on account of over-valuation or under-valuation was raised by the defendant in the trial court at or before the hearing at which the issues were framed; or (ii) such over-valuation or under-valuation is found by the appellate court to have prejudicially affected the disposal of the suit on merits.[2458] It is immaterial whether such over-valuation or under-valuation is erroneous or intentional.[2459] (See Suits Valuation Act, 1887, section 11).

The High Court of Calcutta has held that where a suit is under-valued with the result that the appeal from the decree in the suit is heard and decided by a district court instead of by a high court, the decree of the district court is one passed by a court without jurisdiction and, therefore, a nullity. This happens in cases where a suit of which the true value exceeds Rs 5,000 is valued at less than Rs 5,000. *A* brings a suit against *B* for possession of immovable property in the court of a subordinate judge. The real value of the suit exceeds Rs 5,000, but the suit is valued at Rs 2,100 only. A decree is passed in the suit for *A*. *B* files an appeal in the district court, but the appeal is dismissed. According to the Calcutta decisions, the decree of the district court is a nullity as being one passed without jurisdiction. The reason given is that the true value of the suit being more than Rs 5,000, the proper forum of appeal if the suit had been

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2453. *Nandita Bose v Ratan Lal Nahata*, (1987) 3 SCC 705.
2454. *Mahesh Gupta v Ranjit Singh*, AIR 2010 (NOC) 385 (Del).
2455. *Appa Rao v Sobhanadri*, (1901) ILR 24 Mad 158; *Hamidunnissa v Gopal*, (1897) ILR 24 Cal 661, 667.
2456. *Koti Pujari v Manjaya*, (1898) 21 ILR Mad 271.
2457. *Devendra Singh v Bhola Ram*, AIR 1991 All 157.
2458. *Sheo Deni v Tulsi*, (1893) ILR 15 All 378, 380; *Raman v Secretary of State*, (1901) ILR 24 Mad 427; *Jose Antonio v Francisco*, (1910) ILR 35 Bom 24.
2459. *Hamidunnissa v Gopal*, (1897) ILR 24 Cal 661; *Krishnasami v Kanakasabai*, (1891) ILR 14 Mad 183.

properly valued, would have been the high court, and not the district court, and the result of the under-valuation was to oust the jurisdiction of the high court as the court of appeal.[2460] In *Kiran Singh v Chaman Paswan*,[2461] a suit valued at Rs 2,500 was instituted in the Court of the Subordinate Judge, Monghyr, and against the decree dismissing the suit, the plaintiff preferred an appeal to the district court. That appeal also having been dismissed, the plaintiff preferred a second appeal to the high court. There, the court determined that the correct valuation of the suit was Rs 9,880 and the appellant paid the deficit court fee. On the revised valuation, the suit would be within the competence of the subordinate judge, but an appeal against his judgment would lie not to the district judge but to the high court. The appellant accordingly contended before the high court that the appeal to the district court was incompetent and its decree a nullity and that the second appeal should be heard as a first appeal. The high court negatived this contention following a Full Bench decision of the court in *Radio Singh v Raja Marian*[2462] and dismissed the appeal as no prejudice had been shown. The matter was taken in appeal to the Supreme Court and in affirming the decision of the high court, the Supreme Court held that even an objection on the ground of jurisdiction arising out of over-valuation or under-valuation could, in view of the provisions of section 11 of the Suit Valuation Act, be taken only in the manner mentioned therein, that the decision of the district court was therefore, not a nullity and that a mere change of forum for appeal was not a prejudice contemplated by the section, nor a mere error on the conclusion reached on the merits.[2463]

[s 15.10] Where the subject matter of a suit does not admit of being satisfactorily valued

In some suits, the subject matter is not capable of being estimated at a money value, eg, suits for restitution of conjugal rights; suits to remove a *karnavan*,[2464] suits to direct registration of a document under the Registration Act, 1908, section 77,[2465] *etc*. The court fee in such suits is Rs 10 as provided by the Court Fees Act, 1870, Sch II, Article 17, clause (vi). There is a distinction, however, between valuation for the purpose of jurisdiction and valuation for the purpose of ascertaining court fee.[2466] The subject now under consideration is valuation for purposes of jurisdiction.

In case where the subject matter is not capable of being estimated at a money value, it is provided by section 9 of the Suits Valuation Act, 1887, that the value of the suit for purposes of jurisdiction is what the high court may specify by rules made under that section. Where no rules are made, the high courts of Allahabad and Calcutta have said that the safest and most convenient course is to treat the valuation made by the plaintiff as prima facie the true valuation, but subject to correction by the court. If the defective valuation has been due to an improper motive, the court must decide what should be considered to be the proper value.[2467]

2460. *Rajlakshmi v Katyayani*, (1911) ILR 38 Cal 639.
2461. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 : [1955] 1 SCR 117 : 1954 SCJ 514.
2462. *Radio Singh v Raja Marian*, AIR 1949 Pat 278 : (1948) ILR 27 Pat 1091(FB).
2463. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340; *Kelu Achan v Parvatghi*, (1923) ILR 46 Mad 631 : (1923) 45 Mad LJ 135 (FB); *Moolchand v Ramakrishna*, (1933) ILR 55 All 315; *Ram Deo Singh v Raj Narain*, AIR 1949 Pat 278 : (1948) ILR 27 Pat 1091 (FB).
2464. *Govindan Nambiar v Krishnan Nambiar*, (1882) ILR 4 Mad 146.
2465. *Savarimuthu v Alagium*, (1902) 12 Mad LJ 88; *Ramu Aiyar v Sankara Aiyar*, (1908) ILR 31 Mad 89.
2466. *Dayaram v Gordandas*, (1907) ILR 31 Bom 73.
2467. *Zair Husain Khan v Khurshed Jan*, (1906) ILR 28 All 545; *Jan Mahomed v Mahar Bibi*, (1907) 34 ILR Cal 352.

The cases in which the above rule was laid down were suits for restitution of conjugal rights. In a subsequent case, however, the High Court of Madras said that, though the rule adopted by the high courts of Allahabad and Calcutta might be appropriate in suits for restitution of conjugal rights, it was not so in suits which affected property, and that the best rule in such cases was to value the suits according to the value of the property liable to be affected thereby.[2468] Thus, a suit to compel registration of an instrument whether the instrument be registrable compulsorily (for example, an instrument of gift) or voluntarily (for example, a will), is valued in Madras according to the value of the property that would be affected by the suit;[2469] and a suit to set aside an instrument according to the value of the plaintiff's interest in the instrument.[2470] The Madras High Court has also held that though the court fee on a suit for the removal of a *karnavan* is only Rs 10, it does not follow that a district *munsiff* has jurisdiction to try such a suit where the value of the *tarvad* property exceeds the pecuniary limits of jurisdiction of the *munsiff's* court;[2471] and that a *munsiff* has no jurisdiction to entertain a suit to set aside an adoption, if the value of the property, which would be lost to the adopted son, if the adoption were set aside, exceeds the pecuniary jurisdiction of the court.[2472] The high courts of Allahabad and Calcutta would probably not agree. In fact, the High Court of Allahabad has held that the value, for the purposes of jurisdiction of a suit to set aside an adoption, is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plaint by the plaintiff.[2473] According to the Bombay view, in a suit to enforce registration of a document under section 77 of the Registration Act, where the subject matter of the suit is not capable of monetary value, the valuation placed by the plaintiff would be the prima facie valuation and if that exceeds the pecuniary jurisdiction of the court of the lowest grade, the suit can be rightly filed in the higher court;[2474] but, whichever view be correct, it is certain since the enactment of the Suits Valuation Act (7 of 1887), section 11, that when once a suit of this class is decided on its merits by the lower court, the decision will not be reversed in appeal on the ground of want of jurisdiction unless the cognizance of the suit by that court has prejudicially affected its disposal on the merits.

It has been held by the High Court of Bombay that where the jurisdiction of a court, eg, the City Civil Court at Bombay, is limited to try suits not exceeding a certain amount in value, it cannot entertain a suit, the subject matter of which is not capable of monetary valuation.[2475] The Bombay decision has been negatived by section 6 of Maharashtra Act 9 of 1970.

[S 16] Suits to be instituted where subject-matter situate.—Subject to the pecuniary or other limitations prescribed by any law, suits—

(*a*) for the recovery of immovable property with or without rent or profits,

(*b*) for the partition of immovable property,

2468. *Ramu Aiyar v Sankara Aiyar*, (1908) ILR 31 Mad 89.
2469. *Ramkrishnama v Bhagamma*, (1890) ILR 13 Mad 56 (deed of gift); *Ramu Aiyar v Sankara Aiyar*, (1908) ILR 31 Mad 89.
2470. *Kanaran v Komappan*, (1891) ILR 14 Mad 169; *Parathayi v Sankumani*, (1892) ILR 15 Mad 294.
2471. *Krishna v Raman*, (1888) ILR 11 Mad 266.
2472. *Keshava v Lakshminarayana*, (1883) ILR 6 Mad 192.
2473. *Sheo Deni Rani v Tulsi Ram*, (1883) ILR 15 All 378.
2474. *Leela v EC Shinde*, AIR 1970 Bom 109.
2475. *Induman Ben v UOI*, AIR 1969 Bom 423; *Paras Ram v Janki Bai*, AIR 1961 All 395 : (1961) ILR 1 All 932, (FB).

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property, held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally, works for gain.

Explanation.—In this section "property" means property situate in [2476][India].

SYNOPSIS

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[s 16.1] Subject to the Pecuniary or Other Limitations Prescribed by Law

The pecuniary limitations have been referred to in the notes on section 15. Instances of other limitations are suits under section 92, or suits in Bombay against government or an officer of government in his official capacity,[2477] which can only be filed in a high court or a district court.

2476. Substituted for words "the States" by Act 2 of 1951, section 3.
2477. Bombay Civil Courts Act, 1869, section 32.

[s 16.1.1] High Courts

This section does not apply to high courts in the exercise of their original civil jurisdiction (see section 120). The nature and extent of the jurisdiction of the High Courts at Calcutta, Bombay, Delhi and Madras, which are the only courts having original civil jurisdiction, is defined by the charter for each of these courts which is retained by virtue of Article 225 of the Constitution. The original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay is defined by clause 12 of the charter which empowers them to try suits "for land or other immovable property, if such land or property be situated wholly within the local limits of the ordinary original civil jurisdiction or, in case leave of the court shall have been first obtained, in part within such limits". There have been many conflicting decisions as to the meaning of the expression "suits for land or other immovable property" in the Letters Patent, but the more specific and detailed provisions of this section leave no scope for uncertainty. It has been held by the Calcutta High Court that invocation of original jurisdiction in ordinary original civil jurisdiction has to be guided by the provision of clause 12 and clause 12 alone, and nothing else unless the Special Act provides otherwise. Even in case of an arbitration proceeding, the principal civil court of jurisdiction is determinable is the context of the provisions under clause 12 of the Letters Patent.[2478]

[s 16.2] Scope of the Section

This is one of a group of sections which refer to courts in India and to immovable property situated in India. This is specially expressed in the explanation, lest the proviso be construed as giving a *mofussil* court jurisdiction in respect of immovable property out of India, for Indian courts have no such jurisdiction.[2479] It specifies the court in which suits relating to immovable property and suits for the recovery of movable property actually under distraint or attachment are to be instituted. Section 19 indicates the courts in which suits for compensation for wrong done to the person or to movable property are to be instituted. Section 20 is a general section. Sections 3 and 12 of the Bombay City Civil Courts Act, 1948, which confer jurisdiction on the City Civil Court, Bombay, cannot be construed as excluding section 16 of the Code, and that accordingly, a suit on a mortgage over properties situated outside greater Bombay is not maintainable in the City Civil Court, Bombay.[2480] Section 16 has an overriding effect on section 20 as ultimately if relief is granted to the respondent, he has to work out his remedy against the immovable properties.[2481] Where the court had jurisdiction over the whole of the district of lower Assam but held its sittings sometimes in Nowgong and sometimes at Gauhati, a suit on a mortgage over properties situated in Nowgong area could be instituted at Gauhati.[2482] Compliance with this section is required at the time of institution of the suit. Hence, if subsequent to such institution, the area in which the immovable property in the suit is situated is transferred for any reason to another district, the court in which the suit was instituted is not as a result of such transfer divested of its jurisdiction to proceed with and decide it.[2483]

2478. *IMR Metallurgical Resources AG v Hindustan Newsprint Ltd*, AIR 2006 Cal 141 : 2006 (2) ICC 263.
2479. *Venkatachallam v Suryanarayan Murty*, AIR 1941 Mad 129 : (1940) 2 Mad LJ 520; *Krishna Swami v Venugopala*, AIR 1942 Mad 614 : (1942) ILR Mad 376; *Nachiappa Chettiar v Muthu Karuppan Chettiar*, AIR 1946 Mad 398 : (1946) ILR Mad 858; *Krishnaji v Gajanan*, (1909) ILR 33 Bom 373.
2480. *Urmila Bai v Pastakia*, AIR 1953 Bom 75.
2481. *Shree Shanthi Homes Pvt Ltd v CREF Finance Ltd*, AIR 2002 Kant 252.
2482. *Jiban Ram v Dasuram*, AIR 1955 Assam 217 : (1955) ILR Assam 275.
2483. *Re District Judge, Puri*, AIR 1971 Ori 89 (FB).

[s 16.3] Section 16(c) and Section 20—Choice of Court

If the suit is governed by section 16(c) which has overriding effect over section 20, the court within whose jurisdiction the immovable properties are situated is the court which has jurisdiction to try the suit.[2484]

Where, in a suit for recovery of loan filed by the finance company there was an agreement and also a memorandum of understanding by which it was agreed that suit shall be filed only in the court at Bombay, the suit, however, was filed at Bangalore and from the plaint it was clear that "apparently", all the immovable properties were undisputedly situated in Bangalore, no part of the contract had taken place in Mumbai. It was clear that the plaintiff was seeking relief of foreclosure of the mortgage of the properties which were mortgaged with the finance company, as per the registered documents, the suit was found to be governed by section 16(c) which has an overriding effect on section 20, so the Bangalore court was found to have jurisdiction to try it.[2485]

[s 16.4] Section 16(d) and Section 20—Choice of Court

Suit for specific performance and possession of immovable property agreed to be sold falls under clause (d) of section 16, of the Code of Civil Procedure. Section 20 enacts the rule as to the forums in all cases not falling within the limitations of sections 15 to 19, of the Code of Civil Procedure as is made clear by the opening words "Subject to the limitations aforesaid" appearing in section 20. Since the suit under section 16(d) of the Code of Civil Procedure is maintainable only before the court within jurisdiction of which the suit property is situated and section 20 has no application, the parties cannot by agreement vest the jurisdiction in any other court other than the court within jurisdiction whereof the suit property is situate. Therefore, even if it be assumed that the parties agreed to the jurisdiction of courts, such agreement being against the law would be bad under sections 23 and 28 of the Indian Contract Act, 1872.[2486]

In a case relating to purchase agreement, there was breach of agreement and a suit was filed for damages and breach of contract at Nagpur where the manufacturing unit of the plaintiff was located. The registered office of the defendants was located as Pune where the purchase agreement was executed. Other defendants also resided at Pune and the terms of the agreement also restricted the jurisdiction of courts at Pune. Since there were several causes of action, the Supreme Court in appeal permitted the plaintiff to file separate suit in relation to the purchase order at Pune and further asked him to make necessary amendments to the plaint filed at Nagpur.[2487]

[s 16.5] Judgment of Court Not Competent to Deliver It

See notes under section 11 under the same heading. See notes under heading "Contract Providing for Place of Suing" under section 10 and "Agreement as to Choice of Court" under section 20.

2484. *Shree Shanthi Homes Pvt Ltd v CREF Finance Ltd*, AIR 2002 Kant 252.
2485. *Shree Shanthi Homes Pvt Ltd v CREF Finance Ltd*, AIR 2002 Kant 252.
2486. *Ranjana Nagpal v Devi Ram*, AIR 2002 HP 166.
2487. *Sandeep Polymers Pvt Ltd v Bajaj Auto Ltd*, AIR 2007 SC 2656 : (2007) 7 SCC 148.

[s 16.6] Suit for Specific Performance of Agreement to Sell Immovable Property Without Agreement to Sell

The suit for specific performance of an agreement for sale of immovable property without having any relief for possession of the property cannot be a suit for land. When the plaintiff has asked simply for execution and registration of the conveyance and no relief for possession has been asked for, since the plaintiff is already in possession in different capacity, in such a suit for specific performance, the adjudication of right, title and interest of immovable property is not required and the suit is not suit for land.[2488]

In the above case Qadri, J, speaking for the Bench of the Supreme Court quoted from a decision of the Federal Court and observed in para 13 of the judgment as follows:

> 13. In *M/s. Moolji Jaitha and Co. v Khandesh Spinning and Weaving Mills Co. Ltd.*, (AIR 1950 FC 83), there is divergence of opinion among the learned Judge of five-Judge Bench of the Federal Court in regard to the import of the expression "suit for land". Chief Justice Kania opined, "Taking the suit as a whole, one has to consider whether it is for the purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly." Justice FAZL Ali observed, "If I had really felt that I was called upon to decide it, I would have agreed with the line of cases in which it has been held that, broadly speaking, the expression 'suit for land' covers the following three classes of suits: (1) suits for the determination of title to land; (2) suits for possession of land; and (3) other suits in which the reliefs claimed, if granted, would directly affect title to or possession of land." Justice PATANJALI SASTRI took the view, "The words in question, besides obviously covering claims for recovery of possession or control of land, are apt to connote also suit which primarily and substantially seek an adjudication upon title to immovable property or a determination of any right or interest therein." Justice MAHAJAN observed, "If an attempt is made to find a comprehensive definition of the phrase, it will eventually be discovered that it has created further complications. I, therefore, content myself by saying that where the nature of the suit is such that in substance it involves a controversy about land or immovable property and the Court is called upon to decide conflicting claims to such property and a decree or order is prayed for which will bring about a change in the title to it, that suit can be said to be in respect of land or immovable property; but where incidentally in a suit, the main purpose of which or the primary object of which is quite different, some relief has to be given about land, the title to it not being in dispute in the real sense of the term, then such a suit cannot fall within the four corners of this expression." He added, "In my opinion, if the suit is for specific performance and a decree for possession of the land sold is claimed, such a suit would certainly be a 'suit for land', but if the suit is simpliciter for specific performance, *i.e.*, for the enforcement of the contract of sale and for execution of a conveyance, in that event there can be no good ground for holding that such a suit is a suit for determination of title to land or that the decree in it would operate on the land.[2489]

After discussing the Federal Court's decision in detail, Qadri J, went on to observe in para 15 as follows:

> 15. From the above discussion it follows that a "suit for land" is a suit in which the relief claimed relates to title to or delivery of possession of land or immovable property. Whether a suit as a "suit for land" or not has to be determined on the averments in the plaint with reference to the reliefs claimed therein; where the relief relates to adjudication of title to

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2488. *Adcon Electronics Pvt Ltd v Daulat*, AIR 2001 SC 3712 : (2001) 7 SCC 698; *Deepak Prakash v Jayanta Kumar Bose*, AIR 2003 Cal 153.

2489. *Adcon Electronics Pvt Ltd v Daulat*, AIR 2001 SC 3712 at pp 3714–3715 : (2001) 7 SCC 698 : 2001 (4) Mah LJ 469.

land or immovable property or delivery of possession of the land or immovable property, it will be a "suit for land".[2490]

[s 16.7] Clause (a): Suits for Recovery of Immovable Property

A suit for the recovery of immovable property situated in the City of Bombay must be instituted in a court in Bombay having jurisdiction to entertain the suit. The Small Cause Court in Bombay has no jurisdiction to try such a suit.[2491] The suit must, therefore, be brought in the High Court of Bombay or the City Civil Court depending upon the monetary value of the subject matter of the suit. Hence, it is that the section commences with the words "subject to the pecuniary or other limitations prescribed by any law". The insertion of the words "with or without rent or profits" is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the courts within whose jurisdiction the property is situated.

Since the allotted land under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, was situated in Jullundur District and the appellants were not claiming declaration of ownership of land in Pakistan, the high court was palpably wrong in holding that the civil court has no jurisdiction to declare that the appellants were owners of land in Pakistan and entitled to retain the possession of land allotted to them in lieu thereof.[2492]

The court within whose jurisdiction property which has been mortgaged is situated shall have the jurisdiction to entertain and try this suit. Operations of all provisions of section 20 are not relevant, when provision is adequately made by section 15.[2493]

[s 16.8] Clause (b): Suit for Partition of Immovable Property

(For cases where the property is in the jurisdiction of different courts, see section 17 post.) If part of the property is outside India, the court will deal with the property in India while declining jurisdiction as to the rest.[2494] The Lahore High Court held that a British court can in a partition suit deal with property situated in an Indian state;[2495] but, this is incorrect. Suit was filed for the partition of joint Hindu family properties, and for accounts. Properties were situated in Delhi, Jullundur and the State of Jammu and Kashmir. It was held that the Delhi High Court had territorial jurisdiction to entertain and decide the suit in respect of properties situated in the State of Jammu and Kashmir also. Although, strictly speaking, sections 16 and 17 of the Code were not attracted and the doctrine enunciated by court of equity in England in terms was not applicable in the circumstances of the case and the peculiar situation prevailing in our country, a new equitable doctrine was to be evolved. That doctrine was that the principles of enforceability or executability justified a decision in favour of maintainability of the suit.[2496]

2490. *Adcon Electronics Pvt Ltd v Daulat*, AIR 2001 SC 3712 at p 3715 : (2001) 7 SCC 698 : 2001 (4) Mah LJ 469.; see also *Inox AIR Products Ltd v Rathi Ispat Ltd*, AIR 2007 Del 53 : 2007 (136) DLT 101; *Bhawna Seth v DLF Universal Ltd*, AIR 2007 Del 189 : 2007 (138) DLT 639.
2491. Presidency Small Cause Courts Act, 1882, section 19.
2492. *Dalip Chand v UOI*, 1995 Supp (1) SCC 233.
2493. *Praking v State Bank of Indore*, AIR 1996 MP 28.
2494. *Nachiappa Chettiar v Muthu Karuppan Chettiar*, AIR 1946 Mad 398; *Punchanna v Shib Chandar*, (1887) ILR 14 Cal WN 835 (a case under clause 12 of the Letters Patent); *Harmindar Singh v Balbir Singh*, AIR 1957 Punj 214 : (1957) ILR Punj 1032.
2495. *Ram Kishan v Ranshan*, AIR 1923 Lah 551.
2496. *Dewan Izzat Rai Nanda v Dewan Iqbal Nath Nanda*, AIR 1981 Del 262.

A very interesting case relating to jurisdiction came up before the Supreme Court. In that case, the plaintiff had filed a suit seeking a negative declaration that the Will allegedly made at Delhi and relied upon by defendants was never made. In fact, relief claimed in the suit was for partition and declaration in respect of properties situated outside the jurisdiction at Delhi and the negative declaration sought for was superfluous and unnecessary. It was held by the Supreme Court that the suit comes within the purview of section 16(b) and (d). The relief of partition, accounting and declaration of invalidity of sale deed executed in respect of immovable property situated outside the jurisdiction of Court at Delhi, could not entirely be obtained by personal obedience to the decree by the defendants in the suit. It was further held that by ingeniously introducing the pleas regarding oral Will, the property which was outside the jurisdiction of Court could not be brought within jurisdiction to get the relief of partition.[2497]

PK Balasubramanyan, J, speaking for the Bench, observed in para 12 of the judgment as follows:

> 12. On a reading of the plaint as a whole, it is clear, as we have indicated above, that the suit is one which comes within the purview of section 16(b) and (d) of the Code. If a suit comes within Section 16 of the Code, it has been held by this Court in *Harshad Chiman Lal Modi v DLF Universal Ltd.*, [(2005) 7 SCC 791] that Section 20 of the Code cannot have application in view of the opening words of Section 20 "subject to the limitations aforesaid". This Court has also held that the proviso to Section 16 would apply only if the relief sought could entirely be obtained by personal obedience of the defendant. The relief of partition, accounting and declaration of invalidity of the sale executed in respect of immovable property situate in Village Pataudi, Gurgaon, could not entirely be obtained by a personal obedience to the decree by the defendants in the suit. We are in respectful agreement with the view expressed in the above decision.[2498]

Where a plaint is filed in a court having no jurisdiction to try different causes of action, and the court decides that it can deal with only one of the causes of action set out in the plaint, then it should retain the plaint and strike out from the plaint that part which it holds as beyond its jurisdiction and then the plaintiff can file another suit in the proper court as to that cause of action so struck off.[2499]

[s 16.9] Clause (c): Suit for Foreclosure, Sale or Redemption

A mortgages certain immovable property to *B* to secure payment of money lent to him by *B*. Here, *A* is the mortgagor and *B* is the mortgagee. If *A* does not repay the loan on the due date, *B* may institute a suit against *A* for sale of the mortgaged property, so that the mortgage-debt may be paid out of the sale proceeds of the property, or he may sue for foreclosure of the mortgage. The decree in a foreclosure suit provides that if the mortgagor fails to pay the amount that may be found due to the mortgagee within a time specified by the court (generally six months), the mortgagor shall be absolutely debarred of all right to redeem the property.[2500] If *A* offers payment of the mortgage-debt to *B*, but *B* disputes the amount and refuses to reconvey, *A* may sue *B* for redemption of the mortgage, and the court will pass a decree ordering an account to be taken of what will be due to *B*, and directing that upon *A* paying to *B* the amount so due, *B* shall reconvey the property to *A*.[2501] Suits for foreclosure,

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2497. *Begum Sabiha Sultan v Nawab Mansur Ali Khan*, AIR 2007 SC 1636 : (2007) 4 SCC 343.
2498. *Begum Sabiha Sultan v Nawab Mansur Ali Khan*, AIR 2007 SC 1636, at p 1640 : (2007) 4 SCC 343.
2499. *State Bank of India v Sanjeev Mallik*, AIR 1996 Del 284 (DB).
2500. Transfer of Property Act, 1882, sections 86–87, O XXXIV, rules 2–3.
2501. Transfer of Property Act, 1882, section 93, O XXXIV, rules 7–8.

sale or redemption must be instituted in the court within the local limits of whose jurisdiction the mortgaged property is situated. In view of the commencing words of the section, a case directly under clause (c), section 20 cannot be called in aid,[2502] where the immovable property regarding which an equitable mortgage was created as a collateral security for loan advanced by the plaintiff is situated at Jagadhari in the State of Haryana. Here, a suit for foreclosure or sale of such mortgaged property could be instituted only before the civil courts at Jagadhari, in view of explicit and mandatory provisions contained in clause (c) of section 16 of the Code of Civil Procedure.[2503]

A court cannot declare a charge on property wholly outside its jurisdiction and if it does, a purchaser under such a decree would be in no better position than a purchaser under a money decree.[2504]

[s 16.10] Clause (d): Suits for the Determination of Any Other Right to or Interest in Immovable Property

There is no definition of immovable property in the Code. "Immovable property" is defined in the General Clauses Act, 1897, section 3, clause (25) as including land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. Trees standing on land are immovable property;[2505] but, once the trees are severed from the land, they become movable property; so also, coal cut and raised from the mine.[2506] Growing-crops are movable property.[2507] Land includes water and a right of fishery in an enclosed water is immovable property.[2508] Benefits to arise out of land include incorporeal hereditaments such as a right of ferry,[2509] pensions and allowances charged upon land and rents. Thus, a *haat* is immovable property[2510] and so is the life interest of a widow in the rents and profits of her husband's estate.[2511] "Immovable property" as stated above, includes "benefits to arise out of land". Rent that has already accrued due is movable property, for it is a benefit which has arisen out of land, but rent that is to accrue due is immovable property, for it is a benefit to arise out of land. Hence, a suit for arrears of rent is governed not by the provisions of this section, but by those of section 20, and it may be instituted in any one of the courts specified in that section, although in such suit the plaintiff's title to the property for which the rent is claimed may incidentally come in question.[2512] A suit for specific performance and possession of immovable property agreed to be sold falls under clause (d) of section 16 of the Code of Civil Procedure.[2513] A suit for refund of premium paid by a lessee on the ground that the lease had become impossible of performance is not a suit for the determination of any right to or interest in immovable property and is governed not by section 16 but by section 20

2502. *Rosy Joseph v Union Bank of India*, AIR 1978 Ker 209.
2503. *Central Bank of India v Eleena Fasteners Pvt Ltd*, AIR 1999 HP 104.
2504. *Gudri Lall v Jagannath*, (1886) ILR 8 All 117.
2505. *Sakharam v Vishram*, (1895) ILR 19 Bom 207; *Bapu v Dhondi*, (1892) ILR 16 Bom 353; *Umed Khan v Daulat Ram*, (1883) ILR 5 All 564.
2506. *Mannibai v Cambetta*, AIR 1948 Nag 286 : (1948) ILR Nag 200.
2507. See section 2, clause (13).
2508. *Shibu Haldar v Gopi Sundari*, (1897) ILR 24 Cal 449.
2509. *Krishna v Akilanda*, (1887) ILR 13 Mad 54.
2510. *Surendra v Bhai Lal*, (1897) ILR 22 Cal 449.
2511. *Natha v Dhunbhaiji*, (1898) ILR 23 Bom 1.
2512. *Chintaman v Madhavrao*, (1869) 6 Bom HC App 29; *Rango Lal v Wilson*, (1901) ILR 26 Cal 204; *Kunja v Manindra*, AIR 1923 Cal 619 : (1923) 27 Cal WN 542; *Neelakanda Pillai v Kunju Pillai*, AIR 1935 Mad 545 : (1935) 68 Mad LJ 506; *Hardayal Singh v Ram Ujagar*, AIR 1955 All 416.
2513. *Ranjana Nagpal v Devi Ram*, AIR 2002 HP 166.

of the Code;[2514] but, a suit for a declaration of the plaintiff's right to rent where such right is denied comes under clause (d) of the present section, and must be instituted in the court within the local limits of whose jurisdiction the property is situated.[2515] So also, a suit for rent and ejectment under section 66 of the Bengal Tenancy Act, 1885.[2516] A suit to recover a share of the sale proceeds of land which have already been realised is a suit for money governed by the provisions of section 20;[2517] but, a suit by a vendor of land for the recovery of unpaid purchase money against the buyer who refuses to complete the purchase, is a suit "for the determination of any right to or interest in immovable property" within the meaning of clause (d).[2518] A claim for a beneficial interest under an endowment cannot be considered *de hors* the immovable properties covered by the endowment and therefore, such a claim would fall under this clause. A suit by a mortgagee to recover the mortgage-debt from the mortgagor personally is a suit for debt governed by the provisions of section 20; but if in addition to the claim against the mortgagor personally, the mortgagee seeks to recover the mortgage-debt by sale of the mortgaged property, the suit will come under clause (c) of the present section.[2519] A suit by a mortgagee complaining of the deprivation of the whole of the security by or in consequence of a wrongful act by the mortgagor is in the nature of a wrong done to immovable property and therefore, can only be filed in the court within whose jurisdiction it is situated.[2520] Clause (d) relates to such suits in which the determination of any right to or interest in immovable property not covered by clauses (a), (b) and (c) is involved. Hence, a suit for injunction restraining interference with the plaintiff's possession of land and his operating a tube-well therein, is a suit falling under clause (d).[2521] Wherein a suit for maintenance the plaintiff claims that she is entitled to a charge on immovable property in the hands of the defendant, the case is one within clause (d) of this section; so, where the claim is for a decree by a Muhammedan lady with a prayer for declaring charge on her husband's immovable property, it falls within clause (d) of the section.[2522] Though a court has jurisdiction to declare a charge only over immovable properties situated within its jurisdiction, it is competent under section 8 of the Bombay Hindu Divorce Act of 1947, to declare a charge over properties outside its jurisdiction as security for the amount awarded as maintenance to the wife.[2523] A suit for damages for breach of contract to assign a lease entered into at Madras was filed in the subordinate court at Ottapalam in Malabar on the strength of a prayer that the decree amount should be charged on the leasehold estate which was within the jurisdiction of that court. It was held that the court at Ottapalam had no jurisdiction to entertain the suit under section 16(d) as that section applied only if the dispute related to title or interest in immovable property existing at the date of the suit and not if it is to arise as a result of the decree.[2524] It has been held by the High Court of

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2514. *Dada Siba Estate v Dharan Dev Chand*, AIR 1961 Punj 143 : (1960) ILR 1 Punj 384.
2515. *Keshav v Vinayak*, (1899) ILR 23 Bom 22.
2516. *Kunja v Manindra*, AIR 1923 Cal 619 : (1923) 27 Cal WN 542.
2517. *Venkata v Krishnasami*, (1883) ILR 6 Mad 344; *Ahmad v Abdul Rahman*, (1904) ILR 26 All 603.
2518. *Maturi v Kota*, (1905) ILR 28 Mad 227.
2519. *Vithalrao v Vaghoji*, (1893) ILR Bom 570.
2520. *Hadibandhu v Chandra Shekar*, AIR 1973 Ori 141.
2521. *Om Prakash v Anar Singh*, AIR 1973 All 555.
2522. *Mst Gauhar Jehan v Mt Imteyaz Jehan*, AIR 1948 Pat 384 : (1947) ILR 26 Pat 523; *New Mofussil Co v Shankerlal*, AIR 1941 Bom 247 : (1941) ILR Bom 361 : 43 Beng LR 293; *Muhamed Eusoof v Subramanian*, AIR 1950 Mad 272; *Sitabai v Laxmibai*, (1916) ILR 40 Bom 337; *Snehalata Devi v Samantha Radha*, AIR 1953 Ori 25 : (1952) Cut 451; *Gouri Gupta v Taran Gupta Chaudhary*, AIR 1968 Cal 305; *Nagubai v B Sharma Rao*, AIR 1953 SC 593, 597; *Kanu Mulu v Manglaben*, AIR 1969 Guj 308.
2523. *Ambalal v Sarada Gowri*, (1955) ILR Bom 759 : (1955) 57 Bom LR 499.
2524. *Pulikkal Estate v Joseph*, (1955) 2 Mad LJ 228 wherein the scope of the decisions in 26 Pat 523 : ILR 40 Bom 337 are discussed.

Orissa that a suit for reduction of maintenance awarded by a decree and charged on immovable property does not fall within section 16(1)(d) as the relief has reference only to the quantum of maintenance and not to the subsistence of the charge therefore.[2525] A suit for accounts of a dissolved partnership against a defendant who is residing within the jurisdiction of the court in which the suit is filed is maintainable in that court, although the partnership assets in the shape of immovable properties are situated in a foreign country. Such a suit does not fall under any of the clauses (a)–(e) of this section.[2526] A suit for dissolution of partnership with the usual ancillary reliefs is not a suit within clause (d) merely because a part of the partnership assets consists of a factory.[2527] Machinery is movable property unless it is shown to have been attached or permanently fastened to earth and a suit with reference thereto does not fall within clause (a) or clause (d) of section 16.[2528]

In a case, joint venture agreements (JVA) were entered into by parties at Delhi for development of a commercial complex on a plot of land situated in Haryana. According to the agreement, money was also payable at Delhi and the parties had further agreed that the court at Delhi shall have jurisdiction to decide disputes, that since ownership and title to the property was not in question, the Delhi High Court will have jurisdiction.[2529] It was observed by the court as follows:

> The parties having entered into the contract of their own free will and volition and with open eyes, the respondent cannot be heard to state that a petition of the present nature ought to be treated at par with a suit for specific performance in respect of an immovable property and that as the subject premises is not situated within the local limits of this Court, the petition is liable to be rejected for lack of territorial jurisdiction. Nature of disputes raised by the petitioner hinges on the JVA and the clauses contained therein.[2530]

On this point, the observation of the Supreme Court in *Jatinder Nath v Chopra Land Developers Ltd*,[2531] finally settles the matter:

> In the present case, a bare reading of the agreement indicates that it is an agreement to develop. The appellant remains the owner, the Developer remains the contractor. The Developer is the financer. The appellant is the owner of an asset. The contractor/Developer agrees to exploit that asset on behalf of the owner. The Developer funds the scheme. The building plans remained in the name of the owner. The D.D.A. informs the owner regarding revocation of the building plan. The owner files the writ petition challenging the revocation. The contractor is paid consideration in terms of a part of the property. In the circumstances, it cannot be said that this case is similar to a suit for land.

Plaintiff-tenant was occupying a building at Puri (Orissa). He was taken by the landlord to Calcutta and there compelled by fraud to sign an agreement surrendering his tenancy. Plaintiff's suit challenging the agreement can be filed in the Calcutta City Civil Court, because the cause of action arose at Calcutta, where fraud was practiced and the Calcutta court had jurisdiction under section 20(c). The plaintiff had not sought for any determination of a right to immovable property. It was true that if the suit was decreed, the plaintiff's tenancy rights would be restored. However, merely because of that, it cannot be said that the suit was one for determination of a right to or interest in immovable property.[2532]

2525. *Satyabhama v Krishna Chandra*, AIR 1961 Ori 69.
2526. *Dorairaj v Karuppiah Ambalam*, AIR 1970 Mad 119.
2527. *Durga Das v Jai Narain*, AIR 1922 Bom 188 : (1917) ILR 41 All 513.
2528. *Standard Tubewell and Engg Works Ltd v Jogindra*, AIR 1959 Cal 461.
2529. *Suresh Jain v Dinesh Kumar*, AIR 2008 Del 127.
2530. *Suresh Jain v Dinesh Kumar*, AIR 2008 Del 127, at p 131.
2531. *Jatinder Nath v Chopra Land Developers Ltd*, AIR 2007 SC 1401, at p 1408. Kapadia, J (as he then was) speaking for the Bench.
2532. *Parimal Mitra v Paresh Chandra*, AIR 1982 Cal 361.

Property situated beyond the jurisdiction of City Civil Court, Calcutta, was acquired. The Land Acquisition Officer who awarded compensation, had his office within the jurisdiction of the City Civil Court, Calcutta and the plaintiff's office was also within Calcutta. The plaintiff sued at Calcutta for determination of his right and status in regard to the property. It was held that the Calcutta court had no jurisdiction under section 16(d). Only the court within whose jurisdiction the property was situated could try the suit. The plaint must be returned under O VII, rule 10.[2533]

[s 16.10.1] Income and Mesne Profits of Land Situated Outside India

A suit will lie in an Indian court to establish a right to a share in income derived from grants of land situated outside India, but received by the defendant within the local limits of an Indian court.[2534] Similarly, a suit to recover *mesne* profits of land situated outside India, of which the defendant was in wrongful possession but of which he subsequently delivered possession to the plaintiff, may be instituted in a court in India.[2535] Both these cases fall under section 20, below. A suit for arrears of rent due in respect of a house in Pakistan was held to be maintainable in the small cause court, Calcutta, within whose jurisdiction the parties resided.[2536]

[s 16.11] Clause (e): Wrong to Immovable Property

This refers to torts affecting immovable property such as trespass,[2537] nuisance, infringement of easement, etc.

Where a reading of the plaint leads to one conclusion only, *viz*, that it was for damages relating to immovable property in Mathura, section 16(e) of the Code of Civil Procedure would apply, then section 20 of the Code of Civil Procedure is of no avail to the plaintiff. The mere factum of the execution of the sale deed and payment of the sale consideration being in Delhi, does not comprise any part of cause of action relating to the claim for damages to immovable property raised in this suit. Even if section 16(e) is assumed not to have any applicability to the facts of the case, Delhi courts do not possess territorial jurisdiction because the defendant does not have its principal office in this city. The fact that it has a subordinate office in Delhi, seems to be of little consequence, since no part of cause of action voiced in the plaint has arisen in Delhi.[2538]

[s 16.12] Clause (f): Movable Property Actually under Distraint or Attachment

Movable property under attachment constitutes an exception to the general rule that movables follow the person.[2539] This exception is probably based on the principle that a movable property under attachment is one in session of the court.[2540] The Code follows this rule for the sake of convenience of judicial administration.[2541] The clause applies to courts

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2533. *Trustee for Improvement of Calcutta v Bahadur Khan*, AIR 1984 Cal 412.
2534. *Kashinath v Anant*, (1900) ILR 24 Bom 407.
2535. *Mahadeo v Ramchandra*, AIR 1922 Bom 188 : (1922) ILR 46 Bom 108.
2536. *Debendra v Pramatha*, AIR 1958 Cal 700 : (1956) ILR 1 Cal 503.
2537. *Crisp v Watson*, (1893) ILR 20 Cal 689.
2538. *Anant Raj Industries Ltd v Balmer Lawrie and Co Ltd*, AIR 2003 Del 367.
2539. *Companhia de Mocambique v British South Africa Co*, [1892] 2 QB 358, 367.
2540. *State of Assam v Biraj Mohan*, AIR 1965 Assam 35.
2541. Woodroffe and Amir Ali, *Law of Evidence*, LexisNexis, 20th 2017 Edn, 2016, p 74.

in India, where movables are under an attachment by a foreign court and the defendant is a resident in India, and is able to get the attachment decree to recover the property.[2542]

[s 16.13] Proviso to the Section

The proviso is an exception to the main part of the section which cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant.[2543] In the above case, the suit for specific performance of agreement related to a property situated in Gurgaon (Haryana). The defendants were having their Head Office at Delhi and the agreement entered into between the parties at Delhi provided for payment to be made at Delhi. It was held by the Supreme Court that court at Haryana has jurisdiction to try the suit and the fact that parties had agreed that Delhi High Court alone has jurisdiction was immaterial as such agreement was void being against public policy.

Thakker, J, speaking for the Supreme Court Bench in the above case, observed as follows:

> **16.** The proviso is thus an exception to the main part of the section which in our considered opinion, cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant.
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> **17.** In the instant case, the proviso has no application. The relief sought by the plaintiff is for specific performance of agreement respecting immovable property by directing the defendant No. 1 to execute sale deed in favour of the plaintiff and to deliver possession to him. The trial Court was, therefore, right in holding that the suit was covered by clause (d) of section 16 of the Code and the proviso had no application.
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> **18.** In our opinion, the submission of the learned counsel for the appellant that the parties had agreed that Delhi Court alone had jurisdiction in the matter arising out of the transaction has also no force. Such a provision, in our opinion, would apply to those cases where two or more courts have jurisdiction to entertain a suit and the parties have agreed to submit to the jurisdiction of one court.[2544]

Hakam Singh's case[2545] was the first leading decision of the Supreme Court on the point. In that case, a contract was entered into by the parties for construction work. An agreement provided that notwithstanding where the work was to be executed, the contract "shall be deemed to have been entered into at Bombay" and Bombay Court "alone shall have jurisdiction to adjudicate" the dispute between the parties. In that case, it was held as follows:

> By Clause 13 of the agreement it was expressly stipulated between the parties that the contract shall be deemed to have been entered into by the parties concerned in the city of Bombay. In any event the respondents have their principal office in Bombay and they were liable in respect of a cause of action arising under the terms of the tender to be sued in the courts of Bombay. It is not open to the parties by agreement to confer by their agreement jurisdiction on a court which it does not possess under the Code. But where two courts or more have under the Code of Civil Procedure Jurisdiction to try a suit or proceeding on agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act.

2542. *Kottich v Udaya*, (1912) Mad WN 524.
2543. *Harshad Chiman Lal Modi v DLF, Universal Ltd*, AIR 2005 SC 4446 : (2005) 7 SCC 791.
2544. *Harshad Chiman Lal Modi v DLF, Universal Ltd*, AIR 2005 SC 4446, at p 4451 : (2005) 7 SCC 791.
2545. *Hakam Singh v Gamon (India) Ltd*, AIR 1971 SC 740 : (1971) 1 SCC 286 : 1971 SCR (3) 314. (Shah, CJ, speaking for the Bench).

As the plaintiff has the option of suing in the local jurisdiction, the scope of the proviso is more limited than in the rule of English Equity. The proviso is an exception to the main clauses and should not be construed as enlarging their scope. It applies, therefore, only if the suit falls within one of the categories mentioned in the section and complete relief could be granted by compelling obedience of the defendant to the decree.[2546]

The last paragraph of the section provides that suits to obtain relief respecting, or compensation for wrong to immovable property, may be instituted at the plaintiff's option either in the court within the local limits of whose jurisdiction the property is situated, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain, provided:

(i) the property is held by or on behalf of the defendant;

(ii) the relief sought can be entirely obtained through the personal obedience of the defendant;[2547] and

(iii) the property is situated in, and not beyond, India.[2548]

The proviso does not apply when the property is in the possession of the plaintiff.[2549] As the plaintiff has the option of suing in the local jurisdiction, the scope of the proviso is more limited than in the rule of English Equity. The proviso is an exception to the main clauses and should not be construed as enlarging their scope. It applies therefore only if the suit falls within one of the categories mentioned in the section and complete relief could be granted by compelling obedience of the defendant to the decree.[2550] If the relief sought by the plaintiff is for specific performance of agreement respecting immovable property by directing the defendant No 1 to execute sale deed in favour of the plaintiff and to deliver possession to him. That the suit was covered by clause (d) of section 16 of the Code and the proviso had no application. [2551]

[s 16.14] Equity Acts *In Personam*

This proviso is an application, though in a highly modified form, of the maxim Equity Acts *in personam*. When it is said that Equity Acts *in personam* what is meant is that the court of equity in England (the Chancery Division of the High Court of Justice in the 21st century) has jurisdiction to entertain certain suits (suits in clauses (a)–(c) of the present section being entirely excluded), respecting immovable property, though the property may be situated abroad, if the relief sought can be obtained through the personal obedience of the defendant. The personal obedience of the defendant can be secured only if the defendant resides within the local limits of the jurisdiction of the court, or carries on business within those limits. For in the one case, the person of the defendant being within the jurisdiction and in the other his personal property, the court may if he does not comply with the judgment, direct an arrest of the defendant and commit him to jail or order that his goods be attached until he complies with the order of the court;[2552] but, if neither the person of the defendant nor his personal property is within the jurisdiction, the court will not entertain a suit for a relief respecting

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2546. *Pulikal Estate v Joseph*, (1955) 2 Mad LJ 228.
2547. Norman Bentwich, *Westlake's Private International Law*, Sweet & Maxwell, London, 7th Edn, 1925, p 58; *Mahadeo v Ramchandra*, AIR 1922 Bom 188; *Arunachalla v Mathiah*, (1912) 23 Mad LJ 679.
2548. *Krishnaji v Gajanan*, (1909) ILR 33 Bom 373.
2549. *Crisp v Watson*, (1893) ILR 20 Cal WN 689; *SK Jawala v Helen Jan Haong Lee*, AIR 1978 Cal 247.
2550. *Pulikal Estate v Joseph*, (1955) 2 Mad LJ 228.
2551. *Harshad Chiman Lal Modi v DLF, Universal Ltd*, AIR 2005 SC 4446 : (2005) 7 SCC 791.
2552. *Penn v Lord Baltimore*, (1750) 1 Ves Sen 444.

immovable property situated beyond its jurisdiction, for the court cannot in that event execute its decree either in rem or *in personam* and a court does not entertain a suit if it cannot enforce its decree in the suit.[2553]

[s 16.15] Suits *In Personam*

Suits in respect of which courts of equity in England exercise jurisdiction in *personam* are called suits in *personam*. The essential feature of suits in *personam* is that the land in respect of which the suit is brought is situated abroad, but the person of the defendant or his personal property is within the jurisdiction of the court in which the suit is brought. The land being situated abroad, the decree cannot be executed *in rem*, that is to say, it cannot be executed against the land; but, the person or the personal property of the defendant being within the jurisdiction, the decree can be executed *in personam* that is to say, against the person or personal property of the defendant. It must, however, be noted that the only class of cases in which courts of equity in England entertain suits relating to land situated abroad are cases of contracts, fraud, and trust. In the jurisdiction clause of the agreement, words like "alone", "only", "exclusive" and the like are not used and in the absence thereof, it cannot be held that the said condition excluded the jurisdiction of the court, who was otherwise competent to try the suit by reason of a part of a cause of action having accrued within its jurisdiction.[2554] Thus, suits for specific performance of contracts for sale of land[2555] and suits for foreclosure,[2556] sale[2557] or redemption[2558] in the case of a mortgage of land are cases of contract and the court of equity in England will entertain such suits if the contract is made in England, and the defendant resides or carries on business in England, though the land may be situated abroad. Similarly, where lands abroad have been acquired by the fraud of a party residing in England, a suit to set aside the transaction will be entertained by the court of equity in England.[2559] The court of equity will also entertain a suit to enforce express trusts affecting land situated in a foreign country, or for preservation or protection of the trust fund situated in a foreign country if the trustee resides in England,[2560] but has no jurisdiction to interfere with the administration of a trust which has to be conducted in a foreign territory.[2561] It has also no jurisdiction to entertain suits for recovery[2562] or for partition[2563] of land, or for damages for trespass of land.[2564] (See clauses (a)–(e) of this section.)

[s 16.16] "Actually and Voluntarily Resides"

See notes to section 20 under the same heading.

2553. *Trimbak v Lakshman*, (1896) ILR 20 Bom 495.
2554. *KL Shroff v State of Haryana*, AIR 1998 Del 404.
2555. *Colyer v Finch*, (1856) 5 HL Ca 905.
2556. *Paget v Ede*, (1874) LR 18 Eq 118.
2557. 2 Spence's Eq Jur 678.
2558. *Bent v Young*, (1838) 9 Sim 180, 190.
2559. *Lord Cranstown v Johnston*, (1796) 3 Ves 170.
2560. *Bilasrai Joharmal v Shivanarayan Sarupchand*, AIR 1944 PC 36 : 71 IA 47 : 46 Beng LR 518 : 48 Cal WN 448; *Nelson v Bridport*, (1826) 8 Beav 547.
2561. *Bilasrai Johormull v Shivanarayan Sarupchand*, AIR 1944 PC 36 : 71 IA 47 : 46 Beng LR 518 : 48 Cal WN 448.
2562. *Re Hawthorn*, (1883) 23 Ch D 748.
2563. *Cartwright v Pettus*, (1875) 2 Ch Cas 214.
2564. *British South Africa Co v Companhia de Mocambique*, AIR 1893 Cal 602 : [1892] 2 QB 358.

[s 16.17] "Carries on Business"

See notes to section 20 under the same heading.

[s 16.18] "Personally Works for Gain"

See notes to section 20 under the same heading.

[S 17] Suits for immovable property situate within jurisdiction of different Courts.—Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate:

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

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[s 17.1] Scope and Object of the Section

This section supplements the provisions of section 16, and applies only to suits falling within clauses (a)–(e) of that section.[2565] It is intended for the benefit of suitors, the object being to avoid multiplicity of suit.[2566] Sections 16 and 17 of the Code of Civil Procedure are part of one statutory scheme. Section 16 contains general principle whereas section 17 provides for an exception to the general rule as mentioned in section 16.[2567] *A* sues *B* in a court in district *X* on a mortgage of two properties, one situated in district *X* and the other in district *Y*. The court in district *X* has jurisdiction under this section to order the sale not only of the property in district *X*, but also of the property in district *Y*, and to sell execution of its decree the property in district *Y*.[2568] *A* is not obliged to bring two suits, one in the court of district *X* and the other in the court of district *Y*. He may bring only one suit in either court, and it matters not if the properties are several, one in each district, or one property extending over two or more districts.[2569] The same rule applies to suits for partition[2570] and to suits for the recovery of immovable property.[2571] *A* can sue in any court in which any part of the immovable

2565. *Satya Narayan Banerjee v Radha Nath Das*, AIR 1942 Cal 69 : (1942) ILR 1 Cal 235 : 45 Cal WN 1085.
2566. *Harchandar v Lal Bahadur*, (1894) ILR 16 All 359.
2567. *Shivnarayan (D) by LRs v Maniklal (D) thr LRs*, 2019 (2) JT SC 295 : 2019 (1) RCR (Civil) 985 : 2019 (2) Scale 620.
2568. *Maseyk v Steel*, (1887) ILR 14 Cal 661; *Gopi Mohan v Doybaki*, (1892) ILR 19 Cal 13; *Tinkouri v Shib Chandra*, (1894) ILR 21 Cal 639.
2569. *Shurrop Chander v Ameerrunissa*, (1882) ILR 8 Cal 703.
2570. *Khatija v Ismail*, (1889) ILR 12 Mad 380.
2571. *Kubra Jan v Ram Bali*, (1908) ILR 30 All 560.

property is situated and he has the right to select his own forum;[2572] though this right may be controlled by the court of appeal or the high court; (see sections 22 and 23 below); but, no partition can be made of property situated outside India.[2573]

A *bona fide* compromise will not divest the court of jurisdiction once jurisdiction has properly vested in it. *A* sues *B* in a court in district *X* to recover possession of two properties, one situated in district *X* and the other in district *Y*. The suit is compromised as regards the property situated in district *X*. This does not take away the jurisdiction of the court in district *X* to proceed with the suit as regards the property situated in district *Y*, unless it be shown that the compromise was a mere contrivance to defeat the policy of the rule of procedure as to local jurisdiction.[2574]

Ascertaining the meaning of "*any portion of the property*", the Supreme Court held that the expression "property" in section 17 is used as "singular" but as per section 13 of the General Clauses Act, 1897, it may be read as "plural", i.e., "properties". Also, expression "any portion of the property" can be read as portion of one or more properties situated in jurisdiction of different courts. Moreover, a suit in respect of more than one property situated in different jurisdictions can be instituted in the local limits of the court where one or more properties are situated provided suit is based on "same cause of action" with respect to the properties situated in jurisdiction of different courts.[2575]

[s 17.2] May Be Instituted

Cases are conflicting as to whether a plaintiff suing in respect of a part of a property in one district only is barred from suing as to the other part or the rest of the property in another district in the jurisdiction of another court. But the better opinion is that there is no bar and that the section is permissive.[2576] Thus, if *A* succeeds as heir to two properties, one in district *X* and the other in district *Y*, *A* may sue in the court of district *X* for the recovery of both properties. But, if *A* sues in the court of district *X* for the recovery of the property in that district only, he will not be barred from suing subsequently in the court of district *Y* for the recovery of the property in that district. In an export transaction, a corporation provided credit limit facility to an export firm. The export firm made payments for losses as per agreement at the headquarters of the corporation by demand draft which were encashed by the corporation at that place. Dispute arose as to liability for losses. It was held that the suit can be filed at the place of encashment.[2577]

[s 17.3] Judgment of the Court Not Competent to Deliver It

See notes under section 11 under the same heading. See notes under heading "Contract Providing for Place of Suing", under section 10 *supra*, and "Agreement as to Choice of Court", under section 20 *infra*.

2572. *Ratnagiri Pillai v Vava Ravuthan*, (1890) ILR 19 Mad 477; *Zamiran v Fateh Ali*, (1905) ILR 32 Cal 146.
2573. *Ramacharya v Anantacharya*, (1894) ILR 18 Bom 989.
2574. *Khatija v Ismail*, (1889) ILR 12 Mad 380; *Kubra Jan v Ram Bali*, (1908) ILR 30 All 560.
2575. *Shivnarayan (D) by LRs v Maniklal (D) thr LRs*, 2019 (2) JT SC 295 : 2019 (1) RCR (Civil) 985 : 2019 (2) Scale 620.
2576. *Subba Rau v Rama Rau*, (1867) 3 Mad HCR 376 (decided under the Act of 1859 where leave of a superior court was required); *Nihal Singh v Sowaya*, (1884) PR 162; *Hari Narayan v Ganpatrao*, (1883) ILR 8 Bom 272; contra *Jamoona v Bhamasoondaree*, (1865) 2 WR 148.
2577. *HP State Small Industries Export Corp v Export Credit and Guarantee Corp*, AIR 1992 HP 17.

[s 17.4] Section 17 Inapplicable If Cause of Action as to Property Outside Local Limits of Jurisdiction Is Different

The plaintiff filed a suit in an Oudh Court to recover one immovable property within its jurisdiction and two immovable properties situated in the Punjab without jurisdiction. The plaintiff claimed to be entitled to these three properties under a Will. He also joined in the suit a prayer to be declared *mutawalli* of a *wakf* of another property situated in Punjab called the Khalikabad estate. The plaintiff had a right to include the first two Punjab properties in the Oudh suit; but as to the other Punjab property, the Privy Council said:

> There remains the question of the Khalikabad estate. Here the respondent cannot succeed unless he shows that under the terms of the deed creating the waqf he is the trustee. That question depends upon the construction of the deed. It is a separate and different cause of action from those which found the proceedings in respect of the other three properties. Their Lordships are unable to find any justification for bringing the suit in respect of this property elsewhere than in the court of the district where the property is situated. Such justification cannot, in their Lordships' judgment, be found in Section 17, Code of Civil Procedure, upon which the respondent relied.[2578]

The Supreme Court has held that when the main question involved in the suit is that whether the property involved in Waqf property or not, it can only be decided by a Wakf Tribunal and not by a civil court. Further, it also laid down that matters falling under sections 51 and 52 of the Waqf Act, 1995, are also required to be decided by the Tribunal and not civil court.[2579]

However, if a plaintiff has a single cause of action in respect of properties, some of which are situated at Delhi and the rest in Hissar, Haryana, he can file a suit in respect of all of them either at Delhi or in Hissar. Since this section gives him such a right, inconvenience to the defendants who may be residing in Hissar is no ground for preventing him to choose his forum at Delhi.[2580] A suit filed in the court of the sub-judge, Arrat challenging the gift deed as a forged document was a validly filed suit although properties which were the subject matter of the suit were situated in Arrat and other different places. The plaintiff was not expected to challenge such a gift piecemeal in different courts within whose jurisdiction different properties were situated.[2581] The principle is that it is only in those cases where there is one cause of action and the basis of the plaintiff's claim is the same in all this claims that one joint suit in respect of all the immovable properties, whether situated within the jurisdiction of that court or within the jurisdiction of different courts, can be taken cognizance of, provided that a part of the property lies within the territorial jurisdiction and the total claim is also within the pecuniary jurisdiction.[2582] A suit by reversioner challenging several alienations by a widow of properties situated in different jurisdictions could be instituted under this section in any one of the courts if the alienations formed part of a series.[2583] The section was also applicable where a plaintiff was dispossessed of one property in one district in one month and of another property in another district where the dispossessions were by the same defendant and under the same alleged right.[2584]

2578. *Nisar Ali v Mohamad Ali*, AIR 1932 PC 172 : (1932) 59 IA 268 : 7 Luck 324; *Administrator General v Sulajini Debi*, AIR 1962 Cal 616.
2579. *Rajasthan Wakf Board v Devki Nandan Pathak*, AIR 2017 SC 2155 : 2017 (14) SCC 561 : 2017 (5) Scale 769.
2580. *Prem Kumar v Dharam Pal*, AIR 1972 Del 90.
2581. *Chitranjan v Addl Commissioner*, AIR 1967 All 375.
2582. *Janki Devi v Manilal*, AIR 1975 All 91 : 1975 All LJ 53.
2583. *Ramdhin Baldeo Prasad v Thakuram*, AIR 1952 Nag 303 : (1952) ILR Nag 182.
2584. *Harchandar v Lal Bahadur*, (1894) ILR 16 All 359.

[s 17.5] Immovable Property Within the Jurisdiction of Different Courts

As already stated, the immovable property to which this section refers must be situated in India, for, the courts in India have no jurisdiction over a property situated outside India.[2585] Thus, the court in British India had no jurisdiction to pass a decree in respect of property in Berar before the Independence.[2586] When a mortgagee sued for sale, in the court of the sub-judge of Satara, of a mortgage of properties situated in Satara, Belgaum and Kolhapur, it was held that the court had jurisdiction to deal with the Satara property and with the Belgaum property situated in the jurisdiction of another court in British India, but not with the Kolhapur property situated outside British India.[2587]

The court will deal with property in India, if the suit is for partition, while declining jurisdiction as to the rest.[2588] So also, if part of the property is in a scheduled district outside the local limits of the jurisdiction of the court and which is outside the local extent of the Code.[2589] Where the properties which were the subject matter of a suit for partition were situated, some of them in British India and others in Chandranagore which was then a foreign state, it was held that a decree for partition could be made only with respect to the former and not the latter properties.[2590] Where the family-owned properties, both in India and in a foreign state, it was held that while courts in this country could not pass any decree for partition of the foreign properties, it could direct the parties to account for income derived therefrom.[2591] Where a suit was filed after independence in the court of the subordinate judge of Ludhiana, East Punjab, for partition of properties, bulk of which was situated in Pakistan, it was held that no relief could be granted in respect of those properties and that the immovable properties referred to in sections 16 and 17 had reference to properties situated in India.[2592]

[s 17.6] Appeal

In a suit, property in dispute lay partly in Lucknow and partly in Cawnpore district. The suit was brought in a court in Lucknow district. After the decree in the court dismissing the suit, the plaintiff submitted to the decree so far as property in the Lucknow district was concerned, but went in appeal to the Oudh Chief Court as regards the decision relating to Cawnpore property. It was contended that as the subject matter under appeal was not within the jurisdiction of the Oudh Chief Court, the appeal could not be heard by that court. Held that the suit as filed was proper and that the only court that could hear the appeal was the Oudh Chief Court.[2593]

[s 17.7] Execution

When the court has power to pass a decree as to immovable property in a different jurisdiction, it has also power to execute it. (See note under section 38, Jurisdiction of Court Executing a Decree.)

2585. *Krishna v Gajanan*, (1909) ILR 33 Bom 373.
2586. *Kurusinga v Narsinha*, AIR 1938 Bom 121 : (1937) ILR Bom 895.
2587. *Nilkanth v Vidya Narsing*, AIR 1930 PC 188 : ILR 54 Bom 495 : (1930) 57 IA 194.
2588. *Punchanan v Shib Chandar*, (1887) ILR 14 Cal 936; *Balaram v Ramchandra*, (1898) ILR 22 Bom 922.
2589. *Setrucherla v Maharaja of Jeypur*, (1919) 46 IA 151 : (1919) ILR 42 Mad 813.
2590. *Debendra v Amarenda*, AIR 1955 Cal 159.
2591. *Ramanathan Chettiar v Narayanan Chettiar*, AIR 1955 Mad 629.
2592. *Harmindar Singh v Balbir Singh*, AIR 1957 Punj 214 : (1957) ILR Punj 1032.
2593. *B Sunder Lal v B Gur Saran Lal*, AIR 1938 Oudh 65.

[s 17.8] Courts

Courts in this section mean courts to which the Code of Civil Procedure applies.[2594]

[s 17.9] High Courts

This section does not apply to high courts in the exercise of their original civil jurisdiction. See section 120 and notes to section 16, "High Courts".

[S 18] Place of institution of suit where local limits of jurisdiction of Courts are uncertain.—(1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an Appellate or Revisional Court that a decree or order in a suit relating to such property was made by a court not having jurisdiction where the property is situate, the Appellate or Revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

SYNOPSIS

[s 18.1]	Uncertainty of Local Limits of Jurisdiction	458	[s 18.3]	Judgment of the Court Not Competent to Deliver It	459
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[s 18.1] Uncertainty of Local Limits of Jurisdiction

The uncertainty which legislature had in view was the alteration of boundaries of fluvial action.[2595] The absence of a notification of the boundaries of a district was held to create a reasonable uncertainty.[2596]

[s 18.2] "And there has been a consequent failure of justice"

These have been added in order to further restrict the taking of technical objections as to jurisdiction. *Alla Ditta v Abdul Qadir*[2597] is an instance of an objection to jurisdiction being disallowed although no statement was recorded as required by sub-section (1).

2594. *Setrucherla v Maharaja of Jeypur*, (1919) 42 Mad 813; *Nrisingha v Rajuta*, AIR 1936 PC 189 : (1936) 63 IA 311 : (1934) ILR 15 Pat 567.
2595. Mr Scoble's speech, *Legislative Council*, 10 March 1888.
2596. *Shibu Haldar v Gupi Sundari*, (1897) ILR 24 Cal 449.
2597. *Alla Ditta v Abdul Qadir*, (1901) PR 1, p 5.

[s 18.3] Judgment of the Court Not Competent to Deliver It

See notes under section 11 under the same heading.

[S 19] Suits for compensation for wrongs to person or movables.—Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

ILLUSTRATIONS

(a) *A*, residing in Delhi beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

SYNOPSIS

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[s 19.1] Scope of Section

Section 16 refers to suits for immovable property which have to be filed in the local jurisdiction. Section 20 refers to personal actions such as action in tort or contract, where jurisdiction depends upon the residence of the defendant or the accrual of the cause of action. Section 20 overlaps this section which gives an option where the cause of action accrues in the jurisdiction of one court and the defendant resides in the jurisdiction of another court. The section is limited to actions in torts committed in India and to defendants residing or carrying on business or personally working for gain in India.[2598] It excludes suits for an injunction and suits in respect of torts committed outside India. Such suits fall, where the defendant is resident in India, not under this section, but under section 20.

Section 19 applies only where the wrong takes place (and the place of wrong is not the same where defendant resides). The suit can be filed at the place where the wrong takes place or at the place where defendant resides, or works for gain, or carries on business.[2599]

[s 19.2] Wrong

Wrong means a tort or actionable wrong, i.e., an act which is legally wrongful as prejudicially affecting a legal right of the plaintiff;[2600] but, it must be a tort affecting the plaintiff's person, or his reputation as in the illustrations, or his movable property; for torts affecting immovable property such as trespass or nuisance or infringement of easement fall under section 16(e). Likewise, when the tort for which the claim for compensation is made is malicious prosecution, the suit will fall within the section only when the injury resulting therefrom is to the person or

2598. *Govindan Nair v Achutha Menon*, (1916) ILR 39 Mad 433.
2599. *Escorts Ltd v Tejpal Singh Sisodia*, 2019 SCC OnLine (Del) 7607 : LNIND 2019 DEL 851.
2600. *Templeton v Laurie*, (1900) 2 Bom LR 244.

to reputation.[2601] Where a vendor of goods continued in possession thereof after sale, a suit by the purchaser for damages for non-delivery of goods is not a suit for wrong done to property within section 19 but one for damages for breach of contract and must be instituted under section 20 in the court within whose jurisdiction the defendant resides or the cause of action has arisen wholly or in part.[2602]

The plaintiff may sue either where the defendant resides or the wrong was committed.[2603] If the wrong takes place in the jurisdiction where defendant resides, then the plaintiff has no option but to prefer suit where defendant resides.[2604] A wrong may, however, consist of a series of acts and it is sometimes not easy to specify the place where it was committed. Thus, in a case from Burma,[2605] the defendant at Pyapon wrongfully obtained a magistrate's order for the seizure of plaintiff's boats at Rangoon and it was held that the Rangoon court had jurisdiction as the wrong was done at Rangoon. In an action for malicious prosecution, the court within whose jurisdiction the plaintiff was served with the summons in the criminal case instituted against him has jurisdiction to entertain the suit. The reason given is that though such service is not part of the cause of action for such a suit, the essence of malicious prosecution is the malicious abuse of the process of the court, viz, service of the summons. Hence, the court within whose jurisdiction such abuse has taken place can entertain such a suit under this section;[2606] but it is only at either of the two places mentioned in the section that the suit lies.[2607] The High Court of Bombay, however, has extended the meaning of the words "wrong done" to include not only the place where the wrong was done but also the place where its consequences occurred. Hence, a plaintiff may also file his suit at the place where damage of the wrong was sustained.[2608] According to the Gauhati High Court, the expression "wrong done", in section 19, covers not only the act which caused the wrong, but also the effect of the act.[2609] However, a tribunal is constituted under section 165 of the Motor Vehicles Act, 1988, for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles or damage to any property of a third party. Section 165 does not authorise such a tribunal to adjudicate upon any claim for damages to property of the insured or the 1st party.[2610]

The provisions of Indian Fatal Accidents Act, 1855, are supplemental in addition to the rights of the plaintiff to claim damages under the ordinary civil law.[2611]

[s 19.3] Suits Against Government

The word "resides" refers only to natural persons. The words "carries on business" refer to commercial business. The section, therefore, does not apply to suits against the government for

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2601. *Gokuldas v Baldev Das*, AIR 1961 Mys 188.
2602. *Misrilal v Moda*, (1951) ILR Raj 662.
2603. *Haveli Shah v Painda Khan*, AIR 1926 Cal 88 : (1926) 31 Cal WN 174; *Jabar Deb v National Insurance Co Ltd*, AIR 2006 Gau 143 (DB).
2604. *Escorts Ltd v Tejpal Singh Sisodia*, 2019 SCC OnLine (Del) 7607 : LNIND 2019 DEL 851.
2605. *Re Ma Myity Shwe Tha*, (1917) 3 LBR 164.
2606. *Khandchand v Harumal*, (1964) 66 Bom LR 829.
2607. *Sreepathi Hosiery Mills v Chitra Knitting Co*, AIR 1977 Mad 258 : (1977) Mad LJ 222.
2608. *State v Sarvodaya Industries*, AIR 1975 Bom 197 : (1974) Mah LJ 966.
2609. *State of Meghalaya v Jyotsna Das*, AIR 1991 Gau 96.
2610. *Jabar Deb v National Insurance Co Ltd*, AIR 2006 Gau 143 : 2006 (6) AIR Bom R 1002 (NOC) (DB) (Agartala Bench).
2611. *Pratap Singh v Gurdial Kaur*, AIR 1999 P&H 86.

damages for a tort where the tort is committed outside the jurisdiction. Such suits can only lie in the court of the place where the tort is committed.[2612]

[s 19.4] Judgment of the Court Not Competent to Deliver It

See notes to section 11 under the same heading.

[S 20] Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution: or

(c) the cause of action, wholly or in part, arises.

[2613][* * *]

[2614][*Explanation.*]—A corporation shall be deemed to carry on business at its sole or principal office in [2615]India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

ILLUSTRATIONS

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and request *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Shimla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benaras, *B* and *C* make a joint promissory note payable on demand and deliver it to *A*. *A* may sue *B* and *C* at Benaras, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi where *C* resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

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2612. *Govindarajulu v Secretary of State*, AIR 1927 Mad 689 : (1927) ILR 50 Mad 449.
2613. *Explanation I* omitted by CPC (Amendment) Act 104 of 1976, section 7 (w.e.f. 1-2-1977).
2614. Substituted for "*Explanation II*" by *Ibid.*
2615. Substituted by Act 2 of 1951, section 3 for "the States" (w.e.f. 1-4-1951).

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[s 20.1] Legislative Changes

The Code of Civil Procedure of 1882 substituted the words "every suit" for the words "all other suits". The Code of Civil Procedure of 1908 added the words "wholly or in part" in clause (c). The 1908 Code of Civil Procedure also deleted Explanation III to section 17 of the 1882 Code which related to cause of action in cases of contracts. That was done on account of the words "wholly or in part" having been inserted in clause (c). See notes below "Cause of Action in Suits on Contracts". The Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) has omitted Explanation I which provided:

> Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

With the omission of Explanation I, Explanation II has remained the only Explanation and has accordingly, been renumbered as "Explanation".

[s 20.2] "Subject to the limitations aforesaid"

Section 20 of the Code of Civil Procedure enacts the rule as to the forums in all cases not falling within the limitations of sections 15 to 19 of the Code of Civil Procedure, 1908, as is made clear by the opening words "Subject to the limitations aforesaid" appearing in section 20.[2616]

2616. *Ranjana Nagpal v Devi Ram*, AIR 2002 H P 166.

"Subject to the limitations aforesaid" makes it clear that it is a residuary provision and covers those cases not falling within sections 15 to 19 of the Code of Civil Procedure, 1908.[2617] If the torts take place outside India, then the provision of section 20 would apply. Moreover, the court said that the expression "at such place" which falls under Explanation to section 20 and the word "or" suggests that if the case falls within the later part of the Explanation, i.e., where the defendant does not have a sole office but has a principal office at one place and also have a subordinate office at another place, the court within whose jurisdiction it has subordinate office alone shall have jurisdiction "in respect of the cause of action".[2618]

The limitations are the pecuniary and other limitations referred to in section 16. (See note under the same heading below that section.) The former section was a residuary section referring to "all other suits" and as such was held to be subject to section 19.[2619] The present section overlaps section 19 and is subject to section 16 and by implication to section 15. Therefore, a suit involving adjudication of title to land situated wholly outside the City of Calcutta cannot be instituted in the original side of the High Court of Calcutta, even though the cause of action might have arisen within its limits.[2620]

[s 20.3] High Courts

Section 120 provides that the section is not to apply to high courts exercising their original civil jurisdiction.[2621]

[s 20.4] Scope and Principle of the Section

Clauses (a), (b) and (c) of section 20 are independent of each other.[2622]

This is a general section embracing all personal actions. At common law, actions are either personal or real. Personal actions are also called transitory because they may occur anywhere, such as actions for tort to persons or to movable property or suits on contracts. Real actions are actions against the res or property and are called local because they must be brought in the forum where the immovable property is situated. An action may also be a mixed action being partly real and partly personal. Torts to immovable property such as trespass and nuisance are mixed actions and are referred to in section 16(e). Otherwise, section 16 deals with real and local actions, while sections 19 and 20 deal with personal or transitory actions. Thus, a suit for a declaration that certain documents are void as having been obtained fraudulently and for injunction restraining the defendant from using them is one of the personal reliefs falling under this section and not under section 16(d) as it is not for determining any right to or interest in an immovable property though such property is the subject matter of the impugned documents.[2623] The principle underlying section 20(a) and section 20(b) is that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble.[2624]

2617. *Kalyan Complex v Sha Sumermalji*, Civil Revision Petition No. 1724 of 2016, decided on 18 December 2020 (AP High Court).
2618. *Sarine Technologies Ltd v Diyora and Bhanderi Corp*, 2020 (81) PTC 369 (SC).
2619. *Fazlur Rahim v Dwarka Nath*, (1903) ILR 30 Cal 453.
2620. *Probirendra v State of Bihar*, (1959) ILR Cal 767.
2621. *Babulal v Caltex (India) Ltd*, AIR 1967 Cal 205.
2622. *Sucheta Dilip Ghate v Dilip Shantaram Ghate*, AIR 2003 Bom 390 (DB).
2623. *Shyama Sundari Dasi v Ramapati*, AIR 1973 Cal 319.
2624. *UOI v Ladulal Jain*, AIR 1963 SC 1681.

In *Dashrath Rupsingh Rathod*, the Apex Court summarised the judicial approach on the issue of jurisdiction under section 20 and stated the position thus:

> A plain reading of Section 20 of the CPC arguably allows the plaintiff a multitude of choices in regard to where it may institute its lis, suit or action. Corporations and partnership firms, and even sole proprietorship concerns, could well be transacting business simultaneously in several cities. If clauses (a) and (b) of Section 20 are to be interpreted disjunctively from clause (c), as the use of the word "or" appears to permit the plaintiff to file the suit at any of the places where the cause of action may have arisen regardless of whether the defendant has even a subordinate office at that place. However, if the defendant's location is to form the fulcrum of jurisdiction, and it has an office also at the place where the cause of action has occurred, it has been held that the plaintiff is precluded from instituting the suit anywhere else. Obviously, this is also because every other place would constitute a forum non conveniens. This Court has harmonised the various hues of the conundrum of the place of suing in several cases and has gone to the extent of laying down that it should be courts' endeavour to locate the place where the cause of action has substantially arisen and reject others where it may have incidentally arisen. … if the defendant corporation has a subordinate office in the place where the cause of action arises, litigation must be instituted at that place alone, regardless of the amplitude of options postulated in Section 20 of the CPC.[2625]

The limitations mentioned in this section exclude the real and mixed actions of section 16 and confine the section to personal actions. The plaintiff has the option of suing either: (i) where the cause of action has accrued; or (ii) in the forum of the defendant, i.e., where the defendant resides, or carries on business or personally works for gain.[2626] This alternative is shown in the illustrations which are taken from two old cases, the first from *Winter v Way*[2627] and the second from *DeSouza v Coles*.[2628] Before the jurisdiction of a court can be invoked under this section, it must be shown that the defendant was actually and voluntarily residing or carrying on business or personally working for gain within its jurisdiction at the time of the suit. Neither the fact that he once resided there nor that he became a resident thereafter the suit was instituted would confer jurisdiction on the court if he was not residing there at the commencement of the suit.[2629]

[s 20.4.1] Defendant

The expression "Defendant" includes corporation or a company registered under the Companies Act, 2013.[2630] When the court finds that it has no jurisdiction to entertain the suit on the ground that the defendants are staying outside its territorial jurisdiction, the court should reject the plaint or return it to the plaintiff for presentation before the proper court or dismiss the same in accordance with provisions contained in the Code of Civil Procedure.[2631]

[s 20.4.2] "Actually and Voluntarily Resides"

The word "actually" does not necessarily include domicile and excludes constructive residence. The word "voluntarily" likewise excludes compulsory residence as when a person is

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2625. *Dashrath Rupsingh Rathod v State of Maharashtra*, AIR 2014 SC 3519 : (2014) 9 SCC 129 : JT 2014 (9) 81.
2626. *Ratnagiri v Syed Vava*, (1896) ILR 19 Mad 477; *Velupillai Narayan Pillai v N Gopala Pillai*, AIR 1974 Ker 27; *Ram Rattan v Food Corp of India*, AIR 1978 Del 183.
2627. *Winter v Way*, (1863) 1 Mad HC 200
2628. *DeSouza v Coles*, (1868) 3 Mad HC 384.
2629. *Permnath v Kandoomal*, AIR 1958 Punj 361 : (1958) ILR Punj 682; *Suraj Karan v Sitaram*, AIR 1952 Raj 31.
2630. *Patel Roadways Ltd Bombay v Prasad Trading Co*, (1991) 4 SCC 270.
2631. *Neela Productions, Sreekumar Theatre, Trivandrum v S Kumarswami*, AIR 1996 Ker 239.

confined to a particular place. The word "resides" means to make an abode for a considerable time, to dwell permanently or for a length of time, to have a settled abode for a time. The word "actually" means something real and constructive as opposed to speculative. Residence may be legal and technical or actual and physical. If the family of a person lives at one place and he himself lives for the greater part of the time at another place, he has legal residence where his family resides and actual residence where he resides.[2632] The residence contemplated by clauses (a) and (b) is of such a nature as to show that the court in which the defendant is sued is his natural forum. On the other hand, if a person has been continuously residing in a particular place, his temporary absence therefrom will not take away the case out of the scope of clause (a). Also, if a person has a house where he ordinarily resides, the fact that he has made available for himself another house at a different place where he resides in summer, does not mean that he is a permanent resident of that place also.[2633] The fact that a person has a house at the place of his birth but has made a permanent home at another place where he actually resides and carried on his vacation, does not mean that it is the former place where he actually resides.[2634]

The word "resides" is a flexible one and has many shades of meaning but it must take its colour and content from the context in which it appears and cannot be read in isolation. According to *Webster's Dictionary*, "to reside" has been defined as meaning "to dwell permanently or for any length of time". The expression "resides" brings with it the concept or incidence of some permanency or continuity. The Kerala High Court has held that "Even if there be any confusion of thought on this aspect, the legislature did not evidently want to leave any ambiguity in the expression and that is why the word "resides" was qualified by the expression "actually and voluntarily"."[2635] In the above case, which was a suit for recovery based on pronote, the plaintiff and the defendant were both employed in foreign country and at the time of executing the promissory note, the defendant was in a foreign country. Even at the time of filing of suit, the defendant was in foreign country and not at his permanent residence in India. It was held in the above case that the court in India did not have territorial jurisdiction. However, the defendant had started residing in India permanently. Therefore, it was observed that accepting the plea regarding jurisdiction, even if the plaint were to be returned, it will be presented again before the same in view of changed circumstances regarding defendant's permanent residence. In that view of the matter, the suit was allowed to be disposed of by the same court.[2636]

When the matter was taken to Supreme Court, SB Sinha, J, speaking for the Bench explained the point of law involved in the following words:

> Determination in regard to maintainability of the suit, it is trite, must be made with reference to the date of the institution of the suit. If a cause of action arises at a later date, a fresh suit may lie but that would not mean that the suit which was not maintainable on the date of its institution, unless an exceptional case is made out therefor can be held to have been validly instituted. Discretion, as is well known, cannot be exercised, arbitrarily or capriciously. It must be exercised in accordance with law. When there exists a statute, the question of exercise of jurisdiction which would be contrary to the provisions of the statute would not arise. Application of doctrine of dominus litus is confined only to the cause of action which would fall within Sections 15 to 18 of the Code of Civil Procedure. It will have no application in a case where the provisions of Section 20 thereof is sought to be invoked.[2637]

2632. *Mohan Singh v Lajya Ram*, AIR 1956 Punj 188.
2633. *MSM Buhari v SM Buhari*, AIR 1971 Mad 363.
2634. *MSM Buhari v SM Buhari*, AIR 1971 Mad 363.
2635. *Mohanakumaran Nair v Vijayakumaran Nair*, AIR 2006 Ker 243 : 2006 (3) Ker LT 293.
2636. Ibid.
2637. *Mohanakumaran Nair v Vijayakumaran Nair*, AIR 2008 SC 213, p 215 : (2007) 14 SCC 426.

The legislature has used the word "resides" at various places in different contexts in the code. It is sometimes used in a more restricted sense and sometimes in an extended sense; (see section 136 and O XXV, rule 1). The word, therefore, has to be construed according to the intention of the legislature. However, there is no distinction between the word "resides" as used in sections 16, 19 and 20 and the word "dwell" in clause 12 of the Letters Patent. Hence, cases decided on the latter word would be authorities on the construction of the former. The words "actually and voluntarily resides" in clauses (a) and (b) refer to natural and not juristic persons. They have, therefore, no application to government or legal persons like registered companies.

As regards personal actions, residence gives jurisdiction even when the cause of action has arisen outside India.[2638] Thus, a partner could sue in the court at Bulsar for dissolution of partnership commenced and carried on in foreign territory since the defendant partner resided in Bulsar at the time of the institution of the suit.[2639] On the other hand, if the cause of action has arisen within its jurisdiction, a court in India can entertain a suit against a non-resident foreigner.

Where in a suit for damages the telegram was sent from place *C* by defendant to American Consulate, for deciding cause of action, it was observed that since the defendants were residing at place *H*, the plaintiff can file suit either at place *H* or at place *C* from where telegram was sent.[2640]

The court has no jurisdiction in a suit against a non-resident foreigner on a cause of action which arose wholly outside the Indian territory.[2641] As already stated, the court has jurisdiction to entertain a suit against a foreigner resident within the limits of its jurisdiction in respect of a cause of action that has accrued abroad.[2642] A foreigner is not exempt from the jurisdiction of Indian courts.[2643] If a foreigner resident himself carries on business or personally works for gain, in India, it is clear that he is amenable to the jurisdiction of Indian courts. But what if a foreigner does not reside, or does not himself carry on business or personally work for gain in India, and:

(i) the cause of action arises within the local limits of an Indian court; or

(ii) the cause of action arises outside India but the foreigner carries on business through his agent within the local limits of an Indian court.

As to case (a), it is settled that a non-resident foreigner, who is a subject of a foreign state such as a protected native state before independence may be sued in the court of India if the cause of action arises within the jurisdiction of such court.[2644]

Thus, if *A*, a subject of the native state of Sangli and residing at Sangli, borrows money from *B* at Belgaum, *B* may sue *A* for recovery of money in the Belgaum court, for the cause of action arises at Belgaum. The rule of private international law that a court has no jurisdiction

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2638. *Muthia Chettiar v Shamungham*, AIR 1969 SC 552 : (1969) 1 SCR 444 : 1969 (2) SCJ 105.
2639. *Ismailji v Ismail*, AIR 1921 Bom 460 : (1921) ILR 45 Bom 1228; *DeSilva v Soosai Pillai*, AIR 1954 TC 141.
2640. *SC Bose & Co v G Srikanth*, AIR 2006 AP 337.
2641. *Bhamboo v Ram Narain*, AIR 1928 Lah 297 : (1928) 9 Lah 455.
2642. *Ismailiji v Ismail*, AIR 1921 Bom 460 : (1921) ILR 45 Bom 1228; *Bhujbal v Nanheju*, (1897) ILR 19 All 450.
2643. *Smith v Indian Textile Co*, AIR 1927 All 413 : (1927) ILR 49 All 669.
2644. *Chunilal Kasturchand v Dundappa Damppa*, AIR 1951 Bom 190 : (1950) ILR Bom 640; *Ram Ravji v Pralhaddas*, (1896) ILR 20 Bom 133; *Girdhar v Kassigar*, (1893) ILR 17 Bom 662; *Tadepalli v Nawab Sayed*, (1906) ILR 29 Mad 69; *Annamalai v Murugasa*, (1903) ILR 26 Mad 544 : 30 IA 220; *Rambhat v Sankar*, (1901) 25 Bom 258; *Srinivasa v Venkata*, (1911) 38 IA 129 : (1911) ILR 34 Mad 257; affirming ILR 29 Mad 239; *Swaminathan v Somasundaram*, AIR 1938 Mad 731 : (1938) ILR Mad 1080; *Neelakanda v Kunju*, AIR 1935 Mad 545 : (1935) 68 Mad LJ 506.

to entertain a suit against a foreigner who does not reside within its jurisdiction and who has not submitted to it, is subject to the rules of municipal law. A suit is accordingly, maintainable in an Indian court within its jurisdiction.[2645] A decree passed in such a suit, however, would not be enforceable in a foreign court and where the decree is against several defendants, some of whom are residing within the jurisdiction and some others not, it will be executable against all within the state; outside the state it will not be executable against non-resident foreigners.[2646]

As to case (b), the High Court of Bombay in one case held that where no part of the cause of action arose in Bombay, it had no jurisdiction to entertain a suit against a foreigner who did not reside in Bombay, but carried on business through an agent in Bombay;[2647] but this decision was disapproved in the later case of *Girdhar v Kassiga*.[2648] The point arose in a later case before the Privy Council, but it was left open.[2649] The Madras High Court has held that the expression "carrying on business" in clause 12 of the Letters Patent included carrying on business through an agent in British India by foreigners living outside jurisdiction.[2650] It has been held that a suit for specific performance of an agreement to convey immovable property situated within India could be instituted in the court within whose jurisdiction the properties are situated, wherever the agreement might have been entered into and even when the defendant is a non-resident foreigner.[2651] The question of whether the defendant resides within jurisdiction is relevant only when he is a foreigner. A decree passed by a court against its own citizen who owns a permanent dwelling house at the place is not open to attack on the ground that at the time of the action, he was not actually residing there or submitted to its jurisdiction.[2652] The fortuitous presence of the ship in the Bombay harbour will not entitle the owner to file a limitation action in the absence of any claim being made or apprehended against him or the vessel in that court. Therefore, bringing the ship to the Bombay Port, in order to confer jurisdiction on Bombay High Court, has the character of forum shopping, rather than anything else. The presence of a foreign defendant, who appeared under protest to contest jurisdiction, cannot be considered as conferring jurisdiction on the court to take action. Unless a foreign defendant either resides within jurisdiction or voluntarily appears or has contracted to submit to the jurisdiction of the court, it is not possible to hold that the court will have the jurisdiction against the foreign defendant.[2653] Where the cargo was discharged by the vessel at the Madras port instead of Calcutta port where it was agreed to be discharged, the Madras High Court would have admiralty jurisdiction to decide the suit filed by the owner of goods for damages for breach of court act when the suit was filed at the time when the ship was berthed in the Port of Madras. It cannot be said in such a case that the Madras High Court would have no such jurisdiction as the agreement between parties conferred jurisdiction on the courts in the country where the carrier has his principal place of business namely that of

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2645. *Narain v Balabadra*, AIR 1957 Pat 256.
2646. *Narasinga Rao v Sankar Saran*, AIR 1958 All 775; *Maloji Nar Singh Rao v Shankar Saran*, affirmed in AIR 1962 SC 1737; *Karnataka Films v Official Receiver, Madras*, AIR 1952 Mad 481.
2647. *Kesowji v Khimji* (1888) ILR 12 Bom 507.
2648. *Girdhar v Kassiga*, (1893) ILR 17 Bom 662 (a case under the Presidency Small Cause Courts Act, 1882, section 18).
2649. *Annamalai v Murugasa*, (1903) ILR 26 Mad 544 : 30 IA 220 (a case under section 17 of the Code of Civil Procedure of 1882, corresponding with section 20 of the Code of Civil Procedure, 1908).
2650. *Janoo v Batchu*, AIR 1924 Mad 158 : (1936) 45 Mad LJ 471; dissenting from ILR 12 Bom 507; *Girdhar v Kassiga*, (1893) ILR 17 Bom 662.
2651. *Md Yusuf v Subramaniam Chettiar*, AIR 1950 Mad 27 : (1949) 2 Mad LJ 735; *Panchanan v Tarapada*, AIR 1961 Cal 193 : 65 Cal WN 661.
2652. *Jhumarla v Tansukrai*, AIR 1957 Assam 127.
2653. *World Tanker Carrier Corp v SNP Shipping Services Pvt Ltd*, (1998) 5 SCC 310.

Canada in the instant case. It was more so when there was no ouster of jurisdiction in respect of other courts.[2654]

A contract was entered into by the plaintiff with a foreign company incorporated in the United States of America for the supply of brass dross of guaranteed 90% of metallic recovery. The foreign company had been carrying on its business in India through agents. The offer for supply was given and a contract signed by an Indian agency on behalf of a foreign company in New Delhi. It was held that a suit against the foreign company can be filed in New Delhi.[2655]

[s 20.4.3] "Dwells" Within the Meaning of Clause 12 of Letters Patent

The dwelling or residence must be of a more or less permanent character. It must be of such a nature as to show that the high court in which a defendant is sued is his natural forum.[2656] Therefore, when the defendant has a permanent dwelling at one place, he cannot be said to "dwell" at a place where he has lodged for a temporary purpose only; eg, to defend a suit brought against him,[2657] or for a change while on leave.[2658]

It has been held by the Supreme Court that the jurisdiction of a court under section 20 is different from its jurisdiction under clause 12 of the Letters Patent, and thus, same considerations would not apply in the determination of jurisdiction of courts under section 20 of the CPC and clause 12 of the Letters Patent. Therefore, the plaintiff did not have an absolute right to bring proceedings in the high court and can only do so with the prior leave of the court.[2659]

Every person is deemed in law to have a dwelling or place of residence, and so if he has no permanent place of residence, he will be deemed to "dwell" where he is actually staying at the time. Thus, where a defendant, who was a political agent in Kolhapur, residing in a government building there, sold his furniture and other effects and left Kolhapur on a year's furlough, and while en route to England stayed in Bombay for three days before sailing, he was held to dwell in Bombay so as to give jurisdiction to the high court in a suit instituted against him during his stay in Bombay.[2660] In a Calcutta case, a racing man, who had come to Calcutta for a month for racing, was held to dwell in Calcutta for he had no other residence at the time when the suit was instituted against him.[2661]

On the other hand, a person may have more than one permanent place of residence at the same time. If so, he will be deemed to "dwell" in any one of the places where he is actually staying for the time being, and he may be sued in that place. In *Order v Skinner*,[2662] the defendant, who had a dwelling place in Mussoorie, was held under the circumstances of the case, to have another dwelling place in Bilaspur. Similarly, where a defendant spent his time alternately in Calcutta and the *mofussil*, it was held that he could be sued in Calcutta where he was residing at

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2654. *Supreme Paper Mills Ltd v Owner and other persons Interest in the Motor Vessel "ARABELLA"*, AIR 1999 Mad 118.
2655. *Nandan Iron and Metal Industries v Fensty Inc*, AIR 1992 Del 364.
2656. *Goswami v Goverdhanlalji*, (1890) ILR 14 Bom 541 (SC); in appeal (1894) ILR 18 Bom 290; in appeal to PC (1894) ILR 18 Bom 294; but see *Srinivasa v Venkata*, (1906) ILR 29 Mad 239; SC on appeal (1911) 38 IA 129, 139.
2657. *Emritloll v Kidd*, (1864) 2 Hyd 119.
2658. *Kavasji v Wallace*, (1863) 1 Bom HC 113; *Kissun Singh v Sturt*, (1870) 5 Mad HC 471.
2659. *Food Corp of India v Evdomen Corp*, AIR 1999 SC 2352 : (1999) 2 SCC 446; see also full bench decision by Madras High Court in *Duro Flex Pvt Ltd v Duroflex Sittings System*, AIR 2015 Mad 30.
2660. *Fernandez v Wray*, (1901) ILR 25 Bom 176.
2661. *Morris v Baumgarten*, (1865) Coryton 152; *Mayhew v Tullock*, (1872) 4 NWPHCR 25.
2662. *Order v Skinner*, (1881) ILR 3 All 91 : 7 IA 196.

the time of institution of the suit;[2663] but a person who has been living and carrying on business in Bombay for 20 years cannot be said to be residing at Ahmedabad because he has a family house in Ahmedabad which he visits occasionally; in such a case, Ahmedabad cannot be said to be one of his places of residence.[2664] Where an *Acharya* (Hindu head-priest), who had his permanent place of residence at Nathdwar, where he had been installed on the *gadi* in 1879, came to Bombay for the first time in April 1889 at the invitation of his devotees and stayed in a house which he had purchased in 1888 for occasional residence and exchanged visits with his followers, it was held in a suit that could be brought against him in Bombay in May 1889 that he did not "dwell" in Bombay.[2665] Where a person who was domiciled and resided in Mysore left his house in charge of a servant, and hired a house in Madras to which he brought his wife and family, and apprenticed himself for a year to a *vakil* in Madras, it was held in a suit brought against him in Madras some months after his residence there that inasmuch as he had taken up his abode in Madras, meaning to remain there for several months, and was actually living there when the suit was instituted, he "dwelled" in Madras within the meaning of clause 12 of the Letters Patent.[2666]

[s 20.4.4] "Carries on business"

These words also occur in clause 12 of the Letters Patent, and the decisions under that clause apply equally to cases arising under sections 16, 19 and 20. The word "business" is used in a restricted sense[2667] and is limited to commercial business. The expression "carries on business" is intended to relate to business in which a man may contract debts and is liable to be sued by persons having business transactions with him.[2668] In the case of a work's contract, the place where the contract was executed and the place where it was performed would both give jurisdiction.[2669] A Hindu priest who receives offerings from his followers cannot be said to carry on business, although the offerings are on such a large scale that he employs servants to collect and keep an account of them.[2670] A *zamindari* business has been held not to be the kind of business contemplated by this section.[2671] A person may be carrying on business at a place where he has no office or regular establishment. Thus, a person residing in the *mofussil* who goes once or twice a week from the mofussil to a friend's house in Calcutta and does business there will be said to "carry on business" in Calcutta.[2672] The business need not be carried on personally.[2673] The phrase "carries on business" is used as distinct from the phrase "personally works for gain". It does not involve actual presence or personal effort and a man may carry on business in a place through an agent or through a manager or by his servants without having ever gone there. It means having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control, if not over the actual method of working,

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2663. *Nishadiney v Kally*, (1864) Coryton 24.
2664. *Ugar Chand v Surajmal*, (1900) 2 Bom LR 605; *Guranditta Mal v Ram Das*, (1916) PR No 112, P 343; *Suraj Karan v Sitaram*, AIR 1952 Raj 31, *Mohan Singh v Lajya-ram*, AIR 1956 Punj 188 : (1956) ILR Punj 1299; *Mannalal v Paney Chand*, AIR 1959 Raj 166 : (1959) ILR Raj 62.
2665. *Goswami v Goverdhanlalji*, (1890) ILR 14 Bom 541.
2666. *Srinivasa v Venkata*, (1911) ILR 34 Mad 257 : 38 IA 129; in app from 29 Mad 239.
2667. *Daya Narain v Secretary of State*, (1887) ILR 14 Cal 256; *Govindarajulu v Secretary of State*, AIR 1927 Mad 689 : (1927) ILR 50 Mad 449.
2668. *Goswami v Goverdhanlalji*, (1890) ILR 14 Bom 541.
2669. *Sarkar & Sarkar v State of West Bengal*, AIR 1992 Cal 365.
2670. *Goswami v Goverdhanlalji*, (1890) ILR 14 Bom 541 (SC).
2671. *Nobin Chander v Buroda*, (1875) 19 WR 341; *Anonymous* case (1875) 23 WR 223.
2672. *Greschunder v Collins*, (1864) 2 Hyde 79.
2673. *Muthaya v Allan*, (1882) ILR 4 Mad 209; *Shivbhagwan v Onkarmal*, AIR 1952 Bom 365.

at any rate upon the existence of the business.[2674] The expression "carries on business", has the connotation of permanence and regularity in order to distinguish it from an isolated act or activity. The amplitude of the expression "carries on business" cannot, however, be restricted, merely because it is used in conjunction with the words "personally works for gain". Nor is it possible to read into the expression "carries on business", the element of gain or of profit in the activity that is carried on. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of section 9 of the Code;[2675] but it is necessary that the following three conditions should concur, namely:

(i) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him. Thus, a trader in the *mofussil* who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to "carry on business" in Madras.[2676] So, a firm in England, carrying on business in the name of AB & Co, which employs upon the usual terms a Bombay firm carrying on business in the name of CD & Co, to act as the English firm's commission agents in Bombay, does not "carry on business" in Bombay so as to render itself liable to be sued in Bombay.[2677]

(ii) The person acting as agent must be an agent in the strict sense of the term. The manager of a joint Hindu family is not an "agent" within the meaning of this condition.[2678]

(iii) To constitute "carrying on business" at a certain place, the essential part of the business must take place in that place. Therefore, a retail dealer who sells goods in the *mofussil* cannot be said to "carry on business" in Bombay merely because he has an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf.[2679] A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta, cannot be said to do business in Amritsar;[2680] but, a Bombay firm that has a branch office at Amritsar, where orders are received subject to confirmation by the head office at Bombay, and where money is paid and disbursed, is carrying on business at Amritsar and is liable to be sued at Amritsar.[2681] Similarly, a life assurance company which carries on business in Bombay and employs an agent at Madras who acts merely as a Post Office forwarding proposals and sending moneys cannot be said to do business in Madras.[2682] Where a contract of insurance was made at place *A* and the insurance amount was also payable there, a suit filed at place *B* where the insurance company had a branch office was held

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2674. *Kirpa Ram v Mangal Sen*, AIR 1922 All 367 : (1921) 19 All LJ 696.
2675. *Bakhtawar Singh Balkrishna v UOI*, AIR 1983 Del 201.
2676. *Chinnammal v Tulukannatammal*, (1866) 6 Mad HCR 146.
2677. *Khimji v Forbes*, (1871) 8 Bom HC 102.
2678. *Annamalai v Murugasa*, (1903) ILR 26 Mad 544 : 30 IA 220.
2679. *Framji v Hormasji*, (1865) 1 Bom HC 220.
2680. *Hiranand v Gurmukh Rai*, AIR 1923 Lah 427; *Md Kasim v Hanuman Industries*, AIR 1956 TC 200.
2681. *Kanshi Ram v Dule Rai*, AIR 1933 Lah 11 (1933) 14 Lah 42.
2682. *Pachaimmal v Hindustan CI Society*, AIR 1941 Mad 270 : (1941) ILR Mad 109; *John v Oriental Insurance Co Ltd*, AIR 1929 Mad 347 : (1928) 56 Mad LJ 299.

not maintainable.[2683] Where the plaintiff instituted a suit at Kozhikode alleging that its account with the defendant Bank at its Calcutta branch had been wrongly debited and it was claimed that that court had jurisdiction as the defendant had a branch there, it was held that the existence of a branch was not part of the cause of action and that the Kozhikode court therefore, had no jurisdiction;[2684] but, when a company though incorporated outside India gets itself registered in India and does business in a place in India through its agent authorised to accept insurance proposals, and to pay claims, and to do other business incidental to the work of agency, the company carries on business at the place of business in India.[2685]

[s 20.4.5] Government and Railways

Regarding the words "carries on business" in clauses (a) and (b), there was at one time a conflict of judicial opinion as to whether they can apply to government. Some decisions drew a distinction between the activities of a government attributable to its sovereign character such as war, defence and the like and the commercial activities in which it engages like any of its subjects and held that in respect of the latter, the suit relating to such activities could be instituted in the court within whose jurisdiction the head office is situated.[2686] A number of other decisions, on the other hand, held that though this distinction may be material on the question of liability of the government, it had no relevance on the question of the forum wherein the government could be sued, that it could not be said of the government that it carries on business within the meaning of section 20 and therefore a suit against the government could be instituted where the cause of action arose wholly or in part.[2687] The controversy is set at rest by the Supreme Court in *UOI v Sri Ladulal Jain*[2688] where it stated that the principle underlying clauses (a) and (b) is that the suit should be instituted at a place where the defendant would be in a position to defend the action against it effectively and without trouble and that the running of railways by the government was a business activity and that accordingly, the court of the subordinate judges at Gauhati within whose jurisdiction the railway has its headquarters had jurisdiction to entertain the suit. The mere fact, however, that the particular railway run by the government has its headquarters within the jurisdiction of the court is not enough. In order to attract the jurisdiction of that particular court, the plaintiff would have to show that the railway administration in respect whereof the liability arose is the one to which liability can be fastened by virtue of the provisions of the Railways Act, 1890. If there is a claim against the Union of India in respect of loss which occurred either at the dispatching station or the destination station or along the railway line, such a claim can be entertained against the Union of India, although the place where the loss occurred is outside

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2683. *Bharat Insurance Co v Wasudev*, AIR 1956 Nag 203 : (1956) ILR Nag 494.
2684. *Nedungadi Bank Ltd v Central Bank of India*, AIR 1961 Ker 50 : (1960) ILR Ker 1444.
2685. *Guardian Assurance v Shiva Mangal*, AIR 1937 All 208 : (1937) ILR All 234.
2686. *Pratap Chandra Biswas v UOI*, AIR 1956 Assam 85 : (1956) ILR Assam 51; *Golab Roy v Secy of State*, (1941) ILR 2 Cal 160; unreported judgement of the Madras High Court in CRP 1573 and 1574 of 1950; discussed in *Azizuddin v UOI*, AIR 1955 Mad 346 : (1955) ILR Mad 912.
2687. *Daya Narayana v Secy of State*, (1887) ILR 14 Cal 256; *Govindarajulu v Secy of State*, AIR 1927 Mad 689 : (1927) ILR 50 Mad 449; *Calcutta Motor Cycle Co v UOI*, AIR 1954 Bom 129 : (1953) ILR Bom 1157; *Lakmichand v State of Punjab*, AIR 1954 Punj 181 : (1954) ILR Punj 613; *Achut Anant v GG-in-Council*, AIR 1955 Cal 331; *Azizuddin v UOI*, AIR 1959 Cal 273; *Elias & Co v State of West Bengal*, AIR 1959 Cal 247; *Trilokchand v Dominion of India*, AIR 1959 Cal 281 : (1958) 62 Cal WN 900; *Kalwani v UOI*, AIR 1960 Cal 430 : (1960) 64 Cal WN 765; *Badri Narain v Excise Commissioner*, AIR 1962 AP 382 : (1962) 1 Andh WR 133.
2688. *UOI v Sri Ladulal Jain*, AIR 1963 SC 1681 : (1964) 1 SCJ 101.

the jurisdiction of the court, provided the Union of India is carrying on administration of the railways within its jurisdiction.[2689] Conversely, if the headquarters of a railway administration are situated within the jurisdiction of the court where the suit is filed, the jurisdiction of that court would be attracted if the cause of action has arisen wholly or in part within the local limits of its jurisdiction.[2690]

Where a suit is governed by section 80, Indian Railways Act, 1890, the forum has to be determined solely on the basis of that section. The provisions of section 20, Code of Civil Procedure or of section 18, Presidency Small Cause Courts Act, 1882, do not apply.[2691] Under section 80, Indian Railways Act, 1890, a suit for compensation for loss of life of, or personal injury to, a passenger, or for damage, deterioration or non-delivery of animals or goods, could be instituted at the court having jurisdiction: (i) over the place at which the passenger obtained his pass or purchased his ticket or the animals or goods were delivered for carriage, as the case may be; or (ii) over the place in which the destination station lies; or (iii) loss, injury, destruction, damage or deterioration occurred.[2692] In a Bombay case, a suit was filed for damages against the railway administration for the loss of goods in transit. Another party was also made defendant and leave of the court was obtained under section 20(b) for filing the suit in the particular court, even though that court did not have jurisdiction against the railway administration under section 80, Indian Railways Act, 1890. It was held that while section 20 of the Code of Civil Procedure is a general provision for suits, section 80, Indian Railways Act, 1890, is a special provision for railways and therefore, permission granted under section 20 of the Code of Civil Procedure would be of no avail in the circumstances.[2693] Contract was entered into with the Divisional Superintendent of Railways at Lucknow. Lucknow being in Northern Railways and headquarters of Northern Railways being at Delhi, the suit could be filed against the Union of India in Delhi. The contract was for building or maintenance of the staff quarters which are all necessary and incidental adjuncts to the business of running of railways. The running of railways does not mean only the transporting of passengers and goods, but would also inevitably include within it all the works like building quarters, laying down rails and all acts connected with the running of the railways.[2694] The impugned orders of the Central Government (at Delhi) fixed the selling price and retention price of aluminium. The petitioner company, with its head office at Calcutta, alleged that it had suffered loss owing to such fixation. It was held that the cause of action arose, in part at Calcutta and the Calcutta High Court could entertain the writ petition.[2695] A writ petition is not entertained unless the petitioner comes with a case that he has been prejudiced by state action. In this case, the state action had caused prejudice at Calcutta.[2696] Certain charitable endowments were created by a will. The will related to a few temples within the East Thanjore District. Some matter relating to the endowment had been disposed of by the Deputy Commissioner. The Commissioner had *suo moto* reopened the matter. A suit to set aside the order of the commissioner was filed in the City Civil Court at Madras, in which the office of the Commissioner was situated. An objection to territorial jurisdiction of the court was raised in the written statement. It was held that only the subordinate judge who had got jurisdiction over the properties situated in Sirkali Taluka (which was dealt with by the Will), could entertain the suit. Consequently, the City

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2689. *Jagannath v UOI*, AIR 1966 Cal 540.
2690. *Maniklal v UOI*, AIR 1966 MP 243.
2691. *Assam Cold Storage Co v UOI*, AIR 1971 Assam 69 dissented from.
2692. *Ratanlal Adukia v UOI*, (1989) 3 SCC 537.
2693. *South Eastern Railway Administration v Govind Lal*, AIR 1984 Bom 223.
2694. *Kuldeep Singh v UOI*, AIR 1986 Del 56 (FB).
2695. *Advocate General v MP Khaer Industries*, AIR 1980 SC 846 distinguished.
2696. *UOI v Hindustan Aluminium Corp*, AIR 1983 Cal 307.

Civil Court, Madras had no jurisdiction.[2697] Courts were concerned with the central control and management of the business concerned. Where the business is not of a commercial nature, the suit must be filed against the government at the place where the cause of action arises, wholly or in part. The expression "business" (as used in section 20) means commercial business and not duties or functions of a sovereign character. The place where the state is carrying on business, is a pure question of fact. The test is: what is the nature and purpose of the activity in question? If it is commercial in character, the suit can be filed: (i) at the principal place of business or principal office; and (ii) also at the place where the cause of action arises, wholly or in part.[2698] A construction contract between the plaintiff and the state government, provided that the chief engineer of the state government would have control in the matter. The chief engineer's office was at Jaipur, which was also the headquarters of the state government. It was held that the suit should be filed at Jaipur. The suit was against both the state government and the chief engineer. The main object of section 20 is that the defendants should be able to defend the suit without undue trouble.[2699] The courts at Delhi cannot be said to have the jurisdiction in regard to all disputes relating to all contracts executed by the Union of India simply because the Union of India has its "office" in Delhi. It is not possible to accept the view that Union of India carried on business or worked for gain through the Director of Supplies and Disposals, New Delhi to confer jurisdiction on the courts at Delhi. The expression "voluntarily resides" in section 20 is significant. It necessarily refers to natural persons and not to legal entities. Likewise, the expression "carries on business" or "personally works for gain" do not refer to functions carried on by the Union of India in discharge of its executing powers conferred by the Constitution of India.[2700]

[s 20.4.6] Place of Residence or Work of Plaintiff

Unlike defendant(s), the place of residence or business or work of the plaintiff is immaterial to ascertain the jurisdiction of the court. It is another matter if the plaintiff and defendant are residing or working for gain or doing business within the same locality or the territorial jurisdiction of the same court. But in that case also it is the dwelling place, business place or working place of the defendant which attracts the jurisdiction of the court with regard to dispute between the parties pertaining to movable properties, contract, etc. The point is that it is the place of residence, business and work of the defendant(s) which has a bearing on the question of jurisdiction of the court under sections 20(a) and (b) of the Code of Civil Procedure.

Where the suit is filed at place *G*, suit property is situated at place *S* and the defendant also resides at place *S*. In such a case, territorial jurisdiction of the trial court extends to place *S*, also the application filed by the defendant seeking hearing of the suit at place *S*, cannot be rejected on the ground that the plaintiff resides at place *G*.[2701]

[s 20.5] Old Explanation I, Temporary Residence

The Calcutta High Court on the strength of Explanation I as it stood before its omission held in a case where the defendant had a permanent residence at Gopalganj but resided at

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2697. *Commissioner, Hindu Religious and Charitable Endowments Dept, Madras v Govindrajan*, AIR 1982 Mad 417.
2698. *Gupta Sanitary Stores v UOI*, AIR 1985 Del 122.
2699. *Hotchand Moolchand v Stage*, AIR 1987 Raj 154.
2700. *Bakhtawar Singh Bal Kishan v UOI*, (1998) 2 SCC 293.
2701. *Gopal Jat v Gheesa Lal*, AIR 2003 Raj 312.

Calcutta where he carried on business that a suit in which the cause of action arose at Calcutta could be brought in the Court at Gopalganj.[2702] Thus, Explanation I was relevant only in relation to the Court having jurisdiction where the defendant had a dwelling elsewhere.[2703] Under the deeming provision in Explanation I, if a person had a permanent dwelling at one place and a temporary residence elsewhere he was said to reside at both the places. Under the main part of the section, a suit can be filed (i) where the defendant actually and voluntarily resides or (ii) where he carries on business or (iii) where he personally works for gain or (iv) where the cause of action arises wholly or in part. By providing deemed residence at both the places, was the object to extend the scope of the operative part of the section? If that was so, there was no point in providing a further requirement of the cause of action arising at the place of his temporary residence. If the object was as the Madras High Court said to give jurisdiction to the Court where the permanent dwelling is situated, the requirement of the cause of action arising at the temporary residence was unnecessary. The deeming double residence did not also specify that both were places of his actual and voluntary residence so as to be in harmony with the main part of the section. Explanation I has thus been rightly omitted.

[s 20.6] Section 16(c) and Section 20—Choice of Court

See notes to section 16 under the same heading.

[s 20.7] Section 16(d) and Section 20—Choice of Court

See notes to section 16 under the same heading.

[s 20.8] Judgment of the Court Not Competent to Deliver It

See notes under section 11 under the same heading. See notes under heading "Contract Providing for Place of Suing", under section 10 (*supra*), and "Agreement as to Choice of Court", under section 20 (*infra*).

[s 20.9] Leave of the Court

Leave of court is required when some of the defendants are within and others outside jurisdiction. Thus, a suit against the members of a firm, one of whom resides within jurisdiction, may be instituted with leave of the court as the non-resident defendants;[2704] and if the court refuses leave, the suit cannot proceed unless the non-resident defendants acquiesce.[2705] Goods kept at a place, *A*, were damaged by fire. Goods were insured at *A*, with companies *B* and *C*. Claim was filed in the court at *A*. Court at *A* had jurisdiction against *B* to entertain the claim, but not against *C*. Court at *A* can grant leave under section 20(b) to file a claim against *C*.[2706] Plaintiff filed a suit for the recovery of certain amounts against six defendants. The sixth defendant was a bank, a body corporate incorporated in West Germany and it had a branch at Bombay. By an application under section 20(b), leave was sought by the plaintiff to institute the suit against the sixth defendant. It was held by the trial court that the leave sought for could not be given arbitrarily, especially when the defendant not residing within

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2702. *Sitnath v Jatindra*, (1930) 57 Cal 65, (30) AC 347.
2703. *MSM Buhari v SM Buhari*, 1971 AM 363.
2704. *Alagappa v Annamalai*, (1916) 35 IC 74.
2705. *Mahomedbhai v Adamji*, AIR 1922 Bom 152 : (1922) ILR 46 Bom 229.
2706. *Firm Babu Lal, Mandi v New India Assurance Co Ltd, New Delhi* AIR 1980 Raj 126.

the territorial jurisdiction of the court happened to be the main defendant. On revision, it was held that allegations in the plaint showed that the plaintiff was seeking a decree against the sixth defendant in the alternative only. In such a situation, it could not be said at that stage that the sixth defendant was the main defendant. All the five defendants and the plaintiff were carrying on business at Delhi. Evidence to be produced on their behalf was available mostly in Delhi. It was, therefore, in the interest of justice to grant the leave sought for, so as to avoid hardship to the plaintiff and to the five defendants.[2707] Leave may be given even after institution of the suit,[2708] and even at the stage of appeal.[2709] There is an obligation upon the court before granting leave to consider the position of non-resident defendants who do not appear as well as to consider the objections of those who appear, and especially, when they are the real contestants.[2710] Non-residents include even residents outside India.[2711] The merits of an order refusing leave under section 20(b), cannot be attacked in an appeal from an order returning a plaint to be presented to the proper court.[2712]

[s 20.10] Acquiesce

Section 20 of the Code of Civil Procedure of 1882 provided that if a defendant, not residing within the jurisdiction, did not apply to the court for a stay of proceedings, he should be deemed to have acquiesced in the institution of the suit.[2713] The clause has been omitted from the Code of Civil Procedure, 1908. There is no provision for such a presumption also in sections 22–24. Accordingly, the Calcutta High Court held that a defendant could not be deemed to have acquiesced on the ground that he failed to apply for a transfer.[2714] In a divorce petition under the Hindu Marriage Act, 1955, the defendant had raised objection to territorial jurisdiction in the written statement and issue had also been framed on the said objection. The Madhya Pradesh High Court held regarding the plea that as the objection was not raised about territorial jurisdiction at earliest opportunity, the same cannot be raised at later stage, is intenable.[2715]

However, if a party to the suit has admitted the territorial jurisdiction of a court, he would be estopped from denying it at a later stage on the ground that he could not both, approbate and reprobate.[2716] One defendant carried on business or resided within jurisdiction of the court. Another defendant was not residing or carrying on business or personally working for gain within the jurisdiction of that court. It is only if he acquiesced that the court would have jurisdiction unless leave of court is obtained.[2717]

2707. *Bank of India v Mehta Brothers*, AIR 1984 Del 18.
2708. *Narayan v Secretary of State*, (1906) ILR 30 Bom 570.
2709. *Dwarakadas v Hanuman Das*, AIR 1961 Raj 187 : (1960) ILR Raj 1497; *Manoramabai v Ibrahim Khan*, AIR 1969 Bom 366.
2710. *Dalsukh Nathmal v Motilal*, AIR 1938 Ngp 262 : (1940) ILR Nag 502; *BG Guttal v RR Diwakar*, AIR 1977 Kant 211 : (1977) 1 Kant 287.
2711. *Swaminathan v Somasundaram*, AIR 1938 Mad 731 : (1938) ILR Mad 1080.
2712. *Allan Brothers v Anrui Mal*, AIR 1925 Lah 338 : (1925) 7 Lah LJ 68.
2713. *Venkata v Krishnasami*, (1883) ILR 6 Mad 344; *Ramappa v Ganpat*, (1906) ILR 30 Bom 81.
2714. *Ratan Chand v Secretary of State*, (1914) 18 Cal WN 1340; *Manuranabhai v Ibrahim Khan*, AIR 1969 Bom 366.
2715. *Rajesh Makhija v Smt. Mamta alias Shalu*, AIR 2006 MP 23 : 2005 (3) MPLJ 564 (Gwalior Bench).
2716. *Controller of Insurance v Vanguard Insurance Co Ltd*, AIR 1966 Mad 437.
2717. *Orient Middle East Lines Ltd Bombay v Brace Transport Corp of Montovia*, AIR 1986 Guj 63.

[s 20.11] "Personally works for gain"

These words were inserted to give jurisdiction where a person lives outside the local limits of jurisdiction but comes within them to work for gain as the case of a pleader who lives outside the jurisdiction of the high court where he practices.[2718] The word "works" implies mental or physical effort and does not apply to the receipt of offerings by a Hindu priest.[2719] As already stated, the phrase "works for gain" is not applicable to the government,[2720] nor to companies or corporations.[2721]

[s 20.12] Cause of Action

Section 20 of the CPC recognises the territorial jurisdiction of courts, inter alia, wherever the cause of action wholly or in part arises.[2722]

The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense, "cause of action", means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously, the expression means every fact by which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises "cause of action". It has to be left to be determined in each individual case as to where the cause of action arises.[2723] The cause of action means the circumstances forming infraction of the right or immediate occasion for action. It is left to be determined in each individual case as to where the cause of action arises. The cause of action in suit/petition has no reference to the defence taken in the suit, nor is it related to the evidence by which the cause of action is established.[2724]

A suit is always based on a cause of action. There can be no suit without a cause of action and such cause of action having accrued to the plaintiff, the jurisdiction of the court in a matter of contract will depend on the situs of the contract and the cause of action arising through connecting factors. A cause of action is a bundle of facts which taken with the law applicable, gives the plaintiff a right to relief against the defendant.[2725] It must include some act done by the defendant since in the absence of an act no cause of action can possibly accrue.[2726] It is not limited to actual infringement of right sued on, but includes all the material facts on which it is founded.[2727] It does not comprise of evidence necessary to prove such facts, but every fact

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2718. *Rai Narain v Newtaon*, (1873) 6 NWPHCR 25.
2719. *Goswami v Goverdhanlalji*, (1890) ILR 14 Bom 541.
2720. *Daya Narain v Secretary of State*, (1887) ILR 14 Cal 256, pp 273–74; *UOI v Ladulal*, AIR 1963 SC 1681.
2721. *ST&E Works v JN Sen*, AIR 1959 Cal 461.
2722. *KLG Systel Ltd v Fujitsu, ICIM Ltd*, AIR 2001 Del 357.
2723. *Rajasthan High Court Advocates Association v UOI*, AIR 2001 SC 416 : AIR 2001 SCW 1 : (2001) 2 SCC 294.
2724. *Sucheta Dilip Ghate v Dilip Shantaram Ghate*, AIR 2003 Bom 390 (DB).
2725. *Dhanajishaw v Fforde*, (1887) ILR 11 Bom 649; *Musa v Manilal*, (1905) ILR 29 Bom 368; *Raghoonath v Gobindnarain*, (1895) ILR 22 Cal 451.
2726. *Radhakrishnamurthy v Chandrasekhara*, AIR 1966 AP 334; *Ram Avalamb v Jata Shankar*, AIR 1969 All 526, p 536; *Ujjal Talukdar v Natichand*, AIR 1969 Cal 224; *Il'Veen Chettiar v ST Officer, Bombay*, AIR 1971 Mad 155; *Salik Ram v Ram Lakhan*, AIR 1973 All 107.
2727. *Puranmal v Onkarmath*, AIR 1959 Pat 128 : (1959) ILR 38 Pat 247.

necessary for the plaintiff to prove to enable him to obtain a decree.[2728] Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action;[2729] but it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.[2730] "A cause of action" means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.[2731] It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour.[2732] In legal parlance, the expression "cause of action" is generally understood to mean a situation or a state of facts that entitle a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.[2733]

The cause of action must be antecedent to the institution of the suit.[2734] Accordingly, when a plaintiff filed a suit for ejectment 15 days before he was entitled to possession, he failed for want of cause of action.[2735] The death of the assured is a material part of the cause of action, the plaintiff is bound to prove the fact if traversed and if not proved, the defendant will have an immediate right to judgment. Hence, the court at the place where the assured died has jurisdiction to try a suit for recovery of the insurance money.[2736] Courts in whose jurisdiction the cheques were dishonoured shall have the jurisdiction.[2737]

Where the work in question was awarded and executed in Maharashtra, the show cause notice was in Maharashtra by the Assistant Labour Commissioner, the whole cause of action took place in Maharashtra and respondents 7 to 9, against whom petitioner claims a cause of action, are based in Maharashtra, mere impleadment of Coal India Ltd, the nodal authority, or of Union of India will not confer jurisdiction to Delhi High Court.[2738]

In a case relating to agreement of settlement between bank and loanee a dispute arose as to territorial jurisdiction of court. Every act connected with the loan was performed by the parties at Delhi, like communication as regards increased offer in the original proposal was made by the plaintiff to the office of the bank at Delhi, the draft attached to the said communication was also issued by bank at Delhi, even proceedings of meetings of the independent settlement

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2728. *Dhanraj Mills v NP Boobna*, AIR 1949 Pat 270 : (1948) ILR Pat 723; *Arthur Butler v District Board of Gaya*, AIR 1947 Pat 134 : (1946) ILR Pat 292; *Reed v Brown*, [1888] 22 QBD 128, p 131; *Murti v Bhola Ram*, (1893) ILR 16 All 165 (FB); *Salima Bibi v Sheik Muhammad*, (1896) ILR 18 All 131; *Muhammad Zakaria v Muhammad Hafiz*, (1917) ILR 39 All 506; *Baroda Oil Cakes Traders v Parshotham*, AIR 1954 Bom 491; *Yar Mohamed v Lakshmi Das*, AIR 1959 All 1; *Baku Mahton v Widow of Anathi Thakur*, AIR 1978 Pat 146.
2729. *Arthur Butler v District Board of Gaya*, (1936) ILR15 Pat 292; *Reed v Brown*, (1888) 22 QBD 128; *Joshi v State of Bombay*, AIR 1959 Bom 363 : (1959) ILR Bom 1267.
2730. *ABC Laminart Pvt Ltd v AP Agencies Salem*, (1989) 2 SCC 163 : (1994) 6 SCC 322.
2731. *Cook v Gill*, (1873) 8 CP 107; *London Bombay Bank v Badee*, (1880) ILR 5 Bom 42; *Narayan v Secretary of State*, (1906) ILR 30 Bom 570; *Alexander Brault v Indra Krishna*, AIR 1933 Cal 706, (1933) ILR 60 Cal 918; *Amrit Kunwar v Gur Charan*, AIR 1934 All 226; *Narayanamurthy v Gangaraju*, AIR 1958 AP 451.
2732. *Gauda Singh v Zora Singh*, AIR 1950 Pepsu 21; *Chand Kour v Partab Singh*, (1889) ILR 16 Cal 98, 102, 15 IA 156; *Venkatesha Bhat v Kamal Pat Motila*, AIR 1957 Mad 201; *Gupta v Vishnu*, AIR 1958 Nag 204 : (1956) ILR Nag 556.
2733. *Navin Chandra N Majithia v State of Maharashtra*, [2000] 3 LRI 1013.
2734. *Dominion of India v Nath & Co*, AIR 1950 Cal 207; *Mahant Gobind v Rani Debendrabala*, (1919) 4 Pat LJ 387, 393.
2735. *Gulzar Singh v Kalyan Chand*, (1893) ILR 15 All 399.
2736. *Life Insurance Corporation of India v Krishna Singh*, AIR 1999 Pat 106.
2737. *Chanana Steel Tubes Pvt Ltd v Jaitu Steel Tubes Pvt Ltd*, AIR 2000 HP 48; *Board of Trustee for the Port of Calcutta v Bombay Flour Mills Pvt Ltd*, (1995) 2 SCC 559.
2738. *Groheven Tradex Private Ltd v UOI*, AIR 2001 Del 37.

advisory, wherein the plaintiff participated, took place at the head office of the bank at Delhi. The High Court of Delhi held that mere communication of the letter of repudiation of the settlement agreement was sent from Meerut to Ghaziabad would not divest the High Court at Delhi of territorial jurisdiction.[2739]

In a case where petition seeking appointment of arbitrator was filed, it was held that major part of cause of action arose within the jurisdiction of Jharkhand State and within the district of Bokaro and, therefore, section 20 of the Code of Civil Procedure read with section 2(1)(c) and section 11(12)(b) of the Arbitration and Conciliation Act, 1996, confers territorial jurisdiction to Jharkhand High Court.[2740]

Section 45 of the Arbitration and Conciliation Act, 1996, mandates that a judicial authority under certain circumstances has to mandatorily refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. A judicial authority has no option but to refer the parties to arbitration notwithstanding anything contained in the Arbitration and Conciliation Act, 1996, or in the CPC. Thus, even if, under section 9 read with section 20 of the CPC, the high court had the jurisdiction to entertain the suit, once a request is made by one of the parties to refer the parties to arbitration, the high court is bound to refer the parties to arbitration unless it finds that the said agreement referred to in section 44 was null and void, inoperative or incapable of being performed. Section 45 does not even require a formal application to be made for the purpose. It refers to the *request* of one of the parties or any person claiming through or under him to refer the parties to arbitration.[2741]

When it comes to the question of territorial jurisdiction relating to the application under section 11 of the Arbitration and Conciliation Act, 1996, section 20 becomes relevant.[2742]

In a suit for injunction in the case of infringement of patent under the Patents Act, 1970, it was held that the industrial unit where two products were manufactured by the plaintiff was situated in SIIDCUL, Pant Nagar within the limits of Udham Singh Nagar, Uttarakhand and hence the court at Uttarakhand would have jurisdiction. However, because of suppression of facts, the discretionary relief of injunction was refused.[2743]

The provisions of Hindu Adoptions and Maintenance Act, 1956, are beneficial for women and infirm old parents for their maintenance while in distress. It cannot be presumed by any stretch of imagination that such person in distress would have to run from pillar to post for relief under the provisions of Hindu Adoptions and Maintenance Act, 1956, if the husband or son keeps on changing his residence or prefers to reside in a far away town from the town of wife or parents. In view of this taking of recourse to clause (c) of section 20 of the CPC. the proceedings could be instituted at the place of residence of wife, who is residing at a different place than her husband. The family court at the place where wife and daughter reside. therefore, shall have jurisdiction to entertain the said petition filed by the appellants under the provisions of Hindu Adoptions and Maintenance Act, 1956, and the Special Marriage Act. 1954.[2744]

2739. *Maharaji Educational Trust v Punjab and Sind Bank*, AIR 2006 Del 226 : 2006 (127) DLT 161.
2740. *Rungta Projects v Tenughat Vidyut Nigam Ltd*, AIR 2006 Jhar 64 : 2005 Cal WN 1084.
2741. *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pvt Ltd*, AIR 2014 SC 968 : (2014) 11 SCC 639; see also *Chloro Controls India (Pvt) Ltd v Severn Trent Water Purification Inc*, (2013) 1 SCC 641.
2742. *Swastik Gases (Pvt) Ltd v Indian Oil Corp Ltd*, (2013) 9 SCC 32 : 2013 (8) Scale 433.
2743. *Acme Tele Power Ltd v Sintex Industries Ltd*, AIR 2008 Uttr 49 : MIPR 2009 (1) 321.
2744. *Sucheta Dilip Ghate v Dilip Shantaram Ghate*, AIR 2003 Bom 390 (DB).

[s 20.13] Cause of Action in Writs

In order to confer jurisdiction on a high court to entertain a writ petition or a special civil application, the high court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. It is clear that each and every fact pleaded in the application does not *ipso facto* lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the *lis* that is involved in the case. Facts which have no bearing with the *lis* or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned.[2745]

The entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved before the petitioner can obtain a decree in the material facts.

The expression "material facts" is also known as integral facts. Keeping in view the expressions used in clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction of "cause of action" accrues within the jurisdiction of the court, the court will have jurisdiction in the matter. However, even if a small part of "cause of action", arises within the territorial jurisdiction of the high court, the same by itself may not be considered to be a determinative factor compelling the high court to decide the matter on merit. In appropriate cases, the court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of *forum conveniens*.[2746] In *Ambika Industries v Commissioner of Central Excise*,[2747] the Supreme Court followed its earlier judgement in *Kusum Ingots & Alloys Ltd*,[2748] and held that although in view of section 141 of the CPC, the provisions thereof would not apply to writ proceedings, the expressions used in section 20(c) and Article 226(2) of the Constitution, being *pari materia*, the decisions of the Supreme Court rendered on the interpretation of section 20(c) of the CPC shall apply to the writ proceedings also.

In a dispute arising out of breach of contract, it was held by the Allahabad High Court that acceptance of tender and its communication by respondents to petitioners by e-mail at the place where petitioner carried on his business amounted to completion of contract. Therefore, part of cause of action having arisen at that place in the State of Uttar Pradesh, the Allahabad High Court has territorial jurisdiction to entertain writ petition. It was further held in the case that any ouster clause in the contract can oust the territorial jurisdiction of civil court but not of the high court under Article 226, which cannot be curtailed even by statute.[2749]

A full bench of the Kerala High Court has held that in view of the provisions contained in Article 226(2) of the Constitution of India, a writ petition can be maintained in a high court within the territorial jurisdiction of which an integral part of the cause of action has arisen. Though the expression "cause of action" is not defined either in the Constitution or in the Code of Civil Procedure, it has to be understood in the light of section 20(c) and it means a bundle of facts which is required to be proven by a petitioner or a plaintiff to seek relief in a court of law.[2750]

2745. *UOI v Adavi Exports Ltd*, AIR 2002 SC 126 : (2002) 1 SCC 567 : 2001 (7) Scale 575.
2746. *Kusum Ingots & Alloys Ltd v UOI*, AIR 2004 SC 2321 : (2004) 6 SCC 254.
2747. *Ambika Industries v Commissioner of Central Excise*, AIR 2007 SC 1618 : (2007) 6 SCC 769.
2748. *Kusum Ingots & Alloys Ltd v UOI*, AIR 2004 SC 2321 : (2004) 6 SCC 254 : 2004 (5) Scale 304.
2749. *PR Transport Agency v UOI*, AIR 2006 All 23 : 2005 All LJ 3568 (DB).
2750. *The Registrar v KG Viswanathan*, 2014 (4) Ker HC 451 : 2014 (4) Ker LJ 640.

The Supreme Court has held that "cause of action" referred to in Article 226(2) of the Constitution, carries the same meaning as section 20(c) of the CPC. The high court can issue a writ when the person or the authority against whom the writ is issued is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the court's territorial jurisdiction. The question of whether or not the cause of action wholly or in part has arisen within the territorial limit of any high court has to be decided in the light of the nature and character of the proceedings under Article 226.[2751]

[s 20.14] Cause of Action in Suits on Contracts

The corresponding section of the Code of Civil Procedure of 1882 merely referred to the place where the cause of action arose. It was not clear whether this meant the whole cause of action or any part to the cause of action. The section was therefore amended by section 7 of Act 7 of 1888, which added an *Explanation* as to the significance of the term when applied to contracts. The *Explanation* was as follows:

> *Explanation III*—In suits arising out of contract, the cause of action arises within the meaning of this section of any of the following places, namely:
>
> (i) the place where the contract was made;
>
> (ii) the place where the contract was to be performed or performance thereof completed;
>
> (iii) the place wherein performance of the contract any money to which the suit relates was expressly or impliedly payable.

This *Explanation* made it clear that in suits on contracts, cause of action meant the whole or any part of the cause of action, but it was still not clear that it meant the same in other suits.[2752] In the Code, the words "wholly or in part" have been inserted after the words "cause of action" which make it plain that all suits may be instituted where the cause of action arises wholly or in part.[2753] *Explanation III* has been omitted as no longer necessary but it is nevertheless a correct statement of what is still the law.[2754] The Supreme Court has laid down the following propositions regarding venue for suits on contract:

(i) Ordinarily, acceptance of an offer and its intimation, result in a contract; hence, a suit can be filed in a court within whose jurisdiction the acceptance was communicated.

(ii) The performance of a contract is part of the cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed.

(iii) In suits for agency actions, the cause of action arises at the place where the contract of agency was made or the place where the actions are to be rendered and the payment is to be made by the agent.

(iv) Part of the cause of action arises where money is expressly or impliedly payable under a contract.

(v) In cases of repudiation of a contract, the place where the repudiation is received, is the place where the suit would lie.

2751. *Nawal Kishore Sharma v UOI*, AIR 2014 SC 3607 : (2014) 9 SCC 329.
2752. *Banke Behari v Pokhe Ram*, (1903) ILR 25 All 48.
2753. *Salig Ram v Chaha Mal*, (1912) ILR 34 All 49; *BC Paul & Sons v UOI*, AIR 1978 Cal 423.
2754. *Peoples' Insurance Co v Benoy Bhusan*, AIR 1943 Cal 199 : (1943) ILR 1 Cal 564; *Sita Ram v Ram Chandra*, (1918) PR 26.

(vi) If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and the contract is found to be invalid, such part of the cause of action disappears.[2755]

Some of the connecting factors have been thus set out in the judgment of the Supreme Court. In a suit for damages for breach of contract, the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract; but, making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation results in a contract and hence, a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract would have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions, the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of the cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If the contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and the contract is found to be invalid, such part of the cause of action disappears. The above are some of the connecting factors.[2756]

In a case relating to breach of confidentiality clause in service contract, the Supreme Court has held that "cause of action" and "applicability of law" are two distinct, different and independent things and one cannot be confused with the other. The fact that service contract was entered into outside India would not be relevant when the breach of confidentiality clause took place at Delhi and consequently a court at Delhi would have jurisdiction to try the suit. It was observed that though section 20 of the Code has been designed to secure that justice might be brought as near as possible to every man's hearthstone and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself, but in a case of breach of confidentiality clause in a service contract, the place where the breach has taken place will have jurisdiction.[2757]

All terms of the contract were negotiated and finalised in Bombay. It was, thereafter, that the formal contract was engrossed and sent to Ludhiana for the signatures of respondent. The respondent's director signed the contract, document and forwarded it to its broker at Bombay, for onward transmission to the petitioner for taking necessary action. This issue can be looked at in two ways. If the contract is said to have been concluded when the terms were prepared, then obviously that took place in Bombay. If the contract is said to have been finalised only after both parties had signed, then it is clear that only one of the parties signed at Ludhiana and other signed it in Bombay.[2758]

In a suit for damages for breach of contract, the cause of action consists of the making of the contract, and of its breach; so that the suit may be filed either at the place where the contract

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2755. *ABC Laminart Pvt Ltd v AP Agencies, Salem*, AIR 1989 SC 1239 : (1989) 2 SCC 163 : 1989 (1) Scale 633.
2756. *ABC Laminart Pvt Ltd v AP Agencies, Salem*, AIR 1989 SC 1239 : (1989) 2 SCC 163 : 1989 (1) Scale 633.
2757. *Laxman Prasad v Prodigy Electronics Ltd*, AIR 2008 SC 685 : (2008) 1 SCC 618.
2758. *Toepfer International Asia Pvt Ltd v Thapar Ispat Ltd*, AIR 1999 Bom 417.

was made or at the place where it should have been performed and the breach occurred.[2759] Thus, if a contract is made in Poona to be performed in Poona, the whole cause of action arises in Poona and the suit for breach can only be filed in the Poona Court; but, if the contract is made in Poona to be performed in Belgaum, the suit for its breach can be filed either in the Poona or the Belgaum court. No leave of the court is required in respect of a suit where part of the cause of action arises out of jurisdiction as in the case of high court suits governed by clause 12 of the Letters Patent. But if the suit is for damages for breach of contract to ship goods to Calcutta and the goods are rejected at Calcutta, the rejection is part of the cause of action and the suit can be filed in the high court at Calcutta with leave under clause 12 of the Letters Patent.[2760] A suit seeking compensation for non-delivery and short delivery of the goods instituted in a court within whose jurisdiction neither goods were booked nor were delivered, it was held that such court would not have the jurisdiction to entertain the suit.[2761] The real place of making of contract is a place where communication came to hand or was received and in case of communication by post or telegram, the place where it started its journey and not at the place where it ended is the place where cause of action in part would arise and not the place where it came to be received.[2762] In this case, the petitioner entered into an agreement with the Government of Maharashtra in 1968. In 1972, the petitioner abandoned the work. Under clause 3(b) of the agreement, the appropriate authority of the Government of Maharashtra determined a sum to be recovered from the petitioner. Thereafter, a recovery certificate was issued by the officer of Maharashtra to the collector of Jhansi (Uttar Pradesh) for recovering the above amount as arrears of land revenue. The construction contract was executed in the State of Maharashtra. The liability of the contractor for abandonment of the contract arose in Maharashtra. It was held that the challenge to the liability as determined by the officer of Maharashtra cannot be challenged in the courts in Uttar Pradesh.[2763] When port of loading was Bombay, and the consignee was located in Zurich, Switzerland, no part of "cause of action", had arisen in Delhi, the defendant did not have principal place of business or habitual residence in Delhi, the goods were to travel firstly by sea and thereafter by road, rail or air, the subject carriage would constitute multimodal transport thereby attracting the provisions of section 20. It was held that the Delhi High Court has no jurisdiction to entertain the suit.[2764]

[s 20.14.1] Making of a Contract

The making of a contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made.[2765] The determination of the place where it was made is part of the law of contract. When offeror and offeree are not at one place and exchanging the offer and acceptance through post, then the contract would be deemed to have been entered

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2759. *ABC Laminart Pvt Ltd v AP Agencies, Salem*, AIR 1989 SC 1239 : (1989) 2 SCC 163 : 1989 (1) Scale 633; *Arthur Butler v District Board of Gaya*, (1936) ILR 15 Pat 292; *Dhunjisha v Fforde*, (1887) ILR 11 Bom 649, p 652; *Mulchand v Suganchand*, (1876) ILR 1 Bom 23 (hundi); *Doya v Secretary of State*, (1887) ILR 14 Cal 256; *Rampurtab v Premsuk*, (1891) ILR 15 Bom 93; *Dobson v Bengal Spg & Wvg Co*, (1897) ILR 21 Bom 126; *Seshagiri Row v Nawab Askur*, (1904) ILR 27 Mad 494.
2760. *Engineering Supplies v Dhandhania*, AIR 1931 Cal 659 : (1931) ILR 58 Cal 539.
2761. *UOI v New India Assurance Co Ltd*, AIR 1997 Del 54.
2762. *ONGC v Muderu Construction & Co*, AIR 1998 Guj 46 (DB).
2763. *Chetan Swarup v Collector, Jhansi District*, AIR 1994 All 269 (DB).
2764. *Bhat Carpets v AMI India Logistics Pvt Ltd*, AIR 2004 Del 404.
2765. *D Muhammad Shafi v Karamat Ali*, (1896) PR 76; *Sita Ram v Ram Chandra*, (1918) PR 26; *Sukh Ram v Chaba Mal*, (1912) ILR 34 All 49; *Jupiter General Insurance Co v Abdul Aziz*, AIR 1924 Rang 2. (1923) 1 Rang 231; *Dobson v Bengal Spg & Wvg Co*, (1879) ILR 21 Bom 126; *Jai Ram v Babha*, (1920) 1 Lah 203.

into at the place where the offer was received and the acceptance was posted. The place of delivery of acceptance is irrelevant and does not provide any cause of action.[2766] Where the goods were sent from place *A* to place *B* and the goods, forwarding note contained a clause that jurisdiction for deciding disputes between the parties would be at place *C* and subsequently the letter of subrogation and Power of Attorney was granted at place *D* in favour of the insurer, who compensated the consignee for the loss sustained by him in an accident during the said transportation, the suit for recovery of damages by the consignee and the insurer against the carrier is maintainable before the trial court at place *D* as subrogation was also a part of "cause of action", which has arisen at place *D*.[2767]

A contract by correspondence is made at the place where the letter of acceptance is posted so far as the proposer is concerned;[2768] it is repudiated at the place where the letter of such repudiation is received.[2769] If acceptance is by performance of a condition, the suit may be instituted at the place where the condition is performed.[2770] If the petitioner carries business at Calcutta or replies by mails to correspondence made by it, received at Calcutta, this is not an integral part of cause of action, so, Calcutta High Court has no jurisdiction to entertain writ petition.[2771] In *Bombay Steam Navigation Co Ltd v UOI*,[2772] the High Court of Bombay held that the making of an offer is part of the cause of action and therefore, a suit could be instituted in the court within whose jurisdiction the offer was made. The court held that the receipt of acceptance of an offer was part of the cause of action and that therefore, the suit could be filed at the place where it was received. Both these points were dissented from by the same high court in a subsequent decision on the grounds, firstly, that an offer would be complete only when communicated and therefore the mere dispatch of an offer was not sufficient to give jurisdiction of the court, and secondly, that as a contract is complete when it is accepted, the communication thereof is not a part of the cause of action.[2773] It is well-settled that making of an offer at a particular place does not form part of the cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of such an offer and its intimation result in a contract unless the offeror has waived such intimation or the course of negotiations implies an agreement to the contrary. Revocation of a contract is part of the cause of action. Hence, a suit can be filed in a court within whose jurisdiction it was communicated.[2774] A tender for the construction of a building at Kolhapur was accepted by the government. The acceptance was communicated to the contractor by the government at the contractor's head office in Pune. It was held that part of the cause of action arose at Pune. Hence, the Pune court had jurisdiction to entertain a petition under section 8(1)(b), read with section 2(b) of the Arbitration Act, 1940 (repealed by the Arbitration and Conciliation Act, 1996).[2775] Plaintiff entered into an agreement for the sale of silicon by the plaintiff to the defendant. There was preliminary negotiation at New Delhi. The agreement was sent by the defendant to the plaintiff and the

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2766. *Progressive Construction Ltd v Bharat Hydro Power Corp Ltd*, AIR 1996 Del 92.
2767. *Kalpala Transport Co Ltd v Oriental FRG I Co Ltd*, AIR 2001 Mad 264.
2768. *Dhanraj Mills Ltd v Boobna*, AIR 1949 Pat 270; *Manilal v Venkatachalapathi*, AIR 1943 Mad 471; *Ratanlal v Harcharan*, AIR 1947 All 337 : (1947) ILR All 44; *Kamisetti v Katha*, (1904) ILR 27 Mad 355; *Muhammad Esuff v M Haleem & Co*, AIR 1934 Mad 581.
2769. *Dhanraj Mills Ltd v Boobna*, AIR 1949 Pat 270.
2770. *Sitaram v Thompson*, (1905) ILR 32 Cal 884.
2771. *National Textile Corp Ltd v Haribox Swalram*, AIR 2004 SC 1998 : (2004) 9 SCC 786 : 2004 (4) Scale 227.
2772. *Bombay Steam Navigation Co Ltd v UOI*, AIR 1954 Bom 145.
2773. *Baroda Oil Cakes Traders v Purshottam*, AIR 1954 Bom 491 : 1954 (ILR) Bom 1137; *Firm Kanhaiyalal v Dinesh Chandra*, AIR 1959 MP 234.
2774. *Arthur Butler & Co Ltd v District Board of Gaya*, 15 Pat 292; *Firm Hajarimal v Firm Gulab Chand*, AIR 1956 Nag 118 : (1955) ILR Nag 722; *Venkatesh Bhat v Kamal Pat Motila*, AIR 1957 Mad 201.
2775. *State v Ranjeet Construction*, AIR 1986 Bom 76.

plaintiff later signed the same at Bhubaneswar, making part payment there. Therefore, the acceptance of offer and payment was made at Bhubaneswar, where the cause of action arose.[2776] The High Court of Punjab held that the place where an agreement was accepted, that is to say, where the acceptance of the agreement was conveyed, gives rise to cause of action and to jurisdiction under section 20(c).[2777]

The high court in the above cases elaborated its reasoning in these words:

> Clause (c) of section 20 of the Code deals with "cause of action". In the suit based on a contract, the cause of action will consist of the making of the contract and of its breach at the place where it is to be performed. An action, therefore, for breach of a contract at the option of the plaintiff can be brought either at the place where the contract was made or at the place where the breach was committed. In deciding the question as to where the contract is made, the court must take into consideration the provisions of Section 4 of the Contract Act. A contract is made when an offer of one party is accepted by the other party.[2778]

An action for breach of contract can be brought either at the place where the contract was made or at the place where the breach was committed. In deciding the question as to where the contract is made, the court must take into consideration the provision of section 4 of the Contract Act, 1872. A contract is made when an offer of one party is accepted by the other party. Where acceptance is conveyed to the plaintiff at *C*, a part of the cause of action arises there and the civil court has jurisdiction to entertain petition under sections 14 and 17 of the Arbitration Act, 1940.[2779] In case of a contract by post or telegram, the contract is complete when acceptance of the offer is put in the cause of transmission of the offeror by the offeree by posting a letter or dispatching a telegram and it is the place where acceptance is posted which is the place where the contract is made. However, in the case of a contract by telephone though the offeror and the offeree may be at different places separated by space, they are in a sense in the presence of each other in as much as they can instantaneously hear each other. Communications by telephone or telex, which are instantaneously heard, stand for that reason on a different footing than those by post or telegram and therefore the rule in regard to contracts by post or telegram does not apply to those by telephone and telex. In the case it is the latter, place where acceptance of the offer is received is the place of the contract.[2780] Accordingly, where the offer was made by the plaintiff by telephonic conversation from Ahmedabad and the same was accepted by the defendant by telephonic conversation from Khamgaon, the contract was held to have been made at Ahmedabad where the acceptance was communicated and a part of the cause of action in a suit for damages for breach of contract arose within the jurisdiction of the Ahmedabad court.[2781]

In a suit arising out of contract, making or conclusion of the contract and payment form important parts in determining the cause of action and consequently the territorial jurisdiction of the court. Thus, a suit based on contract can be filed at the place where the contract was made or concluded. On acceptance of offer upon making of demand, the contract would be complete. Thus, where demand drafts were accepted, the place of acceptance of payment would furnish cause of action.[2782]

2776. *Minerals and Metals Trading Corp of India Ltd v Indian Metal & Ferro Alloys Ltd*, AIR 1981 Ori 76.
2777. *UOI v Shibboomal & Sons*, AIR 1989 P&H 205.
2778. *UOI v Shibboomal & Sons*, AIR 1989 P&H 205.
2779. *UOI v Shibboomal & Sons, Chandigarh*, AIR 1989 P&H 205.
2780. *Entores v Miles Far East Corp*, [1955] 2 QB 327.
2781. *Bhagwandas v Girdharlal & Co*, AIR 1966 SC 543.
2782. *Shriram Steel, Raipur v Vandana Trailers, Sakti*, AIR 2008 Chhat 34 : 2008 CgLJ 358.

When the contract is entered into between the parties at a distance, such a contract can invariably be made only by correspondence. In a contract by correspondence, the acceptance must be communicated in some perceptible form as suggested or indicated in the correspondence between the parties, or by speech or other acts. Thus, the question of whether a concluded contract has been made between parties at a distance depends on the facts of the case, and such facts must be established by usual evidence. Where a suit is based on a tripartite agreement between the parties having their headquarters at distant places and it is clear from the contract that the effective date of contract is the date of acceptance of advance payment of money by one of the parties as a part of the performance of the contract and it is agreed to pay the advance by demand draft payable in the bank at Cochin, the court in Cochin would have the jurisdiction to entertain the suit.[2783] As regards repudiation of a contract, the place where such repudiation is received is the place where the suit would lie.[2784] If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of the cause of action disappears. Hence, the suit cannot be said to be within the jurisdiction of the court.[2785]

[s 20.14.2] Termination

Revocation or termination of a contract constitutes a part of the cause of action, and the place where the same takes place, can vest jurisdiction in the court situated therein. In the instant case, although, ostensibly, the letter dated 8 February 1983 tended to formally communicate termination of contract by the respondent to the petitioner, yet, in reality, that termination and repudiation took place when the petitioner had unmitigatingly conveyed to the respondent at *B*, that the agreed rates could not remain in force from 4 December 1979. Petitioner thereby declined to carry out the remaining part of the contract, unless the rates were revised. So far as the existing rates were concerned, there was thus, a clear repudiation. That having taken place at *B* with the receipt of the communication from the petitioner, the court at *B* alone had jurisdiction to entertain the petitioner for reference under the Arbitration Act, 1940.[2786] State of Orissa appointed the plaintiff company as mining agent to raise coal in a colliery within Orissa. Later, the state terminated the contract. This was done by serving a notice of termination. Two notices were served, the first one being served on the plaintiff's agent at *A*, and the second one on the plaintiff company itself at its registered office at *B*. The agent at A had no authority to receive the notice of termination, as per the contract clause. It was held that in the circumstances, the termination by the first notice (served on the agent) was ineffective and section 229 of the Contract Act, 1872, did not help. It was the notice at *B* that effectively terminated the contract. As the termination at *B* constituted a part of the cause of action, the plaintiff was entitled to sue at *B*.[2787]

[s 20.14.3] Performance

The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance

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2783. *Shakti Cement Co Pvt Ltd v FACT*, AIR 1990 Ker 86.
2784. *Fertilizer Corp of India v S. Kumar*, AIR 1965 Punj 107; *Dhanraj Mills Ltd v Boohna*, AIR 1949 Pat 270 : (1948) ILR Pat 723, p 728.
2785. *Surjit Singh v UOI*, AIR 1965 Cal 191.
2786. *Span Consultants Pvt Ltd v Rashtriya Chemicals and Fertilizer Ltd.*, AIR 1982 Del 157.
2787. *State of Orissa v Goenka Investment*, AIR 1983 Cal 438 (DB).

completed.[2788] An intention was shown in the bank guarantee itself that the amount shall be paid to the Finance Secretary to the Government of Sikkim at Gangtok. Accordingly, part of the contract was performable at Gangtok so as to satisfy section 49 and there was jurisdiction to entertain the suit. When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place.[2789] The usual case is that of a contract for the sale of goods and a suit on such a contract may be filed at the place where the goods are deliverable or the price payable.[2790] Thus, if goods for delivery at Allahabad are sold according to sample and paid for in Bombay, the buyer may sue in Allahabad if the goods prove not to be of sample quality.[2791] When a buyer at Kasganj ordered dyes from a seller at Delhi, but after paying for and opening the parcel found it to contain only clay, he was entitled to sue for damages at Kasganj.[2792] Where the textile mill was situated in Bombay, the order for purchase of cloth was placed by the party having business in Calcutta, the supply of cloth was to be made ex-factory from Bombay, the writ petition by the purchaser/petitioner against the mill was found maintainable at Bombay and not in Calcutta.[2793] If not otherwise provided by the contract, goods sold are deliverable at the place where they are sold, or if not ready, at the place of manufacture. If they are sent by common carrier at seller's risk, the contract is performed at the place where they are delivered to the buyer or if at buyer's risk, at the place where they are delivered to the carrier.[2794] In the case of a Free on Board contract (FOB), Bombay, the place of performance is Bombay.[2795] A suit against railway administration for breach of contract for failure to deliver goods could be filed at the place where the goods were consigned as that is part of the cause of action.[2796] Such a suit is also maintainable at the place where the goods were deliverable.[2797] Where a contract for the sale of goods made at Calcutta provided for delivery of goods and payment of price at Calcutta, the entire cause of action arises there, and a suit for damages for breach of the agreement on the ground that the goods were not according to the contract does not lie at Madras where the purchaser was to take delivery.[2798] Where goods delivered to a common carrier were lost through fire while in transit, a suit based on tort would fall under section 19.[2799]

The place of performance is generally expressed in the contract and if not so expressed, it may be inferred from the nature of the act. Thus, a contract to repair a house must be performed where the house is situated, and an agreement to register a mortgage must be

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2788. *Gopikishna v Nikomul*, (1974) 13 Beng LR 461 : 22 WR 79; *Chunilal v Mahiputrav*, (1870) 5 Bom HC 33 (AC); *Premji v Ghulam*, (1908) PR 36; *Bhuttacharya v Cawnpore Woollen Mills*, (1911) 16 Cal WN 325; *Champaklal v Nectar Tea Co*, AIR 1933 Bom 179 : (1933) ILR 57 Bom 306.
2789. *State of Sikkim v Jammu & Kashmir Bank Ltd*, AIR 2002 Sikkim 8.
2790. *Battepati v Calcutta Glass and Silicate Works*, AIR 1949 Mad 145; *Llewhellin v Chunni Lal*, (1882) ILR 4 All 423; *Sheo Charan v Taj Bhai*, (1917) ILR 39 All 368; *Abdur Rashid v Sizing Material Co.*, (1920) ILR 42 All 480 : 56 TC 192; *Patel Bros. v Vadilal*, AIR 1959 Mad 227 : (1959) 1 Mad LJ 106.
2791. *Sheo Charan v Taj Bhai*, (1917) ILR 39 All 368.
2792. *Ram Lal v Bholo Nath*, (1920) ILR 42 All 629.
2793. *National Textile Corp Ltd v Haribox Swalram*, AIR 2004 SC 1998 : (2004) 9 SCC 786 : 2004 (4) Scale 227.
2794. *Winter v Way*, (1964) 1 Mad HC 200.
2795. *Benaim & Co v Debono*, AIR 1924 Cal 514 : 1924 AC 514.
2796. *Ramco Textiles v UOI*, AIR 1960 Ker 275 : (1960) ILR Ker 435 : (1960) Ker LT 352 : 1960 Ker LJ 408; *Gaya Muzaffarpur Roadways v FG Industries Ltd*, AIR 1971 Cal 494.
2797. *Lakshmi Narain v UOI*, AIR 1958 Pat 489; *Fertilizers Corp of India v Tata Iron & Steel Co*, AIR 1965 Punj 143.
2798. *Parthasarathy v Calcutta Glass & Silicate Works Ltd*, (1948) 2 Mad LJ 101; *Subbarao v PK Ginning & Pressing Factory*, AIR 1953 Mad 389 : (1952) 1 Mad LJ 548.
2799. *Kalaswamy v Ponnuswamy*, AIR 1962 Mad 44 : (1961) ILR Mad 1091.

performed at the place where the law requires it to be registered.[2800] If the place is neither expressed in the contract nor implied from the necessities of the case, it will be determined by the court according to the intention of the parties,[2801] or the provisions of sections 48–49 of Contract Act, 1872.

Thus, in *Llewhellin v Chunilal*,[2802] the court said that looking to the ordinary course of business it was the intention of the parties that payment should be made at plaintiff's place of business. Similarly, in *Sreenath Roy v Cally Das*,[2803] a suit for breach of an agreement to mortgage property outside Calcutta was held to lie in Calcutta as the plaintiff's place of business was in Calcutta and the defendant would have to repay the money there to redeem. Ordinarily, in the case of goods purchased or money borrowed, payment must be made at the residence of the seller or lender as the case may be.[2804] In a contract of service which did not fix the place of payment of salary, the salary was held to be payable at the place where the service was rendered.[2805] In a suit for arrears of salary and travelling allowance against the state government, it is the place where the plaintiff was posted and served and not his place of residence which matters for the purpose of jurisdiction.[2806] The fact that such a person serves a notice under section 80 of the CPC does not confer jurisdiction on the court where it is served, as giving of notice does not constitute part of the cause of action.[2807] When *A* sued *B* on a contract of service made at Hyderabad for service was rendered at Hyderabad, alleging that after service was rendered *B* promised to pay in Madras, the court held that there was no consideration for the latter promise, no contract to pay in Madras, and therefore, no breach of contract in Madras so as to enable *A* to sue in Madras.[2808] The State of Orissa appointed the plaintiff company as "mining agent" to get and raise coal from a colliery within Orissa. Plaintiff's contract was terminated by the State of Orissa. Plaintiff sued for damages for breach of contract in West Bengal (Alipore, Calcutta), on the ground that he had made purchase of machinery at Calcutta to enable him to perform the contract and that the Alipore court had jurisdiction. It was held that this did not give the Alipore court jurisdiction. However, in this case, under another head, that court was held to have jurisdiction.[2809] Where a suit is filed for the recovery of amount paid in advance, jurisdiction vests in the court where the advance is made or where the goods are to be delivered.[2810] The principle, that the court of the place where the contract of sale of goods is to be performed by delivery of the goods will have jurisdiction to entertain a suit in respect of non-delivery as per contract, is well accepted.[2811] Where there is a contract for sale of goods, the title to the goods would pass where documents of title are delivered if payment is made through banks on receipt of document. Performance of the contract in such case has to be completed at the destination, by delivery of documents through bank at the destination. Hence, a part of the cause of action arises at the destination.[2812] If

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2800. *Sami v Gopal*, (1873) 7 Mad HC 176; *Patel Bros v Vadilal*, AIR 1959 Mad 227.
2801. *Dhunjisha v Fforde*, (1887) ILR 11 Bom 648; *Muhamad v Muhammad*, (1916) PR 2; *Venkatesh Bhat v Kamal Pat Motilal*, AIR 1957 Mad 201.
2802. *Llewhellin v Chunilal*, (1882) ILR 4 All 423.
2803. *Sreenath Roy v Cally Das*, (1879) ILR 5 Cal 82.
2804. *Bangali Mal v Ganga Ram*, AIR 1923 All 465.
2805. *Beg Mohammed v Kavasji*, (1900) 2 Bom LR 514.
2806. *State of Uttar Pradesh v Raja Ram*, AIR 1966 All 159.
2807. *S Shyam Sunder v Sharma*, AIR 1973 MP 233.
2808. *Seshagiri Raw v Nawab Askur Jung*, (1907) ILR 30 Mad 438; *Kamiseui v Katha*, (1904) ILR 27 Mad 355.
2809. *State of Orissa v Goenka Investment and Mining Industries*, AIR 1983 Cal 438 (DB).
2810. *Jaipur Udyog Ltd v Indian Drugs and Pharmaceutical Ltd*, AIR 1984 All 305.
2811. *Venkatesa v Kamlapati Motilal*, AIR 1957 Mad 201; *Hindustan Malleables v Indian Furnace Co Ltd*, AIR 1979 Pat 146.
2812. *RK Janakiah Chetty v AK Mohan*, AIR 1980 AP 41.

the contract is to be performed at the place where it is made, the suit on the contract must be filed there and nowhere else. A suit for prompt dower by a Mohammedan wife is a suit on contract and the place of performance must be deemed to be the place where the wife has been residing.[2813] In *Dadabhai v Diogo*,[2814] *A* at Karwar sent money to his agent in Bombay with instructions to negotiate a contract for the purchase and shipment of goods from Bombay to Karwar. The agent entered into a contract with *B* and paid him the money, but *B* failed to ship the goods. *A* sued *B* at Karwar, but the court there had no jurisdiction for the contract was made and the money paid in Bombay, and the performance was also to be in Bombay by the shipment of goods from there. A suit for damages for breach of contract and refund of earnest money paid thereunder can be filed at the place where the earnest money was paid as that is part of the cause of action and where that was paid by bill and that was accepted, that amount must be deemed to have been paid at the place of acceptance and a suit can be instituted at the place.[2815] The rejection or repudiation of a claim under a contract of insurance has been held not to be part of the cause of action.[2816]

[s 20.15] Cause of Action in Other Suits

In an administration suit, the undertaking to administer is part of the cause of action.[2817] The grant of probate or letters of administration is part of the cause of action in a suit for a legacy or for a distributive share in the estate of an intestate, or in a suit for the administration of the estate of the deceased testator or intestate.[2818] A suit against executors for administration of estate and for accounts is not a suit for immovable property within section 16 as an inquiry into title of property is only incidental and can be instituted at any court where the cause of action arises wholly or in part.[2819] In a contract of bailment, the payment of the bailee's charge is part of the performance of the contract,[2820] and part of the cause of action also accrues at the place where the goods bailed are stored.[2821] In the suit where material alteration of a cheque fraudulently made is alleged; that fact of the issuance of the cheque constitutes part of the cause of action. Hence, the court at the place where the cheque was issued has jurisdiction to try such a suit.[2822] A suit for a breach of a contract of betrothal may be filed where the breach takes place,[2823] and in case of a contract to marry, at the place where the marriage was to have been celebrated.[2824] A suit for damages for misrepresentation will lie at the place where the misrepresentation was made,[2825] or for wrongful arrest at the place of arrest,[2826] or for death caused by negligence at the place where the death took place,[2827] or for libel at the place of publication.[2828] In actions in tort, aggravation of damages is not part of the cause of action

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2813. *Tulsiman Bibi v Abdul Latif*, AIR 1936 Cal 97 : (1936) ILR 63 Cal 726.
2814. *Dadabhai v Diogo*, (1894) ILR 14 Bom 43.
2815. *Ramdas v Kaluram*, AIR 1960 All 557.
2816. *Kamla Chopra v LIC of India*, AIR 1975 Del 15.
2817. *Srinivasa v Vencatta*, (1906) ILR 29 Mad 239, p 259.
2818. *Re Fuller*, (1854) 2 E&B 573.
2819. *Hemchandra v Direndra*, AIR 1960 Cal 691 : 69 Cal WN 711.
2820. *Boseck v Mandlestan*, (1906) PR 70.
2821. *Ganesh Prasad v Bansidhar*, (1917) 15 All LJ 513.
2822. *KV Bank Ltd v RC Oza*, AIR 1974 Mad 209.
2823. *Bhagsingh v Labhsing*, (1916) PR 93.
2824. *Mathura Prasad v Satya Narayan*, (1922) 65 IC 812.
2825. *Bengal Coal Co v Elgin Cotton Co*, (1870) 2 NWP 13.
2826. *Luddy v Johnson*, (1871) 6 Beng LR 141.
2827. *Shiam Narain v BB & CI Rly*, (1919) ILR 41 All 488.
2828. *Geffert v Rukhand*, (1888) ILR 13 Bom 178; *Chiranjilal v Ribhabdas*, AIR 1955 Raj 291 (for when amounts to publication).

and no jurisdiction can be founded solely thereon.[2829] The cause of action in a suit to set aside a forged Will arises at the place where the Will was published,[2830] or if plaintiff's interest in any property is prejudicially affected by the Will, the suit may be filed at the place where that property is situated.[2831] In a suit to set aside a deed of release executed in Calcutta in plaintiff's interest in property in Bombay, it was said that the cause of action did not arise wholly in Calcutta but included the effect of the release on the Bombay property.[2832] In a contract of insurance of goods made in Rangoon, and providing for payment at Rangoon, the Rangoon High Court held that the cause of action was at Rangoon and not at the place where the goods were destroyed or damaged.[2833] However, the Bombay High Court has dissented from this case on the ground that the destruction or damage of the goods is part of the cause of action. In case of life assurance, it has been held that part of the cause of action arises at the place where the death occurs.[2834] A suit for restitution of conjugal rights may be brought in the court of the place where the husband resides, or it may be brought in the court of the place where the wife resides;[2835] but, if the wife has never lived in the husband's house, the suit must be brought at the place where the wife resides.[2836] A suit for restitution of conjugal rights by Mohammedan husband can be filed in the court within whose jurisdiction the marriage took place as under the Mohammedan Law, marriage is a contract and not a sacrament.[2837] A suit for restitution of conjugal rights can be filed in court within whose jurisdiction the parties are residing and that jurisdiction is not lost by either of the parties subsequently leaving the place.[2838] Where a suit for restitution of conjugal rights against the wife was filed in a court within whose jurisdiction she was living and further relief by way of injunction was claimed against her relations who were alleged to have prevented her from joining the plaintiff and they were neither residing nor carrying on business within the jurisdiction, it was held that the suit was not maintainable as against them.[2839] A right to specific relief for declaration of marriage as void is a suit of a civil nature. A suit to declare invalid a marriage between a Hindu and a Christian can be filed in the court within whose jurisdiction the parties were residing, even if the marriage took place elsewhere.[2840] A suit by a guardian for the custody of his ward removed by the defendant from Allahabad to Lahore may be brought in the court at Lahore, or it may be brought in the court at Allahabad.[2841] A suit for damages for infringement of a trademark may be brought in the court of the place where the defendant resides or in the court of the place where the defendant publishes advertisement constituting infringement of the trademark.[2842]

In another case relating to trademark violation under the Trade Marks Act, 1999, a Division Bench of the Delhi High Court held that the provisions of section 134 of the Act do not

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2829. *Barwankar v Satyanarain Prasad*, AIR 1957 Pat 128.
2830. *Sheodial v Durga Kaur*, (1883) Cal WN 128.
2831. *Nittala Achayya v Nittala Yellamma*, AIR 1923 Mad 109 : (1923) 43 Mad LJ 615.
2832. *Hadjee Ismael v Hadjee Mohommed*, (1874) 13 Beng LR 91.
2833. *Jupiter General Insurance Co v Abdul Aziz*, AIR 1924 Rang 2 : (1923) 1 Rang 231.
2834. *Peoples' Insurance Co Ltd v Benoy Bhusan*, AIR 1943 Cal 199 : (1943) ILR 1 Cal 564; dissenting from *Jupiter General Insurance Co v Abdul Aziz*, AIR 1924 Rang 2 : (1923) 1 Rang 231; *Vishvendra v National Insurance Co*, AIR 1918 Mad 635; *Light of Asia Insurance Co Ltd v Bai Chanchal*, AIR 1932 Bom 392 : (1932) 34 Bom LR 815; *Punjab Mutual Hindu Family Relief Fund v Sardari*, (1918) PR 98.
2835. *Lalitagar v Bai Suraj*, (1894) ILR 18 Bom 316.
2836. *Lakshmi Ammal v Venugopal*, AIR 1934 Mad 407 : (1934) 67 Mad LJ 271.
2837. *Nizamuddin v Huseni*, AIR 1960 MP 212.
2838. *Zahoor Ahmed v Tahra Bi*, AIR 1954 Ngp 51.
2839. *Kaluram v Mangilal*, AIR 1956 MB 160.
2840. *Sanjay Mishra v Eveline*, AIR 1993 MP 54; *Gangabai v Vijay Kumar*, AIR 1974 SC 1126 : (1974) 2 SCC 393 : (1974) SCR 3 882; *Secretary of State v Mask & Co*, AIR 1940 PC 105.
2841. *Charat Chandra v Foram*, (1890) ILR 12 All 213.
2842. *Kheshtra Pal v Pancham Singh*, (1915) ILR 37 All 446.

override the provisions of section 20 of the Code but provide an additional forum and place for filing suit under the Act.[2843] Explaining the applicability of section 134 of the Act in view of section 20 of the Code, M Sharma, J, (as he then was) observed as follows:

> **12.** Now, coming to section 20 of the Code of Civil Procedure, a perusal of the same make it manifest that it is possible to invoke the jurisdiction of a particular Court if the defendants or any of the defendants resides or carries on business or personally works for gain within the jurisdiction of the said Court. When the Trade Marks Act was enacted, the Legislature was fully conscious of the fact that Section 20 of the Code of Civil Procedure provides for a forum and the place in which a suit is required to be instituted. Despite the said fact, Section 134 of Trade Marks Act, 1999 was enacted and while enacting the said provision, which was in addition to the provisions of the Code of Civil Procedure, the Legislature specifically included the non obstante clause, which states "notwithstanding anything contained in the Code of Civil Procedure."
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> **13.** Therefore, in our opinion, in view of the inclusion of the aforesaid expression in the statutory provision "notwithstanding anything contained in the Code of Civil Procedure" the provisions of Section 134 of the Trade Marks Act, 1999 shall have to be read in addition to the provisions of Section 20 of the Code of Civil Procedure.[2844]

In *Dhodha House* Case,[2845] which was under the Trade and Merchandise Marks Act, 1958 (repealed by the Trade Marks Act, 1999), the Supreme Court held that under the Act, to invoke the jurisdiction of the Court, the plaintiff must actually and voluntarily reside at the place or carry out business or personally work for gain. Therefore, where the plaintiff neither resided at the place nor carried on business, the Court at the place would not have territorial jurisdiction merely because its goods are sold at the place. The distinction between the provisions relating to territorial jurisdiction in the Copyright Act, 1957, Trade and Merchandise Marks Act, 1958 and the Trade Marks Act, 1999 has been explained by the Supreme Court in the following words:

> **43.** A cause of action in a given case both under the 1957 Act as also under the 1958 Act may be overlapping to some extent. The territorial jurisdiction conferred upon the Court in terms of the Code of Civil Procedure indisputably shall apply to a suit or proceeding under the 1957 Act as also the 1958 Act. Sub-section (2) of Section 62 of the 1957 Act provides for an additional forum. Such additional forum was provided so as to enable the author to file a suit who may not otherwise be in a position to file a suit at different places where his copyright was violated. The Parliament while enacting the Trade and Merchandise Marks Act in the year 1958 was aware of the provisions of the 1957 Act. It still did not choose to make a similar provision therein. Such an omission may be held to be a conscious action on the part of the Parliament. The intention of the Parliament in not providing for an additional forum in relation to the violation of the 1958 Act is, therefore, clear and explicit. The Parliament while enacting the Trade Marks Act, 1999 provided for such an additional forum by enacting sub-section (2) of Section 134 of the Trade Marks Act. The Court shall not, it is well-settled, readily presume the existence of jurisdiction of a Court which was not conferred by the statute. For the purpose of attracting the jurisdiction of a Court in terms of sub-section (2) of Section 62 of the 1957 Act, the conditions precedent specified therein must be fulfilled, the requisites wherefor are that the plaintiff must actually and voluntarily reside to carry on business or personally work for gain.[2846]

It was further held in the case that activities on the part of the defendant may give to action both under the 1958 Act as also under the 1957 Act. But it would not entitle the plaintiff to invoke the jurisdiction of court in terms of section 62(2) of the 1957 Act. Although O II,

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2843. *Intas Pharmaceuticals Ltd v Allergan Inc*, AIR 2007 Del 108 : 2006 (132) DLT 641 (DB).
2844. *Intas Pharmaceuticals Ltd v Allergan Inc*, AIR 2007 Del 108, at p 111 : 2006 (132) DLT 641 (DB).
2845. *Dhodha House v SK Maingi*, AIR 2006 SC 730 : (2006) 9 SCC 41 : (2006) 1 All LJ 669.
2846. *Dhodha House v SK Maingi*, AIR 2006 SC 730, at p 739 : (2006) 9 SCC 41 : (2006) 1 All LJ 669. SB Sinha, J, speaking for the Bench.

rule 3 of the Code contemplates uniting of several causes of action in the same suit, application of O II, rule 3 of the Code *ipso facto* would not confer jurisdiction upon a court which had none so as to enable it to consider infringement of trade mark under the 1957 Act as also the 1958 Act.[2847]

In the *Dabur India Ltd* case,[2848] this question again came up for consideration before the Supreme Court. In that case, a suit for copyright infringement was filed wherein the relief for passing off action was also claimed. The suit had been filed at the court where the plaintiff resided. It was held that such composite suit is not maintainable. Explaining the decision given earlier in *Dhodha House* case (*supra*), it was observed as follows:

> **29.** What then would be meant by a composite suit? A composite suit would not entitle a court to entertain a suit in respect whereof it has no jurisdiction, territorial or otherwise. Order II, Rule 3 of the Code specifically states so and, thus, there is no reason as to why the same should be ignored. A composite suit within the provisions of the 1957 Act as considered in *Dhodha House* (*supra*), therefore, would mean the suit which is founded on infringement of a copyright and wherein the incidental power of the Court is invoked. A plaintiff may seek a remedy which can otherwise be granted by the court. It was that aspect of the matter which had not been considered in *Dhodha House* (*supra*) but it never meant that two suits having different causes of actions can be clubbed together as a composite suit.

In a suit for infringement of trade mark, the Madras High Court has held that the term "carries on business" in section 62 of Copyright Act, 1957 and section 134(2) of Trade Marks Act, 1999 is not confined to only principal place of business but covers branch or branches where business is carried out. It has been observed that in the scheme of the two enactments, there is a complete departure from the provisions of section 20 of the Code. If the contrast as between two expressions namely, "actually and voluntarily resides" and "carries on business" is correctly perceived, it would reveal that while there is limitation regarding residence, there is no such restriction with reference to "carrying on business".[2849]

Considering the language of section 62 of the Copyright Act and section 134 of the Trade Marks Act, it has been found by the Supreme Court that an additional forum has been provided by including a district court within whose limits the plaintiff actually and voluntarily resides or carries on business or personally works for gain. The expression "*notwithstanding anything contained in the Code of Civil Procedure*" does not oust the applicability of the provisions of section 20 of the Code of Civil Procedure and it is clear that additional remedy has been provided to the plaintiff so as to file a suit where he is residing or carrying on business, etc, as the case may be.[2850]

Suit was filed for infringement of trademark. Defendants were manufacturing and selling their product in Madhya Pradesh by camouflaging registered trademark of plaintiffs. Registration of plaintiffs' trademarks was at Madras and their manufacturing, marketing and selling their product throughout the country was not disputed by the defendants. It was held that part of the cause of action arose at Madras. It was held that High Court of Madras could try it. Since the defendants had not disputed the registration of the trademark of the plaintiffs at Madras and their manufacturing, marketing and selling their product throughout the country, there was no difficulty in holding that on a combined perusal of clause 12 of the

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2847. *Dhodha House v SK Maingi*, AIR 2006 SC 730, at pp 735–736 : (2006) 9 SCC 41 : (2006) 1 All LJ 669.
2848. *Dabur India Ltd v KR Industries*, AIR 2008 SC 3123. (SB Sinha J, speaking for the Bench).
2849. *Wipro Limited v Oushadha Chandrika Ayurvedic India (Pvt) Ltd*, AIR 2008 Mad 165 : (2008) 3 Mad LJ 1 (DB).
2850. *Indian Performing Rights Society Ltd v Sanjay Dalia*, AIR 2015 SC 3479 : (2015) 10 SCC 161 : 2015 (8) SCR 210.

Letters Patent and section 20 of the CPC as well as section 105 of the Act, it can be safely held that the suit can be filed in Madras High Court and the court has jurisdiction to try the same.[2851] A suit for passing-off can be filed at the place where the plaintiff has substantial market for his product. Suit is not required to be filed only at the place where the plaintiff resides.[2852] In a suit for passing-off or for injunction on account of infringement of trademark, the cause of action partly or wholly can arise in a given jurisdiction, only if the defendant is proved to have directly made a sale of goods under the impugned trademark, within the jurisdiction, not to an individual consumer but to a distributor, wholesaler or retailer and if such a sale is on a commercial scale. In the instant case, there was no evidence to show any transaction of sale of goods under the impugned trademark at the place where the suit was instituted, and so, the court at the place had no jurisdiction to entertain the suit.[2853] A suit relating to infringement of trademarks, and for passing-off, cannot be filed in Bombay if the defendants carry on business in Calcutta and there is no proof that the defendants dispatched goods for being sold in Bombay, or that such supply was on commercial basis.[2854] As death of the insured person is a part of the cause of action of suit for recovery of money due on the insurance policy, it can be brought in court having territorial jurisdiction over the place where the insured had died.[2855] A suit for damages for conversion may be brought in the court of the place where the conversion originally took place.[2856] *A* sells and delivers goods to *B* in Bombay. *A* then assigns the debt for the price of the goods to *C* and gives notice of the assignment to *B*. *C* may sue *B* in Poona as the assignment is part of the cause of action.[2857] A suit to set aside a deed can be brought at the place where the deed was registered.[2858] A suit for a declaration that a new constitution framed by a society is invalid can be filed at the place where it was framed.[2859] A suit by a public servant for setting aside an order of dismissal on the ground that he had not been given an opportunity to be heard as required under Article 331 could be filed at the place where the order was passed, as failure to give an opportunity was part of the cause of action and that must be held to have occurred at the place where the order was passed.[2860] A suit for damages for wrongful termination of services can be filed at the place where the services were terminated.[2861] A suit on an award can be filed in a court within whose jurisdiction the agreement to refer the dispute to arbitration was entered into as that is a part of the cause of action.[2862] In a suit for malicious prosecution, the High Court of Rajasthan held that since the essence of a malicious prosecution is the malicious abuse of the process of the court in a particular place, wrong is done to the person, maliciously prosecuted, by serving that process upon him at the place where he is served. Hence, the court within the local limits of whose jurisdiction that place is situated has jurisdiction.[2863] When a bank has branches in different places, each branch is considered as an entity in itself and a suit in respect of dealings

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2851. *Amrutanjan Ltd v Ashwin Fine Chemicals and Pharmaceuticals, Kashi Mira District*, AIR 1991 Mad 277.
2852. *Cadilla Laboratories Pvt Ltd v Ramnath Atul & Co*, AIR 1991 Kant 303.
2853. *HP Horticulture Produce Mktg and Processing Corp Ltd v Mohan Meakin Breweries Ltd.*, AIR 1981 P&H 117.
2854. *Gold Seal Engg Product Pvt Ltd v Hindustan Manufacturers*, AIR 1992 Bom 144.
2855. *Peoples' Insurance Co Ltd v Benoy Bhusan Bhowmik*, (1943) 47 Cal WN 293.
2856. *Kartick Churn v Gopalkisto*, (1877) ILR 3 Cal 264.
2857. *Reed v Brown*, [1888] 22 QBD 128, p 131.
2858. *Rajlakshmi Dassi v Bonomali Sen*, AIR 1950 Cal 510 : 85 Cal LJ 270.
2859. *Sridhar v Jaychandra*, AIR 1959 All 598.
2860. *Hiralal v State of Saurastra*, AIR 1956 Sau 75.
2861. *TRS Mani v IRP Radio Pvt Ltd*, AIR 1963 Mad 30 : (1962) II R Mad 1141 : (1962) 2 Mad LJ 270.
2862. *East India Trading Co v Badat Trading Co*, AIR 1959 Bom 414 : (1959) ILR Bom 1004.
2863. *RP Goala v Amarpal Singh*, AIR 1972 Raj 142; *Khanchand Pokardas v Hiranand*, AIR 1965 Bom 109.

with the branch should be filed in the court within whose jurisdiction the branch has its office and not where the head office is situated.[2864]

Military contract was entered into in Uttar Pradesh. The work was executed in Uttar Pradesh and the award was passed by the arbitrator. Proceedings were instituted in Delhi High Court for making the award a rule of court. It was held that Delhi High Court had no jurisdiction.[2865] There was reference to arbitration of disputes regarding properties located within jurisdiction of two courts. One property was located within the jurisdiction of one of the courts. That court has jurisdiction to entertain proceedings relating to the award.[2866] The doctrine of implied repeal is based on the postulate that the legislature which is presumed to know the existing state of law did not intend to create any confusion by retaining conflicting provisions. Courts in applying this doctrine are supposed merely to give effect to the legislative intent by examining the object and scope of the two enactments. It is a matter of legislative intent that the two sets of provisions of section 20, Code of Civil Procedure and section 18, Presidency Small Causes Courts Act, 1882, were not expected to be applied simultaneously.[2867]

[s 20.16] Section 20 (c) and Article 226 (2) of the Constitution of India

Although in view of section 141 of the CPC, the provisions thereof would not apply to a writ proceeding, the phraseology used in section 20(c) of the CPC and clause (2) of Article 226, being in *pari materia*, the decisions of Supreme Court rendered on interpretation of section 20(c) of the CPC shall apply to the writ proceedings also. Before proceeding to discuss the matter further, it may be pointed out that the entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved before the petitioner can obtain a decree in the material facts. The expression "material facts" is also known as integral facts.[2868]

[s 20.17] Contract of Agency

In suits for an agent's account, the cause of action arises at the place where the contract of agency was made or the place where accounts are to be rendered and payment is to be made by the agents.[2869] It does not arise at the place where a demand for account was made.[2870] In *Lal Singh v Kadir Baksh*,[2871] a Sialkot firm sent hides for sale to their commission agent at Calcutta and were held entitled to sue at Sialkot for the sale proceeds, as the account were to be rendered there and the money was payable there. In *Motilal v Surajman*,[2872] a Bombay merchant *A* ordered goods from time to time from *B* who acted as his *pucca aditia* at Phulgaon. *A* sued *B* in Bombay for the amount due to him on the account. Tyabji, J, held that: (a) instructions were sent by *A* to *B* from Bombay; and (b) as accounts were rendered by *B* to *A* at Bombay; and (c) as demand was made for payment of the amount due from Bombay, payment of the money

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2864. *Hansraj v Indian Overseas Bank Ltd*, AIR 1956 Cal 33; *Nedungadi Bank v Central Bank*, AIR 1961 Ker 50 : (1960) ILR Ker 1444.
2865. *Bakhtawar Singh Balkrishna v UOI*, AIR 1988 SC 1003 : (1988) 2 SCC 293 : 1988 (2) ALR 155 SC : JT 1988 (1) SC 467 : 1988 (1) Scale 527.
2866. *Madhao Deshpande v Madhav Dhamadhikari*, AIR 1988 SC 1347 : (1988) 3 SCC 511 : 1988 (2) ALR 290 SC : JT (2) SC 222 : 1988 (1) Scale 905.
2867. *Ratanlal Adukia v UOI*, (1989) 3 SCC 537.
2868. *Kusum Ingots & Alloys Ltd v UOI*, AIR 2004 SC 2321 : (2004) 6 SCC 254 : JT 2004 1 475.
2869. *Ramdass v Danpat*, AIR 1925 Lah 387 : (1925) 6 Lah 153; *Annamalai Chettyar v Daw Hnin U*, AIR 1936 Rang 251.
2870. *Dharam v Ramlal*, AIR 1961 Punj 567.
2871. *Lal Singh v Kadir Baksh*, AIR 1922 Lah 36 : (1922) 3 Lah LJ 499.
2872. *Motilal v Surajman*, (1906) ILR 30 Bom 167, a case under clause 12 of the Letters Patent.

was intended to be made in Bombay and that a material part of the cause of action arose in Bombay. This case was dissented from in *Tika Ram v Daulat Ram*,[2873] where the Allahabad High Court held that a commission agent doing an independent business of his own is liable to account at his own place of business. This is the view taken in a later Bombay case[2874] and is in accordance with the decisions of the Punjab[2875] and Lahore[2876] courts. Conversely, a commission agent may sue at the place where he carries on business.[2877] The mere sending of goods does not constitute part of the cause of action and does not give jurisdiction of the court of the place from which the goods were sent.[2878] So also, where a contract of commission agent was concluded at Calcutta and goods were sent pursuant to the orders of the commission agent to Amritsar, the cause of action for a suit for accounts against the commission agent arose wholly in Calcutta and the court at Amritsar had no jurisdiction to entertain it.[2879] In *Bilticut* transactions, the buyer gets title to the goods only when the railway receipts are endorsed to him and that being part of the cause of action a suit can be instituted for refund of price paid at the place where they are delivered and it had been further observed that a suit against a commission agent on a *Bilticut* transaction can be brought at a place where part of the cause of action has arisen even if he does not carry on business there.[2880]

[s 20.18] Place Where Money Is Expressly or Impliedly Payable

Part of the cause of action arises where money is expressly or impliedly payable under a contract.[2881] In *Lal Singh v Kadir Baksh*,[2882] the case referred to in the last paragraph, the suit could be instituted at Sialkot as it was an implied term of the contract that the agent should pay his principal there. When the place of payment is not specified, the court will be guided by the intention of the parties.[2883] In a suit based on the refusal of the government to refund sales tax paid by the plaintiff in spite of the order of the sales-tax authority having been set aside, it was held that it would be the court in Bihar State which would have the jurisdiction. The fact that rules 40–43 of the Bihar Sales Tax Rules, 1949, provided for an application of refund to be made to the commissioner for sales tax only and the refund being made payable under these rules only through one of the Bihar State Treasuries implied that the refund was payable at one of those treasuries in Bihar.[2884] The amount due on a balance struck at the foot

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2873. *Tika Ram v Daulat Ram*, AIR 1924 All 530 : (1924) ILR 46 All 465.
2874. *Mahomed Haji v Jute and Gunny Brokers Ltd*, (1931) 33 Bom LR 1364 : AIR 1932 Bom 42: dissenting from *Motilal v Surajmal*, (1906) ILR 30 Bom 167; *Devidatt v Shriram*, AIR 1932 Bom 291 : (1932) ILR 56 Bom 324.
2875. *Muhammad Shafi v Karamat Ali*, (1896) PR 76.
2876. *Bhamboo v Ram Narain*, AIR 1928 Lah 297 : (1928) 9 Lah 455; *Ramditta Mal v Seth Jot Mal*, (1940) AI 1471; *Premnath v Kaudomal*, AIR 1958 P&H 361 : (1958) ILR Punj 682.
2877. *Chandu Lal v Ganeshi Lal*, AIR 1935 Lah 68.
2878. *Nandlal v Kishan lal*, AIR 1928 Bom 548 : (1928) 30 Bom LR 1391; *Puran Chand v Jodh Raj*, AIR 1922 All 448.
2879. *Firm Brijraj v Firm Sagarmal*, AIR 1952 P&H 119; *Pasu & Co v Gulzarilal*, AIR 1958 MP 409.
2880. *Firm Shah Chandran Mal v Hazarilal*, AIR 1962 Raj : (1962) ILR Raj 225; *Firm Hazarilal v Firm Gulab Chand*, AIR 1956 Ngp 118 : (1955) ILR Nag 722.
2881. *UOI v KK Goswami*, AIR 1974 Cal 231 : (1973) ILR 1 Cal 421 : 78 Cal WN 154; *State of Sikkim v Jammu & Kashmir Bank Ltd*, AIR 2002 Sikkim 8.
2882. *Lal Singh v Kadir Baksh*, AIR 1922 Lah 36 : (1922) 3 Lah LJ 499; *Galley & Co v Dabi China Appalaswami Naidu*, AIR 1946 Mad 300; *Appanna v Subbarayulu*, AIR 1957 AP 530.
2883. *Galley & Co v Dabi China Appalaswami Naidu*, AIR 1946 Mad 300; *Dhunjisha v Fjorde*, (1887) ILR 11 Bom 649; *Darragh & Co v Purshotam*, (1881) ILR 4 Mad 372; *Sailendra Nath v Ramsundar*, (1912) 16 Cal LJ 279; *Gafurunissa v Narayan*, (1919) 49 IC 950; *Muhammad v Muhammad*, (1916) PR 2; *Venkatesh Bhat v Kamal Pat Motilal*, AIR 1957 Mad 201.
2884. *State of Bihar v Oriental Coal Co*, AIR 1972 SC 378 : (1972) 4 SCC 468 : 1972 SCR (1) 982.

of an account is payable at the place where the balance was struck although the transactions which were the subject of the account took place elsewhere.[2885] In *Luchmee Chund v Zorawar Mal*,[2886] an account was taken and balance struck on dissolution of a partnership business at Muttra and the Privy Council held that although the partnership agreement had been entered into at Rutlam, the suit for the balance was properly instituted at Muttra as that was the place where the balance was struck and the amount became due and payable. If a seller of goods at Rangoon draws *hundies* on the purchaser at Tuticorin in favour of a bank at Tuticorin, the suit for amount due in respect of the transaction may be instituted at Tuticorin for that is the place where the purchaser has to pay for the goods and it makes no difference that the vendor has discounted the *hundies* at Rangoon.[2887] On the other hand, the mere fact that a cheque is sent in payment from a particular place will not alter the locality of the suit.[2888] When payment is made by cheque and that is honoured, the payment must be held to have been made at the place where the cheque is received and not at the place where it has been cashed.[2889] It is the general agency with liability to account and refund the balance, that is the cause of action, and the fact that a particular collection is made by the agent at a different place will not give jurisdiction to sue at that place.[2890] If under a contract for the sale of goods the price is payable at the seller's place of business, but the buyer failing to pay the seller sends his man to the buyer's residence and the buyer pays at his residence, the buyer cannot in a suit for compensation for inferiority of the goods take advantage of that fact and sue in the court of the place where he resides.[2891] The fact that the creditor is described in a promissory note made at *y* as resident of *K* does not make *K* the place of payment so as to give jurisdiction to the court at *K*. No place of performance being fixed, the question, as stated above is one of intention to be gathered from the contract and the surrounding circumstances.[2892]

[s 20.19] The Debtor Must Find His Creditor

Under the English law, if a place is appointed for the performance of a contract, it is the duty of the creditor to attend at the place named to receive payment; but if no place is appointed, the debtor is bound to find the creditor and tender him the money. In other words, there is an implied promise to pay inter alia where the creditor resides or carries on business. Under the Indian law as enacted in section 49 of the Indian Contract Act, 1872, where no place is fixed for the performance of a promise, whether the promise is to deliver goods or to pay money,[2893] it is the duty of the debtor to apply to the creditor to appoint a reasonable place for the performance of the promise, and to perform it at such place. But what if the debtor does

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2885. *Haimraj v Ram Bux*, (1866) 1 Agra 115.
2886. *Luchmee Chund v Zorawar Mal*, (1860) 8 Moo Ind App 291 (a case under Bengal Regulation Act 2 of 1803).
2887. *Venkatachalam v Rajaballi*, AIR 1935 Mad 663 : (1935) 68 Mad LJ 504 (FB); *Ganesh Parshad v Firm Jawaharsingh*, AIR 1952 P&H 381.
2888. *Sohan Singh v Riddick*, AIR 1922 Lah 164 : (1922) 65 IC 865.
2889. *CIT v Ogale Glass Works*, AIR 1954 SC 429 : (1955) 1 SCR 185 1954 SCJ 577; *Jagdish Mills v CIT*, AIR 1959 SC 1160; *Horsburgh v Chandroji*, AIR 1957 MB 90.
2890. *Shah Sankalchand v Ambalal*, AIR 1930 Bom 150 : (1930) ILR 54 Bom 192.
2891. *Damri Shah v Ralia Mal*, (1920) 2 Lah LJ 555.
2892. *Raman v Gopalachari*, (1908) ILR 31 Mad 223.
2893. *Soniram v RD Tata & Co*, AIR 1927 PC 156 : (1927) 54 IA 265 : 271, 5 Rang 451. The dicta to the contrary in *Tika Ram v Daulat Ram*, AIR 1924 All 530 : (1924) ILR 46 All 465, pp 467–468 are erroneous.

not apply to the creditor to appoint a place? In such a case, it has been held in some cases[2894] that the common law rule applies and there is an implied promise to pay the creditor wherever he might be, and in some[2895] that there is no such duty and no implied promise arises. This question was considered by the judicial committee in *Soniram v RD Tata & Co Ltd*[2896] which arose out of a suit instituted by the respondents in Rangoon for the recovery of the balance due on dealings which they had with the appellants in Calcutta. The contention of the defendant before the Privy Council was that the court at Rangoon had no jurisdiction as he did not reside or carry on business there and that the rule of the common law that debtors should seek the creditor had no application. It was held by the judicial committee that on the terms of the contract the amounts were by implication payable at Rangoon. On this finding, the question of the application of the common law rule did not arise for decision. The Privy Council, however, observed after discussing the decisions of the Indian courts:

> Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that section 49 of the Contract Act gets rid of inferences, that should justly be drawn from the terms of the contract itself or from the necessities of the case involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him.

There has been a divergence of judicial opinion on the precise scope of this decision. On one hand, it has been held that when the debtor does not apply under section 49 and the agreement does not expressly name any place for payment, it would be reasonable and in conformity with justice to invoke the rule of common law.[2897] It is also observed that recourse can be had to that rule in interpreting the agreement where it is silent on the subject.[2898] On the other hand, it has been held that the decision in *Soniram*'s case is one on the terms of the particular contract, that the Rangoon court was held to have jurisdiction because the money was payable there and that the observations relating to the applicability of the common law rule did not amount to a decision on the question and that to apply the technical rule of the common law would be to abrogate the provisions of the Code.[2899] It has further been observed that great caution should be exercised in applying this rule.[2900] The trend in in the 21st century is that even if the common law rule may not be extended to India as a rule of law, courts in India would, in contracts where the place of payment is not provided for expressly or by implication, infer that the parties had implied that payment must be made at the place where the creditor resided or carried on business.[2901] In spite of the disinclination to adopt the common law maxim, it is well-settled that the place of payment would be determined taking

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2894. *Dhunjisha v Fforde*, (1887) ILR 11 Bom 649, 656; *Motilal v Surajmal*, (1906) ILR 30 Bom 167, 171; *Gokul Das v Nathu*, AIR 1926 All 477 : (1926) 48 ILR All 310; *RSEB v Dayal Wood Work*, AIR 1998 AP 381.

2895. *Piyara Singh v Bhagwan Das*, AIR 1951 Pat 33; *Kadarmal v Surajmal*, (1907) 9 Bom LR 903; *Raman v Gopalachari*, (1908) ILR 31 Mad 223.

2896. *Soniram v RD Tata & Co Lt.*, 54 IA 265 : 5 Rang 451 : (1927) PC 156; distinguishing *Pritappa v Virabadrappa*, (1905) 7 Bom LR 993.

2897. *Bharumal v Sakhawatmal*, AIR 1956 Bom 111; *Borakur Engineering and Foundry Works Ltd v State of Bihar*, AIR 1960 Cal 513 : (1960) 64 Cal WN 744.

2898. *Johrimull v Hiralal*, AIR 1961 Pat 198; *Adinarayana v Lakshminarayana*, (1940) 1 Mad LJ 558 : AIR 1940 Mad 588.

2899. *Firm Hiralal v Brijnath*, AIR 1960 P&H 450 (FB) : (1960) II R 2 Punj 291; *Niranjan v Jagat Singh*, AIR 1955 P&H 128.

2900. *Mahaluxmi Bank Ltd v Chota Nagpur Industrial and Commercial Assn*, AIR 1955 Cal 413; *Ramalinga v Jayalakshmi*, AIR 1945 Mad 695.

2901. *Manohar Oil Mills v Bhawani Din Bhagwandin*, AIR 1971 All 326; *Great Eastern Shipping Co v UOI*, AIR 1971 Cal 150; *Shoba Singh & Sons v Saurashtra Iron Foundry*, AIR 1968 Guj 276; *State of Uttar Pradesh v Raja Ram*, AIR 1966 All 159.

into account: (i) the terms of contract; (ii) the attendant circumstances; (iii) the necessities of the case; and (iv) the provisions of the contract and this Code.[2902] The rule does not apply where the facts of the case lead to an inference that payment was intended to be made at a particular place.[2903]

In a suit for recovery payment against fixed deposits wrongfully withheld by bank, the case of the plaintiff was that all decisions with regard to non-payment of due amount in respect of the fixed deposits were taken by the head office of the bank at Delhi. The cause of action in the suit was for non-payment of money due and payable from branch office of the bank at Khidderpore (West Bengal). However, the said branch office is situated outside the ordinary original Civil Jurisdiction of Calcutta High Court. It was held by the Calcutta High Court that neither there was jurisdiction nor leave under clause 12 of the Letters Patent had been sought. Therefore, the suit could have been instituted within whose jurisdiction the branch of the bank is situated, i.e., the District Court of Alipore or at Delhi.[2904]

The rule of the debtor seeking the creditor is not applicable in India for the purpose of determining the local jurisdiction of the courts because that would be engrafting something on to section 20 of the CPC.[2905] The common law rule, however, applies only when the creditor is within the realm. If he is not, the court will infer a negative intention and not apply the rule.[2906] Accordingly, a debtor in an Indian state was held not bound before independence to find and pay a creditor in British India.[2907] But, if the loan was made at a place in British India (Surat), there was an implied obligation to repay it at that place, although the debtor was a resident of an Indian State.[2908] In a claim for the return of a fixed deposit with a bank, it is essential for the plaintiff to prove the terms of the written contract governing the fixed deposit and the place of repayment. In the absence of such proof, the fixed deposit cannot be said to be repayable at any place where the plaintiff resides and makes the demand.[2909] Conversely, it has been held in *Mahaluxmi Bank v Chota Nagpur Industrial and Commercial Association*[2910] that a suit by a bank to recover amounts borrowed by a customer on overdraft account at its branch at Ranchi was not maintainable in Calcutta by reason of its head office being located there, even though the branch at Ranchi had been closed. The common law rule has no application to suits on negotiable instruments which are governed by law merchant.[2911] It has accordingly been held that a suit on a promissory note cannot be filed in the place where the payee resides if it was executed in a different place and the maker also resided there.[2912] The common law rule has no application if the parties do not stand in the relation of debtor and creditor.[2913] Where sales-tax payable under an order of assessment by the State of Bihar was paid by cheque

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2902. *EMES Chettiar v RMANA Chettiar*, AIR 1974 Mad 305.
2903. *Baidyanath v Cool Purchase and Inspection Agency*, AIR 1971 Pat 229; *Mumtaz Begum v Noor Mohammad*, AIR 1965 AP 231.
2904. *Oriental Bank of Commerce v Santosh Kumar Agarwal*, AIR 2008 Cal 148 : (2008) 2 Cal LT 509 (DB).
2905. *Jose Paul v Jose*, AIR 2002 Ker 397 (DB).
2906. *SPC Engineering Co v UOI*, AIR 1966 Cal 259, 264.
2907. *Bansilal v Ghulam*, AIR 1925 PC 290 : (1926) 531 A 58 : 53 Cal 88.
2908. *Nathubhai v Chabildas*, AIR 1935 Bom 283 : (1935) ILR 59 Bom 365.
2909. *Allahabad Bank Ltd v Gullilal*, AIR 1940 All 243 : (1940) ILR All 207.
2910. *Mahaluxmi Bank v Chota Nagpur Industrial and Commercial Association*, AIR 1955 Cal 413.
2911. *Sahni v State of Madhya Bharat*, AIR 1954 MB 184 : (1954) ILR MB 343 (FB); *Horsburgh v Chandroji*, AIR 1957 MB 90; *Jagdish Chandra v Santhi Moyee*, AIR 1961 Cal 321 : 65 Cal WN 113.
2912. *Sailum Easwarayya v Thakur Devi Singh*, AIR 1953 Hyd 289 : (1953) ILR Hyd 510.
2913. *Adinarayana v Lakshminarayana*, (1940) 1 MLJ 558 : AIR 1940 Mad 588; *Galley & Co v Appalaswamy*, (1946) 1 Mad LJ 11; *Shimoga Oil Mills v Radhakrishna Oil Mills*, AIR 1952 Mys 111; *Sundarlal v Jai Narain*, AIR 1955 All 669; *Rampal v Girdhar Lal*, AIR 1955 Ajmer 49; *Kadirsa v Shanmugha*, AIR 1960 Ker 188, 1960 Ker 150.

at Calcutta, and subsequently, the order of assessment was set aside, a suit for the refund of the amount is maintainable at Calcutta on the basis of the common law rule that the debtor should seek the creditor.[2914]

[s 20.20] Negotiable Instruments

It is evident from sections 64 and 70 of the Negotiable Instruments Act, 1881, that in the case of a pronote, just as in the case of bills of exchange or cheques, presentment is necessary with the exception that in the case of pronote payable on demand and not payable at a specified place no presentment is necessary to charge the maker. The place of presentment indicated in section 70 would apply necessarily only to a case where presentment is contemplated. If presentment is not a requirement, even without such presentment the claim would be valid and such a case is one contemplated by the exception in section 64, namely, where a maker of a pronote is sought to be charged on a pronote payable on demand and not payable at a specified place.[2915]

If merely by making an endorsement on the negotiable instrument it is permitted to give rise to jurisdiction of a particular court, it would definitely defeat the purpose of section 20 (c) of the CPC.[2916]

The cause of action in a suit on a negotiable instrument arises wherever any one of the facts the proof of which is essential to plaintiff's case occurs. Thus, a suit may be filed at the place where the bill was drawn, or where it was accepted or dishonoured, or where it was payable. A suit may be instituted at the place where a *hundi* was drawn.[2917] Where a promissory note was signed by the defendant at Secunderabad and delivered to the plaintiff at Madras, the Madras court had jurisdiction as delivery was necessary to complete the plaintiff's title.[2918] If the promissory note is drawn in the jurisdiction of the court, the suit may be filed there, although the promisee is described in the note as resident of another place;[2919] but a promissory note is presumed to have been drawn at the place where it purports to have been executed.[2920] If a *hundi* was neither drawn nor payable in Bombay, it cannot be sued on in the Bombay High Court although it was for the balance of an account of Bombay transactions.[2921] A *hundi* may be sued on at the place where it was dishonoured[2922] or where it was payable.[2923] Courts within whose jurisdiction cheques were dishonoured will have jurisdiction.[2924] A suit on a promissory note executed at Vizanagram and payable at Secunderabad or Madras, is maintainable in the High Court of Madras.[2925] The export firm made payments for losses as per agreement at the headquarters of the corporation by a demand-draft which was encashed by the corporation at that place. Dispute arose as to liability for losses. It was held that the suit can be filed at the place of encashment.[2926] A promissory note not expressly payable at Delhi was delivered

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2914. *Borakar Engineering and Foundry Works v State of Bihar*, AIR 1960 Cal 513.
2915. *Ramasubramoniam v Ranganthan*, 1978 Ker LT 906; *Jose Paul v Jose*, AIR 2002 Ker 397 (DB).
2916. *Mohna Ramakrishanan v Yogam Bala Dev Raj*, AIR 2003 Raj 88.
2917. *Canara Industrial and Banking Syndicate v Narayan Venkatesh*, AIR 1942 Bom 15 : (1942) ILR Bom 101 43 BLR 916; *Rampurtab v Premsuk*, (1890) ILR 15 Bom 93; *Shivji v Hemraj*, (1900) PR 57; *Jewan Lal v Oudh Commercial Bank*, (1916) 34 IC 191; *Basant Ram v Kolahal*, (1878) ILR 1 All 392.
2918. *Winter v Round*, (1867) 1 Mad HCR 202.
2919. *Roman v Gopalachari*, (1908) ILR 31 Mad 223.
2920. *Meenakshi v Myle*, (1905) ILR 28 Mad 19.
2921. *Sewaram v Bajrangdat*, (1916) ILR 40 Bom 473.
2922. *D Mulchand v Suganchand*, (1877) ILR 1 Bom 23; *Narain Das v Kotumal*, (1883) PR 132.
2923. *Damodar Das v Benares Bank*, (1920) 5 Pat LJ 536.
2924. *Chanana Steel Tubes Pvt Ltd v Jaitu Steel Tubes Pvt Ltd*, *AIR* 2000 HP 48.
2925. *Surji Mull v Hudson*, (1904) ILR 24 Mad 259.
2926. *HP State Small Industries Export Corp v Export Credit and Guarantee Corp*, AIR 1992 HP 17.

to the payee there and it was presumed to be payable, so as to give jurisdiction to the Delhi Court.[2927] The presumption in the case of a promissory note not made payable at a specified place is that it is payable at the usual place of business of the creditor.[2928] In the case of a cheque where it is drawn on a bank at place *A* but the creditor hands it over to his bankers at place *B* for collection, the court at *A* has jurisdiction as payment which is part of the cause of action takes place at place *A*.[2929] The whole cause of action in such a case stems from the draft which was obtained at Madras and which was not encashed by the payee but had been encashed by a totally different person through the help and assistance of the Bank of Madras as well as the bank at Bombay. As such, the obtaining of the draft at Madras would furnish part of the cause of action for the institution of the suit at Madras, within the meaning of section 20(c). The whole suit is based upon an infringement of the rights under the draft. Such infringement has necessarily to be established before the relief could be granted and the right to complain about the infringement arose, only on account of the obtaining of the draft at the place where it was obtained, namely, Madras. It is that place where the right is created, though the infringement of that right has taken place either in Madras or elsewhere.[2930] A draft was obtained by a firm at Madras, payable to *R* at Bombay. The draft was lost. Bank was instructed to stop the payment. Draft was presented and collected by a third person. Suit was filed against the bank at Madras. The civil court at Madras has jurisdiction to try it.[2931] Promissory note was executed at *B*, stating it as payable at "B" or any part of India. Promisee settled down at *D* and made demands from there. It was held that suit to recover the debt could lie at *D*. Debtor did not require specification of reasonable place for payment under section 49, Contract Act, 1872. Common principle that the debtor shall seek the creditor and pay to him where he resides, applied. Further, in this case, no presentment was necessary as against the maker, vide section 64, *Exception*, Negotiable Instruments Act, 1881.[2932] Where *hundies* are drawn at Delhi and accepted at Calcutta, part of the cause of action arises at Delhi and the Delhi High Court has jurisdiction.[2933] A bill of exchange was drawn by *A* in Bombay on *B*, having his registered office in England. Bill was discounted by *A* with the plaintiff bank in Bombay. Bill was accepted by *B* in England, but dishonoured on the due date. It was held that material part of the cause of action arose at Bombay. Hence, leave under clause 12, Letters Patent (Bombay), had been properly granted.[2934]

There has been some conflict of judicial opinion on the question of whether a suit can be filed in a court within whose jurisdiction a negotiable instrument has been assigned. In support of the view that an assignment is not in itself part of the cause of action, it is said that otherwise the provision in section 20(c) might be evaded;[2935] but the preponderance of authority is in favour of the view that the words "cause of action" would, in their accepted sense, include assignment and that the court where the assignment took place would have jurisdiction under section 20(c).[2936] This view would bring the law relating to assignment of

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2927. *Muhammad v Muhammad*, (1916) PR 2.
2928. *Nanu Mal v Firm Shiba Mal*, AIR 1939 Lah 18.
2929. *Bodh Raj v Earl Chawla & Co Pvt Ltd*, AIR 1974 P&H 2.
2930. *Vijaya Bank, Egmore, Madras v Kiran & Co*, AIR 1983 Mad 357.
2931. *Vijaya Bank, Egmore, Madras v Kiran & Co*, AIR 1983 Mad 357.
2932. *LN Gupta v Tara Mani*, AIR 1984 Del 49.
2933. *Delhi Cloth Mills v Ramjilal*, AIR 1982 Cal 34.
2934. *Dena Bank Ltd v Ironside Ltd*, AIR 1987 Bom 227.
2935. *Jupiter General Assurance Co v Abdul Aziz*, AIR 1924 Rang 2, 1 Rang 231; *Rameshwar Lal v Gulabchand*, AIR 1960 Raj 243.
2936. *Suganchand v Mulchand*, 9 Bom High Court 272; *Mangamma v Satya Raju*, 31 Mad LJ 816; *Dilbagh Raj v Valuram*, AIR 1933 Lah 940; *Harnath Raj v Choramani Sha*, AIR 1953 Nag 192.

negotiable instruments in line with that relating to assignment of choices in action and other rights.[2937]

The Calcutta High Court has held that an endorsee may sue the drawer and acceptor at the place of endorsement. For when *D* drew a *hundi* at Benaras on his firm at Bombay in favour of *BP & Co*, a firm at Calcutta, and the *hundi* was endorsed by *BP & Co* to *P* in Calcutta, part of the cause of action was held to arise in Calcutta where the endorsement was made and *P* could sue in the Calcutta High Court after obtaining leave under clause 12 of the Charter.[2938] However, the case is different when the drawer of a *hundi* raises money by negotiating his own *hundi*. A seller of goods drew *hundies* outside Madras on the buyer firm in Madras and negotiated them outside Madras. The Madras firm paid the endorsee and was held entitled to sue the drawer in Madras to recover moneys overpaid as the amount of the *hundi* was in excess of what was due for the price of goods.[2939] The overpayment in Madras was part of the cause of action, but the payment received by the drawer from his endorsee could not be treated as a payment towards the contract. The negotiation by the drawer was only a provisional method of realising the money from the persons who were willing to accept the *hundi* for a small profit and take the trouble of getting paid. The High Court of Calcutta has held that if *P* accepts and pays a *hundi* in Calcutta for the accommodation of *D* in Cawnpore and *D* fails to pay, part of the cause of action arises in Calcutta.[2940] On the question of whether a suit can be filed in the place where a railway receipt is assigned, judicial opinion is divided. One view is that the assignment is sufficient to give jurisdiction to the court.[2941] Another is that it is not;[2942] and a third view is that while as assignment for consideration would give jurisdiction, an endorsement which merely authorises the endorsee to take delivery of the goods will not.[2943]

[s 20.21] Bill of Lading

A "bill of lading" is a memorandum signed by the master of a ship or captain of a ship, acknowledging the receipt of goods to be delivered by them at a certain place, subject to certain casualties for which they are not to be answerable, those being provided for by insurance. The bill of lading is signed in three parts: one part being kept by the consignor, another being sent to the consignee, and the third is kept by the captain.[2944]

As the bill of lading confers right of possession, if lawfully obtained, the captain is justified in delivering the goods to the person who presents it to him, as the bill is transferable by endorsement, unless it is presented under suspicious circumstances.[2945]

A bill of lading serves three purposes, *viz*,—

(i) it is receipt for the goods shipped, containing the terms on which they have been received;

2937. *Abdul Gafoor v Sensmal*, AIR 1955 Raj 53, (1955) ILR Raj 269; *Muzaffar Ali Khan v Jawandmal*, AIR 1955 Punj 93.
2938. *Raghoonath v Gobindnarain* (1885) ILR 22 Cal 451.
2939. *Ponnusami v Damodarta*, AIR 1924 Mad 646 : (1924) ILR 47 Mad 403.
2940. *Ramchandar v Ganapatran*, (1920) ILR 47 Cal 583.
2941. *Alliance Assurance Co v UOI*, AIR 1959 Cal 563 : 63 Cal WN 806.
2942. *UOI v Adom Hajee*, AIR 1954 Tr & Coch 362; *Rama Rao v UOI*, AIR 1961 AP 282.
2943. *Fushraj Thanmull v UOI*, AIR 1966 Cal 458; *ISP Trading Co v UOI*, AIR 1973 Cal 74; *Comm for the Port of Calcutta v General Trading Corp Ltd*, AIR 1964 Cal 290.
2944. See SK Sarvaria, rev. *S Krishnamurthy Aiyar's Law Relating to the Negotiable Instruments Act*, Universal Law Publishing Co., Delhi, 2005, 9th Edn, at p 30.
2945. SK Sarvaria, rev. *S Krishnamurthy Aiyar's Law Relating to the Negotiable Instruments Act*, Universal Law Publishing Co., Delhi, 2005, 9th Edn, at p 30.

(ii) it is evidence of the contract for carriage of goods, and

(iii) it is a document of title for the goods specified therein.

The contract of the ship-owners in the bill of lading is that they will deliver the goods at their destination, "in the like good order and condition", in which they were when shipped.[2946] On a bare reading of clause 3 of bill of lading, it is clear that any dispute arising under the bill of lading shall be decided in the country where the carrier has its principal place of business and the law of such country shall apply except as provided elsewhere in the bill of lading. Therefore, the exclusion clause refers to the jurisdiction of a court where the carrier has its principal place of business. Unless and until it is established that the defendant-carrier has its principal place of business at Singapore, the exclusion clause has no application. Simply because in the cause title of the plaint, the plaintiffs have described defendant no 2, Trustrade Enterprises PTE Ltd to be carrying on business at Singapore, would not *ipso facto* establish the fact that the principal place of business of defendant no 2 (respondent herein) is/was at Singapore to exclude the jurisdiction of the Calcutta court which admittedly has the jurisdiction to try the suit. Therefore, absence of reference of clause 3 of bill of lading in the pleadings cannot be said to be suppression of the material fact as the question of jurisdiction would be required to be adjudicated and decided on the basis of the material placed on record at the trial.[2947]

Where the contract was made to carry logs on board the vessel under bills of lading from foreign port for discharge at port of Calcutta, logs were found to be missing and landed at Calcutta, the suit by plaintiff at Calcutta for recovery of value of the logs and other charges was held maintainable as part of "cause of action" and arose within the jurisdiction of the Calcutta court.[2948]

[s 20.22] Partnership

A suit for the dissolution of partnership and for accounts may be instituted either where the contract of partnership was entered into[2949] or where the business of the partnership was carried on;[2950] and if the business was carried on in two places, the suit may be filed at either place.[2951] If the partnership has been dissolved and the accounts taken and balance struck, a suit for the balance will lie at the place where the balance was struck.[2952] The fact that a partnership owns immovable property does not make a suit for the dissolution of partnership and for accounts a suit for immovable property.[2953]

2946. SK Sarvaria, rev, *S Krishnamurthy Aiyar's Law Relating to the Negotiable Instruments Act*, Universal Law Publishing Co., Delhi, 2005, 9th Edn, at p 30; *Ellerman & Bucknall Co Ltd v Misrimal Bherajee.* (1966) SCC 1892, p 1896 : (1966) Supp SCR 92.
2947. *Mayur (HK) Ltd v Owners & Parties, Vessel MV Fortune Express*, AIR 2006 SC 1828 : (2006) 3 SCC 100 : 2006 (1) SCR 860 : 2006 (2) Scale.
2948. *Mayur (HK) Ltd v Owners & Parties, Vessel MV Fortune Express*, AIR 2006 SC 1828, at para 17 : (2006) 3 SCC 100 : 2006 (1) SCR 860 : 2006 (2) Scale.
2949. *Durga Das v Jai Narain*, (1917) ILR 41 All 513; *Jagan v Gainda Mal*, (1897) PR 62; *Jaganandan v Kishna Chand*, (1908) PWR 100.
2950. *Alla Ditta v Shankar Das*, (1916) PR 42; *N Singh v Tulshi Ram*, (1919) 17 All LJ 1015.
2951. *Thimmappa v Kalakrishna*, AIR 1926 Mad 427 : (1926) 50 Mad LJ 298.
2952. *Luchmee Chund v Zorawur Mal*, (1860) 8 Moo Ind App 291.
2953. *Durga Das v Jai Narain*, (1917) ILR 41 All 513.

[s 20.23] Suit on Foreign Judgment

A suit on a foreign judgment instituted in a court governed by the Code must satisfy the conditions of section 20. Where, therefore, a suit on a judgment of District Court of Colombo was filed in the Court of Subordinate Judge, Tiruchirappalli and the defendant did not either reside or carry on business or permanently work for gain within the jurisdiction of the court, it was held that the mere possession of property by the defendant within the jurisdiction of that court was not sufficient to satisfy the requirements of section 20 and that the suit was not maintainable.[2954]

[s 20.24] Place of Suing in Suits to Set Aside the Decree on the Ground of Fraud

The question of whether a suit can be instituted in one district for setting aside a decree passed by a court in another district has been the subject of many decisions. The result of the actual decisions ignoring what are merely *obiter dicta* may be stated thus. A suit to set aside a decree obtained by fraud in court *X*, where nothing is done beyond transferring a decree for execution to court *Y*, can only be maintained in court *X*, that is, the court which passed the decree.[2955] Where, however, a decree passed by court *X* is transferred for execution to court *Y* and the decree-holder makes an application to court *Y* for execution of the decree,[2956] or property belonging to the judgment-debtors is attached in execution by court *Y*,[2957] or the judgment-debtor is arrested by court *Y* in execution and released on giving security,[2958] the judgment-debtor may institute a suit in court *Y* for a declaration that the decree passed by court *X* was obtained by fraud, and for an injunction restraining the decree-holder from executing the decree. Similarly, if the judgment-debtor's property is sold by court *Y* in execution, he may sue the decree-holder in court *Y* for a similar declaration and for setting aside the sale and for possession.[2959] In all these cases, the cause of action arises *in part* within the jurisdiction of court *Y*; but, where the decree-holder has done nothing beyond getting the decree transferred for execution to court *Y*, and has not made an application to court *Y* for execution, the judgment-debtor, as stated above, cannot institute a suit in court *Y* for setting aside the decree, not even if the plaint includes a relief for injunction restraining the decree-holder from executing the decree.[2960] A high court will grant leave under its Charter and entertain a suit to set aside a decree of a *mofussil* court for fraud if part of the cause of action has arisen in its jurisdiction.[2961] Where a decree is passed by court *A* but the fraud on which the decree is sought to be set aside is alleged to have been practised within the jurisdiction of court *B*, a suit to set aside the decree could be instituted at court *B* as part of the cause of action has arisen there.[2962]

2954. *Rajaratnam v Muthuswami*, AIR 1958 Mad 203 : (1958) 1 Mad LJ 194.
2955. *Umrao Singh v Hardeo*, (1907) ILR 29 All 418.
2956. *Banke Behari v Pokhe Ram*, (1903) ILR 25 All 48; *India Provident Co Ltd v Govinda*, AIR 1923 Cal 425 : (1922) 27 CWC 359; *Asgar Aly & Co v Satyanarayana*, *AIR* 1957 Cal 317.
2957. *Jawahir v Nekiram*, (1915) ILR 37 All 189; *Jawahir Singh v ED Sassoon & Co*, AIR 1926 Lah 277 : (1926) 7 Lah 61; *Danaji v Firm Puran Mal*, AIR 1928 Oudh 88, (1928) 3 Luck 142; contra *Dan Dayal v Mumalal*, (1914) ILR 36 All 564.
2958. *Khushali Ram v Gokul Chand*, (1917) ILR 39 All 607.
2959. *Kedar Nath v Prosonna Kumar*, (1901) 5 Cal WN 559; *Gauri Devi v Bishwanath Banerjee*, AIR 1970 All 185.
2960. *Dan Dayal v Mumalal*, (1914) ILR 36 All 564.
2961. *Nistarini Dasi v Nundo Lal*, (1905) ILR 30 Cal 369.
2962. *Natarajan v Saraswathi*, AIR 1958 Mad 516 : (1958) ILR Mad 657 : 71 LW 167; *Nand Lal v Abdul Hafiz*, AIR 1960 J&K 76.

[s 20.25] Explanation: Suit Against Corporation

Normally, under clauses (a) to (c), plaintiff has a choice of forum and cannot be compelled to go to the place of residence or business of the defendant and can file a suit at place where the cause of action arises. If the defendant desires to be protected from being dragged into litigation at some place merely because the cause of action arises there, it can save itself from such a situation by an exclusion clause. The clear intendment of the Explanation, however, is that where the corporation has a subordinate office in the place where the cause of action arises, it cannot be heard to say that it cannot be sued there because it does not carry on business at the place. Clauses (a) and (b) of section 20 inter alia refer to a court within local limits of whose jurisdiction the defendant inter alia "carries on business". Clause (c) on the other hand refers to a court within local limits of whose jurisdiction the cause of action wholly or in part arises.[2963]

The Explanation to section 20 is really an Explanation to clause (a). It is in the nature of a clarification on the scope of clause (a), viz, as to where the corporation can be said to carry on business. The Explanation is in two parts, one before the word "or" occurring between the words "office in India" and the word "in respect of" and the other, thereafter. The first part of the Explanation applies only to such a corporation which has its sole or principal office at a particular place. In that event, the courts within whose jurisdiction the sole or principal office of the defendant is situated will also have jurisdiction inasmuch as even if the defendant may not be carrying on the business at that place, it will "be deemed to carry on business" at that place because of fiction created by the Explanation. The latter part of the Explanation takes care of the case where the defendant does not have a sole office but has a principal office at one place and has also a subordinate office at another place. The words "at such place" occurring at the end of the Explanation and the word "or" referred to above, which is disjunctive, clearly suggest that if the case falls within the latter part of the Explanation, it is not the court within whose jurisdiction the principal office of the defendant is situated, but the court within whose jurisdiction it has a subordinate office which alone shall have jurisdiction "in respect of any cause of action arising at any place where it has also a subordinate office". The linking together of the place where the cause of action arises with the place where the subordinate office is located clearly shows that the intention of the legislature was that in the case of a corporation, for the purposes of clause (a), the location of the subordinate offices, within the local limits of which a cause of action arises, is to be the relevant place for the filing of the suit and not the principal place of business.[2964]

The clear intendment of the Explanation, however, is that, where the corporation has a subordinate office in the place where the cause of action arises, it cannot be said to say that it cannot be sued there because it does not carry on business at that place. It would be a great hardship if, despite the corporation having a subordinate office at the place where the cause of action arises, the plaintiff is to be compelled to travel to the place where the corporation has its principal place. The place should be convenient to the plaintiff; since the corporation has an office at such place, it will also be under no disadvantage. The Explanation provides an alternative locus for the corporation place of business, and not additional one. However, where the defendant chooses to challenge the choice of forum by the plaintiff on the basis of the alternative locus provided by the Explanation, it is required of him to bring sufficient evidence before the court to show that the alternative forum in accordance with the Explanation

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2963. *New Moga Transport Co v United India Insurance Co Ltd*, AIR 2004 SC 2154 : (2004) 4 SCC 677 : 2004 (1) Suppl SCR 623.

2964. *Patel Roadways Ltd, Bombay v Prasad Trading Co*, AIR 1992 SC 1514 : (1991) 4 SCC 270. See also *New Moga Transport Co v United India Insurance Co Ltd*, AIR 2004 SC 2154 : (2004) 4 SCC 677 : 2004 (1) SCR 623; *Anant Raj Industries Ltd v Balmer Lawrie & Co Ltd.*, AIR 2003 Del 367.

would be more convenient, less expensive and more appropriate. But in arriving at a conclusion as to the principal place of business, parties are required to place sufficient material before the court. The Supreme Court explained the point in the under-noted case,[2965] in the following words:

> From this, it appears that the principal place of business would be where the governing power of the corporation is exercised or the place of a Corporation's Chief Executive Offices, which is typically viewed as the nerve center or the place designated as the principal place of business of the Corporation in its incorporation under the various statutes. Therefore, to arrive at a finding as to which is the principal place of business, the parties would be required to place the relevant material before the Court.

The word "corporation" in the Explanation takes in not only statutory corporations but also companies registered under the Companies Act, 1956.[2966] Irrespective of the Companies Act, 1956, the domicile of a trading company is fixed by the situation of its principal place of business,[2967] that is to say, its chief office where the central management and control are actually to be found.[2968] In the case of a company registered under the Companies Act, 1956, the controlling power is, as a fact, generally exercised at the registered office, and that office is, therefore, not only for the purposes of the Act, but for other purposes, the principal place of business.[2969] This is not, however, necessarily the case;[2970] and the question of whether that or some other place is the principal place of business of the company is in each case a pure question of fact to be determined upon a security of the course of business and trading;[2971] but, a company may have subordinate or branch offices in 50 different jurisdictions and it may be sued in any one of such jurisdictions in respect of a cause of action arising there.[2972] It will be noticed that clause (c) of this section is independent of clauses (a) and (b). Therefore, where the cause of action has arisen within the jurisdiction of the court in which the suit is filed, it would not be necessary in the case of a corporation, to rely on this Explanation.[2973] This Explanation contains a deeming provision that a corporation shall be deemed to carry on business at its sole or principal office irrespective of the fact that it carries on business at various purpose of deciding the question of jurisdiction under that clause, the test would be whether the corporation did in fact carry on business within the court's jurisdiction at the time the suit was instituted.[2974] Section 446(2) of the Companies Act, 1956, rules out this section. Under that section, it is the court which is winding up a company which has jurisdiction to try suits filed by or against such a company.[2975]

Section 20 embodies a common treatment of all defendants, whether natural persons or juristic persons. Hence, there must be a common treatment *qua* the presence of the defendant in the particular place, whether with reference to the residence or with reference to the activity

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2965. *Mayar (HK) Ltd v Owners & Parties, Vessel MV Fortune Express*, AIR 2006 SC 1828 : (2006) 3 SCC 100 [PP Naolekar, J, speaking for the Bench].
2966. *Hakam Singh v Gammon (India) Ltd*, AIR 1971 SC 740 : (1971) 1 SCC 286 : 1971 SCR (3) 314; *Sasa Musa Sugar Works v Chunilal*, AIR 1975 Gau 34; *Associated Traders and Engineers v USCS Industries*, AIR 1975 Mad 29 : (1975) 1 Mad LJ 96.
2967. *Jones v Scottish Accident Insurance Co*, (1886) 17 QBD 421.
2968. *Jones v Scottish Accident Insurance Co*, (1886) 17 QBD 421; *De Beers Consolidated Mines Ltd v Howe*, AIR 1906 Cal 455; *Gopal Singh v Punjab National Bank*, AIR 1976 Del 115.
2969. *Watkins v Scottish Imperial Insurance Co*, (1889) 23 QBD 285.
2970. *D Keynsham Blue Lias Co v Barker*, (1863) 2 H&C 729.
2971. *De Beers Consolidated Mines Ltd v Howe*, AIR 1906 Cal 455.
2972. *Peoples' Insurance Co v Benoy Bhusan*, AIR 1943 Cal 190 : (1943) ILR 1 Cal 564; *Home Insurance Co v Jagatjit Sugar Mills Co*, AIR 1952 Punj 142; *Prag Oil Mils Depot v Transport Corp of India*, AIR 1978 Ori 167.
2973. *Central Warehousing Corp v Central Bank of India*, AIR 1973 AP 387 (FB).
2974. *Babulall v Caltex (India) Ltd*, AIR 1967 Cal 205.
2975. *Globe United E&F Co v HB Boveri Ltd*, AIR 1974 Del 200 : (1974) 1 Del 398.

in which the defendant may be engaged.[2976] The plaintiff sued the State Bank of Amritsar. Since the plaintiff failed to show that any part of the cause of action has arisen at Amritsar, it was held that Amritsar court had no jurisdiction and it will be either the Bombay court within whose jurisdiction the principal office of State Bank of India (SBI) is situated or the Ghaziabad court within whose jurisdiction the branch where the account and locker are, which will have jurisdiction to try the suit against SBI.[2977] Where defendant is a corporation as per the Explanation attached to section 20(b), a corporation shall be deemed to carry on business at its sole or principal office in India, or in respect of any cause of action arising at any place where it has also a subordinate office, at such place. The Explanation to section 20, while providing a plaintiff a wider field to institute a suit against a corporation, takes care to see that the defendant in such a suit can conveniently put up its defence through its sole principal or subordinate office.[2978] Where the defendant/applicant has admitted that it has a branch office at 5A Bahadur Shah Zafar Marg, New Delhi and 5 Sansad Marg, New Delhi, the present case is not of the genre where the defendant had been put to a disadvantage, because of the plaintiff's choice of filing the suit in New Delhi. Even if the convenience consideration is set apart, the cause of action had arisen in Delhi. The plaintiff has asserted in the plaint that the order was accepted in Delhi, and this fact has not even been denied or even traversed by the defendant/applicant. It is immaterial whether dealings between the parties were through the defendant's Madras office, or that delivery of the software was to be effected in Cochin. It is trite to state that the cause of action arises at different times, and at different places, and any of these would be a legitimate venue for suing.[2979]

[s 20.26] Suit Against Non-resident Foreigners

The court has no jurisdiction in a suit against a non-resident foreigner on a cause of action which arose wholly outside the Indian territory.[2980] As already stated, the court has jurisdiction to entertain a suit against a foreigner resident within the limits of its jurisdiction in respect of a cause of action that has accrued abroad.[2981] A foreigner is not exempt from the jurisdiction of Indian courts.[2982] If a foreigner resident *himself* carries on business or *personally* works for gain, in India, it is clear that he is amenable to the jurisdiction of Indian courts. But what if a foreigner does not reside, or does not *himself* carry on business or *personally* work for gain, in India, and:

(i) the *cause of action* arises within the local limits of an Indian court; or

(ii) the cause of action arises outside India but the foreigner carries on business *through his agent* within the local limits of an Indian court?

As to case (a), it is settled that a non-resident foreigner, who is a subject of a foreign state such as a protected native state before Independence may be sued in the court of India, if the cause of action arises within the jurisdiction of such court.[2983]

2976. *State Bank of India v Neelam Sharma*, AIR 1980 P&H 251.
2977. *State Bank of India v Neelam Sharma*, AIR 1980 P&H 251.
2978. *Fertilizer Corp of India Ltd v Ranjit Misra*, AIR 1980 Ori 152.
2979. *KLG Systel Ltd v Fujitsu ICIM Ltd*, AIR 2001 Dec 357.
2980. *Bhamboo v Ram Narain*, AIR 1928 Lah 297 : (1928) 9 Lah 455.
2981. *Ismailiji v Ismail*, AIR 1921 Bom 460 : (1921) ILR 45 Bom 1228; *Bhujbal v Nanbeju*, (1897) ILR 19 All 450.
2982. *Smith v Indian Textile Co*, AIR 1927 All 413 : (1927) ILR 49 All 669.
2983. *Chunilal Kasturchand v Dundappa Damppa*, AIR 1951 Bom 190 : (1950) ILR Bom 640; *Ram Ravji v Pralhaddas*, (1896) ILR 20 Bom 133; *Girdhar v Kassigar*, (1893) ILR 17 Bom 662; *Tadepalli v Nawab Sayed*, (1906) ILR 29 Mad 69; *Annamalai v Murugasa*, (1903) ILR 26 Mad 544 : 30 IA 220; *Rambhat v Sankar* (1901) 25 Bom 258; *Srinivasa v Venkata*, (1911) ILR 34 Mad 257 : (1911) 38 IA 129; affirming ILR 29 Mad 239; *Swaminathan v Somasundaran*, AIR 1938 Mad 731 : (1938) ILR Mad 1080; *Neelakanda v Kunju*, AIR 1935 Mad 545 : (1935) 68 Mad LJ 506.

Thus, if *A*, a subject of the native state of Sangli and residing at Sangli, borrows money from *B* at Belgaum, *B* may sue *A* for recovery of money in the Belgaum court, for the cause of action arises at Belgaum. The rule of private international law that a court has no jurisdiction to entertain a suit against a foreigner who does not reside within its jurisdiction and who has not submitted to it is subject to the rules of municipal law. A suit is accordingly, maintainable in an Indian court within its jurisdiction.[2984] A decree passed in such a suit, however, would not be enforceable in foreign court and where the decree is against several defendants, some of whom are residing within the jurisdiction and some others not, while it will be executable against all within the state; outside the state it will not be executable against non-resident foreigners.[2985]

As to case (b), the High Court of Bombay in one case held that where no part of the case of action arises in Bombay, it had no jurisdiction to entertain a suit against a foreigner who did not reside in Bombay, but carried on business *through an agent* in Bombay;[2986] but this decision was disapproved in the later case of *Girdhar v Kassiga*.[2987] The point arises in a later case before the Privy Council, but it was left open.[2988] The Madras High Court has held that the expression "carrying on business" in clause 12 of the Letters Patent included carrying on business through an agent in British India by foreigners living outside jurisdiction.[2989] It has been held that a suit for specific performance of an agreement to convey immovable property situated within India could be instituted in the court within whose jurisdiction the properties are situated, wherever the agreement might have been entered into and even when the defendant is a non-resident foreigner.[2990] The question of whether the defendant resides within jurisdiction is relevant only when he is a foreigner. A decree passed by a court against its own citizen who owns a permanent dwelling house at the place is not open to attack on the ground that at the time of the action, he was not actually residing there or submitted to its jurisdiction.[2991] The fortuitous presence of the ship in the Bombay harbour will not entitle the owner to file a limitation action in the absence of any claim being made or apprehended against him or the vessel in that court. Therefore, bringing the ship to the Bombay port, in order to confer jurisdiction on Bombay High Court, has the character of forum shopping, rather than anything else. The presence of a foreign defendant, who appeared under protest to contest jurisdiction, cannot be considered as conferring jurisdiction on the court to take action. Unless a foreign defendant either resides within jurisdiction or voluntarily appears or has contracted to submit to the jurisdiction of the court, it is not possible to hold that the court will have the jurisdiction against the foreign defendant.[2992] Where the cargo was discharged by the vessel at the Madras port instead of Calcutta port where it was agreed to be discharged, Madras High Court would have admiralty jurisdiction to decide the suit filed by the owner of goods for damages for breach of court act when the suit was filed at the time when the ship was berthed in the Port of Madras. It cannot

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2984. *Narain v Balabadra*, AIR 1957 Pat 256.
2985. *Narasinga Rao v Sankar Saran*, AIR 1958 All 775; affirmed in AIR 1962 SC 1737; *Karnataka Films v Official Receiver, Madras*, AIR 1952 Mad 481.
2986. *Kesowji v Khimji*, (1888) ILR 12 Bom 507.
2987. *Girdhar v Kassiga* (1893) ILR 17 Bom 662 (a case under the Presidency Small Cause Courts Act, 1882, section 18).
2988. *Annamalai v Murugasa*, (1903) ILR 26 Mad 544 : 30 IA 220 (a case under section 17 of the Code of Civil Procedure of 1882, corresponding with section 20 of the Code).
2989. *Janoo v Batchu*, AIR 1924 Mad 158 : (1936) 45 Mad LJ 471; dissenting from ILR 12 Bom 507; following *Girdhar v Kassigar*, (1893) ILR 17 Bom 662.
2990. *Md Yusuf v Subramaniam Chettiar*, AIR 1950 Mad 27 : (1949) 2 Mad LJ 735; *Panchanan v Tarapada*, AIR 1961 Cal 193 : 65 Cal WN 661.
2991. *Jhumarla v Tansukrai*, AIR 1957 Assam 127.
2992. *World Tanker Carrier Corp v SNP Shipping Services Pvt Ltd*, (1998) 5 SCC 310.

be said in such a case that the Madras High Court would have no such jurisdiction as the agreement between parties conferred jurisdiction on the courts in the country where the carrier has his principal place of business namely that of Canada in the instant case. It was more so when there was no ouster of jurisdiction in respect of other courts.[2993]

A contract was entered into by the plaintiff with a foreign company incorporated in the United States of America for the supply of brass dross of guaranteed 90 percent of metallic recovery. The foreign company had been carrying on its business in India through agents. The offer for supply was given and contract signed by Indian agency on behalf of foreign company at New Delhi. It was held that a suit against the foreign company can be filed at New Delhi.[2994]

[s 20.27] Agreement as to the Choice of Court

In regard to jurisdiction of court under the Code of Civil Procedure over a subject-matter, one or more courts may have jurisdiction to deal with it having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one court has jurisdiction, it is said to have exclusive jurisdiction; where more courts than one have jurisdiction over a subject-matter, they are called courts of available or natural jurisdiction. The growing global commercial activities gave rise to the practice of the parties to a contract agreeing beforehand to approach for resolution of their disputes thereunder, to any of the available courts of natural jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forum or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court.[2995]

By a long series of decisions it has been held that (where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in any one of such courts is not contrary to public policy and in no way contravenes section 28 of the Indian Contract Act, 1872.)[2996] Therefore, if on the facts of a given case more than one court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two courts. But by an agreement parties cannot confer jurisdiction to a court which otherwise does not have jurisdiction to deal with a matter.[2997]

Normally, under clauses (a) to (c) of section 20 of the CPC, plaintiff had a choice of forum and cannot be compelled to go to the place of residence or business of the defendant and can file a suit at a place where the cause of action arises. If the defendant desires to be protected from being dragged into a litigation at some place merely because the cause of action arises there, it can save itself from such a situation by an exclusion clause.

In view of the non-obstante clause in section 46 of the Insurance Act 1938, a clause in an insurance policy providing for a choice of forum does not bind the policy holder.[2998]

2993. *Supreme Paper Mills Ltd v Owner and other persons Interest in the Motor Vessel 'ARABELLA'*, AIR 1999 Mad 118.
2994. *Nandan Iron and Metal Industries v Fensty Inc*, AIR 1992 Del 364.
2995. *Modi Entertainment Network v WSG Cricket Pte Ltd*, AIR 2003 SC 1177 : 2003 AIR SCW 733 : (2003) 4 SCC 341.
2996. *New Moga Transport Co v United India Insurance Co Ltd.*, AIR 2004 SC 2154 : (2004) 4 SCC 677 : 2004 (1) SCR 623; see also *Dilip Kumar Ray v Tata Finance Ltd*, AIR 2002 Ori 29.
2997. *New Moga Transport Co v United India Insurance Co Ltd.*, AIR 2004 SC 2154: (2004) 4 SCC 677 : 2004 (1) SCR 623; see *Hakam Singh v Gammon (India) Ltd*, AIR 1971 SC 740 : (1971) 1 SCC 286 : 1971 SCR (3) 314 and *Shriram City Union Finance Corp Ltd v Rama Mishra*, AIR 2002 SC 2402 : AIR 2002 SCW 2617 : (2002) 9 SCC 613.
2998. *Isaq Mahmad v United India Fire & General Insurance Co*, AIR 1978 Guj 46.

Where two or more courts have jurisdiction to try a suit or a proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is valid and is not contrary to the public policy.[2999] Such agreement does not contravene section 28 of the Contract Act, 1872.[3000] Thus, where the cause of action has arisen wholly or in part within the local limits of the jurisdiction of another court, the parties can agree that the disputes between them shall be decided by one of such courts.[3001] Accordingly, the words "Subject to Rajkot jurisdiction only" in a contract between the parties have the effect of excluding the jurisdiction of courts other than those at Rajkot having jurisdiction otherwise to try the suit.[3002] In such a case, the plaintiff by such agreement waives his right to file the suit in a particular court and therefore cannot object to an order by that other court returning the plaint for presentation to the court agreed to by him and defendant.[3003]

According to section 19 of the Code, in case of suits for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business or personally works for gain, within the local limits of jurisdiction of another court, the suit may be instituted at the option of the plaintiff at either of the said courts. But filing of suit in a wrong court is no ground for rejecting the plaint under O VII, rule 11 of the Code. Rather, it should be returned for presentation before proper court.[3004]

Where in a dispute arising out of contract, the contract was made at Calcutta, the defendant's principal office was situated at Calcutta. The clause in the contract required all communications to be addressed to the Managing Director at Calcutta, implementation and execution of contract was monitored from Calcutta and even the arbitration proceedings were required to be taken under the jurisdiction of Calcutta High Court, it was held by the Bombay High Court that were absence of words like "only", "alone" or "exclusively" in clause in contract would not mean that exclusive jurisdiction was not conferred on Calcutta High Court.[3005]

On the point of ouster of jurisdiction by terms of contract, the Supreme Court has explained this aspect in *ABC Laminart Pvt Ltd v AP Agencies*.[3006] It has been stated in para 20 of the decision as follows:

> When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation

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2999. *Bhagat Ram v Ramnivas*, AIR 1949 Ajmer 44; *National Petroleum Co Ltd v Meghraj*, *AIR* 1937 Nag 334; *Hakam Singh v Gammon (India) Ltd*, AIR 1971 SC 740 : (1971) 1 SCC 286 : 1971 SCR (3) 314; *Bombay Goods Carriers v Sha Multhanmal Haslinal & Sons*, AIR 1974 Kant 1; *Manganlal v Satya Narain*, AIR 1978 All 455.

3000. *Achratlal Kesavalal Mehta & Co v Vijayan & Co*, AIR 1925 Mad 1145 : 49 Mad LJ 189; *Raghaviah v Vasudeviah Chetty*, AIR 1944 Mad 47 : (1943) 2 Mad LJ 375; *HK Doda (India) Ltd v MP Sugar Mills Co Ltd*, AIR 1954 Mad 845 : (1954) ILR Mad 885 : (1954) 1 Mad LJ 434 *Tilak Ram Chowdary v Kodumal Jethanand*, AIR 1928 Bom 175; *Haji Abdulla v Stamp*, AIR 1924 Bom 381; *Lakshmi Vilas Mills v Vinayak*, AIR 1935 Bom 195; *Nilton & Co v Ojha Automobiles Engineering Co*, AIR 1931 Cal 279 : ILR 57 Cal 1280; *Continental Drug Co v Chemoids and Industries Ltd*, *AIR* 1955 Cal 161; *Musaji Lukmanji v Durga Das*, AIR 1946 Lah 57 : (1945) Lah 281 (FB); *National Petroleum Co Ltd v Meghraj*, AIR 1973 Nag 334; *Muhammad Khasim v Shri Hanuman Industries*, AIR 1956 T C 200.

3001. *Hakam Singh v Gammon (India) Ltd*, AIR 1971 SC 740; *Timber Pvt Ltd v Skandia Ins Co*, AIR 1973 J&K 86; *Singhal Transport v Jesram*, AIR 1968 Raj 89.

3002. *Kanpur Sugar Supply v Harsukhal*, AIR 1971 All 502; *Jhun Jhunwala Bros v Subbaramier*, AIR 1968 Mad 194; *Beacon Pharmaceutical v Khosla*, AIR 1973 Punj 160.

3003. *Rajendra Mills v HVM Haji Hasan Dada*, AIR 1970 Cal 342.

3004. *SC Bose and Co v G Srikanth*, AIR 2006 AP 337 : 2006 (4) Andh LT 589.

3005. *Pacific Refractories Ltd v Stein Heurtey India Projects Pvt Ltd*, AIR 2006 Bom 231 : 2006 (3) Mah LJ 438.

3006. *ABC Laminart Pvt Ltd v AP Agencies*, AIR 1989 SC 1239 : (1989) 2 SCC 163.

is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of the contract. It would not, however, *ipso facto* take away jurisdiction of other courts.

In para 21, the Supreme Court further went on to observe as follows:

... Where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of an ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "expressio unius est exclusio alterius"—expression of one is the exclusion of another—may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

Similar issue came up before the Supreme Court in another case,[3007] wherein it was observed as follows:

Clause 17 says—any legal proceedings arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai. The clause is no doubt not qualified by the words like "alone", "only" or "exclusively". Therefore, what is to be seen is whether in the facts and circumstances of the present case, it can be inferred that the jurisdiction of all other Courts except Courts in Mumbai is excluded. Having regard to the fact that the order was placed by the defendant at Bombay; the said order was accepted by the branch office of the plaintiff at Bombay; the advance payment was made by the defendant at Bombay; and as per the plaintiff's case the final payment was to be made at Bombay; there was a clear intention to confine the jurisdiction of the Courts in Bombay to the exclusion of all other Courts. The Court of Additional District Judge, Delhi had, therefore, no territorial jurisdiction to try the suit.

In a case where the parties agreed in MOU that all matters between them must be settled before court of Hyderabad, it was held that though words like "alone", "only" and "exclusively" and the like have not been used, mentioning of certain jurisdiction shows intention of parties to exclude all other courts.[3008]

Plaintiff, who was proprietor of a theatre at Kallakurichi, had sued the defendant, a film distributor, on the basis of a contract for the exhibition of movie, part of cause of action had taken place at Kallakurichi, but no cause of action took place at Chennai. The Madras High Court held that court at Kallakurichi has jurisdiction to deal with the matter even though the contract conferred jurisdiction on court at Chennai.[3009]

Where two or more courts have jurisdiction, the parties can, in agreement, choose one of those courts and give it exclusive jurisdiction.[3010] Where there are two or more competent courts which can entertain a suit, the parties to the concerned transaction can contract to vest jurisdiction in one of such courts to try their disputes. If such a contract is clear, unambiguous and explicit, it is not hit by section 28 of the Indian Contract Act, 1872, either.[3011] Parties can

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3007. *Hanil Era Textiles Ltd v Puromatic Filters (Pvt) Ltd*, AIR 2004 SC 2432 : (2004) 4 SCC 671 (Mathur, J, speaking for the Bench).
3008. *Andhra Pradesh State Trading Corp v Auro Logistic Ltd*, AIR 2006 Mad 205 : (2007) 2 BC 683.
3009. *Arputham Line Release v Raja Theatre*, AIR 2006 Mad 344 : 2006 (3) Mad LJ 795.
3010. *Globe Transport Corp v Triveni Eng Corp*, (1983) 4 SCC 707.
3011. *Chandeshwar Singh v Dahu Mohd*, AIR 1983 Pat 257 (FB).

choose one of the two competent courts which deal with the subject matter of litigation.[3012] Unless oppressive, such an agreement should be enforced by the court.[3013]

Where a part of the cause of action arises within the jurisdiction of two courts, the parties can agree that any dispute arising between them shall be tried by one of those courts only. It is also an accepted principle that though the choice of forum made by the parties by consent is to be respected, the enforcement of the choice by the courts cannot be ruled as imperative in all circumstances. It depends on the facts of each case and taking them into consideration, it is open to the court to hold that despite such an agreement between the parties, since the clause becomes oppressive for the plaintiff, it may not enforce the clause in a particular case. Thus, where no independent material has been produced to show that there was an agreement between the parties to oust the jurisdiction of the competent court, the view of the lower court that its jurisdiction stands ousted merely because of the clause printed on the reverse of the consignment note, would be unsustainable.[3014]

So long as the parties to a contract do not oust the jurisdiction of all the courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the court. When there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen there within, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. This cannot be understood as parties contracting against the statute.

When the court has to decide the question of jurisdiction pursuant to an ouster clause, it is necessary to construe the ousting expression or clause properly to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific, accepted notions of contract would bind the parties and unless the absence of *ad idem* can be shown, the other courts should avoid exercising jurisdiction. (However, in construction of the ouster clauses when words like "alone", "only", "exclusive" and the like are used, there may be no difficulty. In such cases, the maxim "*expressio unius est exclusio alterius*"—expression of one is the exclusion of another, may be applied.)

Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, *ipso facto* take away jurisdiction of other courts.[3015]

It is open to the parties to choose one of the forums for filing the suit by agreement and exclude the other forums, but it is not competent to the parties to invest jurisdiction on a court when it has no jurisdiction as consent cannot confer jurisdiction.[3016]

Choice of forum by the parties cannot be allowed by the agreement, where only one court has jurisdiction.[3017] Parties chose to restrict dispute to a particular court. Such option does not

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3012. *EDI Parry (India) Ltd v Sanami Transport*, AIR 1980 AP 30, 32.
3013. *Ganpatrai Agarwal v Fertiliser Corp of India*, AIR 1984 Cal 35.
3014. *Paradeep Port Trust v Hindustan Mercantile Transport Corp*, AIR 1985 Ori 106.
3015. *ABC Laminart Pvt Ltd v AP Agencies Salem*, (1989) 2 SCC 163; *Cheema Enterprise v Mayur Enterprise*, AIR 1998 Gau 86; *Rajaram Maize Products v MPEB, Jabalpur*, AIR 1999 MP 44; *Neyveli Lignite Corp v Vinay Engineering*, AIR 1992 Mad 333; *Kitax v D Surekha*, AIR 1992 Ker 334 (DB).
3016. *Prakash Roadline Pvt Ltd v HMT Bearing Ltd*, AIR 1999 AP 106 (DB); *Nagesh Sales Corp v Kerala Soaps and Oils Ltd*, AIR 1994 Ker 150; *Jabalpur Cable Network Pvt Ltd v ESPN Software India Pvt Ltd*, AIR 1999 MP 271; *Patel Roadways Ltd, Bombay v Prasad Trading Co*, (1991) 4 SCC 270.
3017. *GM, ONGC, Sibsagar v Raj Eng Corp*, AIR 1987 Cal 165.

oust jurisdiction of the court which is competent. Revisional court cannot interfere in such a case. Such interference is possible only if the revisional court comes to the conclusion that the conclusion reached by the trial court is illegal, perverse, arbitrary or *mala fide*.[3018]

In a Calcutta case, a contract was entered into between the parties, at a place where the corporation had its subordinate office. No stipulation conferring exclusive jurisdiction on a particular court existed. Cause of action arose in relation to a transaction entered into at the subordinate office. It was held that the civil court at the place where the subordinate office was situated, was not debarred from entertaining the suit.[3019]

[s 20.28] Agreement as to Choice of Foreign Court

The parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them and the chosen court may be a court in the country of one or both the parties, or it may be a natural forum. If this is the settled position then, even if it is found that the applicants 1 and 3 have signed the agreements in France and not in England, even then the parties will be governed by the English laws in terms of Articles 15.1 and 8.1 of the agreements which they have undisputedly executed and therefore the same will be binding on them. [3020]

The plaintiff purchased some materials from a foreign company situated in West Germany. The bill of lading was executed in Germany. Consignment was shipped from Germany, under a marine insurance policy. The insurance company was also situated in Germany. The contract of insurance covered the risk of transit upto place *S*, where the plaintiff resided. The consignment was short of 799 kg. The plaintiff filed a suit in the court at *K*, having jurisdiction over place *S*. It was contended that as per Article 12, the court at *K* has jurisdiction over place *S*. It was further contended that as per Article 12 of insurance conditions read with Article 48 of VVG (stated to be the German law relating to insurance matters), the suit could be filed only in Germany. It was held that the court at *K* had jurisdiction to try the suit. The ends of justice would be better served by a trial in the court at *K*, rather than in Germany.

In a particular case by clause 12 of the agreement, the parties agreed to submit to the non-exclusive jurisdiction of the English court (without reference to English conflict of law rules). In a case of this type where the parties have agreed on a neutral forum, the question of granting injunction would arise only when the proceedings are brought in a foreign court in breach of the contract, i.e., in a court other than the court which is chosen by the parties. Where the agreement confers non-exclusive jurisdiction on the designated court and where the proceedings are brought in that court, it is not permissible to contend that the institution of the proceedings is breach of contract and any application for stay of such proceedings on the ground that there was another forum which was more appropriate will have to be made to that court. The remedy of the plaintiffs is to raise objection before the court in England where the defendant has instituted its claim.[3021]

An agreement providing that suits relating to disputes thereunder should be filed in a foreign court is not void but it cannot deprive courts in India of their jurisdiction to try them,

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3018. *State of Rajasthan v GS Construction Corp Ltd*, AIR 1988 Guj 73.
3019. *National Hydroelectric Power Corp Ltd v Sova Enterprises*, AIR 1991 Cal 324 (DB).
3020. *Rhodia Ltd v Neon Laboratories Ltd*, AIR 2002 Bom 502.
3021. *WSG Cricket Pvt Ltd v Modi Entertainment Network*, AIR 2002 Bom 365(DB); *Spiliade Maritime Corp v Consulex Ltd*, [1987] AC 460.

and a suit filed in India in contravention of the agreement is not incompetent.[3022] The court in India may adjudicate such a suit if it considers that the ends of justice will be better served by the trial of suit in this country.[3023]

An agreement totally barring the jurisdiction of Indian courts is void by reason of the prohibition in section 28 of the Indian Contract Act, 1872. An agreement which restricts a party absolutely from enforcing rights under a contract in the usual legal proceedings in ordinary tribunals is void. It is no answer that the aggrieved party could take proceedings in England.[3024]

Where the dispute was between two foreign parties, part of the cause of action arose in a foreign country and the contract between the parties contained a forum selection clause under which they had chosen a foreign place as the forum, it was held that the principles of international law require relinquishment of jurisdiction in favour of the chosen forum. Accordingly, the plaint was returned under O VII, rule 10 of Code of Civil Procedure.[3025]

Indian courts certainly have jurisdiction to restrain the defendant from proceeding in the suit which he has filed in another country though generally speaking when the parties have agreed to abide by a particular forum, the court must hold the parties to their bargain. However, this is not an absolute rule. How discretion of court has to be exercised in a given case would depend upon various circumstances. But to grant stay of the suit is still a matter within the discretion of the court.[3026] Any bilateral agreement in which exercise of option of jurisdiction of courts in a particular country can be effectively made is not opposed to public policy and will not be hit under sections 23 or 28 of the Indian Contract Act, 1872. In fact, what was opposed to public policy was indicated as an option to exercise the jurisdiction of a particular court, which originally lacks jurisdiction for the parties concerned, that resort to a private tribunal. In this case, the option was to exclude Indian courts. The parties lived in Connecticut, United States of America. They had jurisdiction there and it was not the case that the petitioner and the respondent herein were going to permanently reside in the United States of America. Hence, there is nothing wrong in the contract to have chosen except the courts in India, thereby including the courts in the United States of America.[3027]

[s 20.29] Agreement as to Choice of Court—Construction of Ouster Clause

(As regards constructions of the ouster clause when words like "alone", "only", "exclusive" and the like have been used, there may be no difficulty. Even without such words in appropriate cases, the maxim *expressio unius est exclusio alterius* (expression of one is the exclusion of another), may be applied.)

A clause in the agreement provided that litigation under the contract would be taken up in a court at Kerala. It did not indicate that "only the Kerala Court" would have jurisdiction. In the suit filed in the Calcutta High Court, the only dispute was whether the manufacturer in Calcutta, who had undertaken to supply gunny bags to the purchaser in Kerala, was entitled

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3022. *LT Societa v Lakshminarayan*, AIR 1959 Cal 669; *Lakshminarayan v Vereenigde*, AIR 1960 Cal 45; *Motabhai v Mahalakshmi Cotton Mills*, 91 Cal LJ 1.
3023. *UL Lastochkina Odesea, USSR v UOI*, AIR 1976 AP 103.
3024. *Rajendra Sethia v Punjab National Bank*, AIR 1991 Del 285.
3025. *Sustainable EMS, LLC v Lee Harris Pomeroy Architects, PC (LHPA)*, AIR 2012 Cal 88.
3026. *Modi Entertainment Network v WSG Cricket Pvt Ltd*, AIR 2002 Bom 222.
3027. *Nirmala Balagopal v Venkatesulu Balagopal*, AIR 2004 Mod 255.

to the benefit of "*force majeure*" clause on the ground of strike. It was held that it could not be said that the Calcutta High Court would not have jurisdiction.[3028]

In a case of filing of a petition for arbitration, the owner of a property situated in Delhi had entered into an agreement with a developer to develop the property. The agreement was entered into at Faridabad where the owner resided. By the said agreement, the parties agreed to refer all disputes to the court at Faridabad. The Supreme Court held that it was not a suit for land and as such it will come under section 20 of the Code.[3029] It was observed by the Court as follows:

> One cannot look at para 16 alone in isolation. On the other hand, with open eyes, the parties had entered into the contract, they had agreed to refer all disputes to an arbitrator at Faridabad and they had agreed that the Faridabad Court alone shall have jurisdiction. In a matter of this kind, it cannot be said that the claim is similar to a suit for land. A housing complex has to be constructed at the site. When dispute arises, it will not be confined only to immovable property. Such disputes also require accounts to be maintained. The disputes also involve rendition of accounts. In the circumstances, in our view, Section 20 CPC alone is attracted.[3030]

An application under section 9 of the Arbitration and Conciliation Act, 1996 in a "Court" (including high court) as mentioned in section 2(1)(e) of the Act, when it would have jurisdiction to decide the question forming the subject-matter if the same had been subject-matter of a suit. But, where in a case, the cause of action arose at Mumbai and the arbitration clause of the agreement between parties also provided that only courts at Mumbai shall have jurisdiction, the application under section 9 cannot be entertained by the Delhi High Court.[3031]

The order form had a clause that "any legal proceedings in respect of any matters or claims or dispute on any account shall be instituted by the purchaser in Delhi High Court only". Bill issued also contained the words "subject to Delhi jurisdiction". Suit to recover price by the seller was filed. It was held that the jurisdiction of the court at Jaipur (the place where contract was entered) was not ousted by the above condition in order form and bill. Condition in order form applied only to legal proceedings instituted by plaintiff. As regards the condition in bill, there was no word "only", used after the words "subject to Delhi jurisdiction" in the bill. The mere use of the words "subject to Delhi jurisdiction" cannot mean that only Delhi courts have jurisdiction.[3032]

The High Court of Andhra Pradesh has held that if the jurisdiction of a civil court under section 20 of the Code of Civil Procedure is to be excluded, that must be done by clear and specific language in the agreement. A condition in a purchase order, "subject to jurisdiction of Bangalore court", cannot be taken as excluding jurisdiction. The clause or condition did not use the word "only" or "alone".[3033]

The intention of the parties can be culled out from use of the expressions "only", "exclusive", and the like with reference to a particular court. But the intention to exclude a court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms. In such case, only the accepted notions of contract would bind the parties.[3034]

3028. *Periwal Packing Industries v Fertilizers*, AIR 1982 Cal 350.
3029. *Jatinder Nath v Chopra Land Developers Pvt Ltd*, AIR 2007 SC 1401 : (2007) 11 SCC 453.
3030. *Jatinder Nath v Chopra Land Developers Pvt Ltd*, AIR 2007 SC 1401, at p 1408 : (2007) 11 SCC 453; Kapadia, J (as he then was) speaking for the Bench.
3031. *Jay Polychem (India) Ltd v Kotak Mahindra Bank Ltd*, AIR 2009 Del 187 : 2009 (158) DLT 363.
3032. *Jaishree Luxury House Kota v Kathotia Sons, Delhi*, AIR 1980 Raj 42.
3033. *Sponge Iron India v Andhra Steel Corp*, AIR 1989 AP 206.
3034. *New Moga Transport Co v United India Insurance Co Ltd*, AIR 2004 SC 2154.

Where parties to the agreement have unambiguously, clearly and explicitly arrived at a consensus that any dispute under the respective agreement shall be tried only before the court having a definite jurisdiction mentioned in the said agreement, then it would operate as bar to the filing of suit in a court other than specified in the agreement. Merely because the clause relating to the jurisdiction of the court does not contain the exclusionary words like "exclusive", "alone", "only" and the like, the jurisdiction of the court other than specified in the agreement cannot be invoked.[3035]

[s 20.30] Agreement as to Choice of Court-ignoring of Ouster Clause

The court would ordinarily have regard to the choice of the parties but where, however, the court whose jurisdiction has been ousted is satisfied that the stipulation would operate harshly, is oppressive in character, inequitable or unfair, for the ends of justice, it can relieve the party of the bargaining. The ouster clause can be ignored in a case where the plaintiff having filed the suit for permanent injunction, at a place where seizure was attempted and as such cause of action arose for restraining the respondent from interfering with his possession of the truck in question, as it would have definitely caused him hardship, if he was to run to court in another state for such relief.[3036]

An agreement to refer a dispute to a particular court may be ignored if the facts demand that the other court (excluded by the agreement) should entertain the suit in the interest of justice.[3037]

Agreement was made regarding the forum of suing where the plaintiff's goods were consigned by agent through the defendant's carrier, but not delivered. Suits for compensation filed in Nowgong were met with plea of defendant that agreement under contract was to file suits only in Malda. It was held that the agreement regarding the forum of suing contained in the consignment note, could not be enforced in the light of the principles relating to the enforceability of such an agreement. The plaintiff as principal was, no doubt, bound by what was agreed by his agent. It was, however, doubtful if the plaintiff had knowledge about the said agreement, regarding the forum of suing. The plaintiff was an inhabitant of Hojai, which was near Nowgong and far removed for Malda. What was more important was that the defendant carrier had its branch office at Hojai too. All these showed that the trial at Nowgong court would be perfectly just, with no real inconvenience to any side.[3038]

In a case where the Calcutta High Court entertained the plaintiff's plea and granted an order of injunction restraining the defendant from proceeding with the arbitration proceeding ignoring the jurisdictional clause in the agreement between parties, the Supreme Court held that when contract between parties contained a clause that dispute under the contract shall be decided by the court at Bombay, the high court has no jurisdiction to try the suit and grant injunction staying the arbitration proceedings at Bombay. It was observed that before granting injunction, the high court should have recorded a clear finding that it has territorial jurisdiction instead of a general remark that the plaintiff has an arguable case.[3039]

The contract between the parties vested jurisdiction in courts at Bombay. If the district *munsif*, Coimbatore entertains and disposes off the suit, it will only be an irregular exercise of jurisdiction and the resultant decree will not be a nullity. In such a situation, when the matter

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3035. *Consolidated Agencies v Gujrat Carbon & Industries Ltd*, AIR 2002 Mad 396 (DB).
3036. *Tara Chand Boid v Shikam Chand Bhora*, AIR 1995 Ori 199.
3037. *Rajasthan Golden Transport Co Ltd v United India Fire and General Insurance Co Ltd*, AIR 1980 Guj 184.
3038. *All Bengal Transport Agency v Hare Krishna Bank*, AIR 1985 Gau 7 (RL Hansaria, J).
3039. *Shree Subhlaxmi Fabrics Pvt Ltd v Chand Mal Boradia*, AIR 2005 SC 2161 : (2005) 10 SCC 704.

is brought before high court under section 115, it has a discretion not to interfere with the order complained of, unless the order, if allowed to stand would occasion failure of justice and cause irreparable injury to the party against whom it was made.[3040]

[s 20.31] Agreement as to Choice of Court—Jurisdiction Cannot Be Conferred upon a Court Which Lacks It

Before the parties can agree to vest the jurisdiction in a particular court, two or more courts including the one in whom the jurisdiction is agreed to be vested must have the jurisdiction under section 20, Code of Civil Procedure. The parties cannot agree to vest jurisdiction in a court which does not have the jurisdiction. Such an agreement would be against the statute and, thus, would be hit by sections 23 and 28 of the Indian Contract Act, 1872.[3041]

Neither can counsel waive the jurisdiction nor consent to confer jurisdiction on courts which do not otherwise have the jurisdiction.[3042]

But it is not open to the parties to confer by their agreement jurisdiction on a court which does not possess it under the Code of Civil Procedure and accordingly where the parties agree that a suit should be instituted at place *A* where there is only a district *munsif's* court, that court has no jurisdiction by virtue of the agreement of the parties to entertain a suit beyond its pecuniary jurisdiction.[3043]

Suit was instituted at Karur for the recovery of damages on the ground that consignment of goods entrusted at Karur for the recovery of damages for being carried to Calcutta and for being delivered to consignee there, was not so delivered. Contract conferred jurisdiction on Bangalore courts. It was held that the court in Bangalore did not have any jurisdiction. By mere agreement between the parties, such jurisdiction cannot be conferred upon the courts in Bangalore. It is not open to the parties by agreement to invest the court with jurisdiction, which it did not otherwise have, having regard to the provisions of section 20(a) and (c), read with the Explanation. Hence, it was not open to the petitioner to object to the jurisdiction of the court at Karur.[3044]

It is a well-settled principle that by agreement, the parties cannot confer jurisdiction where none exists on a court to which the Code of Civil Procedure applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court. Indeed, in such cases, the English courts do permit invoking their jurisdiction. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a foreign court termed as a "neutral court" or "court of choice" creating exclusive or non-exclusive jurisdiction in it.[3045]

3040. *Renown Biscuit Co Bombay v Kamalanathan*, AIR 1980 Mad 28.
3041. *Ranjana Nagpal v Devi Ram*, AIR 2002 HP 166. See also *Dilip Kumar Ray v Tata Finance Ltd*, AIR 2002 Ori 29.
3042. *State of Gujarat v Sarti Devi*, AIR 1996 SC 937 : (1996) 1 SCC 558.
3043. *Dharmal v Jhankidas*, 49 Cal WN 123; *Ram Bahadur Thakur & Co v Devi Dayal (Sales) Ltd*, AIR 1954 Bom 176 : (1954) ILR Bom 334; *HK Dada (India) Ltd v MP Sugar Mills*, AIR 1954 Mad 845; *Sanghvi v Asher Textiles Ltd*, (1961) 2 Mad LJ 337.
3044. *Prakash Roadlines Pvt Ltd v PM Gounder & Co*, AIR 1995 Mad 84.
3045. *Modi Entertainment Network v WSG Cricket Pvt Ltd*, AIR 2003 SC 1177 : 2003 AIR SCW 341 : (2003) 4 SCC 341. See also *Hakim Singh v Gammon (India) Ltd*, AIR 1971 SC 740 : (1971) 1 SCC 286 : 1971 SCR (3) 314; *Patnaik Industries Pvt Ltd v Kalinga Iron Works*, AIR 1984 Ori 182; *Mahesh Chand Gupta v Assistant Collector Delhi*, AIR 2004 Del 101.

In a suit for recovery, the contract between parties was for release and exhibition of a movie. Plaintiff, the proprietor of a theatre was seeking recovery of dues from the defendant distributor. The theatre was situated at place *K*, so part of cause of action had arisen at place *K*. No cause of action took place at place *C*. It was held that the court at place *K* has got jurisdiction to deal with the matter even though contract conferred jurisdiction on court at place *C*.[3046]

[s 20.32] Agreement as to Choice of Court—Effect on Third Party

Forum selection clauses are binding on the parties but cannot bind a third party, unless it is shown that he had been made aware of its implications.[3047]

The mere fact that a person not a party to such an agreement is added to as defendant makes no difference, provided the courts referred to under the agreement has jurisdiction against such a person.[3048] Since such an agreement does not tie the hands of the court, the court in an appropriate case may refuse to drive a party to the court agreed to under the agreement.[3049]

[s 20.33] Agreement as to Choice of Court—Mandatory in Nature

Where an agreement confers exclusive jurisdiction on the court at Gorakhpur and the court would be one of the competent courts under section 20, the agreement is valid and Calcutta High Court has no jurisdiction.[3050]

Such an agreement does not oust the jurisdiction of the court having jurisdiction. Nevertheless, court would ordinarily compel the parties to abide by such an agreement.[3051]

If through clause of the agreement, the parties have bound themselves that any matter arising between them under the said contract, it is the courts in Calcutta alone which will have jurisdiction. Once parties bound themselves as such it is not open for them to choose a different jurisdiction as in the present case by filing the suit at Bhubaneswar. Such a suit would be in violation of the said agreement. For the said reasons, the suit filed in the civil court at Bhubaneswar would not be valid in view of the said agreement.[3052]

[s 20.34] Choice of Court—Invoice, Insurance Policy, Lottery, Purchase Order, etc. Containing Printed Clause

A mere allegation by a plaintiff for the purpose of creating a jurisdiction should not be enforced for conferring jurisdiction. More so, a fact, which does not have any direct relevance with the *lis* but is made to occur only to defeat statutory provisions of section 20(c) of the CPC in order to deprive the court which must have territorial jurisdiction over the subject-matter of the suit, should not be accepted for the reason that the act has knowingly or purposely been performed to harass the defendant and deprive the court, which has territorial jurisdiction over the subject-matter to try the suit. Thus, if merely by making an endorsement on the negotiable

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3046. *Arputham Give Release by its proprietor, Pondicherry v Raja Theater*, AIR 2006 Mad 344.
3047. Indian Contract Act, 1872, section 37.
3048. *Shah Prabhudas v Eurasian Equipments*, AIR 1977 Cal 449.
3049. *S Sarabhai v ET Organisation*, AIR 1975 Guj 72.
3050. *Kumud v Fertiliser Corp of India*, AIR 1985 Cal 89 (reviews case law).
3051. *Bhagat Ram v Gupta Cables*, AIR 1977 Cal 451; *Ghatge and Patil (Transport) Ltd v Madhusudan*, AIR 1977 Bom 299 : 79 Bom LR 378.
3052. *Dilip Kumar Ray v Tata Finance Ltd*, AIR 2002 Ori 29.

instrument, it is permitted to give rise to jurisdiction of a particular court, it would definitely defeat the purpose of section 20(c) of the CPC.[3053]

It is settled law that the jurisdiction of the court where the cause of action, wholly or partly arises, cannot be taken away by the choice of the party to the contract merely on the basis of the condition printed on the bills or the *bilty* as the case may be. The parties cannot create a jurisdiction in the court in whose territorial jurisdiction no cause of action has at all arisen.[3054]

Purchaser of lottery ticket is not bound by the clause of forum selection printed in small print on the reverse side of the lottery ticket. There is a distinction between the bilateral contract and unilateral stipulation.[3055]

The contract having been concluded in Delhi, payments being received in Delhi, material part of cause of action had arisen in Delhi, the courts of Delhi would have jurisdiction, even if the term of invoice conferring exclusive jurisdiction to Goa is not considered. The plea and objection of defendant of lack of jurisdiction is devoid of merit.[3056]

In view of the non-obstante clause in section 46 of the Insurance Act, 1938, a clause in an insurance policy providing for a choice of forum does not bind the policy-holder.[3057]

Where two or more courts have got concurrent jurisdiction, the parties can agree that any claim arising between them shall be instituted in one of the courts which has got jurisdiction; but the parties cannot confer jurisdiction on a court which has got none in law. In this case, the cause of action did not arise wholly or in part in Delhi and the head office of the company was situated in Bombay. The Delhi court had no jurisdiction. Hence, the condition in the policy was not binding on the parties. Since the cause of action arose at *A*, the court at *A* had jurisdiction to entertain the claim.[3058]

Where the consignment note contained printed words "subject to Bombay jurisdiction alone" and, apart from existence of these printed notes, the carrier had no case that there was meeting of minds between the consignor and the carrier, nor was there specific agreement in that behalf and the consignment note was signed only by employer of the carrier and was handed over to the consignor, but there was nothing to indicate that there was an agreement between the parties conferring exclusive jurisdiction on the Bombay court, it was held that the printed words, by themselves and without anything more, would not be sufficient to constitute an agreement to oust the jurisdiction of all courts other than the court specified.[3059]

For ouster of exclusion of jurisdiction of court having concurrent jurisdiction, the language in the agreement must be unambiguous, clear and specific. From condition in the purchase order "subject to jurisdiction to Bangalore courts", ouster of jurisdiction of other courts cannot be implied, position is different, if the condition is "subject to jurisdiction of Bangalore courts only or alone". Purchase order was with the condition "subject to jurisdiction of Bangalore courts". Party from Andhra Pradesh supplied goods in response to purchase order. The sale order contained the condition "subject to Andhra Pradesh state jurisdiction". It could not be said that there was any consensus or agreement between the parties on the question of jurisdiction of courts; courts at

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3053. *Mohna Ramakrishanan v Yogam Bala Dev Raj*, AIR 2003 Raj 88.
3054. *Hindustan Metals v Vishal Goods Transport Co*, AIR 2002 Raj 248.
3055. *Special Secretary v Venkataramana Sesha Iyer*, AIR 1984 AP 5 (DB).
3056. *Dura-Live India Pvt Ltd v BPL Broadband Network Pvt Ltd*, AIR 2004 Del 186.
3057. *Isaq Mahmad v United India Fire and General Insurance Co*, AIR 1978 Guj 46.
3058. *Babu Ram Lal, Mandi v New Delhi Assurance Co Ltd, New Delhi*, AIR 1980 Raj 126.
3059. *United India Insurance Co Ltd v ATC Pvt Ltd*, AIR 1989 Ker 36.

both places had jurisdiction. The plaintiff (i.e., the party supplying goods) had, in the absence of exclusion of jurisdiction, choice in the matter of filing suit in a particular court.[3060]

Where the machinery was purchased and the whole transaction from the submission of quotation, accepting order and receiving payment was handled by the branch office of the manufacturer at Delhi—mere mention of "subject to Bombay jurisdiction" in the quotation of the manufacturer will not oust jurisdiction of Delhi court.[3061]

[s 20.35] Notice Under Section 80

A notice under section 80 presupposes the existence of a cause of action complete and enforceable. It is itself not part of the cause of action and a court therefore, would have no jurisdiction to entertain a suit solely on the basis of the issue of a notice under that section.[3062]

[S 21] Objections to jurisdiction.—[3063][(1)] No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

[3064][(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been consequent failure of justice.]

SYNOPSIS

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3061. *Baldev Steel Ltd v Empire Dyeng & Manufacturing Co Ltd*, AIR 2001 Del 391.
3062. *Bata Shoe Co v UOI*, AIR 1954 Bom 129.
3063. Section 21 re-numbered as sub-section (1) by Act 104 of 1976, section 8 (w.e.f. 1-2-1977).
3064. Inserted by CPC (Amendment) Act 104 of 1976, section 8 (w.e.f. 1-2-1977).

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[s 21.1] Scope

Sub-section 1 of section 21 was inserted with a view to expedite disposal of the suits and to avoid entertainment of technical objections about territorial jurisdiction, unless there is a failure of justice. Sub-section (1) of section 21 provides that the objection regarding territorial jurisdiction can be raised at the earliest possible opportunity and even if it is so raised, it would not be fatal, unless there is a failure of justice. Thus, the mandatory provisions as envisaged under sub-section (1) of section 21 of the Code of Civil Procedure, clearly provides that before raising objections with regard to territorial jurisdiction before the appellate or the revisional courts, the appellants are required to satisfy three conditions precedent with regard to such an objection about the territorial jurisdiction, which are as follows:

(a) the objection must be taken in the court of first instance;

(b) the objection must be taken at the earliest possible opportunity, i.e., before the issues are settled; and

(c) there has been consequent failure of justice.

It is thus, easily deducible that within the meaning of sub-section (1) of section 21, a statutory recognition has been given to the principle that the objection regarding territorial jurisdiction can be waived if the defendant waives this objection by his conduct or otherwise than subsequently on account of this waiver, he can be precluded from taking any such objection before the appellate or revisional courts.[3065]

However, the same high court, relying upon *Kiran Singh v Chaman Paswan*[3066] has held that the objection regarding jurisdiction can be raised at any time even during the appeal. It was observed that when the court, which has decided the matter, had no jurisdiction to adjudicate the dispute, the decree passed by such court is nullity and its validity can be questioned at any time even in an appeal or even during the execution proceedings. Consent of the parties or the silence or the inaction of parties in challenging the jurisdiction will not confer jurisdiction on the court to adjudicate the dispute, which otherwise the court has no jurisdiction to decide.

The plea of jurisdiction goes to the very root of the matter. The trial court having held that it had no territorial jurisdiction to try the suit, the high court should have gone deeper into the matter and until a clear finding was recorded that the court had territorial jurisdiction to try the suit. No injunction could have been granted in favour of the plaintiff by making a general

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3065. *Punjab National Bank v Millen Sales Corp*, AIR 1997 Raj 151; *Pathumma v Kuntalan Kutti*, (1981) 3 SCC 589.

3066. *Manindra Chandra v Lal Mohan*, AIR 1929 Cal 358 : (1929) ILR 56 Cal 940; *Bank of Chettinad v SPKVR Firm*, AIR 1935 Rang 517; *Jnan Chand v Jugal Kishore*, AIR 1960 Cal 331.

remark that the plaintiff has an arguable case that he did not consciously agree to the exclusion of the jurisdiction of the court.[3067]

[s 21.2] High Courts

This section does not apply to high courts in the exercise of their original jurisdiction.[3068] Section 21 of the Code of Civil Procedure is not applicable to the original side of the high court; but waiver can operate independently of section 21. Section 21 is a statutory recognition of the principle that the defect as to the place of suing (under sections 15–20) may be waived independently of this section, and the defendant who may waive the objection may be subsequently precluded from taking it.[3069]

However, the observations of Lord DERBYSHIRE, CJ, speaking for the Division Bench of Calcutta High Court in the undernoted case[3070] is very illuminating:

> .....It must be noted at this stage that Clause 12 gives this Court its jurisdiction. The jurisdiction of the Original Side of this Court is not given to it by Section 20 of the Code of Civil Procedure. Section 20, Code of Civil Procedure, does not apply to the Original Side of the Chartered High Court, (see Section 120 of the Code of Civil Procedure). If this Court has jurisdiction to entertain the suit, there is no need to invoke the aid of Section 21 of the Code of Civil Procedure. If this Court has no jurisdiction to entertain this suit, then the Judge in the Court of first instance has no jurisdiction to hear the case and this Court sitting as an Appellate Court has no jurisdiction to entertain the appeal. That being so, this Court has no jurisdiction to consider the matter and has no jurisdiction to apply Section 21 of the Code of Civil Procedure, and it seems to me, therefore, that Section 21 of the Code can have no application in a case of this kind which is brought on the Original Side of this Court.....

In a decision, the Calcutta High Court reiterated the decision given in the *Maharaja Bahadur of Hathwa* case (*supra*) and held that section 21 of the Code does not apply to high court in exercise of its original civil jurisdiction. It further held that cases relating to banking transactions form exception to the rule that debtor should seek his creditor. Therefore, bank cannot be prevented from re-arguing point of jurisdiction over again.[3071]

[s 21.3] Sections 21 and 99 of the Code of Civil Procedure and Section 11 of the Suits Valuation Act, 1887—Policy Underlying

The policy underlying sections 21 and 99 of the Code of Civil Procedure and section 11 of the Suits Valuation Act, 1887 is the same, namely, that when a case had been tried by the court on the merits and the judgement rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both, territorial and pecuniary, as technical and not open to consideration by an appellate court, unless there has been a prejudice upon merits.[3072] The mere defect in the territorial or pecuniary jurisdiction, such as can be cured by section 21 of the Code of Civil Procedure 1908 or section 11 of the Suits Valuation Act. 1887, does not make the decree a nullity. Therefore, a decree based on compromise between

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3067. *Shree Subhlaxmi Fabrics Pvt Ltd v Chand Mal Baradia*, AIR 2005 SC 2161 : (2005) 10 SCC 704.
3068. *Nandarani Bose v Ranchhoddas Muldas Ramanuj*, AIR 1981 Cal 275.
3069. *Jeevani Bano v Asha Arora*, AIR 1997 Raj 261.
3070. *Maharaja Bahadur of Hathwa v HE Beal*, (1936) 40 Cal WN 65 (DB).
3071. *Oriental Bank of Commerce v Santosh Kumar Agarwal*, AIR 2008 Cal 148 : 2008 (2) Cal LT 509 (DB).
3072. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 : (1955) 1 SCR 117 : (1954) SCJ 514; *Nand Kishore v Prabhu Narain*, AIR 1976 Raj 20.

parties to a suit is not void *ab initio* or a nullity merely because it involves an amount which exceeds the pecuniary limits of the jurisdiction of the court that passed it.[3073] A decree based on compromise, involving an amount exceeding the pecuniary limits of jurisdiction of the court passing it, is an irregularity which does not nullify a decree.[3074]

[s 21.4] Meaning of "Jurisdiction" in Relation to

The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.[3075] The views expressed by the Supreme Court in the *DLF Universal*'s case (*supra*) has been reiterated in a later decision.[3076] In para 23 of the judgement, SB Sinha, J, has observed as follows:

> **23.** We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure; and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with.

In *Harshad Chiman Lal Modi*'s case (*supra*), the Supreme Court quoted with approval an earlier decision in *Kiran Singh*'s case,[3077] wherein it has been observed as follows:

> It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction … strikes … at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

In a case relating to termination of service of an employee, where the Supreme Court found the dispute to be one under the Industrial Disputes Act, 1947, and the jurisdiction of civil court barred, it was held that it was not material whether the objection to jurisdiction was raised at the initial stage or not.[3078] Sirpurkar, J, speaking for the Bench, observed as follows:

> Once the original decree itself has been held to be without jurisdiction and hit by the doctrine of coram non judice, there would be no question of upholding the same merely on the ground that the objection to the jurisdiction was not taken at the initial, First Appellate or the Second Appellate stage.

3073. *Gwala Prasad v Mathura Prasad*, AIR 1937 Oudh 379 : (1938) ILR 13 Luck 340; relying on *Ambadas v Vishnu Govind*, AIR 1927 Bom 83 : (1927) ILR 50 Bom 839; *Anil Kumar Das v Aruna Kumar Bannerjee*, (1962) 66 Cal WN 476.
3074. *Gosto Behari Pramanik v Malati Sen*, AIR 1985 Cal 379.
3075. *Harshad Chiman Lal Modi v DLF Universal Ltd*, AIR 2005 SC 4446 : (2005) 7 SCC 791 : 2005 (Supp 3) SCR 495 : 2005 (7) Scale 533.
3076. *Hasham Abbas Sayyad v Usman Abbas Sayyad*, AIR 2007 SC 1077 : (2007) 2 SCC 355.
3077. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 : (1955) 1 SCR 117. **See also** *Nand Kishore v Prabhu Narain*, AIR 1976 Raj 20 : 1975 WLN 814.
3078. *Chief Engineer, Hydel Project v Ravinder Nath*, AIR 2008 SC 1315, p 1321 : (2008) 2 SCC 350.

In a decision, the Supreme Court has held that it is permissible to raise objection to the jurisdiction as any stage when the objection is as regards the subject matter of the suit.[3079] It has been observed in the above case as follows:

> 19. A distinction, however, must be made between a jurisdiction with regard to subject matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be. It is not a case where the Tribunal had no jurisdiction in relation to the subject matter of claim. As a matter of fact the civil court had no jurisdiction to entertain the suit. If the Tribunal had the jurisdiction to entertain a claim petition under the Motor Vehicles Act, in our opinion, the Court should not have, in the absence of any finding of sufferance of any prejudice on the part of the first respondent, entertained the appeal.

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.[3080]

The question before the Supreme Court[3081] was that whether the motor accident claims tribunal, Kolkata had the jurisdiction to decide the claim application under section 166 of the Motor Vehicles Act, 1988 when the accident had taken place outside Kolkata and claimant also resided outside Kolkata but the respondent carried on business in Kolkata and that whether the high court was correct in setting aside the award on the ground of lack of territorial jurisdiction in the absence of any failure of justice. It was held by the Supreme Court that there is no bar to a claim petition where the insurance company has business as per provisions of section 21 of the Code of Civil Procedure.

A limitation may be: (a) as to the subject matter; (b) as to person; (c) as to the pecuniary value of the suit; or (d) as to place; or it may partake of two or more of these characteristics.[3082]

[s 21.4.1] Subject Matter

Subject matter depends upon the nature of the cause of action and the relief prayed for. Thus, a presidency small causes court has no jurisdiction to entertain certain suits such as suits for the recovery or partition of immovable property; suits for compensation for defamation; suits for dissolution of partnership, etc.[3083] If a presidency small causes court or a provincial small causes court entertains a suit which is excluded from its cognisance, its decree is a nullity.[3084]

3079. *Mantoo Sarkar v Oriental Insurance Co Ltd*, AIR 2009 SC 1022 : (2009) 2 SCC 244 (Sinha, J. speaking for the Bench).
3080. *Raja Soap Factory v Shantharaj*, AIR 1965 SC 1449; *Kunheema v P Balkrishnan*, AIR 1967 Ker 97; *Hriday Nath v Ramchandra*, AIR 1921 Cal 34 : (1921) ILR 48 Cal 138; *Amritrav v Balakrishna*, (1887) ILR 11 Bom 488, p 490.
3081. *Malati Sardar v National Insurance Co Ltd*, (2016) 3 SCC 43.
3082. *Vishnu v Krishnarao*, (1887) ILR 11 Bom 153.
3083. See the Presidency Small Causes Courts Act, 1882 (Act 15 of 1882), section 19. Certain other suits are also excepted from the cognisance of a provincial small causes court. See Provincial Small Causes Courts Act, 1887 (Act 9 of 1887), section 15.
3084. See also Bombay Civil Courts Act, 1869 (Act 14 of 1869), section 28A, and Bengal, NWP and Assam Civil Courts Act, 1887 (Act 12 of 1887), section 23.

[s 21.4.2] Person

The general rule as stated by Garth, CJ in *Olner v Lavezzo*[3085] is that civil courts here, as in England "have jurisdiction to try all civil suits against all persons of any nationality, within the local limits of their jurisdiction". Independent foreign sovereigns are exempt but may submit themselves to jurisdiction by appearance to a writ.[3086]

[s 21.4.3] Pecuniary Value of the Suit

Throughout India, there are courts of different grades having jurisdiction in suits of different amounts in different local areas. These have been set forth in the notes to section 15 where the principles regulating pecuniary jurisdiction are also discussed. A suit may be over-valued and instituted in a court of a higher grade; or it may be under-valued and instituted in a court of a lower grade, but section 11 of the Suits Valuation Act, 1887 (Act 7 of 1887), provides that an objection on this ground shall not be entertained by an appellate or a revisional court unless (1) the objection was taken in the court who first framed and recorded it, or (2) the appellate or revisional court is satisfied that the over-valuation or under-valuation has prejudicially affected the disposal of the suit on its merits.[3087]

The Himachal Pradesh High Court has held that the plea of under-valuation raised for the first time in appeal is not sustainable in the absence of merits of the case having been prejudicially affected. Further, no objection as to the competence of a court with reference to its pecuniary jurisdiction shall be allowed unless there has been a consequent failure of justice.[3088]

[s 21.4.4] Place of Suing

This phrase may refer to territorial jurisdiction in its wider sense as where the suit is not cognizable by an Indian court, being for instance, a suit for partition of land outside India; or in its narrower sense of the local venue in India for suits cognizable by Indian courts.

Judicial opinion has been divided as to in which of the two senses the phrase "place of suing" has been used in this section. Some decisions hold that it is limited to local venue for which rules have been enacted in sections 15–20;[3089] while others take the view that it applies to all questions of territorial as contrasted with inherent jurisdiction.[3090] The question is concluded by the decision of the Supreme Court in *Hiralal v Kalinath*.[3091] There, a suit was filed in the original side of the High Court of Bombay after obtaining leave under clause 12 of the Letters Patent on the allegation that part of the cause of action arose in Bombay. The suit

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3085. *Olner v Lavezzo*, (1884) ILR 10 Cal 878.
3086. *Mighell v Sultan of Johore*, [1893] 1 QB 149. As to princes, chiefs, ambassadors and envoys, see section 86.
3087. *Jose Antonio v Francisco*, (1910) ILR 35 Bom 24; *Rajlakshmi v Katyayani*, (1910) ILR 38 Cal 638, 666, 672; *Rachappa v Shidappa*, (1919) ILR 43 Bom 507 : (1919) 46 IA 24; *Jagtaram v Munder Kuer*, AIR 1934 Pat 240 : (1934) ILR 13 Pat 290; *Sitaram Singh v Tikarem*, AIR 1942 Oudh 481; *Appat Krishna v Lakshmi Nothair*, AIR 1950 Mad 751.
3088. *Ajay Singh (deceased by LRs) v Tikka Brijendra Singh*, AIR 2007 HP 52 : 2006 (2) Shim LC 394; **see also** *State of Himachal Pradesh v Smt Annapurna Pathak*, AIR 2007 HP 88.
3089. *Bhamboo v Ram Narain*, AIR 1928 Lah 207 : (1928) ILR 9 Lah 455; *Prema Dip Pictures v New Sound Pictures*, AIR 1955 MB 193.
3090. *Musaji Lukmanji v Durga Das*, AIR 1946 Lah 57 : (1945) ILR Lah 281; *Dinanath v Mahavir*, AIR 1958 Punj 289.
3091. *Hiralal v Kalinath*, AIR 1962 SC 199 : [1962] 2 SCR 747 : (1961) 2 SCJ 592, affirming *Hiralal v Kalinath*, AIR 1955 All 569; *Harichand v Virbal*, AIR 1975 Guj 150 : (1974) 15 Guj LR 499.

was then referred to arbitration and it resulted in an award in favour of the plaintiff. A decree was passed in terms of the award and that was put in execution. The judgement-debtor resisted it on the ground that no part of the cause of action had arisen in Bombay, and therefore, the high court had no jurisdiction to try the cause and that the decree was a nullity. In rejecting his contention, the Supreme Court observed:

> It is well-settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case which goes to the very root of the jurisdiction and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like section 21 of the Civil Procedure Code.

In view of this decision, the question of whether section 21 applies in terms to objections to local jurisdiction other than those covered by sections 15–20 would appear to be academic as the general principal underlying the section would in any event be applicable.

This decision also settles the controversy in the Indian courts[3092] as to the validity of the decree passed by court *A* in a suit which had been instituted in that court in violation of the agreement of the parties specifying court *B* as the forum for adjudication of disputes under the contract. As already stated, courts in India derived their jurisdiction from the Code and it is not open to the parties by agreement to invest them with or divest them of their jurisdiction.[3093] There being therefore, no inherent lack of jurisdiction in court *A*, any objection based on the agreement is one relating to a place of suing and that falls within the saving of section 21. The decisions therefore, which hold that the decree passed by court *A* would be a nullity are no longer good law.[3094] In section 21(1), the expression "place of suing" covers also objection to the place of suing on the ground that the forum chosen is in violation of the forum selection clause.[3095] The plaintiff had submitted to the jurisdiction of a court by valuing his suit at a particular level. He had sought a relief from the court and, on being denied the relief, had agitated against the decision in the appellate forum, without raising any objection. It was held that the objection as to under-valuation and want of jurisdiction, cannot be raised by the plaintiff's legal representatives, who had been substituted for the plaintiffs.[3096]

If the plaint does not disclose any wrong done to plaintiff at Delhi, then the court at Delhi does not have jurisdiction to entertain subject suit and if summons/notice of suit are issued to defendant, it would cause harassment and inconvenience to defendant. The court is not forum convenience to entertain suit on averments contained in plaint.[3097]

In a suit for specific performance, a plea was taken that court at Hyderabad had no territorial jurisdiction as the property was situated in Medak district. The Hyderabad court rejected the objection on the ground that relief of specific performance could be entirely obtained through personal obedience of defendants residing in Hyderabad; therefore, it had territorial jurisdiction. In the meantime, the Supreme Court had pronounced in *Harshad Chiman Lal Modi*[3098] that a suit for specific performance could only be filed where the property is situated.

3092. *Prem Dip Pictures v New Sound Pictures*, AIR 1955 MB 193; *Gulabchand v Anandan*, AIR 1954 Mad 11; *Dinanath v Mahavir*, AIR 1958 Punj 289.
3093. See notes to section 20: "Agreement as to Choice of Court".
3094. *Prem Dip Pictures v New Sound Pictures*, AIR 1955 MB 193; *Gulab Chand v Anandan*, AIR 1954 Mad 11.
3095. *Savani Transport v Sukumar Chakravarty*, AIR 1986 Cal 330 (DB).
3096. *Shioprasad v Mohanabai*, AIR 1989 Bom 349.
3097. *Escorts Ltd v Tejpal Singh Sisodia*, 2019 SCC OnLine (Del) 7607 : LNIND 2019 DEL 851.
3098. *Harshad Chiman Lal Modi v DLF Universal Ltd*, AIR 2005 SC 4446 : (2005) 7 SCC 791 : 2005 (7) Scale 533.

The instant issue, therefore, travelled to the Supreme Court,[3099] which held that as in the first appeal, the high court had accepted this plea and followed the judgement of the Supreme Court in *Harshad Chiman Lal Modi*, holding that the court in Hyderabad had no territorial jurisdiction and as a result of which the appeal was allowed and ordered to be filed in an appropriate court, no consequent failure of justice had taken place and conclusively the matter was remanded to the high court for adjudication on merits.

[s 21.5] Judgement of the Court Not Competent to Deliver It

See notes to section 11 under the same heading.

[s 21.6] Execution Proceedings: Sub-section 3

The section before its amendment did not apply to execution proceedings.[3100] The new sub-section (3), however, extends the rule of waiver laid down in this section to execution proceedings also. Hence, an objection as to the competence of the executing court with reference to the local limits of its jurisdiction would be disallowed by the appellate or revisional court, unless the conditions therein laid down, viz, that such objection was preferred in the executing court at the earliest opportunity and that there has been a consequent failure of justice, are complied with. The words of sub-section (3) are mandatory. Hence, the appellate or revisional court must reject the objection unless both the conditions which are cumulative have been complied with.

[s 21.7] Waiver of Objection to Jurisdiction

[s 21.7.1] General Rule

It is a fundamental rule that a judgement of a court without jurisdiction is a nullity.[3101] Where by reason of any limitation imposed by statute, charter, commission, a court is without jurisdiction to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Where a limited court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.[3102] The general rule, therefore, is that consent cannot give jurisdiction, and, want of jurisdiction cannot be waived.

[s 21.7.2] Want of Jurisdiction and Irregular Exercise of Jurisdiction

There is an apparent conflict in the reported cases on this subject owing to the failure to keep clearly in view the distinction between want of jurisdiction and irregularity in the exercise of jurisdiction, or to use the phrase of Mookerjee, J, irregularity in the assumption of jurisdiction.[3103] The leading case on the subject is *Ledgard v Bull*[3104] decided by the Privy Council in 1886. The suit was for damages and an injunction for infringement of a patent. Under the

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3099. *KP Ranga Rao v KV Venkatesham*, (2015) 13 SCC 14.
3100. *Vasireddi Srimanthu v Devabhaktuni*, AIR 1947 Mad 347 : (1948) ILR Mad 18 (FB).
3101. *Rajlakshmi v Katyayani*, (1913) ILR 38 Cal 639; *Kiransingh v Chaman Paswan*, AIR 1954 SC 340.
3102. *Bepin Behary v Mohit Kumar*, AIR 1942 Cal 496 : (1942) ILR 1 Cal 149; *Raghuraj v Basudeo*, AIR 1950 Pat 318 : (1950) ILR 29 Pat 318; *United Commercial Bank Ltd v Workmen*, AIR 1951 SC 230.
3103. *Gurdeo Singh v Chandrika*, (1909) ILR 36 Cal 103.
3104. *Ledgard v Bull*, (1887) 13 IA 124 : (1886) ILR 9 All 191; *Vishnu v Krishnarao*, (1887) ILR 11 Bom 153.

Patents and Designs (Amendment) Act, 1950 (stands repealed as of the 21st century), such a suit could only be brought in a district court, but it was brought in the court of a subordinate judge who had no jurisdiction to entertain it. The suit was eventually transferred from the subordinate judge's court to the district court, and there heard and decided. The defendant contended that an order for transfer of a suit from one court to another under section 24 could not be made, unless the suit had been brought in a court having jurisdiction, but his contention was overruled. The same view was taken by the high court on appeal. The judicial committee held that the suit having been instituted in a court which had no jurisdiction, no order of transfer could be made, but that the district court being competent to entertain and try the suit if it were competently brought, the defendant could waive the objection to the irregularities of its institution, but that he had not done so, and the decree of the district court could not, therefore, stand and it ought to have been set aside by the high court. Lord WATSON in delivering the judgement of the Board said:

> The District Judge was perfectly *competent to entertain* and try the suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a Defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. [But] [w]hen the judge has *no inherent jurisdiction* over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although that may constitute the judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue and go to trial upon the merits, the Defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.

The principles laid down in *Ledgard v Bull* were reiterated by their Lordships of the Privy Council in *Meenakshi Naidu v Subramania Sastri*.[3105] That was a case in which no appeal was provided for by an enactment. Their Lordships held that the decree of the high court was a nullity. In the course of the judgment, their Lordships said:

> In the present case there was an inherent incompetency in the High Court to deal with the question brought before it and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

These two cases illustrate the distinction between want of jurisdiction and irregular exercise or assumption of jurisdiction. Irregular exercise or assumption may be waived as it could have been in *Ledgard v Bull* and therefore, if a court were erroneously to assume jurisdiction, to try a suit over which it has inherent jurisdiction, its decree may be set aside but it cannot be treated as a nullity;[3106] but, when the court is not competent to entertain to try the suit, there is want of inherent jurisdiction which cannot be waived. Thus, where a suit was exclusively triable by the revenue court under section 38 of the Rajasthan Tenancy Act, 1955, but was tried by a civil court, it was held that the objection as to jurisdiction could be raised at the stage of appeal.[3107] If the railway at the destination station is not liable for damages to goods or person as under the unamended section 80 of the Indian Railway Act, 1890, the court at the destination station is incompetent to entertain the suit. Such an infirmity being of inherent lack of jurisdiction, the section is inapplicable to such a situation.[3108]

3105. *Meenakshi Naidu v Subramania Sastri*, (1888) ILR 11 Mad 26 : 14 IA 160; *Jeramchod v Dakore Temple Committee*, AIR 1925 PC 155 : (1925) 27 Bom LR 872.
3106. *Bepin Behary v Mohit Kumar*, AIR 1942 Cal 496; *Girwar Narayan v Kamla Prasad*, AIR 1933 Pat 104 : (1933) ILR 12 Pat 117; *Yaruva Chinnapa Redi v Shriniwasrao*, AIR 1935 Mad 835 : (1936) ILR 59 Mad 62; *Ajam Ibram v Bai Hana*, AIR 1939 Bom 85 : (1939) ILR Bom 472.
3107. *Mohanlal v Ratna*, AIR 1971 Raj 164; *Venkata Rao v Brijpal*, AIR 1972 Mys 339.
3108. *UOI v Bhagat Ram*, AIR 1972 All 288.

[s 21.7.3] Interlocutory Orders—Effect on

If the court had no jurisdiction at all to entertain the suit, then anything done by it, eg, interlocutory orders passed by assuming such jurisdiction, would be totally without competence. The mere fact that such incompetence is discovered subsequently, would not render the intermediate acts and findings till the date of discovery of such incompetence as valid. To accept this argument would lead to a very strange situation. Orders passed by a court, which is incompetent to entertain the proceedings: (i) would then be valid between the date when the proceedings are entertained and the discovery of its incompetence; but (ii) would not be either binding or operative, after the date of discovery of the incompetence of the court. Either the court is competent, or it is incompetent, to entertain suits and to pass orders therein;[3109] but here again, there are certain exceptions. If the objection to the jurisdiction is on the ground that the trial court had no jurisdiction because the suit being of a small cause nature, was not cognizable by it, such objection, if not taken in the trial court, cannot be raised in revision.[3110] Similarly, objection to the assumption of jurisdiction by the district judge in a suit for dissolution of marriage under the Muslim Marriages Act, 1939, after the district judge had recorded the finding of the husband's impotence was held impermissible under this section, save where failure of justice was established.[3111] If the court has no owing jurisdiction to some privilege attached to a party, that party can waive such privilege. Thus, a defendant may waive his status as an agriculturist. Another exception is in the case of pecuniary jurisdiction enacted in section 11 of the Suits Valuation Act, 1887 (Act 7 of 1887), and this section proceeds on the lines of that section. A third expression to this section is that to a place of suing or the local venue of suits within the cognisance of Indian courts.

Section 21(2) of the CPC prohibits the appellate and revisional courts from allowing objections as to the pecuniary jurisdiction of the court of first instance unless such objection was taken in the court of first instance at the earliest possible time and also proves that decision by a court without jurisdiction has led to failure of justice. Relying on this and plethora of judicial decisions on the point, the Supreme Court in *Om Prakash Agarwal v Vishan Dayal Rajpoot*,[3112] observed that a party who did not raise any objection regarding the pecuniary jurisdiction of the court and took a chance to obtain judgement in his favour on merits, cannot be allowed to turn around and take the plea before the revisional court that the judgement was rendered by a court without jurisdiction and, thus, it is a nullity. It held that section 21 has been enacted to prevent a party from taking such a plea only after the decision on merit goes against him. The court stated that section 21 contains a legislative policy which has an object and purpose. The object is also to avoid retrial of cases on merit on basis of technical objections. The Court also took note of the law laid down by the single judge of the Allahabad High Court in *Tejumal v Mohd Sarfraz*,[3113] where it was held that "*defects of jurisdiction whether pecuniary or territorial or to the subject matter cannot be cured and can be set up at any stage of the proceeding*". The Supreme Court held that the same cannot be approved as it does not lay down the correct law.

3109. *R Venkatashwami Naidu v South India Viscose Ltd Coimbatore*, AIR 1985 Mad 275.
3110. *Poonam Chand v Ramprasad*, AIR 1969 MP 44.
3111. *Abdul Azeen v Fahimunnisa*, AIR 1969 Mys 226.
3112. *Om Prakash Agarwal v Vishan Dayal Rajpoot*, AIR 2018 SC 5486 : 2018 (131) ALR 453 : 2018 (14) Scale 116.
3113. *Tejumal v Mohd Sarfraz*, (2017) (121) ALR 392.

[s 21.8] Objection as to Place of Suing

The words "place of suing" occur in the heading of sections 15–25, a group of sections which refer to the local venue of suits cognizable by Indian courts in India and in places to which the Code applies. Sections 15–20 lay down rules as to place of suing and there is no doubt that in that section the expression is used with reference to those rules. Those rules regulate the venue in places in India where the Code applies. They deal with matters of domestic concern and prescribe rules for assumption of territorial jurisdiction by Indian courts in matters within their cognisance. Section 21 is, therefore, limited in the same way and has no application to a case not cognizable by Indian courts.[3114] The decision of the Privy Council in *Setrucherla v Maharaja of Jeypore*[3115] makes this clear. The suit was instituted in the court of subordinate judge of Vizagapatam on a mortgage of property which was partly situated in Vizagapatam and partly in a scheduled district to which the Code did not apply. The defendant did not object to the jurisdiction of the court and a decree was passed for the sale of the whole of the property. On appeal, the defendant objected for the first time to the jurisdiction of the trial court. The high court overruled the objection in view of the provision of section 21. The Privy Council, however, upheld the objection on the ground that section 21 only applied when the right place of suing was one subject to the Code. Their Lordship said:

> This is not an objection to the place of suing: it is an objection going to the nullity of the order on the ground of want of jurisdiction.

Another instance is the case of *Manjappa v Rajagopala*,[3116] where a court in the Madras Presidency passed a decree in a suit which was in the cognizance of a foreign court in Mysore, and the high court held that the defect of jurisdiction could not be curbed by section 21. Again, when a subordinate judge passed a decree on a mortgage of lands in the *Santhal Parganas*, in a suit which the legislature had withdrawn from the cognisance of the civil court as they were under settlement, there was no question of the application of section 21, and the court of execution was entitled to treat the decree as a nullity and to refuse to execute it.[3117] In the courts of the jurisdiction it was, however, observed "that where the decree presented for execution was made by a court which apparently had [no] jurisdiction whether *pecuniary or territorial* or in respect of the judgement-debtor's person to make the decree the executing court is entitled to refuse to execute it on the ground that it was made without jurisdiction". (See the interpretation put upon the word "apparently" occurring in this passage in *Amalabala Dasi v Sarat Kumar Dasi*.[3118]) A defect in the territorial or pecuniary jurisdiction such as can be cured by section 21 of the Code or section 11 of the Suits Valuation Act, 1887, does not make the decree a nullity and so, the execution court cannot refuse to execute it.[3119]

On the other hand, when the suit is one within the cognisance of Indian courts and the want of jurisdiction is only as to its local venue under sections 15–20, the defect may be waived under this section. This section is a statutory recognition of the principle that the defect as to place of suing under sections 15–20 may be waived. Where the defendant allows the trial to proceed to judgement without raising the objection and takes the chance of a verdict in his

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3114. *Bhamboo v Ram Narain*, AIR 1928 Lah 297 : (1928) ILR 9 Lah 455.
3115. *Setrucherla v Maharaja of Jeypore*, (1919) 42 Mad 813 : 46 IA 151.
3116. *Manjappa v Rajagopala*, (1918) Mad WN 378.
3117. *Gora Chand v Prafulla Kumar*, AIR 1925 Cal 907 : (1926) ILR 53 Cal 166 (FB); dissented from as to the powers of a court in execution in *Nathan v Samson*, AIR 1932 Rang 252 : (1932) ILR 9 Rang 480; see note "Proof of Jurisdiction" in commentary on O XXI, rule 7.
3118. *Amalabala Dasi v Sarat Kumar Dasi*, (1931) 54 Cal LJ 593.
3119. *Maqsood Ali v Hunter*, AIR 1943 Oudh 338 (FB).

favour, he waives the objection. Long and continued participation in the proceedings without any protest may, in an appropriate case, also amount to a waiver. Such a waiver is, however, limited to objections as to jurisdiction in the appellate and revisional court.[3120] Thus, if the defendant, a resident in the jurisdiction of court *A*, is sued in court *B* on the allegation that he resides in its jurisdiction, he cannot raise this objection for the first time in appeal,[3121] nor can in a subsequent suit the decree be set aside as a nullity.[3122] If a suit on a mortgage of land in the jurisdiction of court *B* is instituted in court *A* contrary to the provisions of section 16, and the defendant does not object, the decree is not a nullity.[3123] So also, where the territorial jurisdiction of the court is altered by a notification during the pendency of the suit.[3124]

Where a suit pending in a civil court in its original jurisdiction was transferred to a small cause court which had no jurisdiction to try it, it was held that the decree was nullity and that the objection, thereto did not fall within section 21 as it related not to the place of suit, but to a court.[3125] A passing of action founded on an allegation of infringement of trade mark must be filed under section 73 of the Act in the court not inferior to the district court. The City Civil Court has no jurisdiction to entertain the suit and the decree passed therein is a nullity and, that is an objection which can be raised in execution proceedings.[3126]

[s 21.9] Objection as to Place of Suing, When to Be Taken

[s 21.9.1] General Rule

The general rule is that an objection to jurisdiction may be taken at any stage of the proceedings provided there are materials on the record to sustain it.[3127] A plea regarding under-valuation and insufficiency of court fee can be taken in the written statement and separate application is not necessary.[3128] It must be taken for the first time in appeal or in second appeal,[3129] or in revision,[3130] or after remand in second appeal,[3131] or in appeal to the Supreme Court, provided the objection is patent on the face of the proceedings.[3132] This section which is framed on the analogy of section 11 of the Suits Valuation Act, 1887, is an exception to this general rule.[3133]

[s 21.9.2] Objection to Be Taken at Earliest Stage of the Suit

The law is well-settled that if objection to territorial and pecuniary jurisdiction is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage.[3134]

3120. *Bahrein Petroleum Co v PJ Pappu*, AIR 1966 SC 634.
3121. *Ratti Ram v Kundan Lal*, (1914) PR 87.
3122. *Annammal v Sambasiva*, (1919) 37 Mad LJ 349.
3123. *Zamindar of Ettiyapuram v Chidambaram*, (1920) ILR 43 Mad 675 (FB); *Achut Anant v Governor General in Council*, AIR 1955 Cal 331.
3124. *Chokkalinga v Velayudha*, AIR 1925 Mad 117 : (1924) 47 Mad LJ 448; *Ramani v Narayanaswami*, AIR 1924 Mad 697 : (1924) 4 Mad LJ 192; *Dirgopal v Kesho Prasad*, AIR 1928 Pat 324 : (1928) ILR 7 Pat 216 (alteration of jurisdiction by diluvion).
3125. *Govinddas v Parameswari Das*, AIR 1957 MP 71; *Chandra Bhushan v Brik Nandan*, AIR 1978 All 459.
3126. *Swamy v Mohideen*, AIR 1958 Mad 490 : (1958) ILR Mad 622 : (1958) 1 Mad LJ 355 : 71 LW 383.
3127. *Ramani v Narayanaswami*, AIR 1924 Mad 697 : (1924) 47 Mad LJ 192.
3128. *Pannalal v Mohan Lal*, AIR 1985 Raj 178.
3129. *Ram Pheron v Shiv Ram*, AIR 1947 Oudh 174 : (1947) ILR 22 Luck 164.
3130. *Nidhi Lal v Mazhar Husain*, (1884) ILR 7 All 230.
3131. *Sayad Nyamtula v Nano*, (1889) ILR 13 Bom 282; *Velayudam v Arunachala*, (1890) ILR 13 Mad 273.
3132. *Bibi Ladli v Bibi Raje*, (1889) ILR 13 Bom 650.
3133. *Beerappa v Yeshwantrao*, AIR 1972 Mys 338.
3134. *Harshad Chiman Lal Modi v DLF Universal Ltd*, AIR 2005 SC 4446.

As a matter of interpretation, it will be seen that forum can be chosen by the parties on their options and all objections regarding choosing the forum is to be determined at the first instance and if necessary by passing order returning the plaint (O VII, rule 10) for presentation in proper court. It is also the settled question of law that all objections towards jurisdiction are to be taken at the earliest point of time as per mandate of section 21 of the Code of Civil Procedure, 1908. It is not proper on the part of the appellate court to set aside the judgement and order of the trial court on this technical ground, unless there was a finding that due to assumption of such jurisdiction, the case is likely to end in a case of failure of justice.[3135]

In a suit, tenant respondent did not raise any objection regarding competence of court and took a chance to obtain judgments in his favour on merits. The court observed that he cannot be allowed to turn around and contend that Court of Additional District Judge had no jurisdiction to try small cause suit or judgement was without jurisdiction and nullity. Section 21 has been enacted to thwart any such objection regarding competence of court and allowed the matter to be heard on merits.[3136]

In a suit for declaration of right, title, interest and possession of property in dispute, the defendant did not in the original written statement, raise the question of want of pecuniary jurisdiction. Long after the issues were settled and the suit set down for hearing, an amendment on the ground of pecuniary jurisdiction cannot be allowed. If the plea was accepted, the jurisdiction of the trial court would be ousted. An amendment to oust jurisdiction of a court should not ordinarily be granted, particularly on a belated application for amendment.[3137] The only objection of the judgment-debtor was that the properties which were the subject matter of the mortgage suit were outside the territorial jurisdiction of the court. Having taken this objection, the judgment remained *ex parte*, both at the stage of the preliminary decree and at the stage of the final decree in the suit. It was held that the judgement-debtor must be deemed to have waived whatever objection to the territorial jurisdiction he might have put forth in his written statement which he filed in answer to the claim.[3138] If the objection of pecuniary jurisdiction is taken after the evidence is recorded, the prayer of *de novo* recording of evidence (in the transferee court to which the suit is transferred from the incompetent court), cannot be granted.[3139]

The section does not refer to the court of first instance and objection may be taken at any time before the final judgement.[3140] It can be raised even before the filing of written statement[3141] or by the court itself even if it is not raised by the defendant.[3142]

The objections relating to the pecuniary or territorial jurisdiction should be raised at the earliest, and if the parties omit to plead and raise the objection at a later stage, the unsuccessful party would be precluded to raise lack of jurisdiction.[3143]

3135. *Germenthangi v F Rokunga*, AIR 2004 Gau 42.
3136. *Om Prakash Agarwal v Vishan Dayal Rajpoot*, (2019) 14 SCC 526.
3137. *Abdul Rahiman Rawther v Kamalathammal*, AIR 1980 Mad 114.
3138. *Abdul Rahiman Rawther v Kamalathammal*, AIR 1980 Mad 114.
3139. *Ramesh Chander v Bhusan Lal*, AIR 1984 P&H 345; *Pathumma v Kuntalan Kutty*, AIR 1981 SC 1683 followed.
3140. *Maha Prasad v Ramani Mohan*, 42 Cal 116 : (1914) 41 IA 197; *Ramlal v Kishanchand*, AIR 1924 PC 95 : 51 Cal 361 : 51 IA 72; *Raichander v Premanand*, AIR 1978 AP 349.
3141. *Sasa Musa Sugar Works v Chunnilal*, AIR 1975 Gau 24.
3142. *Anil Kumar v Manasnath*, AIR 1975 Cal 293.
3143. *Indermani Kirtipal v UOI*, AIR 1996 SC 1567 : JT (1996) 2 (SC) 646.

[s 21.9.3] Outer Limit for Taking Objection

Under section 21 of the Code of Civil Procedure it is clear that no objection as to place of suing shall be allowed by any appellate or revisional court unless the same objection was taken in the court of first instance at the earliest possible opportunity and before the settlement of issues. Therefore, under the terms of the section, the following position is clear: (a) normally objection as to place of suing should be taken at the court of first instance at the earliest possible opportunity and (b) the outer limit of this earliest opportunity is the time before the issues are settled. The issues are settled by the court under O XIV of the Code of Civil Procedure only after the pleadings are filed under O VII and O VIII.[3144]

In writ proceedings, there is no procedure for settlement of issues but if at the threshold of hearing after the pleadings have been filed, these issues of jurisdiction have been raised by the respondents. Therefore, the respondents are well within their right to raise the issue.[3145]

[s 21.9.4] Appeal and Revision—Conditions and Instances

Conditions to be fulfilled, if the appellate or revisional court is to entertain an objection to the territorial jurisdiction of the trial court:

(i) the objection was taken in the trial court;

(ii) it was taken at the earliest opportunity and, where issues have been framed, it was taken before the issues were framed;

(iii) trial in the wrong court has occasioned failure of justice.

All these three conditions must be satisfied.[3146] Even if objection of jurisdiction has been taken by the petitioner at the earliest possible opportunity, what has to be established under section 21(1) is that entertainment of the suit by the trial court had caused failure of justice.[3147] Plea of want of territorial jurisdiction on the part of the trial court must be rejected on appeal, unless it be shown that want of territorial jurisdiction had led to the failure of justice.[3148]

But, under this section, a court of appeal or revision will entertain the objection if it has been taken at the earliest possible opportunity in the court of first instance, and if issues have been settled, at or before the settlement of issues. Even then the court of appeal or revision will not allow the objection unless there has been a failure of justice.[3149] The new sub-section (2) makes these two requirements necessary to the objection as to the pecuniary limits of the court's jurisdiction. If the objection is raised for the first time in appeal or revision, it is excluded by the terms of the section;[3150] but, in a case where the court of small cause sets aside an *ex parte* decree, although the application should have been made to the *munsif* of another court, the objection was entertained in revision on the ground that it referred not only to the place of

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3144. *IFB Automotive Seating & System Ltd v UOI*, AIR 2003 Cal 80.
3145. *IFB Automotive Seating & System Ltd v UOI*, AIR 2003 Cal 80.
3146. *Koopitan Uneen (daughter) v Koopitan Ununi (Son)*, AIR 1981 SC 1683 : (1981) 3 SCC 589 : 1982 SCR (1) 183.
3147. *Renown Biscuit Co, Bombay v Kamalanathan*, AIR 1980 Mad 28.
3148. *Manager, Hardware & Tools Ltd v Saru Smelting Pvt Ltd.*, AIR 1983 All 329 (DB); *Special Secretary, Government of Rajasthan v Venkataramana Seshaiyar*, AIR 1984 AP 5.
3149. *Prabhakar v UOI*, AIR 1970 Bom 285; *Manappa v Bhaskhappa*, AIR 1978 Kant 113.
3150. *Keshav v Vinayak*, (1899) ILR 23 Bom 22; *Muthappa Chetty v Raman Chetty*, AIR 1935 Mad 574; *Vijaya Ramraj v Vijaya Anatha*, AIR 1952 All 564; *Akkamma v Kullampattian*, AIR 1956 Mad 593; *Ayesha Bai v Daleep Singh*, AIR 1961 Raj 186.

suing but to the nature of the court itself.[3151] So also, where the defendant appeared and orally objected to the jurisdiction of the court and was directed to raise the same in his written statement, he cannot be held to have waived his objection by complying with the order of the court and is entitled to put forth the same in the suit.[3152]

Objection to the pecuniary jurisdiction of the court, raised for the first time in revision, could not be allowed. Section 21(2) of the CPC specifically provides that an objection to the pecuniary jurisdiction of a court should be raised at the earliest stage of proceedings in a suit and that it should further be shown that some prejudice had resulted to the aggrieved party, before the proceedings of the court not having the requisite pecuniary jurisdiction could be set aside. An order passed in revision, allowing the objection regarding want of pecuniary jurisdiction in ignorance of the Code of Civil Procedure, was clearly erroneous and, as such, could be reviewed.[3153]

Where preliminary issue pertaining to jurisdiction was decided by the trial court in affirmative but no decision regarding pecuniary jurisdiction was given in the order, the plaintiff amended the plaint and defendant thus having no opportunity to file appeal/revision against order on the question of pecuniary jurisdiction of the court, additional written statement was filed by defendant subsequent to amendment of plaint and objection as to pecuniary jurisdiction reiterated therein. While passing decree, trial court gave finding as to pecuniary jurisdiction though no specific issue to that effect was framed, such finding being given for the first time, the defendant was found entitled to raise objection against it in first and second appeal.[3154]

[s 21.9.5] Legal Representatives—Limitation of

Where the plaintiff had submitted to the jurisdiction of a court, by valuing his suit at a particular value, and the finding went against him, he appealed to the district judge, but died during the pendency of the appeal. On his death, his legal representatives sought to challenge the valuation praying for leave to amend the plaint, stating that the valuation was much higher and that the court below had no jurisdiction. It was held that the legal representative could not do so. Legal representative of a decreased party cannot take a plea which the deceased himself could not have raised.[3155]

[s 21.10] Parties Not Raising Objection to Jurisdiction—Rejection of Plaint Improper

When there was neither an application for rejection of the plaint nor for return of the plaint under O VII, rules 10 and 11 of the CPC, filed by the respondents/defendants and the order of the high court directing return of the plaint was wholly outside the scope of the pending appeals. In fact, the issue relating to territorial jurisdiction of the high court to entertain the appellants' suit was not even raised in the Memorandum of Appeal.[3156]

3151. *Dwarka Das Pyarelal*, AIR 1930 All 873 : (1930) ILR 52 All 947.
3152. *Premier Automobiles Ltd Lakshmi Motors*, AIR 1960 Raj 208.
3153. *Surinder Singh Arora v Sohan Singh Arora*, AIR 1986 Del 293.
3154. *Maheshpur Tea & Industries Pvt Ltd v Mantala Tea Co Ltd*, AIR 2001 Gau 152.
3155. *Dareppa v Mallappa*, AIR 1947 Bom 307 followed; *Shioprasad v Mohanbai*, AIR 1989 Bom 349.
3156. *Exphar SA v Euphrama Laboratories Ltd*, AIR 2004 SC 1682 : (2004) 3 SCC 688 : JT 2004 (3) 1 : 2004 (2) Scale 589.

Besides when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the high court should have taken the allegations contained in the plaint to be correct.[3157]

Apart from the *ex-facie* contradiction of this statement in the judgement itself, the high court erred in going beyond the statements contained in the plaint.[3158]

[s 21.11] Applicability of the Rule in Section 21(1) to Execution Proceedings

The rule of waiver embodied in section 21(1) extends to execution proceedings. If a defendant has not raised during the trial any objection as to the place of suing, he will not be permitted to do so during execution proceedings. The extension was formulated by Wallis, CJ, in *Zamindar of Ettiyapuram v Chidambaram*[3159] in the following words:

> The effect of the section in my opinion is that objections which the appellate or revisional court is thereby precluded from allowing, must be considered cured for all purposes, unless taken before the passing of the decree of the original court. The ordinary way of questioning a decree passed without jurisdiction is on appeal or revision, and if this is forbidden, a court of first instance cannot by execution do that which the appellate or provisional court is precluded from doing.

Dealing with this matter, the Supreme Court observed in *Hiralal v Kalinath*:[3160]

> The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it.[3161]

But it is different where after the passing of a preliminary mortgage decree, the court which passed it ceased to have territorial jurisdiction over any of the mortgaged properties. In such a case, failure on the part of the mortgagor to object to the passing of the final decree, precludes him from disputing the validity of the decree, but not from objection to the jurisdiction of the court to order a sale.[3162]

When a court executing a decree transferred to it, attached and sold properties after territorial jurisdiction had been withdrawn from it, the Madras High Court held that the judgment-debtor's failure to object estopped him from questioning the validity of the sale; but that there

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3157. *Exphar SA v Euphrama Laboratories Ltd.*, AIR 2004 SC 1682 : (2004) 3 SCC 688 : JT 2004 (3) 1 : 2004 (2) Scale 589.
3158. *Exphar SA v Euphrama Laboratories Ltd.*, AIR 2004 SC 1682 : (2004) 3 SCC 688 : JT 2004 (3) 1 : 2004 (2) Scale 589.
3159. *Zamindar of Ettiyapuram v Chidambaram*, (1920) ILR 43 Mad 675, at p 686 (FB); *Maqsood Ali v Hunter*, AIR 1943 Oudh 338 (FB); *Jagannath v Shivnarayan*, AIR 1937 Bom 19 : (1936) 38 Bom LR 1023; *Gomatham v Komandur*, (1904) ILR 27 Mad 118.
3160. *Hiralal v Kalinath*, AIR 1962 SC 199 : [1962] 2 SCR 747 : (1961) 2 SCJ 592.
3161. For instances in which, on the application of the above principle, objection of the court was repelled in execution proceedings, see the following cases: *Anand Rao v Kishendoss*, AIR 1954 Hyd 190; *Swanikannu v Arumugham*, (1955) 2 Mad LJ 16; *Iswar v Najpal*, AIR 1956 Pat 280, 35 Pat 610; *Sheonath v Balaswami*, AIR 1959 Pat 489; *Rajaram Sah v Narad Thakur*, AIR 1960 Pat 136.
3162. *Sivas Kamal v Raja of Jeypore*, AIR 1927 Mad 667 : (1927) ILR 50 Mad 882.

was no estoppel against a subsequent purchaser of the same property at a sale held in execution of a decree passed against the same judgement-debtor in another suit, for the estoppel of the judgement-debtor did not operate against such purchaser.[3163] The same court has also held that if a court continues to execute a decree against immovable property after territorial jurisdiction has been withdrawn from it, the judgement-debtor's failure to object will preclude him from raising the point in appeal.[3164] So also, where the executing court sold properties outside its territorial jurisdiction in addition to some properties within its jurisdiction, it was held that objection, not having been taken before sale, could not be raised at a later stage.[3165]

The rule of waiver enactment in sub-section (1) is extended to the executing court by the new sub-section (3) which requires that the objection as to the local limits of jurisdiction of the executing court must have been raised in the executing court at the earliest opportunity, and even where it has been so raised, there must have been consequent failure of justice.

[s 21.12] Condition as to Consequent Failure of Justice

Even though the objection has been raised at the earliest opportunity and wrongly disallowed, the judgement will not be disturbed unless the trial in the wrong court had led to a "failure of justice".[3166] In order to ascertain whether there has been a failure of justice, the appellate court must go into the merits of the case and form an opinion upon the justice or otherwise of the decision of the first court.[3167] Where a defendant has raised an objection as to the place of suing but has not pressed it for decision and has participated in the trial taking the chance of obtaining the favourable verdict, he cannot be heard to say that he was prejudiced or that there was failure of justice.[3168] Even though the objections to the pecuniary jurisdiction was taken before the courts at the earliest opportunity, there was no consequent failure of justice; hence, the objection of the jurisdiction was rejected.[3169] The Madras High Court, relying upon *RSD v Finance Co Pvt Ltd*,[3170] held that even if the objection was raised by the defendant in the trial court at the earliest opportunity, unless it is shown in the appellate court that on account of the trial by the wrong court, there has been failure of justice, the appellate court cannot interfere in the finding of the trial court on the ground of jurisdiction of the court.[3171]

[s 21.13] Remand

There is no question of territorial jurisdiction when a suit is remanded by a court of appeal, for, jurisdiction then depends entirely upon the order of remand.[3172]

3163. *Veerappa v Ramasami*, (1920) ILR 43 Mad 135.
3164. *Manavikraman v Ananthanarayana*, AIR 1924 Mad 457 : (1924) 46 Mad LJ 250; *Ramani v Narayanaswami*, AIR 1924 Mad 697 : (1924) 47 Mad LJ 192; *Rajagopala v Tirupathia*, AIR 1926 Mad 421 : (1926) ILR 49 Mad 746.
3165. *Ayisass Nagratna*, AIR 1934 Mad 573.
3166. *Bhag Singh v Labh Singh*, (1916) PR 93; *Gajendra v Sunder Singh*, AIR 1934 All 549; *Champalal v Saligram*, AIR 1961 Raj 235; *Inderrnal T Mahajan v Ramprasad*, AIR 1970 MP 40; *Champalal v Saligram*, AIR 1961 Raj 235 : (1961) ILR Raj 614; *Yogeshwar Raj Puri v Yog Raj Puri*, AIR 1967 Punj 163.
3167. *Lachharam v Virji*, AIR 1921 All 66 : (1921) 19 All LJ 305.
3168. *Nanakchand v TT Elec Supply Co*, AIR 1975 Mad 103 : (1974) 2 Mad LJ 431.
3169. *Surender Mahanti v Ghasi Ram Mahanti*, AIR 1996 Ori 172.
3170. *RSD v Finance Co Pvt Ltd*, AIR 1993 SC 2094.
3171. *G Loganathan v S Chenniya Chettiar*, AIR 1996 Mad 224.
3172. *Uthman v Nania*, AIR 1923 Mad 351 : (1923) 44 Mad LJ 238.

[3173]**[[S 21A] Bar on suit to set aside decree on objection as to place of suing.**—No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title on any ground based on an objection as to the place of suing.

Explanation.—The expression "former suit" means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned.]

SYNOPSIS

[s 21A.1]	Scope	535	[s 21A.4]	Litigating Under the Same Title	536
[s 21A.2]	Former Suit	536	[s 21A.5]	Objection as to Place of Suing	536
[s 21A.3]	The Same Parties, or Between the Parties Under Whom They or Any of Them Claim	536			

[s 21A.1] Scope

Section 21 lays down that no objection as the place of suing shall be allowed by any appellate or revisional court, unless such objection was taken in the court of the first instance at the earliest opportunity. The section does not expressly provide as to whether such an objection can be permissible in a separate suit challenging the decree. On that question, there was a conflict of judicial opinion. The Madras High Court[3174] and the Lahore High Court[3175] held that if the defendant did not object to jurisdiction and allowed a decree to be passed against him, he could not in a subsequent suit, set aside the decree for want of jurisdiction. The Nagpur High Court held that section 21 was not limited to appeals and revisions in the same suit,[3176] and this was also the view taken by the Oudh Chief Court;[3177] but the Allahabad High Court considered that it was not legitimate to extend the bar of section 21 beyond the limits provided by the section, and that in such a case, the plaintiff was entitled to maintain an independent suit for the avoidance of the decree.[3178] In a later decision, the same High Court took the view that if the objection as to jurisdiction has not been taken in the trial court and the suit has been allowed to be disposed by a judgement and no appeal has been filed against such a judgement, the decree became final and was a bar in a subsequent suit, wherein the objection as to local jurisdiction would not be permissible.[3179] It is submitted that the view taken by the Madras and Lahore High Courts was correct, for, once the objection as to jurisdiction was waived under section 21, it was waived for all purposes. The contrary view was opposed to the policy underlying the section, in that though such an objection was impermissible in an appeal or a revision against the decree, it was still permissible to be raised in a subsequent suit. This section gives effect to the view taken by the Madras, Lahore and Nagpur High Courts and the Chief Court of Oudh.

3173. Inserted by CPC (Amendment) Act 104 of 1976, section 9 (w.e.f. 1-2-1977).
3174. *Nageshwara v Ganesa*, AIR 1942 Mad 675; *Annammal v Sambasiva*, (1919) 37 Mad LJ 349; *Chokkalinga v Velayudha*, AIR 1925 Mad 117 : (1924) 47 Mad LJ 448.
3175. *Parshotam Das v Radhakishan*, AIR 1929 Lah 449 : (1929) 11 Lah LJ 306.
3176. *Firm Jagniram v Ganpati Damaji*, AIR 1941 Ngp 31 : (1941) ILR Nag 1.
3177. *Maqsood Ali v Hunter*, AIR 1943 Oudh 338.
3178. *Raghubar v Harilal*, AIR 1931 All 454 : (1931) ILR 53 All 560.
3179. *Chitranjan Prasad v Addl Commissioner, Varanasi*, AIR 1967 All 375.

The expression "former suit" means a suit decided before the decision in the suit filed to question the validity of the decree, and it is immaterial whether it was filed before or after the suit which challenges such validity.

[s 21A.2] Former Suit

See notes to section 11 under the same heading.

[s 21A.3] The Same Parties, or Between the Parties Under Whom They or Any of Them Claim

See notes to section 26(B) Condition II. See notes to section 11 under the same heading. Also see sub-headings under section 11. As to synopsis (a)–(j), see notes under section 11.

[s 21A.4] Litigating Under the Same Title

See notes to section 26(B) Condition III. See notes to section 11 under the same heading.

[s 21A.5] Objection as to Place of Suing

Section 21A was inserted in the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976)on the recommendation of the Law Commission of India. The object, meaning and purpose of section 21A has been explained by the Supreme Court in the case of *Subhas Mahadevasa Habib*,[3180] in the following words:

> Though Section 21A of the Code speaks of a suit not being maintainable for challenging the validity of a prior decree between the same parties on a ground based on an objection as to "the place of suing", there is no reason to restrict its operation only to an objection based on territorial jurisdiction and excluding from its purview a defect based on pecuniary jurisdiction. In the sense in which the expression "place of suing" has been used in the Code it could be understood as taking within it both territorial jurisdiction and pecuniary jurisdiction. Section 15 of the Code deals with pecuniary jurisdiction and, Sections 15 to 20 of the Code deals with "place of suing". The heading "place of suing" covers Section 15 also. This Court in the *Bahrein Petroleum Co. Ltd. v P.J. Pappu* [(1996) 1 SC R 461] made no distinction between Section 15 on the one hand and Sections 16 to 20 on the other, in the context of Section 21 of the Code. Even otherwise, considering the interpretation placed by this court on Section 11 of the Suits Valuation Act and treating it as equivalent in effect to Section 21 of the Code of Civil Procedure, as it existed prior to the amendment in 1976, it is possible to say, especially in the context of the amendment brought about in Section 21 of the Code by Amendment Act 104 of 1976, that Section 21A was intended to cover a challenge to a prior decree as regards lack of jurisdiction, both territorial and pecuniary, with reference to the place of suing, meaning thereby the court in which the suit was instituted.

[S 22] Power to transfer suits which may be instituted in more than one Court.—Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties

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3180. *Subhas Mahadevasa Habib v Nemasa Ambasa Dharmadas*, AIR 2007 SC 1828 (Balasubramanyan, J. speaking for the bench).

(if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

SYNOPSIS

[s 22.1]	Scope of Sections 22–25	537	[s 22.3]	Grounds of Transfer	538
[s 22.2]	Transfer Where Plaintiff Has a Choice of Courts	537	[s 22.4]	Notice	538
			[s 22.5]	Stay of Suit	538

[s 22.1] Scope of Sections 22–25

This and the next section are concerned with a case where the plaintiff has the choice of two or more courts in which he may properly institute a suit. They deal with the right of a defendant to apply to a court to have the case transferred from the court in which it is filed to another court. They postulate that the several courts concerned shall each have jurisdiction. It follows that an application by the defendant under section 23 for transfer cannot be entertained where he has pleaded want of jurisdiction of the court in which the suit has been instituted.[3181] The two sections contemplate three possibilities: (a) where the alternative courts are subordinate to the same appellate court; (b) where they are subordinate to different appellate courts but to the same high court; and (c) where they are subordinate to different high courts.

The case where the two courts are high courts is not expressly dealt with. Sections 24 and 25 are concerned with an entirely different kind of case. They are not concerned with the right in the defendant alone to apply to have transferred to one of alternative possible courts, a suit which his opponent, the plaintiff, has filed in one of those possible alternative courts. The sections are broken up into two different categories. The first category is dealt with in section 24 and the second in section 25.[3182] The Specific Relief Act, 1963, does not confer a power of transfer. What could not have been asked for originally, cannot be asked for by amendment.[3183] An order of transfer under section 22 is based on balance of convenience. The fact that the suit was filed earlier, is immaterial.[3184] When a transfer petition is filed making allegations against the additional district judge, impugning his fairness, independence and impartiality in the transfer application, the report if any, and when called for, should normally be confined to the allegations made against the impartiality or fairness of the judge and not with respect to the correctness or otherwise of the order passed by him.[3185]

Apprehending injustice on the ground of earlier decision against the applicant in another case by the munsif is no ground for transfer of case. Allowing transfers on such grounds would hamper course of justice.[3186]

[s 22.2] Transfer Where Plaintiff Has a Choice of Courts

The power of transfer given by this section is not a general power as in section 24. It is limited to cases in sections 16 and 20 where the plaintiff has the option to sue in more courts

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3181. *Babulal v Kotumal*, AIR 1941 All 27 : (1940) ILR All 737; *Krishnaji Rao v Gokuldas*, AIR 1953 Mys 115.
3182. *Kanhaiyalal v Zumerlal*, AIR 1940 Nag 145. See notes under section 24.
3183. *Rajkumar v Benoy Kumar*, AIR 1985 Cal 328.
3184. *SS Mahalakshmi Mills v Rajesh Trading Co*, AIR 1983 Bom 486.
3185. *Pushpa Devi Saraf v Jai Narayan Parasrampuria*, (1992) 2 SCC 676.
3186. *K Subbarao v Laxminarayan Complex*, AIR 1996 Kant 127.

than one.[3187] *Prima facie*, a plaintiff as *arbiter litis* has the right to select his own forum.[3188] That right is controlled by the power of transfer; but it is a right that ought not lightly to be interfered with.[3189] The words "shall determine" in the section clearly mean "shall make an order of transfer".[3190] Wife's application for custody was pending as the husband instituted the suit in a court at another place. Transfer application was made by the wife as the nature of both the proceedings was such that they should be heard by the same court. No suggestion by husband was made that financial difficulties prevented proper prosecution of the proceedings at the place where the wife's application was pending. Here, the prejudice to husband could not be assumed from the mere fact that he would have to undertake the journey. In this case, keeping in mind the abovementioned facts, the suit filed by the husband was transferred.[3191]

[s 22.3] Grounds of Transfer

See notes to section 24 under the same heading.

[s 22.4] Notice

The provisions of this section as to notice and time of application are mandatory.[3192] Notice should be given to all parties impleaded in the suit, whether as plaintiff or as defendant and not merely to parties arrayed on the opposite side.[3193] Under the terms of the section, notice must be given of the application before it is made, but it has been held that the defect could be cured by notice on the application itself.[3194]

[s 22.5] Stay of Suit

Section 20 of the Code of Civil Procedure, 1882, provided for stay of proceedings in order to compel the plaintiff to take his case to another court. This has been omitted, as sufficient provision has been made by the power of transfer in sections 22–24; but the court has an inherent jurisdiction to stay any suit which is an abuse of its process.

Whether the institution of the suit in a particular court is an abuse of the process of that court is a question of fact. In a suit filed in the Bombay High Court, the fact that both the parties and the witnesses of the defendants were residents of Wardha in the Central Provinces (Madhya Pradesh), was held not to justify an order for the stay of the suit.[3195] The high court has also power to stay a suit in another court.[3196]

[S 23] To what Court application lies.—(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under Section 22 shall be made to the Appellate Court.

3187. *Purna Chandra v Dhone Kristo*, (1914) 12 All LJ 896; *National Engineering Co v Rattan*, AIR 1923 Lah 288.
3188. *Khatija Bibi v Taruk*, (1883) ILR 9 Cal 980.
3189. *Umatul v Kulsoom*, (1909) ILR 10 Cal 980.
3190. *David v James*, AIR 1958 Ker 82.
3191. *Shakuntala Modi v Omprakash Bharuka*, AIR 1991 SC 1104.
3192. *Gulab Chand v Sher Singh*, (1917) PR 11; *Shiv Dutt v Moti Ram*, AIR 1925 Lah 322 : (1925) 7 Lah LJ 93.
3193. *Vijayaram v Dr. Vijaya Anand*, AIR 1953 All 750.
3194. *Basanti v Sahodra*, AIR 1935 All 979 : (1955) All LJ 1093.
3195. *Geffert v Rukchand*, (1889) II R 13 Bom 178; *Hindustan Assurance Ltd v Kail Mulraj*, (1914) 27 Mad LJ 645; *Shiv v Kanhaya*, (1919) PR 167.
3196. See note under O XXXIX, rule 1.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

SYNOPSIS

[s 23.1]	High Courts	539	[s 23.4]	Different High Courts	540
[s 23.2]	Scope of Sections 22 and 23	539	[s 23.5]	Suit Is Brought	541
[s 23.3]	Subordinate Courts	539			

[s 23.1] High Courts

Sections 22 and 23 do not apply to high courts in the exercise of their ordinary original civil jurisdiction.[3197]

[s 23.2] Scope of Sections 22 and 23

Sections 22 and 23 are complementary to each other. While section 22 confers a power on the defendant to apply for transfer subject to the conditions mentioned therein, section 23 specifies the court to which the application should be made. An application under section 23 must therefore, fulfil the conditions mentioned in section 22 and is liable to be dismissed if it is not made before the settlement of issues.[3198]

[s 23.3] Subordinate Courts

Subordination of court is regulated by section 3. A court of a subordinate judge is subordinate to the district court no matter what the forum of appeal may be in the particular case for the transfer of which application is made.[3199]

A full bench of the Rangoon High Court has held that for the transfer of a suit pending in a court on the original side of the high court, an application should be made to that court which has hold of the case and that court has power to transfer under section 151 of the Code.[3200] Prior to the filing of the petition by the husband against the wife for divorce under section 13, Hindu Marriage Act, 1955, in the court of the additional district judge at Jind in Haryana, the respondent (wife) had already filed a petition under section 9 of the Hindu Marriage Act, 1955, for restitution of conjugal rights, against the petitioner-husband. An application under section 10 of the Code of Civil Procedure was filed by the wife (before the Jind court) for staying the proceedings therein, in view of the petition already filed by her at Delhi. The additional district judge, Jind, allowed the wife's petition under section 10 of the Code of Civil Procedure on the ground that if the petition under section 13, Hindu Marriage Act, 1955, was allowed to continue, the petition filed by the wife under section 9 of the Act would be rendered infructuous.

3197. *Mahindra Chandra v Lal Mohan*, AIR 1929 Cal 358 : (1929) ILR 56 Cal 940.
3198. *Rajnath v Vidyaram*, AIR 1953 All 772.
3199. *Umatul v Kulsoom*, (1901) 10 Cal LJ 208.
3200. *Ramaswamy Chettyar v VT Chettyar*, AIR 1934 Rang 265 : (1934) ILR 12 Rang 548 (FB).

The order of the additional district judge, Jind, staying proceedings was vacated by the High Court. In the interest of justice, the petition under section 13 of the Act, brought by the husband and pending in the court at Jind, was transferred to the court at Delhi.[3201]

[s 23.4] Different High Courts

From sub-section (3) of section 23 extracted above, it is clear that an application for transfer has to be made in the high court in which the suit brought is situated. The suit was instituted in the court at Surat, and since Surat is not within the jurisdiction of Andhra Pradesh High Court, the application for transfer has to be filed in the high court to which the court at Surat is subordinate but not in Andhra Pradesh High Court. It does not matter that the petitioner wants the suit to be brought to the jurisdiction of Andhra Pradesh court, which is subordinate to it. Andhra Pradesh High Court has no jurisdiction to entertain the application for transfer. The expression "suit is brought" in section 23(3) of the Code of Civil Procedure relates to the place where the suit was instituted, and it cannot be interpreted to mean the court to which suit "has to be brought". So, the petition to transfer a suit instituted at Surat to a court, which is subordinate to Andhra Pradesh High Court, is not maintainable.[3202]

If suits between the same parties are instituted in courts subordinate to different high courts, either high court can transfer the suit from the court which is subordinate to it,[3203] and the transfer can be made to a court subordinate to another high court.[3204] A judge on the original side of the high court is not a court subordinate to the high court and a bench of the high court cannot entertain an application for the transfer of a suit from him to another court.[3205] In a case where the plaintiff in abuse of his power as dominus litis and in disregard of the convenience of both parties filed his suit in a court subordinate to the high court at Allahabad, that high court in its inherent jurisdiction transferred the suit to the Chief Court at Oudh.[3206]

The provisions relating to transfer of suits contained in sections 22 to 25 of the Code have been interpreted by various high courts of the country. But on the interpretation of section 23(3) of the Code, there has been divergence of views. While some of the high courts held the view that a high court acting under section 23(3) of the Code cannot transfer a suit pending in a court subordinate to it, to some other court subordinate to another high court and the power to make such inter-state transfer vested in the Supreme Court under section 25 of the Code, some of the high courts held a contrary view about the powers of the high courts under section 23(3) of the Code. Even the decision of the Supreme Court in *Vijayalakshmi's* case,[3207] did not set the controversy at rest, although the apex court doubted the correctness of the decision of Bombay High Court (Nagpur Bench) in *Priyavari Mehta's* case.[3208]

However, a decision of the Supreme Court has set the controversy at rest and laid down the correct law.[3209] It was held by the Supreme Court that high court has no power, authority or jurisdiction to transfer a case, appeal or other proceeding pending in a court subordinate to

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3201. *Ved Prakash Garg v Seema*, AIR 1988 P&H 75.
3202. *Shree Raghavendra Exports v Nauakar Enterprises*, AIR 2004 AP 84.
3203. *Venkata Sa Barod v Maksudan Das*, (1908) ILR 35 Cal 541; *Vallabhbhai v Chotalal*, AIR 1927 Bom 79 : (1927) ILR 51 Bom 26, pp 29–30; *Kanhaiyalal v Zumerlal*, AIR 1940 Nag 145.
3204. *Sadayandi v Venugopal*, AIR 1960 Ker 91 : (1959) ILR Ker 180.
3205. *Hayat Mahomed v Shaikh Mannu*, AIR 1927 Cal 290 : (1927) 45 Cal LJ 71; *Hindustan Assurance Ltd v Rail Mulraj*, (1914) 27 Mad LJ 645.
3206. *Datt Singh v Tej Singh*, AIR 1934 All 14 : (1934) ILR 56 All 201.
3207. *Guda Vijayalakshmi v Guda Sekhara Sastry*, (1981) 2 SCC 646.
3208. *Priyavari Mehta v Priyanath Mehta*, AIR 1980 Bom 337. (Overruled in *Durgesh Sharma's* case.)
3209. *Durgesh Sharma v Jayshree*, AIR 2009 SC 285 : (2008) 9 SCC 648 : 2008 (13) Scale 54.

it to any court subordinate to another high court in purported exercise of power under sub-section (3) of section 23 and it is only the Supreme Court which can exercise the said authority under section 25. CK Thakker, J, speaking for the Bench observed as follows:

> **71.** In our considered opinion, where several courts having jurisdiction are subordinate to one appellate Court, an application for transfer may be made to such appellate Court and the Court may transfer a case from one Court subordinate to it to another Court subordinate to it. Likewise, where such Courts are subordinate to the same High Court, an application may be made and action may be taken by the High Court transferring a case from one Court subordinate to it to any other Court subordinate to that High Court. But where such Courts are subordinate to different High Courts, it is only the Supreme Court (this court) which may pass an order of transfer. In other words, if two Courts are subordinate to different High Courts, one High Court has no power, jurisdiction or authority to transfer a case pending in any Court subordinate to that High Court to a Court subordinate to other High Court. It is only the Supreme Court (this court) which may order the transfer.

The Supreme Court in the above case, went on to observe further as follows:

> **72.** Section 25, as originally enacted in the Code of 1908 and the decision prior to Amendment Act of 1976, have no application after substitution of Section 25 as it stands today. To us, Section 23 has no application to such cases and the only provision attracted is Section 25.
>
> **73.** The language of Section 25 also supports the view which we are inclined to take. Sub-section (1) of Section 25 of the Code enacts that "on the application of a party", this Court may pass an appropriate order of transfer. Thus, Section 25 is "self-contained Code" and comprises of substantive as well as procedural law on the point. It allows a party to move the Court by making an application as also it empowers the Court to make an order of transfer.

As regards the correct interpretation of section 23, the Supreme Court observed further as follows:

> In our considered view, the fallacy in the argument lies in the fact that it presumes and presupposes that Section 23 of the Code is a substantive provision which authorises a Court mentioned therein to order transfer. It is not so. The said section, as held by us, is merely a procedural one or a machinery provision and provides mode, method or manner in approaching a Court for making an application. It does not empower a Court to effect transfer.

With these observations, the Supreme Court overruled the undernoted cases.[3210]

[s 23.5] Suit Is Brought

The expression "suit is brought" in section 23(3) of the Code of Civil Procedure relates to the place where the suit was instituted and it cannot be interpreted to mean, the court to which suit "has to be brought".[3211]

[S 24] General power of transfer and withdrawal.—(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

3210. *Lakshmi Nagdev v Jitendra Kumar Nagdev*, (2004) 4 MPLJ 310; *Mamta Gupta v Mukund Kumar Gupta*, AIR 2000 AP 394; *Priyavari Mehta v Priyanath Mehta*, AIR 1980 Bom 337; *State Bank of India v Sakow Industries Faridabad (Pvt) Ltd, New Delhi*, AIR 1976 P&H 321.

3211. *Shree Raghavendra Exports v Nauakar Enterprises*, AIR 2004 AP 84.

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or,

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which [3212][is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

[3213][(3) For the purposes of this section,—

(*a*) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(*b*) "proceeding" includes a proceeding for the execution of a decree or order.]

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[3214][(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]

SYNOPSIS

[s 24.1] Alterations in the Section 543
[s 24.2] Accepted Judicial Norm 543
[s 24.3] Return of Plaint Distinct from Transfer of Suit 543
[s 24.4] Nature of Proceedings 544
[s 24.5] Consolidation and Transfer of Suits 545
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[s 24.15] Probate and Succession Certificate 557
[s 24.16] Election Petition 557
[s 24.17] Notice 558
[s 24.18] "At any stage" 559
[s 24.19] "Pending before it" 560
[s 24.20] District Court 560

3212. Substituted by CPC (Amendment) Act 104 of 1976 (w.e.f. 1-2-1977) for the words "thereafter tries such suit".
3213. Substituted by section 10, Act 104 of 1976, for sub-section (3) (w.e.f. 1-2-1977).
3214. Inserted by section 10, Act 104 of 1976, (w.e.f. 1-2-1977).

[s 24.21] Clause (a): Court Subordinate To It 561
[s 24.22] Clause (a): Suit 562
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[s 24.24] Clauses (a) and (b): "Competent to try or dispose of the same" 563
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[s 24.31] Sub-section (5) 567
[s 24.32] Decree by Transferee Court 567
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[s 24.1] Alterations in the Section

Sub-section 1 remains unaltered. In sub-section 2, the words "the court which thereafter tries such suit" are deleted and the following words are substituted, *viz*: "the court which *is thereafter to try or dispose off such suit or proceeding*". Sub-section 3 is restructured and divided into clauses (a) and (b). Clause (a) is the same as the unamended sub-section 3. Clause (b) defines the word "proceeding" as including a proceeding for the execution of a decree or order. Sub-section 4 remains unaltered. Sub-section 5 has been newly added to clarify that a suit or a proceeding may be transferred from a court which has no jurisdiction to try it.

[s 24.2] Accepted Judicial Norm

One important aspect of the provisions of section 24 of the Code of Civil Procedure is that the power of transfer is conferred on the high court or the district court, courts which normally exercise appellate or supervisory jurisdiction in the scheme of procedure envisaged under the provisions of the Code of Civil Procedure. The power is conferred on a higher judicial forum. While it is an accepted judicial norm that the judges of the higher judiciary have the choice to hear a matter, the judge himself can recuse from the case and direct the matter to be posted before any other judges if he has the feeling that one of the parties to the proceeding may have a reasonable apprehension of bias if the proceedings should go on before him, may be for a variety of reasons such as a previous acquaintance of one of the parties to the proceedings, irrespective of the fact as to whether he is really biased or not — classic example, being that of a judge, not sitting in appeal over his own judgement, order or decision expressed earlier in respect of the subject-matter before him in any other context. But, in so far as the proceedings before the trial court are concerned, it is strictly determined as per sections 15, 16, 17, 18, 19 and 20. What needs to be observed and pointed out in terms of the provisions of the CPC is that the judge of the subordinate judiciary does not have the power to recuse himself from the suit or proceeding pending before the court he presides.[3215]

[s 24.3] Return of Plaint Distinct from Transfer of Suit

Sometimes the presentation of a plaint in a wrong court can lead to piquant situations. In 1988, a suit was filed on the original side of the High Court of Delhi for declaration, for specific performance of agreement, for possession of property and for permanent injunction. Written statement was filed by the defendants contesting the claims of the plaintiff but without raising any objection as to the jurisdiction of the court. The suit was transferred to the district court,

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3215. *MV Ganesh Prasad v ML Vasudevamurthy*, AIR 2003 Kant 39.

Delhi. After more than eight years, the written statement was amended raising an objection as to jurisdiction of the court at Delhi, since the suit was for recovery of immovable property situated in Gurgaon District. On the basis of the amended written statement, an additional issue as to the jurisdiction of the Delhi court was framed by the trial court. After hearing the parties, the trial court held that the suit was covered by clause (d) of section 16 of the Code and as such the Delhi court had no jurisdiction and the plaint was ordered to be returned to the plaintiff for presentation to the proper court. The said order was confirmed by the high court as well as the Supreme Court.[3216]

After the judgement of the Supreme Court in the above-mentioned case, which was CA No 2726 of 2000 decided on 26 September 2005, the plaintiff filed IA No 3 in the said disposed of appeal praying therein to direct the Gurgaon court to take up the suit from the stage at which it stands transferred. Rejecting the prayer made in the IA, the Supreme Court held that the Court at Gurgaon cannot be said to be a successor court for the purpose of section 24 of the Code.

Transfer of a case cannot be ordered on the ground that the court where case is pending does not have the jurisdiction. On such a ground, the party has to apply for dismissal of the case and not for transfer.[3217]

The return of plaint to the plaintiff for presentation to the proper court on the ground of want of jurisdiction of the court returning it is not a case of transfer of the suit but lack of jurisdiction of the court in which it was earlier filed. On presentation of plaint to the proper court, it will not be treated as continuation of proceedings, and the suit cannot be directed to be tried from the stage at which it has been transferred. The provisions of O XVIII, rule 15 which deal with succeeding judge proceeding with the case from where it was left by his predecessor are not attracted.[3218]

In a case, the civil judge transferred a suit *suo motu* to the high court on the ground of pecuniary jurisdiction. The high court did not issue any order to return the plaint, rather it registered the suit and entertained it. The Delhi High Court rejected the plea of *de novo* trial. It was held that since it was not a case of return of plaint, *de novo* trial cannot be allowed and no prejudice would be caused to the defendant if the suit was continued from the stage it was received.[3219]

[s 24.4] Nature of Proceedings

Petition filed before district judge under section 24, for transfer of the suit pending in a trial court, is a proceeding independent of the suit. It cannot be said that the order rejecting the petition passed by the learned district judge under section 24 of the Code of Civil Procedure is an order passed in a pending proceeding in a suit, though the prayer in the application under section 24 is for transferring the pending suit to some other court which has jurisdiction. The order cannot be characterised as an order passed in the pending suit itself. If this is so, the proviso to section 115 of the CPC is not attracted and as such it cannot be said that unless the order is shown to have caused irreparable injury or has occasion to failure of justice, it is not revisable.[3220]

3216. See *Harshad Chiman Lal Modi v DLF Universal Ltd.*, AIR 2005 SC 4446 : (2005) 7 SCC 791.
3217. *Neha Arun Jugadar v Kumari Palak Diwan Ji*, AIR 2011 SC 1164 : (2011) 15 SCC 222 : 2011 (3) CTC 665.
3218. *Harshad Chiman Lal Modi v DLF Universal Ltd*, AIR 2006 SC 646 : (2006) 1 SCC 364.
3219. *Sunil Dutt v Bhag Singh*, AIR 2009 (NOC) 2759 : (2009) 157 DLT 41(Del).
3220. *MV Ganesh Prasad v ML Vasudevamurthy*, AIR 2003 Kant 39.

[s 24.5] Consolidation and Transfer of Suits

Where in the matter relating to management of educational society due to rivalry between members and persons claiming to be the members of the society, three suits for injunction were filed before three different courts. To avoid multiplicity of litigation and conflicting orders, all suits were directed to be tried simultaneously by consolidating them and were transferred to a competent court for this purpose.[3221]

[s 24.6] Scope of the Section

Section 24 of the Code of Civil Procedure deals with general power of transfer and withdrawal and enables the district court to transfer any suit, appeal or other proceedings pending before it, for trial or disposal to any court subordinate to it and competent to try or dispose of the same.[3222]

Under this section, an application for transfer can be made by any of the parties to a suit, appeal or other proceeding. Whereas this section deals with the general power of a high court or a district court to transfer or withdraw any suit, etc, section 25 amended by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), confers on the Supreme Court the power to transfer a pending suit, appeal or proceeding from one high court or civil court in the state to a high court or other civil court in another state. Where "socially sensitive" suits, affecting considerable sections of the society are withdrawn, the order of withdrawal cannot be objected to by exaggerating the aspect of observation of demeanour of witnesses already examined, where the suits affect considerable sections of the public. Expeditious termination of litigation is vital in such cases.[3223] Even where section 21A of the Hindu Marriage Act, 1955 (consolidation and joint trial), is not applicable, a transfer can be ordered under section 24 of the Code.[3224] The motor accident claims tribunal constituted under section 110 of the Motor Vehicles Act, 1939, is a court subordinate to the high court within the meaning of section 24, CPC, and the high court can transfer the case from one tribunal in the state to another tribunal under section 24 of the Code.[3225] The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is a special Act and has been enacted to provide for the establishment of tribunal for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. Specific provisions for transfer of pending cases has been made in section 31 of the said Act and, therefore, provisions of the CPC, for transfer of suit as provided in section 24 will not apply.[3226] There can be an order of transfer in respect of a suit filed in pauperism.[3227]

[s 24.7] Sections 24, 25 and Letter Patent Clause (13)—Court

Sections 24 and 25 of the Code of Civil Procedure deal with courts and not tribunals. In any event, the Code of Civil Procedure is not applicable to tribunals; as such it has limited application by reason of specific provision provided in the Debt Recovery Tribunal Act. It does

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3221. *Shabbir Ahmed Khilji v Mehar M Sadique*, AIR 2003 Raj 331.
3222. *P Aisha Potti v Returning Officer Kollam*, AIR 2002 Ker 268.
3223. *Baselius Marthoma Mathews v Paulose Mar Atheinasius*, AIR 1979 SC 1909 : (1980) 1 SCC 601 : (1980) 1 SCR 250.
3224. *Paritokona Bannerjee v Rabishankar Bannerjee*, AIR 1987 Cal 269.
3225. *Kajetan Leo Vaz v Jagdish Raghunath Mankar*, AIR 1996 Bom 62.
3226. *PK Saraswat v UOI*, AIR 1999 Sikkim 16.
3227. *N Ram Mohan v J. Kasthuri*, AIR 1976 Mad 271 : (1976) 1 Mad LJ 163.

not apply without such specific provisions. Clause 13 of the Letters Patent also deals with courts and not with tribunals. The debt recovery tribunal is not a court within the meaning of clause 13 of the Letters Patent or that of section 24 or section 25 of the CPC.[3228]

[s 24.8] High Courts

This section applies to high courts in the exercise of their ordinary original civil jurisdiction.[3229] An application under this section might be heard by any judge of the high court, although such an application is an original proceeding[3230] whereas one under clause 13 of the Letters Patent must be made to a judge sitting in the original side.[3231] There was dispute between the management and workers' unions relating to conditions of service of workmen. Two writ petitions concerning the dispute and challenging the award passed by the industrial court were filed before the Allahabad Bench and one was filed before the Lucknow Bench. It was ordered that the latter petition filed before the Lucknow Bench should be transferred to Allahabad. In the interest of all parties, the case should be heard at Allahabad to avoid conflicting judgments.

When an application is filed under section 24 of the Code by one party to the suit and the court has to decide the matter of transfer or withdrawal of the case, it is an adjudicated order in the original jurisdiction of such court. The wording in section 5(i) of the Kerala High Court Act, 1958, is clear and gives no room for doubt that against such an order passed under section 24 of the Code by a single judge, an appeal will be maintainable to the Division Bench under Letters Patent. The high court can also pass interim order to prevent injustice.[3232]

JB Koshy, J (as he then was), speaking for the Full Bench of the Kerala High Court, observed as follows:

> When Section 5(i) clearly provides for appeal from orders, it cannot be stated that no appeal will lie from the adjudicated "order" under Section 24, CPC, of a Single Judge to the Division Bench. Merely because no appeal is provided from the order of District Court under Section 24, CPC, it cannot be stated that right of appeal given under Section 5(i) should be denied despite the clear wordings used in that section, if the District Court passes an illegal order, parties can approach the High Court under Article 227 of the Constitution of India.[3233]

The above-mentioned Full Bench decision of the Kerala High Court has quoted with approval *Sutherland's Statutory Construction* (3rd Edn, vol 3, para 6807) wherein it has been stated as follows:

> Statutes giving the right of appeal are liberally construed in furtherance of justice, an interpretation which will work for the forfeiture of that right is not favoured. Thus provisions limiting the time for bringing an appeal are liberally interpreted so that the party pursuing the remedy of appeal will not be defeated on mere technicalities. Likewise, an interpretation limiting the cases from which an appeal may be brought or person who may bring an appeal is not preferred.

3228. *State Bank of India v Madhumita Construction Pvt Ltd*, AIR 2003 Cal 7.
3229. *Mahindra Chandra v Lal Mohan*, AIR 1929 Cal 358 : (1929) ILR 56 Cal 940.
3230. *Sanganbhat v Vasudev*, AIR 1976 Kant 229 : (1976) Kant 992.
3231. *Srirangam Municipality v Palaniswamy*, AIR 1951 Mad 807 : (1951) ILR Mad 897 : (1951) 1 Mad LJ 281; *Lachinarayanan Jute Mfg Co v Dwip Narayan*, AIR 1956 Cal 65.
3232. *KV Balan v Sivagiri Sree Narayana Dharma Sanghom Trust*, AIR 2006 Ker 58 : 2005 (4) Ker LT 865 (FB).
3233. *KV Balan v Sivagiri Sree Narayana Dharma Sanghom Trust*, AIR 2006 Ker 58, p 66 : 2005 (4) Ker LT 865 (FB).

[s 24.9] Allahabad High Court and Its Lucknow Bench and Other Instances

No doubt in *Nasiruddin*'s case[3234] it has been held that there is no permanent seat of the High Court at Allahabad. This is true in the sense that there is nothing permanent in the world. But as things stand in the 21st century, the principal seat of the Allahabad High Court is indisputably at Allahabad. The Chief Justice and most of the senior and other judges ordinarily sit at Allahabad. The Registrar General of the Court also functions at Allahabad. The Allahabad High Court was created by Queen Victoria's Letter Patent in 1866, whereas Lucknow only had a judicial commissioner's court upto 1925 and thereafter the Chief Court for Avadh upto 1948, when the amalgamation order was passed. Hence, from the historical angle also, there can be no doubt that the principal seat of the High Court is at Allahabad.[3235]

The second proviso to clause 14 of the United Provinces High Courts (Amalgamation) Order, 1948, clearly indicates that it is only cases which arise out of Avadh area, that is to say, at least part of the cause of action arises in Avadh, which can be transferred by the Chief Justice to Allahabad. Hence, the Chief Justice has no jurisdiction to transfer a case in which no part of the cause of action arose in Avadh to Allahabad under clause 14. Such cases illegally filed at Lucknow must be returned at the very threshold to counsel for filing at Allahabad.[3236]

It was held in a case that while passing the order, the acting Chief Justice was exercising administrative powers. He was not obliged to write a detailed judgement, dealing with each and every point raised by one party and controverted by the other. It could not be said that the order of the judge did not reflect any basis for the transfer to Allahabad of the petition filed at Lucknow. The fact that the petition was filed by the petitioner at Lucknow did not bar the petitioner in seeking the relief of transfer. Nor could it prevent the Chief Justice from passing an administrative order of transfer, once it was brought to his notice that it was necessary on the merits of the case.[3237]

The question of interpretation of power of transfer of cases exercised by the principal seat of a high court and a permanent bench of that high court came up for consideration before the Madras High Court. While interpreting the expression "subordinate court" appearing in section 23 in the light of Madras High Court (Establishment of Permanent Bench at Madurai) Order, 2004, it was held that the said expression means all courts subordinate to the high court including court of small causes. In this view of the matter, courts lying within the jurisdiction of the Permanent Bench at Madurai can be termed as subordinate to the principal seat at Madras. Thus, the High Court at Madras can exercise power and transfer cases falling within the territorial jurisdiction of Permanent Bench at Madurai to other court within the territorial jurisdiction of the principal seat.[3238] It was observed by the high court as follows:

> 17. True it is, that the word High Court under Section 3(25) of the General Clauses Act is defined as, "High Court", used with reference to civil proceedings shall mean the highest civil court of appeal in the part of India in which the Act or regulation containing the expression operates. Although it may appear that the court of appeal for cases in the Districts lying within the Territorial Jurisdiction of Permanent Bench at Madurai would only be the latter, when once the proviso to Presidential Order abovementioned empowers the Chief Justice in the Principal Seat at Madras High Court to order for hearing of any

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3234. *Nasiruddin v State Transport Appellate Tribunal*, AIR 1976 SC 331 : (1975) 2 SCC 671 : 1976 SCR (1) 505.
3235. *Vijendra Pal Singh v Sr Regional Manager, FCI, Lucknow*, AIR 2002 All 206 (DB).
3236. *Vijendra Pal Singh v Sr Regional Manager, FCI, Lucknow*, AIR 2002 All 206 (DB).
3237. *Centre of Indian Trade Unions, UP State Committee v Acting Chief Justice, High Court, Allahabad*, AIR 1990 All 55 (DB).
3238. *T Kamatchi v S. Murali alias Kanagasabapathy*, AIR 2006 Mad 159 : 2006 (1) Mad LJ 418.

> case pending in the Madurai Bench at Madras, it would only indicate that such power of appellate authority of the Madurai Bench is likely to be delegated to the Principal Bench at Madras. This delegation as connoted to the proviso to the Presidential Order cannot have any meaningful effect unless and until the Principal Seat is clothes (sic) with such power of appellate authority over the Territorial Jurisdiction of Permanent Bench at Madurai.[3239]

[s 24.10] Jurisdiction

Before the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), one view was that an order for transfer of a suit from one court to another court cannot be made unless the suit had been in the first instance brought in a court which had jurisdiction to try it.[3240] This was also the view taken by the Andhra Pradesh High Court which, however, held that the mere fact that there was a dispute about jurisdiction did not restrict the power of transfer.[3241] If after the transfer is made, the parties joined issue and went to trial upon the merits without any objection, the order of transfer could not subsequently be impeached.[3242] Where a district *munsif* transferred the records of a case to another district *munsif* in anticipation of an order of transfer by the district judge and it was disposed of on the merits without objection, it was held that there was a mere irregularity which could be waived and that the decree was not open to attack by reason thereof.[3243] The same rule applied to appeals.[3244] The Allahabad High Court took a contrary view and held that the fact that the court of first instance had no jurisdiction to dispose of the suit could not oust the jurisdiction of the high court or district court to transfer the same to a court competent to try it.[3245] This was also the view of the Nagpur High Court.[3246] The Parliament has, by inserting sub-section 5 accepted the Allahabad and Nagpur view as against the other view. In a decision by the Allahabad High Court in *Ledgard v Bull* and *Raja Soap Factory v Shantharaj*,[3247] the court has taken a view contrary to its earlier view and held that a suit, appeal or other proceeding cannot be transferred unless it was filed in the court with jurisdiction. Furthermore, it has confirmed the view of the district court, the transferee court, that the high court could not transfer to it an appeal which the high court had held it had no jurisdiction to entertain. The order by the district court was passed before sub-section (5) came into force and that the sub-section not being retrospective, did not affect that order.[3248] Nevertheless, a suit cannot be transferred to a court which has no jurisdiction (other than territorial jurisdiction) to try it.[3249] This is clear from the words "competent to try or dispose off the same" in clauses (a) and (b) of sub-section (1). Thus, a high court cannot transfer to a district court an insolvency petition presented to it under the Presidency-Towns Insolvency Act, 1909;[3250] nor can a district court transfer a suit from one subordinate court to another subordinate court which has been newly created and empowered to try subsequently instituted suits;[3251] but it is not necessary that the court to which a suit is transferred should

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3239. *T Kamatchi v S Murali alias Kanagasabapathy*, AIR 2006 Mad 159, at pp 162–163 : 2006 (1) Mad LJ 418.
3240. *Rajah Soap Factory v SP Santharaj*, AIR 1965 SC 1449.
3241. *T Reddy v M Rao*, AIR 1970 AP 194.
3242. *Ledgard v Bull*, (1887) ILR 9 All 191 : 13 IA 134; *Peary Lal v Komal Kishor*, (1880) ILR 6 Cal 30.
3243. *Posan Singh v Inder Deo Singh*, AIR 1952 Pat 328.
3244. *Ram Narain v Parmeswar*, (1898) ILR 25 Cal 39.
3245. *Narain Das v Khunnilal*, AIR 1934 All 569.
3246. *Daftary v Dube*, AIR 1955 Ngp 44 : (1955) ILR Nag 36.
3247. *Ledgard v Bull*, (1887) ILR 9 All 191 : 13 IA 134; *Raja Soap Factory v Shantharaj*, AIR 1965 SC 1449.
3248. *Murarilal v Raman Lal*, AIR 1978 All 106; *Krishna Chand v Tej Ram*, AIR 1978 J&K 9.
3249. *Kishore Lal v Balkishan*, AIR 1932 All 660 : (1932) ILR 54 All 824; dissenting from *Jannat v Ghulam*, (1920) 5 Pat LJ 588.
3250. *Srinivasa v Official Assignee*, (1915) ILR 38 Mad 472.
3251. *Vaithilinga v Kaliaperumal*, (1918) Mad WN 291.

have concurrent territorial jurisdiction and a high court or district court may transfer a suit from one subordinate court to another subordinate court which has pecuniary jurisdiction although it may not have territorial jurisdiction to try the suit.[3252] Where a suit was instituted in court *A* which would have on the valuation given in the plaint jurisdiction to entertain it and subsequently, the suit was transferred to court *B* which had higher pecuniary jurisdiction, and that court held that on its true valuation, the suit was beyond the jurisdiction of court *A*, it was held that the order of transfer was not open to attack on the ground that the suit was instituted in a court which had no jurisdiction to entertain it.[3253]

In a suit for damages and injunction, the court granted injunction in favour of the plaintiff. Thereafter, the plaintiff sought amendment of the plaint claiming higher amount of damages and the same was allowed. As a result of the amendment, the trial court lost pecuniary jurisdiction. The plaintiff filed a petition for transfer of the suit to avoid order of return of the plaint without continuation of interim injunction. It was held by the Delhi High Court that there was nothing in O VII, rule 10 of the Code which can be construed as a bar to maintain a petition under section 24 of the Code.[3254]

Dwelling on the ambit and domain of section 24 and Order VII of the Code, it was observed by the court as follows:

> Harmonious and constructive application of the above two sets of provisions of the procedural law would require the Court to adopt an approach which would satisfy the twin objects of the Code of Civil Procedure, namely, expeditious disposal of the case and achievement of the ends of justice, without causing prejudice to the parties. Convenience or inconvenience of the parties would hardly be a relevant consideration for the Court while laying down such a principle.[3255]

[s 24.11] General Power of Transfer

Section 24 of the Code of Civil Procedure deals with the general power of transfer and withdrawal. As can be seen from the language of section 24 of the CPC, the powers, no doubt, are very wide; however, those powers are being exercised while transferring matters within certain permissible limitations.[3256]

This section gives a general power of transfer of all suits, appeals and other proceedings and is not limited like section 22 to suits in which the plaintiff has the option of suing in more than one court. It may be exercised at any stage of the proceeding and even *suo motu* without an application.[3257] Section 24 of the CPC deals with the general power of transfer and withdrawal of suits, appeals or other proceedings pending before the subordinate court to the high court or district court for trial or disposal to any court subordinate to them and competent to try and dispose off the same, or withdraw any suit, appeal or other proceeding pending in any court subordinate to them.[3258] The High Court of Andhra Pradesh recommended the government to transfer some areas from jurisdiction of courts at another place for the reason that the pendency in court at place from jurisdiction of which area was transferred was heavy and at

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3252. *Kishore Lal v Balkishan*, AIR 1932 All 660 : (1932) ILR 54 All 824.
3253. *Syam Nandan v Dhanpati Kuer*, AIR 1960 Pat 244.
3254. *Aviat Chemicals Pvt Ltd v Magna Laboratories (Gujarat) Pvt Ltd*, AIR 2006 Del 115 : 2006 (127) DLT 300.
3255. *Aviat Chemicals Pvt Ltd v Magna Laboratories (Gujarat) Pvt Ltd*, AIR 2006 Del 115, at p 123 : 2006 (127) DLT 300. Per Swatanter Kumar, J (as he then was).
3256. *Satyasri Fertilizers v EID Parry (India) Ltd, Chennai*, AIR 2003 AP 312.
3257. *Seshagiri Rao v Somasundaramma*, AIR 1949 Mad 65 : (1949) ILR Mad 94; *Allahabad Bank v Raja Ram*, AIR 1933 Lah 671 : (1933) ILR 14 Lah 779.
3258. *Shamim Ahmed v Egmore Benefits Society Ltd*, AIR 1996 Mad 63.

place to which area was transferred was very low. The district judge recommended transfer of area in question at latter place for achieving equal distribution of work among courts. It was held that there was nothing arbitrary and illegal in the notification of the government.[3259]

[s 24.12] Grounds of Transfer

As stated in the notes on section 22, the plaintiff as arbiter litis or dominus litis has the right to choose any forum the law allows him[3260] and it has been held that it is a substantive right like a right of appeal.[3261] But it is subject to control under sections 22–24. The burden lies on the applicant to make out a strong case for a transfer. As mere balance of convenience in favour of proceedings in another court is not a sufficient ground[3262] though it is a relevant consideration.[3263]

The court has laid down various propositions which can be considered as a ground to transfer the case.[3264] These are illustrative in nature:

1. balance of convenience or inconvenience to the plaintiff or the defendant or witnesses;
2. convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit;
3. issues raised by the parties;
4. reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending;
5. important questions of law involved or a considerable section of public interested in the litigation;
6. the plaintiff or the defendant is not likely to have a "fair trial.

[s 24.12.1] Reasonable Ground

As a general rule, the court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice.[3265]

Where the applicant was a practicing lawyer, who sought transfer at a place where she was practicing, objection was raised that she will have an influence at that place. No foundation was made out for the objection. Such objection cannot be entertained. No doubt, such discretionary powers cannot be put within the strait-jacket of cast-iron for all the situations. It is always for the court to find out from the allegations so made, whether any reasonable ground is made out for transfer of the case.[3266] Transfer of cases from one court to another is a serious matter, because it indirectly casts doubt on the integrity or competence of the judge from whom the matter is transferred. This should not be done without a proper and sufficient cause. If there are good and sufficient reasons for transferring a case from one court to another, they must be clearly set out. What the court has to consider is whether the applicant has made out

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3259. *D Awastha Reddy v Govt of Andhra Pradesh*, AIR 1998 AP 174 (DB).
3260. *Sadayandi v Venugopal*, AIR 1960 Ker 91.
3261. *Ganapathy v Commr of Hindu Religious Endowments*, AIR 1955 Mad 378 : (1955) II R Mad 870.
3262. *Re Norton's Settlement*, [1907] 1 Ch 407, 409; *Madho Prasad v Motichand*, (1919) II R 41 All 381.
3263. *Tula Ram v Harjiwan Das*, (1883) ILR 5 All 60; *Subha Bibi v Maqbul*, (1916) 14 All LJ 242; *Inayatullah v Nisar*, AIR 1922 All 65 : (1922) ILR 44 All 278.
3264. *Sadhana Badhoriya v Sunil Badhoriya*, 2019 (4) MPLJ 331.
3265. *Re Norton's Settlement*, [1907] 1 Ch 407; *Hindustan Co v Mulraj*, (1914) 27 Mad LJ 645.
3266. *Sudha Sharma v Ram Naresh Jaiswal*, AIR 1990 MP 320.

a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction.[3267]

In other words, the court held that mere apprehension of a litigant that he will not get justice from a court will not justify transfer of a case, as requirement of section 24 of the Code of Civil Procedure will not be met in such a case. The court has to be very careful in transferring a matter on such grounds. There was no occasion for the petitioner even to presume that he will not get justice from the court concerned. The court has to be wary in transferring the case on the ground of biasedness as it casts aspersion upon integrity and competence of the presiding officer.[3268]

In the undernoted cases, the Supreme Court held the age of the wife and the distance between the place of residence and the place where the matrimonial proceedings were filed, as well as the absence of people who could escort her, were considered to be reasonable grounds for directing transfer of proceedings to a place more convenient to her.[3269]

Powers under section 24 cannot be exercised *ipse dixit*. Thus, where the high court, without applying its mind and without recording any reasons, allowed transfer simply observing that it would be appropriate to transfer the suit, the order was set aside by the Supreme Court. It was observed that the order of transfer must reflect the application of mind by the court and the circumstances which weighed in taking the action.[3270]

[s 24.12.2] Common Question of Facts and Law

Where two persons filed suits against each other in different courts on the same cause of action, it was held desirable that the suits should be tried by one and the same court.[3271]

Where there are two suits in different courts which raise common questions of fact and law, and the decisions in which are interdependent, it is desirable that they should be tried together by the same judge so as to avoid multiplicity in trial of the same issues and conflict of decisions.[3272] The involvement of common question of law and facts is not the only ground authorising the transfer of suits under section 24. It is only illustrative and not exhaustive. This is paramountly a matter involving the satisfaction of the court which exercises the power. If the facts of the suits sought to be tried together are inter-twined with cause of action in each suit, the transfer of suit may not be refused, provided the parties and subject matter of the suits are one and the same. When the court feels that facts intertwined with the different causes of action are separated and suits tried independently would result in conflicting decisions, it can allow the transfer and joint trial. Thus, where the litigating parties in both the suits were one and the same and the subject matter involved in both the suits was a two-shop room, thereby apart from the common nature, facts being inter-twined and overlapped, the possibility of conflicting decisions if the suits were tried separately could not be totally ruled out, transfer and joint trial was hence ordered.[3273] It has likewise been held that where different suits by

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3267. *Tula Ram v Harjiwan Das*, (1883) ILR 5 All 60, 62.
3268. *Amar Nath v Nanak Chand*, AIR 2020 HP 153 : 2020 SCC OnLine HP 580.
3269. *Anjali Ashok Sadhwani v Ashok Kishenchand Sadhwani*, AIR 2009 SC 1374; *Sapna Agarwal v Om Prakash Jalan*, AIR 2009 SC 1641 : (2008) 17 SCC 602 : 2008 (15) Scale 155; *Fatema v Jafri Syed Hussain (Parvez)*, AIR 2009 SC 1773 : (2009) 17 SCC 401; *Pooja Bashistha v Bhupendra Bashistha*, AIR 2009 SC 1673 : (2009) 17 SCC 385.
3270. *Kulwinder Kaur v Kandi Friends Education Trust*, AIR 2008 SC 1333 : (2008) 3 SCC 659.
3271. *Rajulu v Govindan Nair*, AIR (1938) ILR Mad 745; *Zubeida Khatoon v Md Hayath*, AIR 1933 Lah 635; *Manjari v Nirupam*, AIR 1975 Del 42 : (1974) 1 Del 135.
3272. *Purna Chandra v Samantha*, AIR 1953 Ori 46 : (1951) ILR Cut 1.
3273. *Rosamma Joseph v PC Sebastian*, AIR 1996 Ker 113.

different plaintiffs were filed in different courts raising the same question under section 13 of the Pensions' Act, 1871, it was desirable that all of them should be tried by one court and that orders of transfer should be made for that purpose under section 24.[3274] An order of transfer would also be made to prevent abuse of the process of the court.[3275]

The involvement of common question of law and facts is not the only ground authorising the transfer of suits under section 24. It is only illustrative and not exhaustive. This is paramountly a matter involving the satisfaction of the court which exercises the power. If the facts of the suits sought to be tried together are inter-twined with the cause of action in each suit, the transfer of suit may not be refused, provided the parties and subject matter of the suits are one and the same. When the court feels that facts inter-twined with the different causes of action are separated and suits tried independently would result in conflicting decisions, it can allow transfer and joint trial. Thus, where the litigating parties in both the suits were one and the same and the subject matter involved in both the suits was a two-shop room, thereby apart from the common nature, facts being intertwined and overlapped, the possibility of conflicting decisions if the suits were tried separately, could not be totally ruled out; transfer and joint trial was hence ordered.

In a case relating to succession certificate, the petitioner put forward his claim on the basis of a Will before Civil Judge (Senior Division). The respondent filed a suit before Civil Judge (Junior Division) for cancellation of the Will. It was held by the Allahabad High Court that the claims of the petitioner as well as that of the respondent were based on execution and non-execution of the alleged Will and therefore, it would be in the interest of justice that both cases are decided in the same court. It was further held that the expression "same court" in O IVA does not mean the same judge; rather, it means the same civil court and as such the order transferring the proceeding from the court of Civil Judge (Junior Division) to the court of Civil Judge (Senior Division) was proper.[3276]

In another instance, a partition suit had been filed and a probate case was also pending in another court. Same subject-matter was involved in both cases. The parties admitted that the stands of the parties in both the cases were almost same and the issues involved were almost similar and same set of oral and documentary evidence would be required to be led by both parties. Under these circumstances, it was held that in the interest of justice and convenience of parties, the partition suit and the probate case should be tried together.[3277]

[s 24.12.3] Comments by Judge

It is too much to say that if any statements are made, it means that the presiding officer has made up his mind with respect to the decision in the case. If this be the position, no case can be heard by any court. It cannot be expected that the judges should be silent without expressing any opinion. A sphinx-like attitude is not expected from the presiding officer especially when he is trying a matrimonial case or litigation between very near relations. There should be an effective discussion, an effective attempt to conciliate and an effective attempt to clarify the misunderstandings so that the disputes can be settled or a just and proper decision can be taken

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3274. *District Collector v Kerala Varma*, AIR 1960 Ker 199 : (1959) Ker LJ 1219.
3275. *State Bank of India v Sakow Industries*, AIR 1976 P&H 321 : (1976) 78 Punj LR 638.
3276. *Amardeep v District Judge, Lalitpur*, 2007 (3) ALJ 691.
3277. *Smt Pushplata Prasad v Dilip Kumar Sinha*, AIR 2007 Jhar 1 : 2006 (3) AIR Jhar R 649.

by the presiding officer. If in that process, the presiding officer makes any comments on merits of the case, it cannot be misunderstood as an expression of the decision.[3278]

The mere fact that a judge, while deciding an earlier case, had made certain remarks, is no ground for the transfer of a subsequent case on the same point before him.[3279]

[s 24.12.4] Bias Attributed to a Judge

The apprehension of bias on the part of a litigant should be a "*bona fide*, reasonable apprehension" and not a mere apprehension of the litigant that can be the basis to order transfer of the pending case in the exercise of the power under section 24 of the CPC. The examination of the existence of such apprehension though requires to be decided from the point of the person expressing apprehension, nevertheless if extended to an extreme extent will result in the anomalous situation that whenever a litigant comes up before the court in application filed under section 24 of the CPC, that the applicant has a reasonable apprehension of bias operating against him by the presiding officer of the court being prejudiced against him, then the version of the applicant has to be automatically accepted and the transfer application allowed. This cannot be and is not the object of section 24 of the CPC. Until and unless the court is satisfied that the apprehension of bias or prejudice which a litigant expresses is *bona fide* and reasonable, expression of apprehension which is proved by the circumstances and material placed by such applicant before the court where the application is moved, an application of this nature cannot be automatically ordered.[3280]

Another ground of transfer is the pecuniary or other personal interest in the presiding judge[3281] or a reasonable apprehension of the litigant that he will not get a fair trial.[3282] The fact that an erroneous order has been passed is not in itself a ground for transfer as it does not necessarily lead to an inference of bias.[3283]

Vesting of power of adjudication of a sessions triable case under section 498A on a presiding officer who was dealing with matrimonial suit, cannot *ipso facto* lead to a conclusion that the court would be biased. Vesting of power in a particular court to decide civil *lis* and criminal matters is common practice and on this ground bias cannot be attributed to the court.[3284]

In a case where repeated adjournments were sought by the applicant due to sickness and the court, after taking note of earlier adjournments, uttered some words, that itself cannot be taken as a ground of bias against the litigant and transfer of case cannot be sought on that ground.[3285]

If the petitioners did not make out any case to prove their contention that there is every likelihood of bias to the presiding officer due to his acquaintance with the parties and their counsel, unless there are specific instances of bias and the presiding officer has personal interest in the subject matter of the suits, he cannot be branded as a biased officer. This would demoralise the officers in the eye of the public and it becomes very difficult for such officers

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3278. *Sangeetha S Chugh v Ram Narayan*, AIR 1995 Kant 112.
3279. *G Lakshmi Ammal v Elumaki Chettiar*, AIR 1981 Mad 24.
3280. *MV Ganesh Prasad v ML Vasudevamurthy*, AIR 2003 Kant 39.
3281. *Loburi v Assam Railway and Trading Co*, (1884) ILR 10 Cal 915.
3282. *Sher Singh v Thakur Das*, (1903) PR 88; *Ahad Shah v Ayshan*, AIR 1923 Lah 564.
3283. *Madan Lal v Babu Lal*, AIR 1962 Mani 42.
3284. *Anand Jhawar v Rinku Jhawar*, AIR 2007 (NOC) 1963 (Cal).
3285. *Virendra Bhushan v Rajendra Kumar*, AIR 2007 (NOC) 2353 (Raj).

to work in a free and unbiased atmosphere. The mere apprehension of the petitioners on imaginary grounds cannot be accepted.[3286]

The Supreme Court, in a case where the husband was taking care of the child who was nine years old and was suffering from malignant disease, found that the high court ought to have transferred the case in favour of the husband.[3287]

The petitioner's apprehension that the presiding officer is biased against him was based on an incident in which it was alleged that the presiding officer while hearing the suit had used harsh language against the petitioner. The incident had happened when the suit which was pending before the trial court for about eight years had reached the stage of pronouncement of judgment. The developments in the case clearly indicate that there was an effect on the part of the petitioner to stall and prolong the proceedings. However, there was absolutely no allegation of bias or prejudice made against the presiding officer during this period. The apprehension of bias expressed on the basis of an incident which is said to have taken place in the course of the proceedings in the suit in respect of which the version of the petitioner is also not believed by the learned district judge and can never be said to have given the cause for formation of a reasonable apprehension that the presiding officer is biased against the petitioner. The district judge was therefore fully justified in rejecting the application filed under section 24 of the CPC on this ground.[3288]

[s 24.12.5] Suspicion, Presumption or Apprehension

A mere suspicion by a party that he will not obtain justice, does not justify transfer. There must be reasonable apprehension to that effect. A judicial order made by a judge cannot be legitimately made the foundation for a transfer application. Mere presumption or possible apprehension could not and should not be the basis of transferring a case from one court to another; only in very special circumstances it may become necessary to transfer a case from one court to another.[3289]

The mere apprehension of the petitioners on imaginary grounds cannot be accepted.[3290]

Application for transfer of a case on the allegation of bias against the Presiding Officer cannot be filed without being supported by affidavit.[3291] It has been observed as follows:

> It is to be always kept in mind that there should be a reasonable ground to justify the plea of apprehension in the mind of a party to a judicial proceeding about the dealing of the proceeding of a Judge. This must be in the realm of actuality. A fanciful idea, an imaginary suspicion or capricious plea can never be equated with the conception of reasonable apprehension.[3292]

[s 24.12.6] Judicial Order

A judicial order made by a judge cannot be legitimately made the foundation for a transfer application.

3286. *Pasupala Fakhruddin v Jamia Mosque*, AIR 2003 AP 448.
3287. *Amandeep Goyal v Yogesh Rani*, (2016) 15 SCC 267.
3288. *MV Ganesh Prasad v ML Vasudevamurthy*, AIR 2003 Kant 39.
3289. *Rajkot Cancer Society v Municipal Corp, Rajkot*, AIR 1988 Guj 63.
3290. *Pasupala Fakruddin v Jamia Mosque*, AIR 2003 AP 448. See also *Nandini Chatterjee v Arup Hari Chatterjee*, AIR 2001 Cal 26.
3291. *Sudarshan Jain v Deep Chand Jain*, AIR 2006 MP 6 : 2006 AIHC (NOC) 702.
3292. *Sudarshan Jain v Deep Chand Jain*, AIR 2006 MP 6, p 10 : 2006 AIHC (NOC) 702 [Per Dipak Misra J as he then was.]

Where a stay application against the trial court's order to issue interim injunction is filed in the appellate court, which refuses to grant stay, the defendant cannot seek transfer of appeal. Remedy against dismissal of stay does not lie in a petition for transfer.[3293]

[s 24.12.7] Convenience

Where in a suit for partition instituted in the court of 24-*Parganas*, the parties were residents of Calcutta and the major portion of the immovable property was also situated in Calcutta, the suit was transferred to the original side of the High Court of Calcutta on the ground principally, of convenience.[3294] In a suit to set aside certain deeds of gift executed by a deceased person on the ground that the deceased was not of sound mind and that the deeds were procured by undue influence, the High Court of Allahabad ordered the suit to be transferred to the court of the place where the deeds were executed on the ground that the witnesses were residents of that place and that the defence must turn upon local evidence.[3295]

The court while considering an application for transfer of a case cannot delve into the existence or lack of territorial jurisdiction of respective courts. The paramount factor would be convenience of both parties. Thus, where in a suit arising out of a contract, the petitioner had its head office at Visakhapatnam and an equally important Regional Office at Hyderabad. It was found that substantial portion of transaction had taken place at Hyderabad in the form of issuance and acceptance of tenders, undertaking negotiations. It was held that no inconvenience would be caused to the petitioner if suits are decided by court at Hyderabad.[3296]

Where the wife sought transfer of a petition for judicial separation filed by the husband on the ground that it was inconvenient for her to attend as she was serving in other district and her father was not in a position to accompany her, it was considered sufficient ground for transfer of the petition to the place where the wife resides.[3297]

[s 24.12.8] Medical Ground

In view of the fact that under the present CPC, the affidavit evidence relating to the chief-examination had been introduced for the purpose of cross-examination or otherwise, if there is any difficulty in this regard, the litigant is at liberty to move an appropriate application relating to expenses. Hence, it is needless to say that the litigant is at liberty to move such an application in the event of any difficulty on the ground of health.[3298] The fact that a party to the suit is a diabetic patient is therefore, no ground for transfer of the suit.[3299]

[s 24.13] Transfer from Rent Court to Civil Court Permissibility

The Rent Control Act, 1948 and the rules made thereunder are a complete Code covering the proceedings under the said Act. Even with reference to the transfer of the proceedings before the rent controller as well as before the appellate authority, it is provided under the Act

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3293. *Vijay Kumar v Uma Sanghi*, AIR 1987 MP 41; See also *Nandini Chatterjee v Arup Hari Chatterjee*, AIR 2001 Cal 26.
3294. *Jotendronath v Raj Kristo*, (1890) 116 ILR Cal 771; *Kumaragurubara Temple v KS Mudaliar*, AIR 1977 Mad 27 : (1976) 2 Mad LJ 209; but see *Oriental Bank v Pashole Tea Co*, AIR 1975 Cal 476.
3295. *Inayat-ullah v Nisar*, AIR 1922 All 65 : (1922) ILR 44 All 278.
3296. *Girijan Co-op Corp Ltd v Hukmichand Sachion Kumar*, (2007) 2 Andh LT 18.
3297. *Smt Varsha Rani Nag v Herald Vinay Nandan*, 2007 CgLJ 145.
3298. *Satyasri Fertilisers v EID Parry (India) Ltd, Chennai*, AIR 2003 AP 312.
3299. *Satyasri Fertilisers v EID Parry (India) Ltd, Chennai*, AIR 2003 AP 312.

and the rules made thereunder. But, however, there is no provision for transfer of a proceeding from the rent control court to any other civil court. In fact, the powers of ordering eviction under the grounds specified under the Act are exclusively conferred on the specified or notified courts or the authorities. Therefore, such power conferred by notification under the provisions of the Act, cannot be conferred by the high court by transferring a rent control proceeding pending on the file of the rent controller to any civil court, as such powers are vested only in government. Therefore, the petitions seeking transfer of the proceedings pending before the rent controller to the civil court would not be maintainable. Further even on merits also, there is no case for ordering transfer as the conduct of the petitioners clearly showed that it is intended only to delay and protract the proceedings before the rent controller.[3300]

Under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, there are provisions for making rules and rules have been framed thereunder known as the Tamil Nadu Buildings (Lease and Rent Control) Rules 1974. Rule 14 of the said rules provides for transfer of proceedings from one Controller to another and rule 17 provides for transfer of proceedings from one appellate authority to another. Since there are adequate provisions in the Act and the Rules governing transfer of cases, a proceeding before the Rent Controller cannot be transferred to high court under section 24 of the Code.[3301]

[s 24.14] Disputes Between Husband and Wife

The high court under section 24 of the Code of Civil Procedure, 1908 has unquestionable power to transfer cases from one court to the other court. Similarly, as the family court is also a court subordinate to the high court and is subject to the provisions of the CPC, the high court is empowered under section 24 of the Code to transfer cases from one family court to the other family court. Where the Supreme Court found that other proceedings between parties were pending at Jamnagar, the court found it fit to allow the appeal and transfer the divorce case instituted at Rajkot to Jamnagar at the instance of the wife.[3302]

In a Karnataka case, the suit was by the husband for restitution of conjugal rights. The wife sought transfer of the suit to her parent's place. She apprehended danger to her life in the event of entering the husband's town. Affidavit was filed by the husband assuring full security to her life. Efforts of the court to rid her of her apprehension were in vain. Transfer of the suit was allowed, having due regard to the state of mind of the wife.[3303] The overall picture which emerged in this case is that though the application of the petitioner appears to be earlier in time, it cannot be said that the non-petitioner has filed the case under section 13 of the Hindu Marriage Act, 1955 only as a counter-blast to her application for restitution of conjugal rights. in such a situation, no case of transfer is made out.[3304] A petition for divorce was filed by the husband at Mysore where he was working. The wife filed a petition for restitution at Bangalore where she was residing with the father. The wife admittedly suffered from a mental disorder and it was held in the interest of justice and equity proceedings that the wife cannot be forced to join proceedings at Mysore. The petition of the husband was transferred to Bangalore.[3305]

3300. *LK Prakash Babu v Mohd Akbar*, AIR 2003 AP 168.
3301. *A Chandrasekar T Venugopal*, (2008) 7 Mad LJ 625 : (2008) 3 Mad LW 915 (DB).
3302. *Tejalben v Nihirbhai Bharatbhai Kothari*, (2016) 3 SCC 69.
3303. *Jayadevi v Basavraj*, AIR 1990 Kant 273.
3304. *Chand Kanwar vSantosh Kumar Singh*, AIR 1997 Raj 190.
3305. *RS Shyamala vr G Rajasekhar*, AIR 1995 Kant 228. See also *Anita Shrivastava v Ashish Saxena*, AIR 2006 (NOC) 1354 (MP) : (2006) 2 MPLJ 271; *Vandana vAngad Singh Jadav*, AIR 2006 (NOC) 1152 (MP) : (2006) 1 MPLJ 463.

In a case, the Kerala High Court held that Family Courts are subordinate to the high court and as such the high court is empowered to withdraw case from one Family Court and transfer it to another Family Court irrespective of the fact whether or not the transferee court has competency and territorial jurisdiction to try the case. Such power can be exercised under section 24 of the Code without taking recourse to section 8 of the Family Courts Act, 1984.[3306]

In a case of matrimonial dispute, the wife and the husband appeared before Supreme Court Lok Adalat and there was a settlement between the parties with the intervention of mediators. The parties agreed that they want divorce by mutual consent and also agreed not to proceed with pending criminal and civil disputes. In view of this, the transfer petition filed by wife was disposed of in terms of the settlement and direction to grant divorce by mutual consent was issued.[3307]

Where the case was filed by husband against the wife at place *D* for declaration of marriage as void, the wife living at place *Y* and she had to travel by bus and had to change bus thrice for reaching place *D*, and at place *Y* her two brothers were residing where she could conveniently live and conduct the case also. Under the circumstances, the high court transferred the case at place *Y*, where wife was residing.[3308]

[s 24.15] Probate and Succession Certificate

The various provisions of the Indian Succession Act, 1925 is that a proceeding for the grant of a probate or a succession certificate has to be treated and equated to a proceeding in a suit and the procedures governing those proceedings are as laid down in the CPC. A combined reading of the provisions of the Indian Succession Act, 1925 clearly suggests that the proceedings for the grant of succession certificate before the learned District Judge are in the form of regular suits and they are to be conducted according to the CPC. In any view of the matter, as the proceedings for grant of succession certificate is pending before a civil court subordinate to the high court, the application under section 24 of the CPC will certainly be maintainable for transfer of proceedings for grant of succession certificate under the Act.[3309]

Where two probate petitions, one filed by petitioner before the high court and the other filed by respondent before the distrct court; both based on two separate wills by same testator, involving the same parties, considering the fact that the petition had been instituted earlier before high court, a court of competent jurisdiction, the petition before the District Judge was directed to be transferred to the high court.[3310]

[s 24.16] Election Petition

Under section 88(b) of the Kerala Panchayat Raj Act (13 of 1994), the court having jurisdiction to try an election petition in the case of a district panchayat is the district court and if the government may by notification notify under sub-section (2) of section 88 of the said Act such other additional district court, then such other district court may have jurisdiction to try the election petition under section 88 of the Act. Section 24 of the Code of Civil Procedure deals with general power of transfer and withdrawal and enables the district court to transfer any suit, appeal or other proceedings pending before it, for trial or disposal to any court

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3306. *Denny Antony v Mary Kutty Abraham*, AIR 2007 AIHC (NOC) 2026 (Ker) : 2007 AIHC (NOC) 1658.
3307. *Aparna Goyal v Rakesh Goyal*, AIR 2009 SC 1836 (Three-Judge Bench).
3308. *Samta Sanjay Kumar vSanjay Kumar Sharma*, AIR 2006 AIHC (NOC) 1142 (Raj).
3309. *Sushmita Dey v Sovana Dey*, AIR 2003 Cal 38.
3310. *DC Raizade v State*, AIR 2003 Del 200.

subordinate to it and competent to try or dispose of the same. Though the district court is therefore, empowered to transfer a case to an additional district court, then also such additional district court should also be a court competent to try or dispose of the matter. For the limited purpose of section 24 of the CPC alone, an additional district court shall be deemed to be subordinate to the district court. Hence if an additional district court if otherwise competent to try to dispose of the election petition and if it is notified under section 88(2) then the district court is empowered to transfer to such additional district court notified. It is only by virtue of such notification that the additional district court will be competent to try and dispose of the matter. However, in case the petition is transferred to a court not notified by the government, the transfer of election case by district court to such other court is not legal since such other court will have no jurisdiction to try such case.[3311]

[s 24.17] Notice

No notice is necessary if the court acts *suo motu*. If an application is made, notice must be given by the court and not by the party as in section 22. The provision as to notice is imperative, and an order for transfer made without notice will be set aside;[3312] and so will an *ex parte* decree made by a court to which the suit has been transferred without notice to the defendant.[3313] Notice to the other party (of the application for transfer) is mandatory.[3314] Before transferring a suit under section 24, notice must be served on the parties. If the *vakalatnama* authorises the counsel to accept a notice issued by the civil judge and does not authorise the counsel to accept service of notice by any other court, then the district court cannot serve the notice of transfer on counsel. The parties must be notified personally.[3315] Rule 63 of Civil Rules of Practice contemplate that when a suit is transferred on administrative grounds by the district court invoking the general power of transfer and withdrawal under section 24, the transferor court has to issue notice either to the counsel who is on the record or to the parties intimating the date of their appearance before the transferee court. The endeavour though laudable, is not sufficient to remedy the difficulties of the parties who are not informed by their counsel representing them before the transferor court for some reason or the other, if notice is given to counsel and in the absence of notice also being issued to parties by the transferor court as contemplated under rule 63 of Civil Rules of Practice, even if notice is issued to the counsel appearing on their behalf.[3316] The mere bifurcation of a court does not mean (i) that a suit validly instituted within that particular court should cease to be within its jurisdiction; or (ii) that the suit should be necessarily transferred to the new court.[3317] On the other hand, the Madras High Court treats the matter of notice as one of practice and procedure and holds that notice may be waived[3318] and that want of notice is an irregularity which does not invalidate the order of transfer.[3319] The same is the view of the High Court of Calcutta which has held that a transfer without notice is only an irregularity if it does not prejudice the opposite side and, is not sufficient ground for holding that the court to which the case is transferred has

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3311. *P Aisha Potti v Returning Officer, Kollam*, AIR 2002 Ker 268.
3312. *Ram Das v Habibullah*, AIR 1933 All 178 : (1932) ILR 53 All 916; *Fatima v Imdad Ali*, (1920) 18 All LJ 351; *Demello v New Victoria Mills Ltd*, AIR 1926 All 17.
3313. *Gangaram v Gujar Mal*, AIR 1923 Lah 444.
3314. *Anjula v Milan Kumar*, AIR 1981 All 178.
3315. *Umesh Chandra v Mahesh Chandra*, AIR 1983 All 290.,
3316. *Koruprolu Atchaya v Bideshi Raghuram Singh*, AIR 1995 AP 58.
3317. *Maganlal Purshottamlal v Chimanlal Dabyabhai Modi*, AIR 1980 Guj 14.
3318. *Sankumani v Ikoran*, (1890) ILR 13 Mad 211.
3319. *Bellary Press Co v Venkata*, (1911) 21 Mad LJ 829.

no jurisdiction to dispose of the case.[3320] According to the Karnataka High Court, a *suo motu* transfer by the high court or district court under section 24 does not call for the issuance of notice to the parties. It is only when the transfer is to be made on the application of a party that notice is required to be given and the matter heard. In the instant case, a *suo motu* transfer was made by the District Judge. Therefore, revision petitioners were not entitled to notice. However, though the District Judge may not issue notice when he directs a transfer *suo motu*, the transferee court is bound to issue a court notice to the parties, of the fact of transfer and to appear before the transferee court on the specified date.[3321] The Lahore High Court held that this section is wider in scope than section 22 and no notice before the filing of an application for transfer is necessary under this section.[3322] An order of the high court made *suo motu* under this section need not be in any prescribed form and accordingly, a memo of the high court directing that certain suits pending in court *A* should be tried by court *B* amounts to an order of transfer under this section.[3323] It has been held by the High Court of Andhra Pradesh that it is the duty of the court under rule 48 of the Civil Rules of Practice either to issue notice to the parties or to record its reasons before making an order of transfer.[3324] Such a notice is necessary to enable the parties to appoint their advocates in the transferee court.[3325]

The Supreme Court has held that the purpose of section 24, CPC is merely to confer on the court a discretionary power. A court acting under section 24, CPC may or may not in its judicial discretion transfer a particular case. Section 24 does not prescribe any ground for ordering the transfer of a case. In certain cases it may be ordered *suo motu* and it may be done for administrative reasons. But when an application for transfer is made by a party, the court is required to issue notice to the other side and hear the party before directing transfer.[3326]

[s 24.18] "At any stage"

These words and the substitution of the word "pending" for "instituted" settle the doubt as to whether a suit could be transferred or withdrawn after the hearing had commenced. The High Courts of Bombay, Madras and Allahabad had held when the Civil Procedure Code of 1882 was in force that a suit could be transferred or withdrawn at any stage even after the hearing had commenced, and even in the course of execution proceedings.[3327] On the other hand, the Calcutta High Court held that there was no power to interfere after the hearing had commenced and no power to transfer an execution proceeding.[3328] The change in the language of the section was clearly intended to give effect to the former view. It has nevertheless been held by the High Court of Calcutta that an execution proceeding is not included in the words "suit or other proceedings"[3329] but the contrary has been laid down by the Allahabad,[3330] Madras,[3331]

3320. *Bhola Nath v Maharajadhiraj of Burdwan*, AIR 1932 Cal 265.
3321. *B Sundara Gowda v Martin D'Souza*, AIR 1989 Kant 207.
3322. *Mst Zabida v Mohammad*, AIR 1933 Lah 635.
3323. *Devi Chand v Rikhab Chand*, AIR 1957 Raj 255 : (1956) ILR Raj 209.
3324. *Subbarayadu v Rangiah*, (1961) 1 Andh WR 212.
3325. *Kishore Kumar v Basudeo Prasad*, AIR 1977 Pat 131; *Korn Prok Atchaya v Bideshi Raghuram Singh*, AIR 1995 AP 58.
3326. *Jitendra Singh v Bhanu Kumari*, AIR 2008 SC 2987 : (2009) 1 SCC 130 : (2008) 6 SCR 377.
3327. *Re Balaji* (1881) ILR 5 Bom 680; *Nassarivanji v Kharsedji*, (1898) ILR 22 Bom 778; *Muttalagiri v Muttayyar*, (1883) ILR 6 Mad 357; *Palanisami Thondama*, (1903) ILR 26 Mad 595; *Bandhu v Lakhi*, (1885) ILR 7 All 342.
3328. *Kishori Mohun v Gul Mahomed*, (1888) ILR 13 Cal 177.
3329. *Ranjit Kumar v Gour Hari*, AIR 1956 Cal 655.
3330. *Md Habibullah v Tikaram Chand*, AIR 1925 All 276 : (1925) ILR 47 All 57.
3331. *Rajagopala v Tirupati*, AIR 1926 Mad 421 : (1926) ILR 49 Mad 746.

and Patna[3332] High Courts. Where there is a transfer of execution case under section 24, the transferee court need not be the court which passed the decree or a court to which the decree was sent for execution under section 39. It need only have pecuniary jurisdiction to dispose of the case.[3333] Under section 24, the District Judge can transfer the case at any stage, and this is so, notwithstanding that there was defect in the initial presentation.[3334] In view of clause (b) of sub-section 3 now inserted in sub-section 3, the Calcutta High Court view that the words "other proceeding" do not include an execution proceeding is no longer correct. The high court in exercise of the power under Article 227 of the Constitution and section 24 of the CPC has the power to *suo motu* transfer the matter from one court to another.[3335]

[s 24.19] "Pending before it"

Under the corresponding section of the Civil Procedure Code of 1882, it was held that a District Judge had no power to transfer to a subordinate court a suit pending before himself.[3336] Clause (a) of sub-section 1 confers this power on high courts and district courts.

[s 24.20] District Court

District court in this section means a court of *unlimited* pecuniary jurisdiction. An order of transfer under this section cannot, therefore, be made by an Assistant Judge whose pecuniary jurisdiction is *limited*.[3337] A first class Subordinate judge in charge of a court can make administrative orders distributing the work of his court among the judges attached to it; but when once a judge has taken cognizance of a suit it cannot be removed from his file. Such a removal amounts to a transfer of a suit which can only be ordered by a district court or by the high court.[3338] If, however, the suit is transferred by the first class subordinate judge, and allowed to be heard without objection, so that there is a waiver of the objection as to jurisdiction, the legality of the proceedings cannot be challenged in appeal.[3339]

In view of the express provision of Article 235, under Chapter VI of Part VI of the Constitution of India, it appears that control over subordinate judicial administration vests completely with the high court and it is exclusively for the high court to decide before whom jurisdiction will vest, if a regular District Judge goes on leave. In that view of the matter an application before high court under section 24 of the Code for transfer of proceeding on the ground of lack of jurisdiction/power of the District Judge, Andaman and Nicobar Islands to deal with civil cases in absence of regular District Judge, has no basis.[3340]

The power exercised by a district court in relation to transfer of suit, cannot be considered as an order passed on an interlocutory application. It is an independent right given to a particular court and tried as an independent proceeding. Such an order cannot be challenged in a writ petition under Article 227 of the Constitution. The remedy is to file a revision under section 115 of the Code.[3341]

3332. *Dasarath Baijanath*, AIR 1960 Pat 285.
3333. *Hakim Mohammad Ali v Bhanwari Rai*, AIR 1981 Raj 176.
3334. *Vishwanath Gupta v Parbati Devi*, AIR 1982 All 106.
3335. *Silver Granites v Murugan*, AIR 1995 Mad 217.
3336. *Sakharam v Gangaram*, (1889) ILR 13 Bom 654.
3337. *Haji Umar v Gustadji*, (1910) ILR 34 Bom 411.
3338. *Shankarji v Vrajlal*, AIR 1935 Bom 286 : (1935) ILR 59 Bom 466 : (1935) 37 Bom LR 255.
3339. *Ajam Ibram v Hava Bibi*, AIR 1939 Bom 485 : (1939) ILR Bom 472.
3340. *Thomas G Rathina Raj v UOI*, AIR 2008 Cal 250.
3341. *Miss Saroja Bhatija vSanjaya B Makhija*, 2007 (1) AIR Kar R 286.

A full bench of the Calcutta High Court has held that section 20 of the civil courts Act, 1977 makes it clear that if a decree or order of a District Judge is not appealable to the high court then no appeal would lie to the high court from a decree and/or order of additional District Judge which makes it abundantly clear that for the purpose of exercising judicial power, the Additional District Judge is equivalent and/or equated to a District Judge. However, the general administrative power rests with the District Judge in terms of section 9 of the Civil Courts Act, 1887 as also the general power and jurisdiction of withdrawal under section 24 of the CPC. If Additional District Judges were to be deemed subordinate to the district court for all purposes, it would not have been necessary to insert section 24(3) in the CPC.[3342]

[s 24.21] Clause (a): Court Subordinate To It

A decree for dissolution of marriage under the Indian Divorce Act 4 of 1869, made by the Divisional Judge of Nagpur was confirmed by the High Court of Bombay; but after the confirmation of the decree by the Bombay High Court, it was held that an application for alimony must be made to the court at Nagpur. The Bombay High Court could not entertain it, nor could it transfer the application to the Nagpur court, for that court was not subordinate to it.[3343] The high court in its appellate side cannot transfer a case from the *mofusil* to its original side, as the court sitting in the original side is not subordinate to it.[3344] The high court can, under sections 22–24 of the Code, transfer a case from one family court to another. Family courts are civil courts within the meaning of these sections.[3345] A senior subordinate judge in Punjab cannot transfer a case from his court to that of a junior subordinate judge, for the latter is not subordinate to him.[3346] The section does not appear to empower a court to withdraw to its file an interlocutory application in a suit or original proceeding pending in a subordinate court while the suit or original proceeding itself remains on the file of that court.[3347] An agency court constituted under the Andhra Pradesh Scheduled Districts Act and the rules thereunder is a court subordinate to the high court. The high court can therefore, transfer a suit pending in such agency court to a civil court; but on such transfer, the procedure to be followed would be that which would have been applicable had the suit been tried by an agency court.[3348]

Being an appellate authority over motor accident claims tribunals, the high court can transfer a case from one tribunal to another tribunal.[3349] The power of transfer under section 24 can be exercised, only in respect of proceedings pending in a subordinate court. Where the plaint has been returned under the orders of the trial court for presentation to the proper court and there is no suit or plaint pending in a subordinate court, the case cannot be transferred under section 24, because there is no case pending.[3350] Application was made for transfer of proceedings to motor accident claims tribunal at place "for convenience, since all the parties and eye-witnesses to the occurrence were residents of place *B*", it was held that motor accident claims tribunal being a civil court subordinate to high court for the purpose of section 24, the transfer application is maintainable. Such transfer of proceeding can be ordered under

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3342. *West Bengal Housing Infrastructure Development Corp v Impression*, AIR 2016 Cal 236 : (2016) 4 ALR 435 (Cal).
3343. *Wallace v Wallace*, (1916) ILR 40 Bom 109.
3344. *Malampati Kondayya v Official Receiver, Nellore*, AIR 1951 Mad 676 : (1951) 1 Mad LJ 97.
3345. *Munna Lal v State of Uttar Pradesh*, AIR 1991 All 189 (DB).
3346. *Kishan Lal v Jai Lal*, (1920) ILR 1 Lah 158.
3347. *Malampati Kondayya v Official Receiver, Nellore*, AIR 1951 Mad 676.
3348. *J Sitaram Rao v State*, AIR 1978 AP 82.
3349. *Raju Das v Sushil Kumar Das*, AIR 1991 Gau 71.
3350. *Ramesh Chand Bhardwaja v Ram Prakash Sharma*, AIR 1991 Del 280.

Article 227 of the Constitution also.[3351] There can be no legal impediment for transfer of the proceedings pending before the family court to any of the competent civil courts subordinate to the high court. In the absence of any special provisions contained in the Family Courts Act 66 of 1984, prohibiting the exercise of power of transfer by the high court under section 24 of the Code, when the other concerned civil courts available in other parts of the state where no family court had been established, are competent to try the subject matter of disputes to be fought in family court, it goes without saying that the powers of transfer as contemplated under section 24 of the Code can by no stretch of imagination is held to have been whittled or taken away by the provisions of section 8 of the Family Courts Act of 1984.[3352] Application was filed by the landlady for eviction of tenant before the authority under section 23A(b) of Madhya Pradesh Accommodation Control Act, 1961. Jurisdiction of the authority was challenged. Authority held that it had no jurisdiction and transferred the case to the civil court. The case was registered as a civil suit. The high court, in revision, set aside the order of authority and remitted the case to the authority for disposal. The civil court, instead of transferring, and remitted the case to the authority for disposal. Here, the landlady filed an application under section 24 and 151 of the CPC before the District Judge for transfer of the case to authority. The District Judge allowed the application as order of civil court was nullity. It was held that order of District Judge could not be interfered with under Article 227 of the Constitution, as it would perpetuate a wrong committed by a civil court.[3353]

[s 24.22] Clause (a): Suit

One view was that an execution proceeding is not included in the expression "suit or other proceeding".[3354] But the expression "Suit, appeal or other proceeding" in clauses (a) and (b) of sub-section 1 is of wide import and there is no reason why an execution proceeding should be excluded from such a comprehensive expression. Besides, an execution proceeding is a proceeding in a suit and would therefore, be included in the words "other proceeding".[3355] Clause (b) of the newly added sub-section 3 has now defined the word "proceeding" to include an execution proceeding.

[s 24.23] Clauses (a) and (b): "Other proceedings"

The word "other proceedings" used in section 24 of the Code of Civil Procedure, 1908 denotes the proceedings held under the CPC or in any other civil proceedings in which provisions of section 24 of the CPC is applicable or in the situation where any Civil Act is silent in respect of the applicability of the CPC, but not in the matter in which specific provisions of the CPC only have been adopted in which section 24 is not included. The Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act (22 of 1972) is a special law, while the CPC is a general law and it is well settled that the specific law would prevail over the general law.[3356]

3351. *Kanniammal v P Narayanan*, AIR 1989 Mad 350.
3352. *KR Srinathi v H Ramakrishnan*, AIR 1990 Mad 330.
3353. *Gopaldas v District Judge, Indore*, AIR 1990 MP 279 (DB).
3354. *Ranjit Kumar v Gauri Hari*, AIR 1956 Cal 655; *Chandravathi v Payapattillath*, AIR 1966 Ker 318 : (1966) ILR 2 Ker 74.
3355. *Muhammad v Tikamchand*, AIR 1925 All 276 : (1925) ILR 47 All 57; *Kuruppiah v Ayya Nadar*, AIR 1965 Mad 435 : (1964) ILR 1 Mad 782 : (1965) 1 Mad LJ 75; *Rajgopala v Tirupati*, AIR 1926 Mad 421 : (1926) ILR 49 Mad 746; *Dasarath v Baijnath*, AIR 1960 Pat 285.
3356. *Ganga Ram Dohrey v State of Uttar Pradesh*, AIR 2002 All 238.

The language of section 24(3)(b) of the Code is clear and explicit and an application for the enforcement of award filed under section 36 of the Arbitration and Conciliation Act, 1996 would come under the category of "proceeding" under the section. Therefore, the District Judge would have power and jurisdiction to transfer application under section 36 of the Act from a court which had no jurisdiction to decide the case in the first instance to court of competent jurisdiction.[3357]

The words "other proceeding" include an insolvency petition,[3358] but not a proceeding under section 476 of the Code of Criminal Procedure, 1973.[3359] The Madras High Court has held that a district court has power under the clause to withdraw to its own file proceedings in execution transmitted by it to a subordinate court.[3360] Under this section, the high court can transfer *suo motu* proceedings under sections 184, 185, 195–96 of the Companies Act, 1913[3361] corresponding to sections 467, 468, 477–78 of the 1956 Act. It has been held by the Madras High Court that the term "civil proceedings" is not a technical expression and that it would include all matters which the courts have jurisdiction to decide under the Code and that accordingly, a dispute as to possession which is referred to the district *munsif* under section 146 of the Code of Criminal Procedure, 1973 is a proceeding which could be transferred under this section.[3362] It has also been held that where a suit or proceeding is transferred from court A to court B, all interlocutory proceedings in the suit should be taken in court B and not court A.[3363]

[s 24.24] Clauses (a) and (b): "Competent to try or dispose of the same"

Insertion of words "Competent to try or dispose of same" in the section indicate that the competence of court required is both pecuniary and territorial.[3364]

Where it appears that the suit has been instituted in the court which has both pecuniary jurisdiction as well as the territorial jurisdiction and there is nothing to indicate either in the pleading or in the petition as to how the interest of the defendants would be served best in transferring the same to Berhampur Court, there is no justification to set aside the impugned order passed by the learned District Judge, Berhampur in rejecting transfer of petition.[3365]

[s 24.25] Clause (b): Withdrawal of Suit

A bare perusal of section 24 leaves no manner of doubt that the high court had the requisite jurisdiction to *suo motu* withdraw a suit to its file and adjudicate itself all or any of the issues involved therein.[3366]

However, the high court, while deciding writ petition ordered transfer of suits and appeals involving similar issues to it. An application for recall of the order was filed. It was held by the Supreme Court that the dismissal of suits by the high court on the ground that issues

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3357. *Shahab Uddin alias Munnan v District Judge, Muzaffarnagar*, (2009) 2 All LJ 275 : (2009) 74 All LR 12.
3358. *Nassarvanji v Kharshedji*, (1898) ILR 22 Bom 770.
3359. *Rameshar v Rajdhari*, AIR 1927 All 469 : (1927) ILR 49 All 460.
3360. *Velliappa v Subrahmanyam*, (1916) ILR 39 Mad 485.
3361. *Peoples Insurance Co v Sardul Singh*, AIR 1961 P&H 87 : (1960) ILR Punj 341.
3362. *Kochadai v Nagayaswami*, AIR 1961 Mad 247 : (1961) ILR Mad 413 : (1961) 1 Mad LJ 342; *Ramchandra v State of Uttar Pradesh*, AIR 1966 SC 1888.
3363. *Mineral Development Ltd v State of Bihar*, AIR 1962 Pat 443; *Sheo Brich v Basgit*, AIR 1957 Pat 73 : (1956) ILR 35 Pat 639; but see *Jeharudin v Haricharan*, AIR 1914 Cal 815 : (1914) 18 Cal WN 479.
3364. *Dinabandhu Patro v State Bank of India*, AIR 2003 Ori 129.
3365. *Dinabandhu Patro v State Bank of India*, AIR 2003 Ori 129.
3366. *Abdul Rahman v Prasony Bai*, AIR 2003 SC 718 : (2003) 1 SCC 488.

raised in the suits were being examined in the writ petition, without passing any order on the application for recall, was not justified, as the procedure adopted by it was unknown to law.[3367] But where ends of justice demand, an order by the high court transferring a proceeding to itself cannot be faulted. Thus, in a case under the Recovery of Debts due to Bank and Financial Institutions Act, 1993, where the borrower had taken loan from Bank but lingered the case for 30 years on technical grounds, the Division Bench of Orissa High Court held the transfer of proceeding to high court itself as proper. While rejecting the plea of the borrower for transfer of the proceeding to civil court for execution instead of being dealt with by tribunal on ground of pecuniary jurisdiction, it was observed that the borrower gave no reason what difference it makes to him if the recovery is made by one forum or the other.[3368]

[s 24.26] Competent Court

The court to which a suit is transferred must possess pecuniary jurisdiction, but it is not necessary that it should have territorial jurisdiction.[3369] The Chief Court of Oudh has held that it is not necessary that the transferee court should have territorial jurisdiction, and that competence means intrinsic competence and refers to the subject matter of the case and its pecuniary value.[3370] A civil court is excluded from trying it by tenancy legislation.[3371] The expression "district court" in the Hindu Marriage Act, 1955 includes the court of the Additional district judge under section 8(2) of the Bengal, Agra, Assam Civil Courts Act, 1887, and therefore, it is competent for the district court to transfer an application under section 13 of the Hindu Marriage Act, 1955, to the court of the Additional District Judge.[3372] If a suit pending in a small cause court is transferred to a subordinate judge's court, it must be within the pecuniary limits of the jurisdiction of the subordinate judge. If the subordinate judge is invested with small cause court powers, it matters not that those powers fall short of the value of the suit. This has been decided by the Bombay High Court[3373] dissenting from a Madras decision which made the competency of the court depend upon its small cause court powers.[3374] The Calcutta High Court agrees with the view of the Bombay High Court.[3375] The Madras High Court has also held that a district court may transfer any proceeding from a court of small causes to a court not having adequate small cause powers to deal with it as a court of small causes.[3376] The high court can pass an order transferring the appeal to its own court and not necessarily to the district court which also has jurisdiction over the same, as the section only requires that the transfer should be only to a court which has jurisdiction.[3377] The District Judge cannot, under section 24, transfer an appeal to a court not competent to try it.[3378] Under section 24(1)(b) and (c) of the Code, the high court can transfer to itself.

3367. *Abdul Gafur v State of Uttarakhand*, AIR 2009 SC 413 : (2008) 10 SCC 97.
3368. *Rama Kanta Mishra v United Commercial Bank*, AIR 2009 Orissa 163 (DB).
3369. *Kishore Lal v Balkishan*, AIR 1932 All 660 : (1932) ILR 54 All 824; not following a contrary opinion expressed in *Ram Das v Habibullah*, AIR 1933 All 178 : (1932) ILR 53 All 916; *U Maung v U Nyo*, AIR 1940 Rang 133.
3370. *Sita Ram v Balak Ram*, AIR 1933 Oudh 154 : (1933) ILR 8 Luck 347; *Chouthmul v Bhonrilal*, AIR 1956 Raj 192; *Vidyamba v Lakshmi Venkiamma*, AIR 1958 AP 218 : (1958) ILR AP 54; *MN Jain v Rajasthan Financial Corp*, AIR 1974 Raj 204; *Karupiah v Ayya Nadar*, AIR 1965 Mad 435 : (1964) II LR 1 Mad 782.
3371. *Adam Aslam Dadabhai v Hiralal C Thakore*, AIR 1965 Guj 131 : (1965) 6 Guj LR 99.
3372. *Ajit Kumar v Kananbala*, AIR 1960 Cal 565 : (1960) 64 Cal WN 246.
3373. *Parshotumdas v Bhagubhai*, AIR 1932 Bom 486 : (1932) ILR 56 Bom 387.
3374. *Muruesa v Venkata*, AIR 1929 Mad 513 : (1929) 56 Mad LJ 649.
3375. *Barada Kant v Jitendra Nath*, AIR 1939 Cal 345.
3376. *Kamalathammal v Harihara*, AIR 1941 Mad 103.
3377. *Ayesha Bai v Daleep Singh*, AIR 1971 Raj 186 : (1960) ILR Raj 1271.
3378. *Paresh Nath Mondal v Bejan Behari Mondal*, AIR 1982 Cal 285 (DB).

at Jabalpur, the suit filed by the Union of India relating to compensation for loss caused to numerous victims of the Bhopal gas leak disaster. Such jurisdiction exists under Article 227 of the Constitution also, if the conditions of that article are satisfied. However, on the facts, such transfer was not considered necessary.[3379] The competence of the transferee court must be judged as on the date of the transfer. Thus, where appeals are preferred to the high court and as a result of subsequent legislation, the district court became competent to hear the appeals, it was held that the high court could transfer the appeals to the district court.[3380]

ILLUSTRATION

A suit for Rs 900 is pending in the small cause court at Ahmedabad. Application is made to transfer it to the court of the second class sub-judge at Ahmedabad whose jurisdiction extends to Rs 5,000, but who is invested with small cause court powers upto Rs 300. The high court has power to make the transfer, for the suit is within the pecuniary jurisdiction of the second class sub-judge.[3381]

Again, the competency of the court is not affected by the circumstance that the small cause court has under section 16 of the Provincial Small Cause Courts Act, 1887 preferential jurisdiction; and a suit may be transferred from a small cause court to the court of a subordinate judge having jurisdiction within the same local limits,[3382] or to the City Civil Court, Madras.[3383] It is not necessary that the transfer must be made to a court which has small cause court powers;[3384] but the high court has no power to transfer an insolvency petition made under the Provincial Insolvency Act, 1920, and pending before a subordinate judge to the judge of the high court exercising insolvency jurisdiction.[3385]

A suit under section 92 cannot be transferred to a court not empowered under that section.[3386]

[s 24.27] Order of Transfer: When Takes Effect

It has been held by the Punjab High Court[3387] that an order withdrawing a suit from a court under this section, whether made on an application of the party or *suo motu*, takes effect from the time when it is made and that thereafter, the court before which the proceedings are pending, has no jurisdiction to try it, and that accordingly, any decree or order made by that court in that proceedings is a nullity, even though the order of withdrawal had not been communicated to it. This view is based on decisions which have held that an order of stay of execution passed by the appellate court takes away the jurisdiction of the court below to proceed with the execution from the very time the order is made;[3388] but, the preponderance of judicial opinion is in favour of the view that an order for stay operates only from the time when it is communicated[3389] and it is submitted that an order of withdrawal cannot be held to oust the jurisdiction of the court before which the cause is pending, until it is communicated.

3379. *Union Carbide Corp v UOI*, AIR 1988 MP 206.
3380. *Sarju Dei v Rampati*, AIR 1962 All 503; *Bhanwar Lal v Motilal*, AIR 1971 Raj 242.
3381. *Parshotumdas v Bhagubhai*, AIR 1932 Bom 486 : (1932) ILR 56 Bom 387 : 139 IC 194.
3382. *Chockalinga v Palaniappa*, AIR 1932 Mad 683 : (1932) ILR 55 Mad 960.
3383. *Abdul Khadi v Pancharyappa*, AIR 1940 Mad 9 : (1940) ILR Mad 251.
3384. *Khwaja Afzal v Mahmood Hussain*, AIR 1943 Oudh 449; *Kamalathammal v Harihara*, AIR 1941 Mad 103 : (1940) 2 Mad LJ 700; *Vidyarthi v Ram Pearey Lal*, AIR 1935 All 690 : (1935) All LJ 511; *Har Prasad v Kedarnath*, AIR 1935 All 350.
3385. *Goculdoss v Sadasivier*, AIR 1928 Mad 1091 : (1929) ILR 52 Mad 57; Re *Oomer Ahmad Bros*, AIR 1927 Rang 107 : (1926) ILR 4 Rang 554.
3386. *Dhoribhai v Pragdasji*, AIR 1935 Bom 172 : (1935) ILR 59 Bom 412.
3387. *Nathuram v Jagannath*, AIR 1960 Punj 521; *Din Dayal v UOI*, AIR 1954 P&H 46.
3388. *Karam Ali v Raja*, AIR 1949 Lah 108; *Hukum Chand v Kamalanand*, (1906) ILR 33 Cal 927.
3389. See notes to O XLI, rule 5.

[s 24.28] Re-transfer

Clause (b)(iii) gives power to re-transfer a suit to the court from which it was withdrawn. There was no such power in the Code of 1882 and the cases in footnote[3390] are obsolete.

Under this clause, the court making an order for transfer or withdrawal may issue special directions. The directions contemplated are as to trial *de novo* or proceeding with the suit from the point on which it was transferred or withdrawn. An order for joint trial with another suit is not within this section.[3391] If a suit is transferred to a court not having jurisdiction, its re-transfer to the competent court can be ordered. The expression "competent" in section 24 (1)(b)(ii) implies territorial competence also.[3392]

[s 24.29] Sub-section (2): Applicability in Pending Proceeding

Section 24 can be applied in a pending proceeding. During pendency of a suit filed before a court having jurisdiction to entertain it, an application for amendment for claim seeking ouster of jurisdiction of that court was filed and the same was allowed. It was held that until and unless a specific order is passed under O VII, rule 10 is passed directing return of plaint, it must be held that the suit was pending before the court and, therefore, the power order is passed under section 24 could be exercised by the judge in the facts and circumstances of the case.[3393]

Directions for the substantive questions at issue between the parties cannot be issued as "special directions" under sub-section (2).[3394]

[s 24.30] Sub-section (4): Court of Small Causes

The High Courts of Allahabad,[3395] Madras,[3396] Patna[3397] and latterly, also the High Courts of Bombay[3398] and Calcutta,[3399] have agreed that the expression "Court of Small Causes" in sub-section (4) includes a court vested with the powers of a Court of Small Causes. The High Courts of Bombay,[3400] and Calcutta,[3401] at one time held that it was restricted to a court established under Act 9 of 1887, but those decisions are no longer law.

The provisions of sub-section (4) do not constitute the court to which the suit is transferred as a small cause court.[3402] It derives jurisdiction to try the suit as a small cause suit from section 24(4),[3403] and is deemed to be a small cause court for the purposes of the suit[3404] with the result that its procedure in the trial of the suit is governed by the provisions of Act 9 of

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3390. *Amir v Prahlad*, (1902) ILR 24 All 204; *Nandan v Kenney*, (1902) ILR 24 All 356.
3391. *Sheobirch v Basgit*, AIR 1957 Pat 73.
3392. *Syndicate Bank v K Gangadhar*, AIR 1992 Kant 163.
3393. *Vivekanand Nidhi v Ashima Goswami*, AIR 1997 Cal 340.
3394. *Anand Issardas v Virji Raisi*, AIR 1984 Bom 39 (DB).
3395. *Mangal v Rupchand*, (1891) ILR 13 All 324; *Sukha v Raghunath Das*, (1917) ILR 39 All 214; *Chaturi Singh v Musammat Rania*, (1918) ILR 40 All 525; *Megi Mal v Hira Lal*, (1924) 22 All LJ 880 : AIR 1924 All 761; *Anand Issardas v Virji Raisi*, AIR 1984 Bom 39 (DB).
3396. *Sankararama v Padmanabha*, (1915) ILR 38 Mad 25.
3397. *D Bhagawan Das v Keshwar Lal*, AIR 1923 Pat 49 : (1922) ILR 1 Pat 696.
3398. *Narayan v Bhagubina*, (1907) ILR 31 Bom 314 (FB).
3399. *Badal Chandra v Srikrishna*, AIR 1929 Cal 354 : (1929) ILR 56 Cal 588; *Madhusudan v Behari Lal*, (1918) 27 Cal LJ 461.
3400. *Ramchandra v Ganesh*, (1899) ILR 23 Bom 382.
3401. *Dulal v Ram Narain*, (1904) ILR 31 Cal 1057.
3402. *Krishna v Bhau Mansaram*, (1894) ILR 18 Bom 61.
3403. *Parshotumdas v Bhagubhai*, AIR 1932 Bom 486 : (1932) ILR 56 Bom 387.
3404. *Sankararama v Padmanabha*, (1915) ILR 38 Mad 25.

1887,[3405] and no appeal lies if there is no appeal under that Act.[3406] The procedure will be that of a small cause court even though the District Judge transferring the suit directs it to be tried as a regular suit, for he has no jurisdiction to give such a direction.[3407] The decree will not operate as *res judicata* in a suit which the small cause court had no jurisdiction to entertain.[3408] The same principles apply where on the retirement or transfer of a subordinate judge having small cause court powers, the suit is transferred by order of the District Judge to another judge not invested with small cause court jurisdiction, and no appeal will lie from a decree passed by the latter judge;[3409] but, if no order of transfer is made, and if on the transfer of a *munsif* vested with small cause court powers, his successor, who is not so invested, takes cognizance of the suit under section 35 of the Provincial Small Cause Courts Act, 1887 and tries it as a regular suit, an appeal will lie.[3410]

In a recent decision, the Madras High Court, relying on a Full Bench decision of Allahabad High Court in *Bhagwati Pande's* case (*supra*), held that an ejectment suit which is exclusively triable by Court of Small Causes can be transferred to civil court for trial along with original suit for damages for use and occupation.[3411] It was observed as follows:

> **17.** The statutory provision as contained in Section 24(4) was inserted only to lide over the difficulties which would arise on the point of jurisdiction in as much as the constitution of the Small Cause Court was made only as per the provisions of the Presidency Small Cause Courts Act, 1882. However, the civil courts are established as per the provisions of the Code of Civil Procedure. Therefore, it is very clear that in the event of transfer of civil suit from the Court of Small Causes to a civil court, the Transferee Court shall be deemed to be a Court of Small Causes for the purpose of such suit.[3412]

[s 24.31] Sub-section (5)

The court to which application is made under section 24 for transfer, is not bound to grant the application. Hence, where the application is made for transfer of a suit pending in an incompetent court, the court empowered to transfer under section 24 can direct that the applicant (plaintiff) can apply to the trial court for withdrawal of the suit, with permission to file fresh suit in the competent court.[3413] Where the suit initially instituted in a court having no territorial jurisdiction is transferred by the District Judge to a court having such jurisdiction, the decree passed in the suit cannot be challenged for want of initial competence.[3414]

[s 24.32] Decree by Transferee Court

The decree drawn by transferee-court should always disclose original court in which suit was instituted, date of presentation of plaint to be mentioned in the decree is the date on

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3405. *Chhotey Lal v Lakshmi Chand*, (1916) ILR 38 All 425; *Ugrah Singh v Motihari Co Ltd*, (1919) 4 Pat LJ 13.
3406. *Sukha v Raghunath Das*, (1917) ILR 39 All 214; *Vidyamba v Lakshmi Venkiamma*, AIR 1958 AP 218.
3407. *Sankarama v Padmanabha*, (1915) ILR 38 Mad 25.
3408. *Dulare Lal v Hazari Lal*, (1914) 12 All LJ 853.
3409. *Kamalathammal v Harihara*, AIR 1941 Mad 103; *Kaulesher v Dast Muhammad*, (1883) 5 All 274; *Ramcharan v Kishore Lal*, AIR 1929 All 50 : (1928) ILR 50 All 810; *Anant Prasad v Chunnu Tewari*, AIR 1939 All 452.
3410. *Bhagwati v Badri*, AIR 1931 All 574 : (1922) ILR 54 All 171 (FB); *Bisheshar Pande v Tirloki Pande*, AIR 1937 Oudh 398 : (1937) ILR 13 Luck 269.
3411. *M Alwar v Hindustan Petroleum Corp Ltd*, AIR 2010 Mad 47.
3412. *M Alwar v Hindustan Petroleum Corp Ltd*, AIR 2010 Mad 47, p 49.
3413. *Shakuntala Devi v Amir Hasan*, AIR 1986 All 234.
3414. *Jagdish v Premlala Rai*, AIR 1990 Raj 87.

which suit was instituted in the original court, and not the date on which it was received by transferee-court.[3415]

[s 24.33] Revision

Where the petition to the District Judge for transfer of suit pending in the trial court is dismissed the order rejecting petition is revisable and the proviso to section 115 is not attracted. Petition filed before District Judge under section 24, for transfer of the suit pending in trial court, is a proceeding independent of the suit. It cannot be said that the order rejecting the petition passed by the learned district judge under section 24 of the CPC is an order passed in a pending proceedings in a suit, though the prayer in the application under section 24 is for transferring the pending suit to some other court which has jurisdiction. The order cannot be characterised as an order passed in the pending suit itself. If this is so, the proviso to section 115 of the CPC is not attracted and as such it cannot be said that unless the order is shown to have caused irreparable injury or has occasional failure of justice, it is not revisable.[3416]

The interference with the order can only be if the revisional court finds that the subordinate court has exercised jurisdiction not vested in it by law or to have failed to exercise its jurisdiction or to have acted in the exercise of its jurisdiction illegally or with material irregularity. It is only if the order impugned falls into any one or the other of these, it is amenable to the revisional jurisdiction of the high court under section 115 of the CPC.[3417]

While it is an accepted judicial norm that the judges of the higher judiciary have the choice to hear a matter in the sense that the judge himself can recuse from the case and direct the matter to be posted before any other judge/s if the learned judge has the feeling that one of the parties to the proceeding may have a reasonable apprehension of bias if the proceedings should go on before the particular judge. But, insofar as the proceedings before the trial courts are concerned, it is strictly determined as per the provisions of the CPC, particularly having regard to the provisions of sections 15, 16, 17, 18, 19 and 20. In the scheme of the CPC the judges of the subordinate judiciary, do not have the power to recuse themselves from the suit or proceeding pending before the court over which they preside.[3418]

[s 24.34] Appeal

An order transferring a case under this section is not appealable.[3419]

[3420]**[S 25] Power of Supreme Court to transfer suits, etc.**—(1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

3415. *M Krishna Rao v ML Narasikha Rao*, AIR 2003 AP 498 (DB).
3416. *MV Ganesh v ML Vasudevamurthy*, AIR 2003 Kant 39.
3417. *MV Ganesh v ML Vasudevamurthy*, AIR 2003 Kant 39.
3418. *MV Ganesh v ML Vasudevamurthy*, AIR 2003 Kant 39.
3419. *Khuntilal v Narain Das*, AIR 1935 All 750; *Dayabhai v Murgappa*, AIR 1935 Rang 267 (FB) : (1935) 13 Rang 475. For transfer of suit from a Presidency Small Cause Court to high court, see notes to clause 13 of the Letters Patent and for powers of court to stay a suit pending before it, see notes to section 22 under the same head. For power of high court to stay suit pending in another court, see notes to O XXXIX, rule 1.
3420. Substituted by Act 104 of 1976, section 11, for section 25 (w.e.f. 1-2-1977).

(2) Every application under this section shall be made by a motion which shall be supported by an affidavit.

(3) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.]

SYNOPSIS

[s 25.1]	Scope	569	[s 25.9]	Effect of rejection of earlier transfer application in other matter	577
[s 25.2]	Paramount Consideration	570	[s 25.10]	Sections 24, 25 and Letter Patent clause (13) Court	577
[s 25.3]	Withdrawal Before itself to Decide	572	[s 25.11]	Sections 10 and 25 of the Code of Civil Procedure, 1908	577
[s 25.4]	Family Matters	572	[s 25.12]	Return of Plaint Distinct from Transfer of Suit	577
[s 25.5]	Transfer of Civil Case from One State to Another	574	[s 25.13]	Effect of Allowing of Earlier Transfer Application in Other Matter	577
[s 25.6]	Minimising Hardship	575	[s 25.14]	Transfer of Subsequent Suit to the Court dealing with Earlier Suit	578
[s 25.7]	Transfer Application Allowed Instances	575			
[s 25.8]	Transfer Application Disallowed Instances	576			

[s 25.1] Scope

Under the section before its amendment, by Act (104 of 1976) it was the state government which had the power to transfer cases from one high court to another upon a report made by a judge of the high court that there were reasonable objections to its being heard by him. Such transfer could be effected by a notification in the Official Gazette. The section as it stood before its amendment was on the analogy of section 52 of the Code of Criminal Procedure, 1898. The new section is wider in scope than the unamended section.

The changes affected by the amendment:

(i) the power of transfer is conferred on the Supreme Court;

(ii) the power is wider in that, whereas under the unamended section the state government could transfer only a suit, appeal or other proceeding pending before a single judge of a high court, the Supreme Court can now transfer a suit, appeal or other proceeding pending not only before a single judge but also before a division bench of a high court or other civil court in any other state.

The application has to be made by a motion supported by an affidavit. If the Supreme Court finds that the application was frivolous or vexatious, it would naturally dismiss it and in doing so, can award as compensation to the opposing party a sum not exceeding rupees two thousand. Sub-section 5 is the same as sub-section 2 of the section before its amendment.

What is expedient for the ends of justice will have to be judged upon the totality of facts and circumstances in a given case.[3421]

The Supreme Court[3422] has held that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that the summoning of the defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:

(i) Availability of video conferencing facility.

(ii) Availability of legal aid service.

(iii) Deposit of cost for travel, lodging and boarding in terms of O XXV of the CPC.

(iv) E-mail address/phone number, if any, at which litigant from out station may communicate.

In the case, both the parties have filed transfer petition in order to transfer the matrimonial disputes. The husband opposes the transfer petition filed by the wife under section 21A of Hindu Marriage Act, 1955. The transfer petition of wife is subsequent to that of husband. The Hon'ble Supreme Court held that the case does not fall under the section 21A of the HMA, 1955 and furthermore, section 21A does not divest this court of the power available under section 25(1) of the Code of Civil Procedure, 1908. The only test prescribed in section 25(1) of the CPC for the exercise of the power of transfer by this court is "expediency for the ends of justice".[3423]

[s 25.2] Paramount Consideration

The paramount consideration for the exercise of power of transfer must be to meet the ends of justice. It is true that if more than one court has jurisdiction under the CPC to try the suit, the plaintiff, as dominus litis, has a right to choose the court and the defendant cannot demand that the suit be tried in any particular court which is convenient to him. The mere convenience of the parties or of any one of them may not be enough for ordering transfer. It must also be shown that trial in the chosen forum will result in the denial of justice. A party seeking justice may choose a forum most inconvenient to the adversary, with a view to depriving the adversary of a fair trial. The Parliament has, therefore, invested the Supreme Court with discretion to transfer the case from one court to another, to meet the ends of justice. Words of wide amplitude ("for the ends of justice") have been advisedly used, to leave the matter to the discretion of the Apex Court, as it is not possible to conceive all situations requiring or justifying the exercise of power; but, justice according to law, should be done. If, for achieving that objective, the transfer of the case is imperative, there should be no hesitation to transfer the case, even if it may cause some inconvenience to the plaintiff.[3424]

A Division Bench of the Delhi High Court has held that section 24 of the Code refers to the general power of transfer and withdrawal of proceedings, but the principle behind section 23 and section 24 is that the power would lie to the superior court having jurisdiction

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3421. *Arvee Industries v Ratanlal*, AIR 1977 SC 2429 : (1977) 4 SCC 363.
3422. *Nigam Krishna Veni v Harish Nigam*, LNINDORD 2014 SC 4794.
3423. *Shruti Kaushal Bisht v Kaushal R Bisht*, (2021) 1 Mad LJ 200 : LNINDORD 2020 SC 23.
3424. *Subramanian Swamy v Rama*, AIR 1990 SC 113 : (1990) 1 SCC 4 : (1989) 1 SCR 469.

in the matter. The power under section 25 conferred on the Supreme Court is much wider.[3425] Dwelling on the doctrine of forum non-conveniens, it was observed by the Division Bench as follows:

> The principle of forum non convenience does not apply to civil suits in India which are governed by the said Code, there being no provision under the Code for the same and recourse to Section 151, CPC is not permissible for the application of the principle of forum non conveniens to domestic forums especially keeping in mind that it is the other side of the coin of the doctrine of anti suit injunction. An aggrieved party can, however, approach the Supreme Court under Section 25 of the said Code.[3426]

Explaining the doctrine of forum non-convenience the Division Bench observed that the doctrine of forum non convenience which originated in Scotland and thereafter brought to England. United States of America simply put means that if legal proceedings are initiated in a particular forum and that forum is of the opinion that there is a more convenient forum where such *lis* should be tried, it desists from trying the particular lis.

According to Dicey and Morris, the doctrine of forum non convenience, i.e. that some other forum is more appropriate in the sense of more suitable for the ends of justice, was developed by Scottish Courts in the nineteenth century, and was adopted (with some modifications) in the United States. The Scots rule is that the court may decline jurisdiction, after giving consideration to the interests of the parties and the requirements of justice, on the ground that the case cannot be suitably tried in the Scottish Court nor full justice be done there, but only in another court.[3427]

An offshoot of the above doctrine is the practice of granting anti-suit injunction. In the *Spiliada Maritime case,*[3428] the House of Lords has held:

> The basic principle is that a stay will only be granted on the ground of forum non convenience where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action....

However, the Division Bench of the Delhi High Court in *Horlick's* case (*supra*) held that the doctrine of anti-suit injunction though may be applicable both in foreign forums and domestic forums in different countries, it has no place in India regarding another domestic forum in view of the specific bar created by section 41(b) of the Specific Relief Act, 1963. But Indian Courts can apply the principle *vis-a-vis* foreign forums or while exercising discretionary jurisdiction under Article 226 of the Constitution.

The Supreme Court in *Modi Entertainment Network v WSG Cricket Pvt Ltd*[3429] observed:

> **9.** The Courts in India like the Courts in England are Courts of both law and equity. The principles governing grant of injunction—an equitable relief—by a Court will also govern grant of anti-suit injunction which is but a species of injunction. When Court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another Court including a foreign Court, it is called anti-suit injunction. It is a common ground that the Courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction *in personam*. However, having regard to the rule of comity, this power

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3425. *Horlicks Ltd v Heinz India (Pvt) Ltd*, 164 (2009) DLT 539 (DB).
3426. *Horlicks Ltd v Heinz India (Pvt) Ltd*, (2009) 164 DLT 539 (DB), p 595, (Sanjay Kishan Kaul J speaking for the Bench).
3427. Dicey and Morris, *Conflict of Laws*, 12th Edn, 1993, Third Impression, p 398.
3428. *Spiliada Maritime Corp v Cansulex Ltd*, [1987] AC 460.
3429. *Modi Entertainment Network v WSG Cricket Pvt Ltd*, AIR 2003 SC 1177 (Quadri J speaking for the Bench).

will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court.

[s 25.3] Withdrawal Before itself to Decide

The Supreme Court, finding no hope to unite the parties, withdrew the petition to itself and granted a decree of divorce by mutual consent.[3430] When the transfer petition came up for hearing before the Supreme Court, the parties desired to settle the dispute outside the court and filed a Memorandum of Agreement before the Supreme Court. In view of the settlement arrived at between the parties, the Supreme Court considered it necessary to transfer the Hindu Marriage Act case to itself in the light of the agreement filed by the parties.[3431]

[s 25.4] Family Matters

Power to transfer a case under section 25 of the CPC is not excluded by sections 21–21A of the Hindu Marriage Act, 1955.[3432] Since family matters are sensitive in character and the judges of the family courts have to play a greater participatory role, that objective can only be achieved if a rapport is established by the judges of such courts with the parties concerned; hence, keeping in view the unfounded allegations of the petitioner, the Supreme Court declined to transfer the matter, however, leaving it to the judge concerned whether he would prefer to keep hearing the matter or recommend a transfer to another family court within the same jurisdiction.[3433] Having regard to the agreement between the parties seeking dissolution of marriage by mutual consent, the Hon'ble Supreme Court ordered transfer of the petition from the Court of District Judge, Bokaro to the District Judge, Delhi.[3434] Considering the fact that the husband is a high-ranking railway officer, who would be entitled to travel facility, in the opinion of the Supreme Court in the backdrop of events that have taken place, it would be expedient in the interest of justice to transfer the proceedings from one court to another for disposal in accordance with law.[3435] In the absence of any objection from the respondent, the petition under section 13 of the Hindu Marriage Act, 1955 was transferred to Delhi, where a petition under section 125 of the CrPC is pending.[3436] Considering the fact that a child out of the marriage aged about two and a half years was with the wife at Varanasi; and, since, the child could not be left alone at Varanasi, the petition was transferred from the Court of District Judge, Delhi to the Family Court, Varanasi.[3437] Though, the reasons given by the appellant for transfer of the case from the Family Court, Pune, to the Family Court, Delhi and the apprehension entertained by the appellant were totally unjustified, since the principal judge, Family Court, Pune, had taken the grievances made by the appellant before the court rather seriously and had commented adversely about the same, with a view to do complete justice between the parties, the case was directed to be transferred from the file of the Principal Judge, Family Court, Pune, to the Principal Judge, Family Court, Delhi.[3438]

3430. *Anita Sabharwal v Anil Sabharwal*, (1997) 11 SCC 490.
3431. *Shashi Garg v Arun Garg*, (1997) 7 SCC 565.
3432. *G Vijayalakshmi v G Ramchandra*, AIR 1981 SC 1143 : (1981) 2 SCC 646 : (1981) SCR 3 223.
3433. *Shehnaz Mudbhatkal v Arvind Ramakrishna*, (1998) 5 SCC 596.
3434. *Seema Srinidhi v Praveen Kumar Tiwari*, (1997) 8 SCC 712.
3435. *Anita Laxmi Narian Singh v Laxmi Narian Singh*, (1992) 2 SCC 562.
3436. *Savitri v Harichand*, (1998) 3 SCC 71.
3437. *Jaishree Banerjee v Abhirup Banerjee*, (1997) 11 SCC 107.
3438. *Payal Ashok Kumar Jindal v Capt Ashok Kumar Jindal*, (1992) 3 SCC 116.

Where the Supreme Court was petitioned for transfer from Gurgaon to Delhi, the court allowed it on an undertaking that the respondent father will follow the visitation rights for the child.[3439]

In a case where the marriage of a Hindu couple was performed in Goa, it was held that as the provisions of Hindu Marriage Act, 1955 would be applicable the proceedings for the annulment of the said marriage can be heard outside Goa and a petition for transfer the proceeding out of Goa is maintainable.[3440] Altamas Kabir J, speaking for the Supreme Court Bench, explained the applicability of Hindu Marriage Act in the following words:

> **13.** As far as the Civil Code as enacted on 25th December, 1910, and the provisions of the law of marriage as a Civil Contract in Goa, Daman and Diu which come into force on 26th May, 1911, are concerned, we are unable to agree with Ms. Aggarwal that all marriages performed within the territory of Goa unless registered should be void. The said provision was altered by the decree of 22nd January, 1946, which restored the validity of both Catholic marriages and Hindu marriages. Two Hindus, therefore, can contract a marriage according to Hindu Religious rites or by way of a civil marriage. Section 2 of the Hindu Marriage Act extends the operation of the Act to the whole of India except Jammu and Kashmir and also applies to Hindus domiciled in the territories to which the Act extends who are outside the said territories. In other words, the provisions of the Hindu Marriage Act, 1955, would be applicable to the petitioner's case and can be heard by any Court having jurisdiction within the territories to which it applies.[3441]

The Supreme Court further went on to hold as follows:

> **14.** We are not convinced with the submissions made by Ms. Aggarwal that the annulment proceedings cannot be heard outside the State of Goa in view of the existing laws which made the Civil Code and the laws relating to marriage applicable to all persons residing within the State of Goa. In addition to the above, Sections 5 and 6 of the Goa, Daman & Diu (Administration) Act, 1962, indicate that the Central Government has authority to extend enactments applicable to the rest of the country. In other words, even if it were to be held that it is the customary law in Goa which would prevail over the personal law of the parties, the same could not be a bar to the transfer of the matter outside the State of Goa to any other State.[3442]

In a particular case the wife alleged that she was kidnapped and her signature was forcibly taken before the marriage registrar to show that she had married the respondent. She further alleged that she managed to run away from the custody of the respondent and apprehended threat of bodily injury/death if she were to visit the place of marriage. She alleged paucity of funds to engage a counsel at the place where the suit was pending. The allegations were not refuted by the respondent, so the court transferred the suit from the Court of Family Judge in West Bengal to the Court of Family Judge in the State of Bihar.[3443]

A suit for an injunction was pending in a court at Delhi, and was sought to be transferred to City Civil Court, Mumbai. The suit was in respect of a flat gifted by the father of the petitioner wife, alleged to have been filed by respondent husband with a view to harass the petitioner due to matrimonial disputes between parties, pending before the Mumbai Courts. The petitioner was finding it very difficult to cope with the harassment of respondent husband and to contest the case initiated by him at Delhi, in the atmosphere of fear, the petitioner wife had to leave the abovementioned apartment at Delhi and go to her parents at Mumbai. Considering all

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3439. *Akta Juneja v Sanjeev Kumar Juneja*, (2016) 15 SCC 523.
3440. *Vinisha Jitesh Tolani v Jitesh Kishore Tolani*, AIR 2010 SC 1915 : (2010) 5 SCC 748.
3441. *Vinisha Jitesh Tolani v Jitesh Kishore Tolani*, AIR 2010 SC 1915, pp 1918–19.
3442. *Vinisha Jitesh Tolani v Jitesh Kishore Tolani*, AIR 2010 SC 1915, p 1919.
3443. *Priyanka Biswas v Subrato Biswas*, AIR 2005 SC 3119 : (2005) 13 SCC 436 : JT 2005 (6) 380 : 2005 (5) Scale 600.

the facts and circumstances, to serve the ends of justice better, the suit pending in the court at Delhi was directed to be transferred to the City Civil Court, Mumbai.[3444]

[s 25.5] Transfer of Civil Case from One State to Another

Considerations for the transfer of a civil case from one State to another by the Supreme Court are dealt with in the cases below.[3445]

On the question of transfer of civil cases from one State to another, see also note 4 to section 23 (*ante*.).

In *Durgesh Sharma's* case,[3446] the Supreme Court held that even when section 25 of the Code in its present form was substituted by the Amendment Act of 1976, sub-section (3) of section 23 of the Code has neither been deleted nor amended. It was observed that interpreting section 23 in the manner suggested by the learned counsel would result in allowing inroad and encroachment on the powers of the Supreme Court. It further held that section 23 must be read subject to section25 and even if the high court had the power to transfer a case from one State to another State, that must be taken to have been withdrawn from 1 January 1977 when the Amendment Act of 1976 came into force.

In *Bank of Sharjah v Joplin Overseas Investment Pvt Ltd*, the Supreme Court was seized of a transfer petition seeking the transfer of admiralty suit pending before the Gujarat High Court to the Bombay High Court, another transfer petition seeking transfer of a separate admiralty suit from Bombay High Court to Gujarat High Court and two SLPs filed by the owner of the vessel. It was held that though in the normal course, the Gujarat High Court should have been the appropriate high court to hear all the suits in view of the fact that the vessel had always been positioned in the territorial waters of India abutting the State of Gujarat and within the area of a port over which the Gujarat High Court had territorial jurisdiction, but there were various orders of arrest passed by the Bombay High Court prior to the filing of admiralty suit in the Gujarat High Court and in view of the fact that petitioner had filed a caveat before the Bombay High Court and took advantage of the orders of arrest passed by the Bombay High Court without raising any objection to the jurisdiction of the Bombay High Court, and in view of the fact that the conduct of petitioner before the Bombay High Court was found to be less than wholesome, all the admiralty suits pending in the Gujarat High Court with regard to the vessel in question were transferred to the Bombay High Court. [3447]

Sometimes it so happens that due to error of the Draftsman some provision in an enactment. which ought to have been deleted, are not deleted, as was the case with section 23(3) of the Code or some provision, which should have been incorporated in the repealing enactment are not provided for specifically. Such omissions cast added responsibility on Courts to interpret the law and find out the true intention of the legislature and remove the absurdity. It would be pertinent to make a reference to the observations of Lord Denning, LJ which was quoted with approval by a five-Judge Bench of the Supreme Court in *M Pentiah's* case.[3448] Denning LJ said:

3444. *Reena Mehra v Rohit Rai Mehra*, AIR 2003 SC 1002 : (2003) 2 SCC 291 : (2003) 1 Scale 433.
3445. *Beni Shankar Sharma v Suryakant Sharma*, AIR 1982 SC 52 : (1981) 3 SCC 627; *Indian Overseas Bank v Chemical Const Co*, AIR 1979 SC 1514 : (1979) 3 SCR 3 920; *G Vijayalakshmi v GR Sekhra Sastry*, AIR 1981 SC 143.
3446. *Durgesh Sharma v Jayshree*, AIR 2009 SC 285 : (2008) 9 SCC 648.
3447. *Bank of Sharjah v Joplin Overseas Investment Pvt Ltd*, (2015) 11 SCC 486 : (2015) 2 Scale 672.
3448. *M Pentiah v Muddala Veeramallappa*, AIR 1961 SC 1107 : (1961) 2 SCR 295 at p 314.

> When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament..... and then he must supplement the written word so as to give 'force of life' to the intention of the legislature.....A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.[3449]

In M Pentiah's case the Supreme Court also quoted with approval a passage from Maxwell, wherein it has been stated as follows:

> Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.....Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense.[3450]

[s 25.6] Minimising Hardship

A suit was transferred from the file of the Subordinate Judge, Patna by an earlier order of the Supreme Court, to be tried along with another suit pending with the original side of the Bombay High Court. The suit pending on the original side of the Bombay High Court was subsequently decreed while the appeal against it was pending. The petitioners prayed for the transfer of the suit back to Patna on the ground that the order of the joint trial had outlived its purpose. The Supreme Court, giving regard to the facts and circumstances of the case, instead of re-transferring the suit to Patna, directed that the original side of the Bombay High Court should frame necessary issues in this suit within six weeks and try the suit on day to day basis from the date of framing of issues. The shares were forfeited by the appellant company, consequent to which proceedings were filed in a different state and within the state in different courts. The appellant company prayed for transfer of case to one single court. The Supreme Court, instead of transferring all these cases to one single court which would *inter alia*, cause hardship and unavoidable expenses to the respondent, observed that the petitioners move the respective high court to have the cases transferred for disposal within their respective jurisdictions so that the hardship to both the sides is minimised.[3451]

The Supreme Court has held that in a case seeking transfer, the "coparitive hardship" was more to the wife in the facts and circumstances of the case and therefore allowed the transfer petition[3452]. The convenience of the wife has to be looked in cases related to transfer of matrimonial proceedings.[3453]

[s 25.7] Transfer Application Allowed Instances

The reason for seeking transfer of the suit is that the first petitioner who was the *Karta* of the joint family of the petitioners was about 75 years old. The petitioners had no place to stay

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3449. *Seaford Court Estates Ltd v Asher*, (1949) 2 All ER 155 (CA).
3450. Maxwell, *Interpretation of Statutes*, 10th Edn p 229.
3451. *Vatsa Industries Ltd, Bombay v Shanker Lal Shroff*, (1997) 10 SCC 333.
3452. *Vaishali Shridhar Jagtap v Shridhar Vishwanath Jagtap*, (2016) 14 SCC 356.
3453. *Aarti Rana v Gaurav Rana*, 2019 (Suppl) Sim LC 313.

in Guwahati and it would have been impossible for the petitioners who were all residents of Calcutta to defend the suit if it was tried in Guwahati. Considering the facts and circumstances of the case, the Supreme Court considered it expedient for the ends of justice to have the suit tried at Calcutta.[3454]

Since, the earlier suit was filed in Kanpur, the registered office of the company was also at Kanpur, and the income-tax return was also filed at Kanpur, it went without saying that the suit otherwise deserves to be decided by one and the same court, hence, the suit at Calcutta was ordered to be transferred to Kanpur.[3455]

Though, the reasons given by the appellant for transfer of the case from the Family Court, Pune, to the Family Court, Delhi and the apprehension entertained by the appellant were totally unjustified, since the Principal Judge, Family Court, Pune, had taken the grievances made by the appellant before the court rather seriously and had commented adversely about the same, with a view to do complete justice between the parties, the case was directed to be transferred from the file of the Principal Judge, Family Court, Pune, to the Principal Judge Family Court, Delhi.[3456]

A very interesting case relating to transfer of suits from one State to the other came up before a three-Judge Bench of the Supreme Court. Two Original Applications were pending before the Debt Recovery Tribunal, Hyderabad, one filed by a company Vinedale Distilleries Ltd and the other filed by Dena Bank. In 2006, the Supreme Court, while allowing transfer petition and transferring various suits pending between the parties before the civil court in Andhra Pradesh to the Delhi High Court, passed the following order:

> In order to avoid any future confusion, on consent of parties, any suit which may be filed in future touching upon the control and management of the Company in question, should be filed before the Hon'ble Delhi High Court, which will decide the matters.[3457]

In the matter of the two Original Applications pending between the parties before Debt Recovery Tribunal, Hyderabad, the Supreme Court, taking note of its earlier order in 2006, observed that though suits and the present proceedings before the tribunal are different, considering the intent and purport of its earlier order, the proceedings before the Debt Recovery Tribunal, Hyderabad be transferred to Debt Recovery Tribunal at Delhi.[3458]

[s 25.8] Transfer Application Disallowed Instances

No party is entitled to get a case transferred from one bench to another, unless the bench is biased or there are some reasonable grounds for the same. No right to get a case transferred to any other bench can legitimately be claimed, merely because the judge expresses opinion on the merits of the case on the conclusion of hearing. On the conclusion of the oral hearing, the Supreme Court expressed its opinion in the open court, that it was inclined to allow the appeal and set aside the order of the high court and dismiss the writ petition. However, taking a sympathetic view, it requested the counsel appearing for the party to obtain certain instructions; but such opportunity granted to the party was misused by the party by raising mischievous and frivolous objections for the transfer of the case from one bench to another, instead of filing written submissions. The prayer for transfer was rejected by the Supreme

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3454. *Beni Shanker Sharma v Surayakant Sharma*, (1981) 3 SCC 627.
3455. *Murray & Co Pvt Ltd v Madan Lal Poddar*, (1994) Supp 3SCC 696.
3456. *Payal Ashok Kumar Jindal v Capt Ashok Kumar Jindal*, (1992) 3 SCC 116.
3457. *Vinedale Distilleries Ltd v Dena Bank*, AIR 2010 SC 695 : (2010) 3 SCC 466.
3458. *Vinedale Distilleries Ltd v Dena Bank*, AIR 2010 SC 695 : (2010) 3 SCC 466.

Court in the circumstances. It was more so, since oral hearing had already been completed, and, despite several adjournments, the party had failed to appear before the court or to file the written submission.[3459]

A petition was filed seeking transfer of writ appeal filed in the Telegana High Court pertains to land acquisition proceedings to the Hon'ble Delhi High Court. The Hon'ble Supreme Court dismisses the transfer petition that delay in disposal of the case cannot be considered as a sole ground to transfer the case as every court has its own limitations.[3460]

Where the petitioner was employed in a transferable job, the Supreme Court declined the transfer of the case as it may lead to fresh applications for transfer.[3461]

In view of the respondent undertaking to meet the travel expenses of the petitioner, it was held by the Supreme Court that there was no justification in transferring the case from Sultanpur to Valsad.[3462]

[s 25.9] Effect of rejection of earlier transfer application in other matter

On an earlier occasion, the respondent made an application for transfer of the Dibrugarh case to Delhi, which was rejected by the Supreme Court. In these circumstances, it was deemed proper to transfer the guardianship case filed by the respondent at Delhi to Dibrugarh, where another application was already pending. Although, it may have caused the respondent some trouble of undertaking the journey to Dibrugarh but, for that reason in the facts of the present case, it could not be presumed that the respondent would be prejudiced in prosecuting his case. Since, the respondent was not in any financial difficulty, he could make an appropriate arrangement for his representation at Dibrugarh.[3463]

[s 25.10] Sections 24, 25 and Letter Patent clause (13) Court

See notes to section 24.

[s 25.11] Sections 10 and 25 of the Code of Civil Procedure, 1908

See notes to section 10.

[s 25.12] Return of Plaint Distinct from Transfer of Suit

See notes to section 24.

[s 25.13] Effect of Allowing of Earlier Transfer Application in Other Matter

Where, suit sought to be transferred was associated with two matters already ordered to be transferred by Supreme Court, in the light of the said fact, the suit in question was also directed to be transferred to the same high court. However, since the already over-burdened high court had another case added to its pendency, the Supreme Court observed that the judge

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3459. *Gujarat Electricity Board v Atmaram Suncomal*, AIR 1989 SC 1433.
3460. *Motilal (Died) as per LRS v District Collector*, Transfer Petition(s)(Civil) No(s) 280/2020, decided on 11 September 2020 (SC).
3461. *Nidhi Jachin v Jachin Krishna*, (2013) 14 SCC 607.
3462. *Shiv Kumari Devenndra Ojha v Rammajor Sheetlaprasad Ojha*, (1997) 2 SCC 452.
3463. *Shakuntala Modi v Om Prakash Bharuka*, (1991) 2 SCC 706.

of the concerned high court excepting for such witnesses who are very material and who the learned judge of the high court, in his discretion of any witnesses may need to be watched and so on.[3464]

[s 25.14] Transfer of Subsequent Suit to the Court dealing with Earlier Suit

In a particular case there was contract for supply of jute bags between the plaintiff company and the defendant company and the goods supplied were found to be defective and therefore returned. Suits were filed by both companies against each other for recovery of amount before different courts, the cause of action alleged in the two plaints referred to same period and same transactions. The issues arising were common and almost the same set of oral and documentary evidence were required to be adduced. The possibility of conflicting decrees by two courts could not be ruled out. Therefore, the suit instituted at a later point was directed by the Supreme Court to be transferred to the court where earlier suit was filed.[3465]

Institution of suits

[S 26] Institution of suits.—[3466][(1)] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

[3467][(2) In every plaint, facts shall be proved by affidavit].[3468]

AMENDMENT FOR COMMERCIAL DISPUTE OF A SPECIFIED VALUE

Amendment of section 26.—In section 26 of the Code of Civil Procedure, 1908 (5 of 1908) (hereafter referred to as the Code), in sub-section (2), the following proviso shall be inserted, namely:—

"*Provided* that such an affidavit shall be in the form and manner as prescribed under Order VI of rule 15A.".

SYNOPSIS

[s 26.1]	Introduction	578	[s 26.4]	Purpose of Amendment	581
[s 26.2]	Suit	580	[s 26.5]	"Facts shall be proved by affidavit"	581
[s 26.3]	Changes Introduced by the Section	581			

[s 26.1] Introduction

The Amending Act of 1999 has inserted a new sub-section (2) in section 26. The old section 26 has been re-numbered as sub-section (1). The Amending Act came into effect from 1 July 2002. It shall not apply to or affect any suit pending immediately before the commencement of amending provisions and every such suit shall be tried as if the amending provision had not come into force.

3464. *Mohit Kumar v Dato Mohan Swami*, AIR 2004 SC 3682 : (2004) 4 SCC 145 : (2004) 3 Scalse 544.
3465. *Chitivalasa Jute Mills v Jaypee Rewa Cement*, AIR 2004 SC 1687 : (2004) 3 SCC 85 : JT 2004 (2) SC 535.
3466. Section 26 re-numbered as sub-section (1) thereof by Act 46 of 1999, section 2 (w.e.f. 1-7-2002).
3467. Section 26 re-numbered as sub-section (1) and sub-section (2) inserted by the CPC (Amendment) Act, 1999 (46 of 1999), section 2 (wef 1 July 2002) *vide* Notfication. SO 603(E), dated 6 June 2002.
3468. See Amendment for Commercial Dispute of a Specified Value *vide* the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), section 16 and the Schedule (wref 23-10-2015).

The amended section 26 requires that in every plaint, facts shall be proved by an affidavit. The requirement of affidavit is not limited only to plaint but extends to the written statement as well, as it appears from the insertion of sub-rule (3) of rule 15 of O VI. The said rule provides that person verifying the pleading shall also furnish an affidavit in support of his pleadings.

The Law Commission in its 163rd report strongly proposed the amendment to section 26 in its present format. It was thought that the amendment was salutary and may, at least to some extent, check the tendency to make false averments in the pleadings.

The Hon'ble Supreme Court[3469] has held:

> ...The swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice...The due process of law cannot be permitted to be slighted not the majesty of law be made a mockery by such acts or conduct on the part of the parties to the litigation or even while appearing as witnesses. Anyone who makes an attempt to impede or undermine or obstruct the free flow of the unsoiled stream of justice by resorting to the filing of false evidence commits criminal contempt of the Court and renders himself liable to be dealt with in accordance with the Act. Filing of false affidavits or making false statement on oath in Courts aims at striking a blow at the Rule of Law and no Court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the foundation of justice were allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statements and fabricating false evidence in a court of law. The stream of justice has to be kept clean and pure and anyone soiling its purity must be dealt with sternly so that the message percolates loud and clear that no one can be permitted to undermine the dignity of the court and interfere with the due course of judicial proceedings or the administration of justice.....

Further the Hon'ble Supreme Court in *Mohan Singh v Late Amar Singh*,[3470] stressed the consequences of filing false affidavits in courts, by holding as under:

> Tampering with the record of judicial proceedings and filing of false affidavit, in a court of law has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of unsoiled stream of justice and aims at striking a blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity. Since, we are *prima facie* satisfied that the tenant has filed false affidavits and tampered with judicial record, with a view to eradicate the evil of perjury, we consider it appropriate to direct the Registrar of this Court to file a complaint before the appropriate court and set the criminal law in motion...

The party in an affidavit contemplated under the amended section, should swear to the correctness of only the fact stated in the pleading and not to the questions or propositions of law, if any stated thereon. It should also be open to the party to say in his affidavit which of the facts are true to his knowledge and which of the facts he believes to be true based on information received by him.

In the opinion of the authors, such a provision would only add to delays in disposal of suits. There are enough provisions in the existing laws to deal with false and malicious averments in the pleadings and this additional requirement would not make any difference. It must be considered that similar requirements in support of fact stated in the writ petition and counter and other affidavits filed in the writ proceedings, have, in no manner, operated as a check upon the tendency to make false statement. The Law Commission, it seems, was conscious of these

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3469. *Dhanajay Sharma v State of Haryana* (1995) 3 SCC 757.
3470. *Mohan Singh v Late Amar Singh*, (1998) 5 Scale 115.

difficulties and have observed that these measures may be tried out on an experimental basis and if it is found to cause further delays, the same could be reviewed.

[s 26.2] Suit

The section[3471] in terms states that a suit can be instituted by the presentation of a plaint or in such other manner as may be prescribed.[3472] O IV, rule 1 provides that every suit shall be instituted by presenting a plaint to the court or such officer appointed in that behalf.[3473] The word "suit" means and apart from some context, must be taken to mean a civil proceeding instituted by means of a plaint.[3474] A proceeding which does not commence with a plaint is not a suit.[3475] Judicial opinion differs on the question whether a suit could be said to have been instituted when a petition to sue in *forma pauperis* is presented. One view is that until permission is granted, there is no suit and consequently, no order of attachment before judgment under O XXXVIII or for an injunction under O XXXIX could be made on a petition to sue in *forma pauperis*, as such an order can only be passed in a suit.[3476] The other view is that under this section a suit may be instituted not merely by presentation of a plaint, but also in such manner, as may be prescribed. Having regard to the provision in O XXXIII, rule 1 as to institution of suit by a pauper, the presentation of the petition would itself amount to institution of a suit. Accordingly, the court has the power, pending an application to sue in *forma pauperis*, to grant an injunction or appoint a commissioner under O XXXIX.[3477] The submission is that the latter view is the better view. An application under section 20 of the Arbitration Act, 1940, can well be described as a suit.[3478] A third party notice taken out by a defendant in a suit is not a plaint for the purposes of the Court Fees Act, 1870.[3479] The High Court of Orissa takes the view that though probate proceedings, when they become contentious, assume the form of a suit, they are not in reality in the nature of a regular suit under the Code. And since there cannot be a decree except in a suit provided by the Code, an order made in such probate proceedings is not a decree.[3480] In *Balaram Singh v Dudnath*,[3481] a proceeding started on an application made under the UP Agriculturists Relief Act was treated as a suit. It is submitted that the decision overlooks the word "prescribed" in the section which means prescribed by rules under the Code. Rights of parties are determined as on date of filing of suit.[3482]

3471. Now sub-section (1).
3472. *Kanji v Manglaben*, AIR 1969 Guj 308 : 10 Guj LR 1011.
3473. *ST Corp of India v Iron-side Ltd*, AIR 1966 Bom 126 : (1966) ILR Bom 307 : (1966) 67 Bom LR 644.
3474. *Hansraj v Official Liquidator*, AIR 1933 PC 63 : (1933) ILR 54 All 1067 : 60 IA 13.
3475. *Venkata v Venkatarama*, (1899) ILR 22 Mad 256; *Upadhya v Persidh Singh*, (1896) ILR 23 Cal 723; *Ram Kirpal v Ram Kuari*, (1884) ILR 6 All 269, p 274 : 11 IA 37; *Babulal v Kotumal*, AIR 1940 All 737; *Usman Ali Khan v Sagarmal*, 1965 AIR SC 1798 : (1965) 3 SCR 201.
3476. *Janandan v Anand Mahadeo*, (1883) ILR 7 Bom 373; *Poorna Chandra v Tara Prasad*, AIR 1917 Cal 852 : (1917) 21 Cal WN 870 : (1917) 25 CLJ 159; *Timmayya v Sadasivappa*, AIR 1952 Mys 354.
3477. *Chidambaram v Nataraja*, AIR 1939 Mad 80 : (1938) ILR Mad 1060; *Totaram Ichcharan v Dattamangu*, AIR 1943 Pat 143 : (1934) ILR Bom 138; *Channu Lal v Shama*, AIR 1955 Ngp 259 : (1955) ILR Nag 922; *Matuki v Kamakha Prasad*, AIR 1958 Pat 264 : (1958) ILR 37 Pat 331; *Namga Devi v Rajni*, (1961) 21 Cut LT 250; *Shripati Kuer v Malti Devi*, AIR 1967 Pat 320.
3478. *SPC Engineering Co v UOI*, AIR 1966 Cal 259.
3479. *ST Corp of India v Iron-side Ltd*, *supra*.
3480. *Puinbasi Majhiani v Shiba Bhue*, AIR 1967 Ori 41 : (1966) ILR Cut 213.
3481. *Balaram Singh v Dudnath*, AIR 1949 All 100 : (1948) ILR All 363.
3482. *Nand Kishore Marwah v Samundri Devi*, (1987) 3 SCC 382.

[s 26.3] Changes Introduced by the Section

The words "or in such other manner as may be prescribed" were added in 1908. No other manner of instituting suits has hitherto been prescribed.

By the Code of Civil Procedure (Amendment) Act, 1999 *vide* section 2 wef 1 July 2002, the existing section 26 was numbered as sub-section (1) of this section and sub-section (2) was inserted in it.

[s 26.4] Purpose of Amendment

The intention of the legislature in bringing about the various amendments in the CPC with effect from 1-7-2002 were aimed at eliminating the procedural delays in the disposal of civil matters. The amendments effected to section 26, O IV and O VI rule 15, are also geared to achieve such object, but being procedural in nature, they are directory in nature and non-compliance thereof would not automatically render the plaint non-est, as has been held by the Division Bench of the Calcutta High Court.[3483]

[s 26.5] "Facts shall be proved by affidavit"

Prior to insertion of sub-section (2) in section 26 there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading (O VI, rule 15(4)). The affidavit required to be filed under amended section 26(2) and O VI, rule 15(4) of the CPC has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.[3484]

Summons and Discovery

[S 27] Summons to defendants.—Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed [3485][on such day not beyond thirty days from date of the institution of the suit].

SYNOPSIS

[s 27.1]	Alterations in the Section	582	[s 27.4]	"On such day not beyond thirty days from the date of institution of the suit"	583
[s 27.2]	Issue and Service of Summons	582			
[s 27.3]	Code of Civil Procedure (Amendment) Acts of 1999 (46 of 1999) and 2002 (22 of 2002) Constitutional Validity	583			

3483. *Vidyawati Gupta v Bhakti Hari Nayak*, AIR 2006 SC 1194 : (2006) 2 SCC 777.
3484. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : JT 2005 (6) SC 468.
3485. Inserted by the CPC (Amendment) Act, 1999 (46 of 1999), section 3 (wef 1 -7-2002) *vide* Notfication SO 603(E), dated 6 June 2002.

[s 27.1] Alterations in the Section

By Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) *vide* section 3, with effect from 1-7-2002, the words "on such day not beyond thirty days from the date of institution of the suit" were inserted in section 27. The amendment in this section was enforced from 1-7-2002. However, it shall not apply or affect any suit pending immediately before the commencement of the amendment and every such suit shall be tried as if the amendment had not come into force.

The intention of legislature in amending section 27 was to cut down time in effecting the service of summons to the defendant. The amended section 27 requires that the defendant be served within 30 days from the date of institution of suit. To facilitate the implementation of section 27, rule 9 of O VII has also been substituted, wherein it is provided where the court orders that the summons be served on the defendants, it will direct the plaintiff to present as many copies of the plaint as there are defendants within seven days from the date of such order along with the requisite fee. The summons can be served upon the defendant within 30 days only if process fee is deposited within seven days. Further, the plaint can be rejected under newly inserted clause (f) in rule 11 of O VII, if the provisions of rule 9 of O VII have not been complied with.

In the opinion of the authors, the amended section, though well intended, may not serve the purpose for which it is intended, as it only covers the service of defendant for the first time after the institution of suit. The language of the amended section counts the period of 30 days from the date of the institution of suit. It is unlikely in most of the cases, except, where immediate interim relief is prayed for, that the defendant may be required to be served again for other occasions within 30 days of institution of suit. It would have been appropriate if the legislature had taken care of subsequent orders directing service of summons and had not limited the time frame only from the date of institution of suit. The legislature has substituted rule 5 of O IX of the Code, wherein a period of Seven days is prescribed for taking steps for issue of a fresh summons in subsequent hearings. The intention of legislature would be served if the defendants were also required to be served within 30 days of each subsequent hearing, if the defendant's or any of the defendant is not served with the summons on previous hearings.

In *Karnataka Industrial Corp v State of Karnataka*,[3486] the plaintiff has preferred an appeal against the judgment of trial court dismissing the suit on the ground that it is not maintainable because the plaint does not disclose the cause of action. The court remanded back the matter to the trial court for fresh consideration. It was further held that if the trial court is satisfied that the suit is not maintainable, the court have to issue notice to the defendants to adduced its reply and till such time, the court will refuse to pass *ex-parte* interim relief. It would be a salutary practice that principle of natural justice should be followed even the case does not have any substance.

[s 27.2] Issue and Service of Summons

Rules 142–148A of the City Civil Court, Ahmedabad and O XXXVII, rules 1 and 2 as amended by the High Court of Bombay providing summary procedure are not inconsistent with this section and are therefore not *ultra vires* section 122 of the Code.[3487]

3486. *Karnataka Industrial Corp v State of Karnataka*, Regular First Appeal No.14 of 2019, decided on 22 January 2020 (Karnataka High Court).

3487. *Keshavlal Prabhudas v Manubhai*, AIR 1968 Guj 223 : (1968) 9 Guj LR 177. See O v below.

[s 27.3] Code of Civil Procedure (Amendment) Acts of 1999 (46 of 1999) and 2002 (22 of 2002) Constitutional Validity

The amendments to sections 27, 89, 100A, O VII, rule 11; O XVIII, rule 4 and O XL, rule 9 made by Act 46 of 1999 and Act 22 of 2002 are not *ultra vires* the Constitution of India. The amendments made were within the legislative competence and are not violative of any of the provisions of the Constitution and there is no constitutional infirmity in the same.[3488]

[s 27.4] "On such day not beyond thirty days from the date of institution of the suit"

The words "on such day not beyond thirty days from the date of the institution of the suit" do not mean that the summons must be served within thirty days of the date of the institution of the suit. The words added by amendment, fix outer time frame, by providing that steps must be taken within 30 days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1 January 2002 then the correct addresses of the defendants and the process fee must be filed in the court within 30 days so that summons be issued by the court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the court is not in a position or is unable to or does not issue summons within thirty days, there will, compliance with the provisions of section 27 once within thirty days the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the court to issue the summons.[3489]

[S 28] Service of summons where defendant resides in another [3490][State].—(1) A summons may be sent for service in another [36]State to such Court and in such manner as may be prescribed by rules in force in that [36]State.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

[3491][(3) Where the language of the summons sent for service in another State is different from the language of the record referred to in sub-section (2), a translation of the record—

(a) in Hindi, where the language of the Court issuing the summons is Hindi, or

(b) in Hindi or English, where the language of such record is other than Hindi, or English

shall also be sent together with the record sent under that sub-section.]

3488. *Salem Advocate Bar Association, Tamil Nadu v UOI*, AIR 2003 SC 189.
3489. *Salem Advocate Bar Association, Tamil Nadu v UOI*, AIR 2003 SC 189.
3490. Substituted for "Province" by AO 1950.
3491. Inserted by CPC (Amendment) Act 104 of 1976, section 12 (wef 1 -5-1977).

Sub-section 3 is added to avoid the difficulty that the court issuing the summons might feel where the language of the court issuing the summons is different from the language of the court to which the summons is sent for service (see note to O V, rule 23).

[3492]**[S 29] Service of foreign summonses.**—Summonses and other processes issued by—

(a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extend, or

(b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India, or

(c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply,

may be sent to the courts in the territories to which this Code extends and served as if they were summonses issued by such courts.]

By notification.—For notifications issued under the corresponding section, see general statutory rules and orders.

[S 30] Power to order discovery and the like.—Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.

SYNOPSIS

[s 30.1]	High Court Amendment	584	[s 30.6]	Summonses to Persons to Give Evidence	585
[s 30.2]	Delivery and Answering of Interrogatories	585	[s 30.7]	Proof of Facts by Affidavits	585
[s 30.3]	Admission of Documents and Facts	585	[s 30.8]	Section 30 and O IX read with O XXXIX	585
[s 30.4]	Discovery and Inspection	585	[s 30.9]	Section 30(b) and O XVI	585
[s 30.5]	Production, Impounding and Return of Documents	585			

[s 30.1] High Court Amendment

Calcutta.—In clause (*a*) omit the words "delivery and answering of interrogatories, the admission of documents and facts, and the discovery" after the words "matters relating to" and before the word "inspection" *vide* Cal. Gaz. Pt. I, dated 20 April 1967.

3492. Substituted by CPC (Amendment) Act 2 of 1951, section 6, for section 29 (w.e.f. 1-4-1951).

[s 30.2] Delivery and Answering of Interrogatories

See O XI below.

[s 30.3] Admission of Documents and Facts

See O XII below.

[s 30.4] Discovery and Inspection

See O XI below.

[s 30.5] Production, Impounding and Return of Documents

See O XIII below.

[s 30.6] Summonses to Persons to Give Evidence

See O XVI below.

[s 30.7] Proof of Facts by Affidavits

See O XIX below.

[s 30.8] Section 30 and O IX read with O XXXIX

Provisions of O XIX, rules 1 and 2 apply to an application for grant of temporary injunction, in view of section 30. Apart from principles of natural justice, it is clear, having regard to the statutory provisions contained in section 30 and O XIX, rules 1 and 2 read with O XXXIX, rule 1, that the court possesses the power to call the deponent for cross-examination, when an affidavit has been filed in support of an application for temporary injunction.[3493]

[s 30.9] Section 30(b) and O XVI

Where, a suit for recovery of amount was filed against a bank and its officer, alleging fraud to have been committed by officer and money unauthorisedly taken out from account of plaintiff, the application to issue witness summons to the Metropolitan Magistrate's Court to produce list of documents filed before it in criminal complaint against officer of bank was filed under section 30(b) and O XVI where under the court has such power and jurisdiction to issue a summon to person whose attendance is required either to give evidence or to produce documents, the application was filed before the suit had to go for trial and therefore was within limitation and filed on behalf of applicant firm supported by affidavit of one of partners of firms, the application read with plaint providing particulars of the said criminal case was entitled to be allowed.[3494]

3493. *Ram Swaroop v Bholu Ram*, AIR 1991 Raj 56 (DB).
3494. *Naren Advertising & Marketing v State Bank of Saurashtra*, AIR 2001 Guj 222; See also the Indian Partnership Act, 1932, section 19.

[S 31] Summons to witness.—The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

[s 31.1] High Court Amendment

Calcutta.—Omit figure "27"—*vide* Cal Gaz Pt I, dated 20 April 1967.

[S 32] Penalty for default.—The Court may compel the attendance of any person to whom a summon has been issued under section 30 and for that purpose may—

(a) issue a warrant for his arrest;

(b) attach and sell his property;

(c) impose a fine upon him [3495][not exceeding five thousand rupees];

(d) order him to furnish security for his appearance and in default commit him to the civil prison.

SYNOPSIS

[s 32.1] Alterations in the Section 586
[s 32.2] "To whom a Summon has been Issued" 587

[s 32.1] Alterations in the Section

By Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) *vide* section 4; wef 1 July 2002, the words "not exceeding five hundred rupees" are substituted with the words "not exceeding five thousand rupees" in section 32. The Amending Act allows greater discretion upon the court to impose a fine by enhancing the limit of the fine from Rs 500 under the pre-amended section to Rs 5000, to compel the attendance of any person to whom a summon has been issued under section 30 of the Code.

The summons, under this section may be issued either to the party to the cause, witnesses in the matter or any other person, whose presence may be necessary or reasonable, in all matters relating to the delivery and answering of interrogatories, the admission of document and facts and the discovery, inspection, production, impounding and return of document or other material objects producible as evidence. Further, summons may also be issued to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid.

Further, the power of assessing authority, which is a *quasi*-judicial authority, is clothed with the powers of the civil court. Therefore, section 32 of CPC would apply and this section gives immense power to the assessing authority to compel attendance/appearance of any person.[3496]

The legislature while amending section 32 did not amend rule 12 of O XVI. Though the amount of fine is increased from Rs 500 to Rs 5,000 in section 32, the amount of fine in rule 12 of O XVI remains Rs 500. In the opinion of authors, the legislature should accordingly amend O XVI to bring it in harmony with section 32, otherwise precious time of the courts would be spent in clearing the clouds over this controversy.

3495. Substituted for "not exceeding five hundred rupees" by the CPC (Amendment) Act, 1999 (46 of 1999), section 4 (wef 1-7-2002) *vide* Notification SO 603(E), dated 6 June 2002.

3496. *Maulikkumar Vinodkumar Patel. v TRO*, (2019) 417 ITR 590.

[s 32.2] "To whom a Summon has been Issued"

This section applies only if a summons has been issued. It does not apply where a person is merely ordered to produce a document.[3497]

Judgment and Decree

[S 33] Judgment and decree.—The Court after the case has been heard, shall, pronounce judgment, and on such judgment a decree shall follow.

SYNOPSIS

[s 33.1]	On Such Judgment: A Decree Shall Follow	587	[s 33.3]	Non-payment of Court fee Decree Cannot be Withheld	588
[s 33.2]	Judicial Discipline	588			

[s 33.1] On Such Judgment: A Decree Shall Follow

A mere order deciding the matter in dispute not supported by reasons is no judgment.[3498] Under the section, it is imperative that a decree must follow the judgment. Since it is the duty of the court to comply with the provisions of the law, its failure to draw up a decree ought not to deprive a party of his right of appeal. Order XLI, rule 1, no doubt, provides that every appeal shall be accompanied by a decree. The validity of an appeal presented without a copy of the decree where the court had failed to draft one has been the subject of consideration in several cases. In some decisions, effect has been given to the mandatory words of O XLI, rule 11, without reference to the question whether the party could be prejudiced by reason of the failure of the court to draw up a decree.[3499] In other decisions, it has been held that a litigant should not suffer for the default of the court and that the hearing of an appeal filed without a decree should be adjourned to enable the party to obtain a decree.[3500] The question was considered by the Supreme Court in *Jagadish v Jawarlal.*[3501] There, an appeal presented without a certified copy of the decree, was admitted and a certified copy of the decree which was subsequently drawn up by the trial court, was obtained and produced. The Supreme Court held that though the production of the certified copy of the decree was mandatory under O XLI, rule 11, as there was failure on the part of the court to draw up a decree, the appellate court could pass such orders, as were appropriate for the production of the decree in the appeal presented without it. Where a decree was passed by the trial court prior to coming into force of Punjab Pre-emption (Repeal) Act, 1973 but was challenged in appeal after the act was passed and affirmed on appeal, that would fall within the meaning of section 3 of Punjab Pre-emption (Repeal) Act, 1973, while the case is pending in the High Court.[3502] It has also been held that an execution application presented after the judgment is pronounced but without a copy of

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3497. *Ramdeo Prasad v State*, AIR 1951 All 415; *Kumar Rameshwar v Rani Riknath*, (1920) 5 Pat LJ 550. See the Code of Civil Procedure 1908, O XVI, rules 10–13, rule 17, and rule 21.
3498. *Swaran Lal v Harendra Kumar*, AIR 1969 Cal 1167 : (1969) 1 SCC 709 : (1969) 3 SCR 976; *Jaswant Singh v Punjab Government*, AIR 1994 P&H 116.
3499. *Jilaram v Gangaram*, AIR 1920 Lah 395 : 1 Lah 223.
3500. *Sriramamurthi v Sriramamurthy*, AIR 1941 Mad 929; *Mandharlal v Nanak Chand*, AIR 1919 Lah 53; *Debendranath v Hrishi Pada*, AIR 1956 Assam 120.
3501. *Jagadish v Jawarlal*, AIR 1961 SC 832 : (1961) 2 SCR 918.
3502. *Sadhu Singh v Dharm Dev*, (1981) 1 SCC 510.

the decree as required by O XXI, rule 10, was valid where no decree had been drawn up by the court.[3503]

In a suit filed for relief of permanent injunction, but courts below, though granting relief of injunction, proceedings on the premise that the suit was for declaration of title and decided the same recording a finding of title in favour of the plaintiff. Such a decision was held to be contrary to the pleadings and the settled legal position and hence, judgment and decrees passed in suit set aside.[3504]

Where, respondents fraudulently obtained mutation of immovable property in their favour on the basis of revoked gift showing deceased donor as present and witnessing mutation, and the deceased owner in fact had expired long before that, the mutation obtained by fraudulent means is *non est*, just as a decree obtained by fraud is a nullity.[3505] This section does not apply so far as decrees under the Hindu Marriage Act, 1955 are concerned.[3506]

[s 33.2] Judicial Discipline

Writ appeal against application was dismissed for default by a single judge of the high court. The writ court, condoned the delay and directed the single judge "to take up the application and pass appropriate orders". The single judge was of the view that the language used does not belong to judicial pronouncements (paras 6, 7, 8, 11), judges of the high court who happen to sit single, and hear the matters assigned to them by the Chief Justice are not subordinate to the members of the division benches.

In the circumstances, the Single Judge recused himself from the matter and directed the registry to place the papers before the Chief Justice for appropriate orders.[3507]

[s 33.3] Non-payment of Court fee Decree Cannot be Withheld

In view of the provisions of section 33 and O II, rule 6, there is no manner of doubt that once a judgment is delivered and signed, there is no option left with the court except to draw decree in terms of the judgment. Drawing up of a decree cannot be postponed. Dismissal of suit on account of non-payment of the court-fee for drawing up of decree is not in consonance with the law. Decree shall be drawn in terms of the judgment of the court and in view of section 11 of Court-Fees Act, 1870, the decree will bear an endorsement that the same shall not be executed till difference in court fee is paid.[3508]

Interest

[S 34] Interest.—(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, [3509][with further interest at such rate not exceeding six per

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3503. *Rajeswar Rao v Shankar Rao*, AIR 1962 Pat 398.
3504. *Jharkhand State Housing Board v Anirudh Kumar Sahu*, (2018) 18 SCC 330: (2004) 4 JCR 697 Jhr
3505. *N Khosla v Rajlakshmi*, AIR 2006 SC 1249 : (2006) 3 SCC 605.
3506. *Dalit Singh v Shamsher Kaur*, AIR 1969 P&H 69 : (1969) ILR 1 Punj 393. See O XX, rule 1.
3507. *Govt of Andhra Pradesh v Official Liquidator, M&CE India Ltd*, AIR 2002 AP 220.
3508. *GC Kumar v Ashok Kumar*, AIR 2001 Del 338 (DB).
3509. Substituted for "with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged" by CPC (Amendment) Act, 66 of 1956, section 2, (w.e.f. 1-1-1957).

cent per annum as the Court deems reasonable on such principal sum], from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

[3510][Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I.—In this sub-section "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

Explanation II.—For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.]

(2) Where such a decree is silent with respect to the payment of further interest [3511][on such principal sum] from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

SYNOPSIS

[s 34.1] Alterations in the Section 590
[s 34.2] Scope of the Section 590
[s 34.3] Act of Court 593
[s 34.4] "On such Principal Sum" and "the Principal sum adjudged" 593
[s 34.5] Comparison of Rate of Interest in Two Suits of Plaintiff Relevancy 595
[s 34.6] Vague Remark by Court Regarding Concession of Party as to Interest Effect 596
[s 34.7] Term of Invoice Pertaining to Interest 596
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3510. Inserted by CPC (Amendment) Act 104 of 1976, section 13 (wef 1 July 1977).
3511. Substituted for "on such aggregate sum as aforesaid" by CPC (Amendment) Act 66 of 1956, section 2 (w.e.f. 1-1-1957).

[s 34.1] Alterations in the Section

By the Civil Procedure Code (Amendment) Act LXVI of 1956, for the words "on such sum with further interest at such rate as the court deems reasonable on the correct sum so adjudged" in sub-clause (1), the words with further interest at such rate not exceeding six per cent pa as the court deems reasonable on such principal sum' were substituted.

In clause (2), instead of the words "on such aggregate sum as aforesaid", the words "on such sum" were substituted.

The Amendment Act, 1976, has now added a proviso and two explanations. The proviso enables the court to award interest at a rate higher than six per cent but not exceeding a contractual rate or where such contractual rate is not provided at the rates charged by nationalised banks on loans or advances in relation to commercial transactions. Explanation I defines a nationalised bank and Explanation II defines a commercial transaction for the purpose of this section. The proviso does not apply to an adjudged amount arising out of a transaction which is not a commercial transaction. In such cases, the rate prescribed under sub-section (1) would apply. A suit filed before the amendment of section 34 by section 13 of Civil Procedure (Amendment) Act, 1976 shall not be governed by the amended section 34 by virtue of section 97(e) of the Amendment Act.[3512]

[s 34.2] Scope of the Section

It may be noticed that before the amendment of 1976, the maximum interest which the court could award was six percent pa. However, in appropriate cases, the court had the discretion to award interest at a lesser rate but in no case exceeding six percent. Now, the courts are empowered to increase post-decretal interest in relation to a liability arising out of a commercial transaction, on the principal sum adjudged.[3513]

Under section 34 of the CPC, the court has a very wide discretion in ordering interest on the principal sum adjudged and may order interest at such rate it deems reasonable to be paid on the said principal sum adjudged from the date of the suit till the date of payment. It is the discretion of the court to award interest.[3514]

Payment of interest is discretionary under the provisions of section 60 of Sale of Goods Act, 1930 and section 3 of Interest Act, 1978. It was observed by HL Dattu J in the following words[3515]:

> 38. The court has the discretion to award interest along with the principal amount and the same is clear from the use of the word "may" in all the three provisions cited above. Section 34 CPC is the main provision under which interest could be awarded by the court and Section 61 of the Sale of Goods Act, 1930 is an offshoot of Section 34 CPC. Section 3 of the Interest Act, 1978 also makes the Interest Act subject to the provision of Section 34 CPC. Hence, we can safely deduce that the interest awarded is a discretion exercised by the court, on the principal amount claimed, in case of a suit for recovery of payment by the supplier if such payment is delayed by the buyer.

It is therefore clear that interest *pendente lite* would be awarded at the rate which the court considers reasonable. Future interest from the date of suit till payment would ordinarily not exceed the rate of six percent pa, but in case of commercial transaction, rate of such interest

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3512. *Shri Bharat-Laxmi Wool Store Panipat v Punjab National Bank*, (1992) 3 SCC 204.
3513. *Madan Mohan v HPMC*, AIR 2006 HP 105; See also *Charu Bhainagar v HPMC*, AIR 2006 HP 119.
3514. *State of Bihar v Mijaj International*, AIR 2004 Jhar 29.
3515. *Purbanchal Cables & Conductors (Pvt) Ltd v Assam SEB*, (2012) 7 SCC 462.

could exceed the rate of six percent pa, but shall not exceed the contractual rate or where there is no contractual rate of interest then the rates at which money is lent or advanced by nationalised banks in relation to commercial transaction. However, the provision as above does not mean and imply that the court is obliged and should mandatorily grant interest at the contractual rate, either from the date of suit till the date of decree or from the date of decree till payment thereof.[3516]

In a case relating to refund of instalments paid by the intending purchaser for purchase of flat, it was held by the Supreme Court that since the interest was not granted to the party along with the principal amount, he would also be entitled, in addition to the 12% pa interest on the principal amount, but also interest at the same rate which was earlier denied to him. It was observed that it was being so ordered because interest is not penalty or punishment, but it is normal accretion on capital.[3517]

In a case where injunction was sought against forcible dispossession by Development Authority and the said Authority gave undertaking to pay compensation to landowners within two months, the Supreme Court directed payment of interest at the rate of 18% pa when the undertaking was not complied with. It was observed that the landowners have been denied beneficial use of money.[3518]

Payment of interest on a sum claimed by the plaintiff or a sum, which has been adjudged by the court as payable, is an issue, which has to be pleaded and decided by the court in the suit itself. If the court has not adjudged any interest to be payable on the principal sum even though it is pleaded or it refused to grant the interest, then, in execution proceedings, the Executing Court cannot go beyond the decree and award interest.[3519]

In a suit for specific performance of agreement for sale, the purchaser did not pay the balance sale consideration on the pretext that the vendor has not paid the transfer charges. It was held by the high court that transfer charges is a contingency which has to take place only after the said amount is calculated and demanded. As such the purchaser is liable to pay interest on the balance sale consideration.[3520]

This section applies only where the decree is for the payment of "money". The expression "decree for the payment of money" as used in this section includes a claim to unliquidated damages.[3521] This section does not apply where the decree is for the enforcement of a mortgage or charges.[3522] (see notes below under the head "Interest in suits for enforcement of mortgage"). There is no analogy between interest awarded under this section and *mesne* profits.[3523] In a suit by a principal against his agent, the accounts contained several controversial items which had to be adjudicated based on an elaborate report of the commissioner. Such a decree being one for the payment of money, the court awarded interest from the date of the decree until realisation on the principal amount so adjudicated.[3524] Section 34 contemplates interest payable—

3516. *Union Bank of India v Chhatarpur Siliment Sales Corp*, AIR 2002 MP 145.
3517. *Alok Shanker Pandey v UOI*, AIR 2007 SC 1198 : (2007) 3 SCC 545.
3518. *Rakesh Kumar Jain v State of Uttar Pradesh*, AIR 2007 SC 917 : (2007) 2 SCC 461.
3519. *O Sreenivasulu v P Santhi*, AIR 2007 AP 115 : (2007) 2 Andh LD 175 : (2007) 2 Andh LT 673.
3520. *Amol Kishore Mule v Vishwanath Rajaram Shahande*, AIR 2007 Bom 55 : 2006 (6) All MR 254 (Aurangabad Bench).
3521. *Bhagwant Genuji v Gangabisan Ramgopal*, (1940) 42 Bom LR 750, AIR 1940 Bom 369.
3522. See notes below, under the head, "Interests in suit for enforcement of mortgage".
3523. *Dwarkanath v Debendra*, (1906) ILR 33 Cal 1232.
3524. *N Bhaironbut & Co v Kashi Ram*, AIR 1973 Raj 271.

(i) from the date of the institution of the suit to the date of decree; and

(ii) date of decree to the date of realisation.[3525]

An illiterate lady sued and got a decree for cancellation of a sale deed on the ground of fraud. It was held that the defendant cannot claim interest on the money advanced.[3526]

In a suit filed by an indigent person, the court passed a money decree. A question arose whether interest is payable from the date when the petition to sue as pauper was filed or from the date when the petition was converted into a suit. A Division Bench of Kerala High Court held that conversion of petition and assignment of number are routine steps, since formalities required to be followed necessarily are to be completed. Therefore, the suit shall be deemed to have been instituted on the date on which application to sue as indigent person is filed and as such interest is payable from that date.[3527]

The Interest Act, 1978 does not apply to Jammu and Kashmir. However, the jurisdiction of the court to award interest from the date of a decree passed in terms of the award of an arbitrator is not taken away.[3528]

Interest cannot be allowed by way of damages for breach of contract.[3529]

Though section 34 of Code of Civil Procedure, 1908 (Code of Civil Procedure) provides that the rate of current interest and future interest, are within the discretion of the court, the provisions of section 34 indicate the guideline for exercise of such discretion. It shows that grant of interest at contract rate should be the normal rule, the use of discretion to refuse interest or reduce the contract rate being the exception. To reduce or deny interest would amount to penalising the creditor for approaching the court and encouraging the debtor to deliberately and unjustly prolong the litigation. If the court wants to reduce the rate of interest, either current or future, such reduction should be supported by reason.[3530] In view of this fact, the petitioner, a public corporation, was willing to refund the amount to individual applicants from whom it has received the amount and there was no delay on its part in either making the said offer or in depositing the amount in court when directed to do so. The Supreme Court held that the facts of the case do not warrant burdening the petitioner with any interest on the amount of question.[3531] A decree awarded interest to the bank at 16.5%. However, the plaintiff succeeded in proving interest at the rate of 25.5% communicated to the borrower from time-to-time. The Karnataka High Court held that merely because the defendant chose to deny his liability, the court cannot refuse to award higher rate of interest which the law entitles the bank to charge.[3532]

Section 34 lays that in addition to *pendente lite* and future interest, additional interest adjudged on such principal sum for the period prior to the institution of the suit can also be granted by the court. This interest adjudged for the period prior to the institution of the suit also has to be on such "principal sum" and this also has reference to earlier expression "principal sum adjudged".[3533] The transport subsidy which was payable to the industrial unit by the Union of India under transport subsidy scheme, was wrongfully detained by the authorities

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3525. *Government of Andhra Pradesh v Gammon India Ltd Bombay*, AIR 1984 AP 230.
3526. *Siya Ram v Lilawati*, (1990) ILR All 75.
3527. *KSEB v Karthiyayani*, AIR 2007 Ker 102 : (2006) 4 Ker LT 1006 (DB).
3528. *Managing Director, J&K Handicrafts v Goodluck Carpets*, AIR 1990 SC 864 : (1990) 4 SCC 740 : (1990) 1 All LR 367.
3529. *Andard Mount (London) Ltd v Creswell (India) Ltd*, AIR 1985 Del 45.
3530. *Vijaya Bank v S Bhathija*, AIR 1994 Kant 123; *State Bank of India v Ghulam Nabi*, AIR 1998 J&K 46.
3531. *South Eastern Coal Field Ltd v Subhash Kumar Gupta*, (1994) Supp 3 SCC 334.
3532. *Canara Bank v Millan Medicals*, AIR 1996 Kant 24.
3533. *Punjab National Bank v Surinder Singh Mandyal*, AIR 1996 HP 1.

and subsequently the authorities were directed to release such subsidy. The interest however, was not granted, since neither there was any provision for payment of such interest in the scheme nor could the petitioner bring to the notice of the court, any provision entitling him to any interest.[3534] Earnest money cannot be retained after the withdrawal of the tender and interest is payable on the amount of earnest money unreasonably retained.[3535] In the absence of pleading and proof, the bank is not entitled to charge interest on service, or incidental charges.[3536] It is the primary duty of the housing board to hand over the possession if the formalities before handing over the possession have been completed; and if by any reason whatsoever, not attributable to the allottee, the possession is delayed by the housing board, it cannot and shall not put such allottee in loss by demanding interest for the period when the housing board itself was in error or ask for the enhanced price payable at the year or time when actual handing over of the possession is made by the housing board to the allottee.[3537] Heirs of bailer would be entitled to the price of market value of gold ornaments, at the time of the institution of the suit alongwith interest at the rate of 12% pa, more so, when the custody of the box containing gold jewellery and ornaments was entrusted to the bank and the custody always remained with the bank.[3538] Section 34 mandates that reasonable and proper interest may be awarded on the principal sum from the date of the suit till the date of the decree and further interest can also be awarded, not exceeding six per cent pa from the date of the decree to the date of the payment. There may be a substance that nowadays banks are giving higher rate of interest than six per cent pa hence, the reasoning of the legislature in fixing six per cent pa as further interest, does not hold good, but till the section is un-amended, the higher limit of interest is six per cent pa and the court as such could not award any interest for the period from the date of the suit till the date of decree or till the date of payment at the rate of six per cent pa in non–commercial transactions.[3539]

It is submitted that in the absence of any words indicating that the proviso is to apply to matters pending at the date the Amending Act, 1976 came into force, the proviso is prospective though contained in a procedural statute since it would affect substantive rights of parties in pending matters.

[s 34.3] Act of Court

On the principle that act of court will prejudice no one, the court can award interest where payment of dues was stayed even though no such condition was imposed in the said order.[3540]

[s 34.4] "On such Principal Sum" and "the Principal sum adjudged"

Section 34 lays that in addition to *pendente lite* and future interest, additional interest adjudged on such principal sum for the period prior to the institution of the suit can also be granted by the court. This interest adjudged for the period prior to the institution of the suit

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3534. *Associated Cement Co Ltd v UOI*, AIR 1997 HP 1 (DB).
3535. *Aditya Mass Communications Pvt Ltd v AP State Road Transport Corp, Hyderabad*, AIR 1998 AP 125.
3536. *Kolli Venkatta Apparao v State Bank of India*, AIR 1998 AP 2.
3537. *Jhabarmal v Rajasthan Housing Board*, AIR 1998 Raj 254.
3538. *Jagdish Chand Trikha v Punjab National Bank*, AIR 1998 Del 266.
3539. *Meenakashi Pharma Distributors v State of Karnataka*, AIR 1999 Kant 192.
3540. *LML Ltd, Kanpur v State of Uttar Pradesh*, AIR 2001 All 321 (DB); See also *Raj Kumar Dey v Tara Pade Dey*, AIR 1987 SC 2195 : (1987) 4 SCC 398 : JT (1987) 3 SC 555; *Sohan Lal & Co v Lt Governor*, AIR 1991 SC 1592 : (1991) Supp 2 SCC 295 : (1991) 2 SCR 295; *Gursharan Singh v MIDC*, AIR 1996 SC 1175 : (1996) 2 SCC 459.

also has to be on such "principal sum" and this also has reference to earlier expression "principal sum adjudged".[3541]

The bank which had advanced a loan, computed interests at quarterly rests and, after every quarter, added interest to the last balance, treating that balance as the principal sum for the next quarter for computing interest. It was held that in such a case, the "principal sum" for the purpose of section 34, would be the sum so arrived at, that is to say, the sum total of the original advance and the unpaid interest.[3542]

A commercial loan was advanced by bank. The loanee was to pay interest from the date of loan till the date of payment in full with quarterly rest. Interest accrued and added to principal amount on date of suit is "principal amount" for purposes of the interest and not the amount of loan originally advanced.[3543]

Submission that expression "on such principal sum" as occurring twice in the latter part of section 34(1), which refers to interest *pendente lite* and post-decree, should be interpreted to mean principal sum arrived at by excluding the interest even if it has stood capitalised, cannot be accepted. This is because, first, the interest once capitalised, ceases to be interest and becomes a part of principal sum or capital. That being so, the interest forming amalgam with the principal, in view of having been capitalised, is the principal sum and, therefore, the question of awarding interest on interest does not arise at all. Secondly, well-settled principles of interpretation of statutes would frown upon such a plea being entertained. A construction which leads to repugnancy or inconsistency has to be avoided. Ordinarily, a word or expression used at several places in one enactment should be assigned the same meaning so as to avoid "a head-on clash" between two meanings assigned to the same word or expression occurring at two places in the same enactment. It should not be lightly assumed that "Parliament had given with one hand what it took away with the other". That construction is to be rejected which will introduce uncertainty, friction or confusion into the working of the system. While embarking upon interpretation of words and expressions used in a statute it is possible to find a situation when the same word or expression may have somewhat different meaning at different places depending on the subject or context. This is however, an exception which can be resorted to only in the event of repugnancy in the subject or context being spelled out.[3544]

The award of interest can only be on the principal sum adjudged and not on the principal and interest as on the date of the decree. The court has also no discretion to award interest beyond the rate of 6%. But the court has still a discretion to award or not to award any interest and in awarding interest, to determine at what rate it should be awarded.[3545]

The meaning assigned to the expression "the principal sum adjudged" should continue to be assigned to "principal sum" at such other places in section 34(1) where the expression has been used qualified by the adjective "such", that is to say, as "such principal sum". Recognition of the method of capitalisation of interest so as to make it a part of the principal consistently with the contract between the parties or established banking practice does not offend the sense of reason, justice and equity. Such a system has a long established practice and a serious of judicial precedents upholding the same. Secondly, the underlying principle is that when interest is debited to the account of the borrower on periodical rests, it is debited because of

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3541. *Punjab National Bank v Surinder Singh Mandyal*, AIR 1996 HP 1.
3542. *Syndicate Bank v West Bengal Cement Ltd*, AIR 1989 Del 107.
3543. *Indian Bank v Kamalaya Cloth Store*, AIR 1991 Ori 44.
3544. *Central Bank of India v Ravindra*, AIR 2001 SC 3095 : (2002) 1 SCC 367.
3545. *KC Pradhan v Arun Kumar Dutta*, AIR 2008 Ori 109 : 2007 (Supp) Ori LR 641.

its having fallen due on that day. Nothing prevents the borrower from paying the amount of interest on the date it falls due. If the amount of interest is paid there will be no occasion for capitalising the amount of interest and converting it into principal. If the interest is not paid on the date due, from that date the creditor is deprived of such use of the money which it would have made if the debtor had paid the amount of interest on the date due. The creditor needs to be compensated for deprivation.[3546]

The 1956 Amendment serves a twofold purpose. First, it prevents award of interest on the amount of interest so adjudged on the date of suit. Secondly, it brings the last clause of section 34, by narrowing down its ambit, in conformity with the scope of the first clause in so far as the expression "the principal sum adjudged" occurring in the first part of section 34 is concerned which has been left untouched by amendment. The meaning to be assigned to this expression in the first part remains the same as it was even before the amendment. However, in the third part of section 34, the words used were "on the aggregate sum so adjudged".[3547]

Therefore, subject to a binding stipulation contained in a voluntary contract between the parties and/or an established practice or usage interest on loans and advances may be charged on periodical rests and also capitalised on remaining unpaid amount. The principal sum actually advanced, coupled with the interest on periodical rests so capitalised, is capable of being adjudged as principal sum on the date of the suit. The principal sum so adjudged is "such principal sum" within the meaning of section 34 of the CPC, on which interest *pendente lite* and future interest, ie, post-decree interest, at such rate and for such period which the court may deem fit, may be awarded by the court.[3548]

Once the principal amount awarded is known, in relation to compensation for the time taken for the said payment to reach the decree holder, the only entitlement can be to interest at the rate granted by the court, but always with the base figure remaining as the cumulative amount of the award, and not the amount inclusive of interest as on the date of the decree.[3549]

The principal sum would mean and constitute outstanding loan as capitalised on the date of suit including the balance of loan amount remaining unpaid as well as the interest accrued thereon at the contractual rate, till the date of suit. Interest *pendente lite* from the date of suit as also future interest, shall, therefore, be payable on such capitalised sum which would constitute "principal sum adjudged" within the meaning of the said term under section 34(1) of the CPC, and not only on the balance amount outstanding towards the principal sum loaned.[3550]

[s 34.5] Comparison of Rate of Interest in Two Suits of Plaintiff Relevancy

Where special court decreed suit filed by Standard Chartered Bank (SCB) against Citibank with interest at the rate of 20% pa, and another suit filed back to back by Citibank against Canbank Financial Services Ltd (CANFINA) was decreed with interest at the rate of nine percent pa, in the appeals against both suits and allowed by Supreme Court — Citibank was held entitled to restitution/refund of total amount it had paid to SCB with interest at the rate of 12%pa and CANFINA was held entitled to refund with interest at the rate of 9% pa. Clarification of order was sought by SCB on ground of different rates of interest awarded in two suits of restitution of monies — variation of rate of interest ordered in two appeals

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3546. *KC Pradhan v Arun Kumar Dutta*, AIR 2008 Ori 109 : 2007 (Supp) Ori LR 641.
3547. *KC Pradhan v Arun Kumar Dutta*, AIR 2008 Ori 109 : 2007 (Supp) Ori LR 641
3548. *Central Bank of India v Ravindra*, AIR 2001 SC 3095 : (2002) 1 SCC 367.
3549. *Sanyukt Nirmata v Delhi Development Authority*, AIR 2003 Del 68.
3550. *Union Bank of India v Chhatarpur Siliment Sales Corp*, AIR 2002 MP 145.

was keeping in view rate at which interest was allowed by special courts in two suits—the contention of SCB that Citibank was unjustly enriched by payment of interest at higher rate of three percent pa was found misplaced, comparison of rate of interest in two suits is wholly irrelevant.[3551]

[s 34.6] Vague Remark by Court Regarding Concession of Party as to Interest Effect

It is true that a concession made by a party and an observation made to that effect in the judgment, cannot be allowed to be denied. Only the court which recorded the statement itself was competent to rectify the error if the court recording the statement was approached to consider the matter without delay. However, in certain cases where a stray remark or observation is made by the court, which is not very clear and vague, a different picture emerges from the other part of the judgment. In such a case, it may be open for Supreme Court to ascertain the correct position based on totality of the observations made in the judgment itself. The question in the instant case was whether rate of interest awarded on compensation amount was not disputed before the high court. The high court judgment observed that the rate was not disputed. However, the high court in its judgment has nowhere indicated that the counsel appearing for the insurance company had made any statement conceding the rate of interest nor it is indicated how the concession was made. Then, the observation that the "rate of interest was not in dispute before the Court" may only lead to an inference that the rate of interest was not disputed before the court in the arguments advanced on behalf of the party concerned. On the other hand, it was found that on behalf of the insurance company its learned counsel had cited the decisions to indicate that the lower rate of interest was awarded in certain decisions and the decisions were referred to in the judgment. This is enough to indicate that the rate of interest was actually disputed before high court.[3552]

Where, in a suit for recovery of loan by a bank, the claim for enhanced rate of interest was made as per terms of agreement between parties, the observations by the trial court, that there was no record to show that defendants had agreed to pay higher rate of interest was found running contrary to terms of agreement, and subsequent acknowledgments made by defendants also indicating that they acknowledged their liability of amount due and amount was calculated on basis of enhanced rate of interest, there was no question of taking separate consent of defendant, as rate was increased as per terms of agreement, there was no violation of principles of natural justice for want of notice to defendants, therefore, claim for enhanced rate of interest cannot be rejected.[3553]

[s 34.7] Term of Invoice Pertaining to Interest

In the case of sale of goods, the terms and conditions on invoices showing that interest at the rate of 24% pa is payable, constitutes the agreed rate of interest.[3554]

3551. *Citibank NA v Standard Chartered Bank*, AIR 2005 SC 94 : (2004) 8 SCC 348 : (2004) 9 Scale 74.
3552. *United India Insurance Co Ltd v Patricia Jean Mahajan*, AIR 2002 SC 2607 : AIR 2002 SCW 2920 : (2002) 6 SCC 281 : (2002) 5 JT SC 74.
3553. *Syndicate Bank v R Veeramma*, AIR 2003 SC 2122, p 2123 : (2003) 2 SCC 15 : (2002) 9 Scale 734.
3554. *Dura-Line India Pvt Ltd v BPL Broadband Network Pvt Ltd*, AIR 2004 Del 186.

[s 34.8] Moneylender

One need not possess money lending licence if he or she intends to give money as hand loan. Merely because the petitioner is not a money-lender, it does not mean that the petitioner is not entitled to claim any interest which is agreed to be paid by the respondent.[3555]

[s 34.9] Inflation

There is a discernible tendency in some judicial pronouncements that the hazards of inflation of the future should be mitigated by a generous rate of interest. But there is no reason why this class of holders of funds, should alone receive separate treatment. Inflation is an economic and financial condition of general application. Inflation is a phenomena of which the court can take judicial notice. The court has to strike a balance between the competing equities.[3556] Its impact on any particular plaintiff has been neither more nor less as compared to everybody else; there is nothing special about it. Effects of inflation have to be neutralised — at least partially — by wiser investments. Interest is not awarded as damages; it is awarded to the plaintiff, only for his being kept out of the money which ought to have been paid to him. It takes care of the period between date of the claim and the date of realisation. It has nothing to do with the erosion that the fund suffers thereafter, owing to future inflation.[3557] It cannot be laid down as a rule of law, that interest above a particular rate is per se penal or excessive. Whether penal or excessive, is always a question to be decided on the facts and circumstances of a given case.[3558]

[s 34.10] The Three Divisions of Interest

Interest that may be awarded to a plaintiff in a suit for money may be divided into three heads, according to the period for which it is allowed, namely—

(a) interest accrued prior to the institution of the suit on the principal sum adjudged (as distinguished from the principal sum claimed);

(b) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, "at such rate as the court deems reasonable";

(c) further interest on the principal sum adjudged from the date of the decree to the date of the payment or to such earlier date as the court thinks fit, at a rate not exceeding six percent pa.

The award of interest can only be on the principal sum adjudged and not on the principal and interest as on the date of the decree. Also, the court has no discretion to award interest beyond the rate of six percent. But the court has still a discretion to award or not award any interest and in awarding interest, to determine at what rate it should be awarded, subject to the maximum of six per cent.[3559]

Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head.[3560] It applies only to the second and third heads. It

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3555. *C. Madhu v BVS Murthy*, AIR 2003 Kant 113.
3556. *UOI v Prince Muffakam Jah*, AIR 1995 SC 227 : (1995) 1 SCC 702 : (1994) 4 SCR 582.
3557. *Managing Director, Karnataka Power Corp Ltd v Geetha*, AIR 1989 Kant 104 (DB).
3558. *Chilamkuri Gowisankar Rao v Bhrugumalla Venkatappaya Sons and Co*, AIR 1973 AP 310 (DB).
3559. *BR & Sons v CPVK Chetty & Co*, AIR 1962 Mad 310. See also *RC Datta v Rajiv Anand*, AIR 2003 Del 199; *UOI v Parasuram*, AIR 2003 Kant 333.
3560. *Crewdson v Ganesh*, (1920) 32 Cal LJ 239, p 253; *Joseph v UOI*, AIR 1957 Ker 3.

has been held the right to interest prior to the suit is a substantive one where as *pendente lite*, it is one of procedure within the discretion of the court.[3561]

[s 34.10.1] Interest Prior to the Date of Suit

Under section 34 of the Code, no rate of interest has been fixed in respect of the interest payable prior to the institution of the suit on the principal sum adjudged and the interest payable on the principal sum adjudged from the date of the suit to the date of the decree. It is only in regard to further interest payable on the principal sum adjudged from the date of the decree to the payment, six percent interest has been fixed.[3562]

Interest can be awarded either under the statute or under an agreement between the parties or as per the usage and custom. If the claim of the interest does not fall on either of these categories, the plaintiff shall not be entitled to recover it from the defendant.[3563]

Pre-suit interest is referable to substantive law and can be subdivided into two sub-heads: (i) where there is a stipulation for the payment of interest at a fixed rate and (ii) where there is no such stipulation. If there is a stipulation for the rate of interest, the court must allow the rate upon the date of the suit, subject to three exceptions:

(i) any provision of law applicable to money lending transactions, or usury laws or any other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties;

(ii) if the rate is penal, the court must award at such rate as it deems reasonable; and

(iii) even if the rate is not penal, the court may reduce it if the interest is excessive and the transaction was substantially unfair.

If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except on proof of mercantile usage, statutory right to interest or an implied agreement.[3564]

Interest antecedent to suit is not a matter of procedure but a brief note on the subject will not be out of place. The law on the subject may be considered under the following two heads:

(i) where there is a stipulation for the payment of interest at a fixed rate;

(ii) where there is no stipulation at all for the payment of interest.

[s 34.10.1.1] Stipulation to Pay Interest

If there is a stipulation for the rate of interest, the court must allow that rate up to the date of the suit, however high it may be, subject to the two following exceptions:

(a) if the rate is penal, the court may award interest at such rate as it deems reasonable: and

(b) even if the rate is not penal, the court may reduce it if the interest is excessive and the transaction was substantially unfair.

3561. *Basant Kumar Misra v Roshanalal Shrivastava*, AIR 1954 Ngp 300 : (1954) ILR Nag 435.
3562. *APSRT C v B Vijaya*, AIR 2002 AP 441 (FB).
3563. *New India Assurance Ltd v Chinar Goods Carrier*, AIR 1998 Del 392.
3564. *Ravi Fabrics v Shaherbon Traders*, AIR 2003 Mad 192.

For the period prior to institution of suit, contractual rate of interest is mandatory. Court has no discretion in the matter.[3565] In a Bombay case, the defendant did not specifically deny the plaintiffs averment, that the defendant had agreed to pay interest at the rate of 12% pa. It was held that the award of interest at the rate of 12% (for the pre-suit period), was justified.[3566] In a Gujarat case, the bank sued for the recovery of a loan amount with interest. Defendants admitted the claim and prayed for instalments and reduction of interest rates. A "compromise" decree was passed by the trial court, despite the objections of the plaintiff. It was held that such a decree was not tenable. A decree which is not in conformity with the judgment, is liable to be revised and set aside.[3567] If the parties agree that in respect of amounts advanced for agricultural purpose certain rate of interest would be paid, it may not be proper for the court to interfere and reduce the amount of interest agreed to be paid by the parties. The court must always give utmost respect and sanctity to the contract entered into between the parties. Section 21A of the Banking Regulation Act, 1949, specifically states that the transaction should not be reopened by the court on account of excessive interest, it may not be proper on the part of the court to re-write the contract and hold that one of the parties is entitled to avoid the contract in the matter of payment of interest.[3568]

The Himachal Pradesh High Court has held that where fluctuating rate of interest was agreed to be charged, but the minimum rate of interest was agreed to be 19% pa with six monthly rests, the plea that the interest was not agreed to be paid at the said rate cannot be accepted.[3569]

[s 34.10.1.2] No Stipulation to Pay Interest

If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except in the following cases:

Mercantile usages.—Where it is allowed by mercantile usage;[3570] but such usage must be pleaded and proved.[3571] There was no contract between the parties of interest. The bills of the plaintiff were to some extent inflated and to some extent there was mistake, besides the incorrect measurements. The plaintiff had committed a breach of contract by not completing the building and had almost abandoned the work before its completion. In these circumstances, the Bombay High Court had held that the plaintiff cannot be granted interest prior to the date of institution of the suit.[3572]

3565. *State of India v B Gupta (Tea) Ltd*, AIR 1987 Cal 64 (DB); *Bank of Baroda v Shri Subhash Chander Dutta*, AIR 1995 J&K 99.
3566. *Oriental Coal Co Ltd v Mohanlal Kishanlal*, AIR 1984 Bom 174 (DB).
3567. *Union Bank of India, Bhavnagar v Narendra Plastics*, AIR 1991 Guj 67 (DB).
3568. *K Pushpangadan v Federal Bank Ltd*, AIR 1999 Ker 421 (DB).
3569. *HP State Industrial Dev Corp Ltd, Shimla v Gobind Pharm Chem Pvt Ltd*, AIR 2007 HP 3 : (2006) 2 Shim LC 300.
3570. *Rayalamma v Butchirammya*, AIR 1942 Mad 429 : (1942) ILR Mad 464; *Doolubdas v Ramalall*, (1850) 5 Moo Ind App 109, p 136 (Bombay); *Juggomohun v Manichand*, (1859) 7 Moo Ind App 263 (Cal); *Juggomohun v Kaisreechand*, (1862) 9 Moo Ind App 260 (Cal); *BN Railway Co Ltd v Ruttanji*, AIR 1938 PC 67 : (1938) ILR 2 Cal 72 : (1938) 65 IA 66.
3571. *Hirabai Gendalal v Bhagirath Ramchandra & Co*, (1945) ILR Bom 819 : AIR 1946 Bom 174 : 47 BLR 808; *Mahamad Abdul Hasim v Srimat Jagatram*, (1941) ILR All 777 : AIR 1942 All 96; *Dinanath v Divanchand*, (1930) 32 Bom LR 404 : AIR 1930 Bom 444.
3572. *Dinshaw and Dinshaw (M/s) v Indoswe Engineers Pvt Ltd*, AIR 1995 Bom 180.

[s 34.10.1.3] Statutory right to interest

Interest is payable where a right to it, or an authority for its allowance or payment, is conferred by statute.[3573] In the case of sale of goods, even if there is no stipulation in the contract to pay interest, the vendor is entitled to interest from the date of payment of the price till the date of the suit under section 61(2)(a) of the Sale of Goods Act, 1930.[3574] Section 80 of the Negotiable Instruments Act, 1881 provides that when no rate of interest is specified in a promissory note or bill of exchange, the court shall, notwithstanding any agreement relating to interest between the parties, award interest at the rate of six percent pa from the date on which the amount claimed became due and payable. Similarly, the Interest Act 32 of 1839 (now replaced by Interest Act, 1978) enacts that where there is no stipulation to pay interest, but the amount claimed is a sum certain (as distinguished from unascertained damages), *and is payable at a certain time* by virtue of some "written instrument", the court,[3575] may allow interest at a rate not exceeding the current rate of interest *from the date on which the amount became payable*. If no time is fixed for the payment of the amount, the court may award interest at the rate aforesaid *from the time the creditor demands payment in writing intimating* to the debtor that interest will be claimed from the date of such demand up to the date of payment.[3576] The provisions of the Interest Act 32 of 1839 (now replaced by Interest Act, 1978) are in the main a reproduction of the provisions of Lord Tenterden's Act [3 and 4 Wm 4, c 42, section 48]. The House of Lords in *London, Chathan and Dover Railway Co v South Eastern Railway Co*,[3577] the modern leading case on interest, held that the "sum certain" within the meaning of that Act must be a certain sum which is one absolutely and in all events due and not a mere provisional payment to be made by one party to the other. Interest Act of 1839, section 1 contains a proviso that "interest shall be payable in all cases in which it is now payable by law." This proviso applies to cases in which the Court of Equity exercises jurisdiction to allow interest.[3578] But to invoke the rule of equity the existence of circumstances attracting equity jurisdiction has to be established.[3579] In such cases, it has been held that interest could be awarded by way of damages.[3580] It is settled law that interest can be allowed only if it is supported by law of contract. There is no case that as per the terms of the contract, plaintiff are entitled to get interest. Interest on the suit claim can be granted under section 34 of the CPC only from the date of the suit. As for the interregnum, the only law which could be applicable is the Interest Act, 1978.[3581] To deny post litigation interest would amount to depriving the claimant of compensation for delay in obtaining relief for no fault of his. We hold that even though section 34 of the Code of Civil Procedure, has not been expressly made applicable to the proceedings before the Claims Commissioner under the Indian Railways Act, 1890 (now replaced by Interest Act, 1978), there is no reason to hold that the principles of section 34 would be inapplicable.[3582] There exists no specific bar to the applicability of

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3573. *UOI v Watkins Mayor & Co*, AIR 1966 SC 275.
3574. *State v Ajit Kumar*, AIR 1977 Cal 273 : 81 Cal WN 36.
3575. This does not apply to an executing court; *Hogarth Shipping Co Ltd v Mitsui Bussan Kaisha Ltd*, (1926) 53 Cal 735, (1926) AC 1119; *Vithal Dass v Rupchand*, AIR 1967 SC 188 : (1966) Supp SCR 164; *Deonandan v Ramdayal*, AIR 1971 AP 102; *Mahavir Prasad v Durga Datt*, AIR 1961 SC 990 : (1961) 3 SCR 639.
3576. *Bajranglal v Anandilal Ram Chandra*, (1944) Nag 101 : (1944) AN 124.
3577. *London, Chathan and Dover Railway Co v South Eastern Railway Co*, (1893) AC 429.
3578. *Raja Kamakshya Narain Singh v Bhurmull*, ('46) AP 154. Section 65 IA 66, *supra*; *Maine and New Brunswick & Co v Hart*, (1929) AC 631 relied on.
3579. *State v New India Sugar Mills*, 1977 AP 95.
3580. *Joseph v UOI*, (1957) A Ker 3; *Hindustan Commercial Bank v Jagtar Singh*, 1974 AIR P&H 208.
3581. *CT Xavier v P.V Joseph*, AIR 1995 Ker 140 (DB).
3582. *UOI v Laxmi Pati*, AIR 1995 MP 90 (DB).

the CPC in section 18 of the Railway Claims Tribunal Act, 1987. Rather it unshackles the tribunal from the procedural laws mandated in the Code while at the same time maintaining the requirement of compliance of natural justice. Thus, section 34 of the Code continues to be vested in the authority of the Railway Claims Tribunal and it has power to award interest *pendente lite* on compensation paid by Railways.[3583]

In *Trojan Co Ltd v Nagappa Chettiar*,[3584] interest was allowed on money obtained by a stock-broker while acting on behalf of a constituent, as he stood in a fiduciary relationship to him. But apart from rules of equity, interest is not payable on damages prior to suit, while after suit, it is in the discretion of the court.[3585] In a writ petition, the Supreme Court directed the bank, to deposit certain amount in the cash credit account of petitioner. The bank deposited the said sum accordingly in cash credit account. It was held that petitioners would not be entitled to any interest on the said sum. Cash credit account is in the nature of a current account and no interest is payable in this account.[3586] Where, in a suit for rent, the lease was found to be invalid, and a decree was granted for damages for use and occupation, it was held that no interest could be awarded thereon prior to suit.[3587] Interest on compensation under the Railway Accident and Untoward Incidents (Compensation) Rules 1990 is payable from the date of filing of the petition before the tribunal.[3588]

The Kerala High Court has held in the undernoted case that when no rate of interest is specified in the loan instrument, the creditor can claim interest as provided under section 80 of the Negotiable Instrument Act only up to the date of filing of the suit and the interest *pendente lite* is subject to discretion of the court as provided under section 34 of the Code.[3589] However, a Division Bench of the Andhra Pradesh High Court has held that liability to pay interest is not provided in the Railways Act, 1989 (section 124-A). It is discretionary on the part of the tribunal to grant interest while determining compensation. But liability towards interest can be fastened only on the date of determination of the compensation, and not from the date of filing application in the tribunal.[3590]

Tribunals under the Railway Claims Tribunal Act, 1987 are bound by the principles of natural justice. Since grant of interest on decretal amount under section 34 of the Code is also based on the principles of natural justice, it was held by a Division Bench of Calcutta High Court that Railway Tribunal should award interest on determined sum from the date of application till date of deposit as the rate given by a National Bank for term deposit of one year or more.[3591]

An important area towards which the attention of the Supreme Court was direct is the amount of compensation payable under the Railway Accident (Compensation and Untoward Incidents) Rules, 1960. It is common knowledge that amount payable as compensation is revised from time to time. If a victim or claimant is paid compensation as was prescribed on

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3583. *Prasant Kumar Choudhury v UOI*, AIR 2007 Ori 33 : 2008 ACJ 685.
3584. *Trojan Co Ltd v Nagappa Chettiar*, AIR 1953 SC 235 : (1953) SCR 789 : (1953) SCJ 345.
3585. *Mahavir Prasad v Durga Dutto*, AIR 1961 SC 990 : (1961) 3 SCR 639 : (1961) 1 SCJ 569; *UOI v Khandelwal Bros*, AIR 1975 Mad 389; *VA Thevar v Madurai Municipality*, AIR 1975 Mad 77 : (1975) 1 Mad LJ 97.
3586. *Raneagunj Coal Association Ltd v UOI*, AIR 1990 SC 1879.
3587. *Jai Narain v Bisewar Prasad*, AIR 1954 Pat 304.
3588. *UOI v M Thankaraj*, AIR 2000 Ker 91 (DB).
3589. *Thankachan v Catholic Syrian Bank Ltd*, AIR 2007 (Digest of Cases) 6 (Ker) : 2006 (3) Banker's Journal 212 : 2006 3 Ker LT 53.
3590. *UOI v Konduru Venkata Reddy*, AIR 2008 AP 211 : (2008) 5 Andh LT 172.
3591. *Mainura Bibi v UOI*, AIR 2009 Cal 214 : 2009 (81) All Ind case 606 (DB).

the date of accident, the amount he will receive after settlement of his claim over a long period of litigation before Tribunal, would be a mere pittance. In the case of *Rathi Menon*,[3592] the Supreme Court held that compensation to be paid by Railway Administration must be fixed as per what the rules prescribed at the time of making the order and not in terms of the money value which prevailed on the date of the accident. The observations of KT Thomas J in the above case is an example of humanitarian approach to interpretation:

> 28. The unjust consequence resulting from the interpretation which the Division Bench placed can be demonstrated in another plane also. If a person who sustained injury in a railway accident or in an untoward incident was disabled from making an application immediately and he makes the application a few years hence, is he to get the compensation in terms of the money value which is prevailed on the date of the accident? Suppose a Tribunal wrongly dismissed a claim after a few years of filing the application and the claimant approaches the High Court in appeals. As it happens quite often now, some High Courts could take up such an appeal only after the lapse of many years and if the appeal is decided in favour of the claimant after so many years, what a pity if the amount awarded is only in terms of the figure indicated on the date of the accident.
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> 29. From all these, we are of the definite opinion that the Claims Tribunal must consider what the rules prescribed at the time of making the order for payment of the compensation.

Relying on the above decision, the Supreme Court reaffirmed the view in a subsequent decision.[3593]

Implied agreement.—An agreement to pay interest can be implied from the course of dealing between the parties.[3594] For cases in which courts of equity allow interest, see *Bengal Nagpur Railway Co v Rattanji Ramji.*[3595]

The law was thus summed up by the Supreme Court in *Mahavir Prasad v Durga Dutto*:[3596]

> Interest for a period prior to the commencement of the suit is claimable either under an agreement or usage of trade or under a statutory provision or under the Interest Act, for a sum certain where notice is given. Interest is also awarded in some cases by Courts of equity.

It has accordingly been held that interest is not payable on tax which has not been paid unless the statute provides for it.[3597] The tribunal, under the MP Town Improvement Trust Act, 1961, assessing compensation in respect of compulsory acquisition of land, though having the characteristics of a civil court, has been held not justified in awarding interest from the date of delivery of possession till the determination of the compensation. This is so because neither this section nor the MP Act authorises award of such interest.[3598] In an Andhra Pradesh case, the petitioner — an advocate—accepted the full amount payable to him by the state government as his legal remuneration, without protest for the non-payment of interest at the rate of 12% pa on the allegedly delayed payment. The payment was made by the state government without following the elaborate procedure otherwise prescribed for the sanction of individual bills and for the scrutiny of certificates, etc. It was held that the petitioner cannot subsequently claim such interest at the rate of 12%pa. It was all the more so, when in the government

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3592. *Rathi Menon v UOI*, AIR 2001 SC 1333 : (2001) 3 SCC 714.
3593. *N Parmeswaran Pillai v UOI*, AIR 2002 SC 1834 : (2002) 4 SCC 306.
3594. *Wiollmot v Gardner*, [1901] 2 Ch 548; *Re Dunchan*, [1905] 1 Ch 307.
3595. *Bengal Nagpur Railway Co v Rattanji Ramji*, 65 IA 66 ; (1938) 2 Cal 73 : 42 Cal WN 985.
3596. *Mahavir Prasad v Durga Dutto*, AIR 1961 SC 990 : (1961) 3 SCR 639 : (1961) 1 SCJ 569; *Suganchand v Balchand*, AIR 1952 Pat 489; *UOI v Khetra Mohan*, AIR 1960 Cal 190; *Rajendra Prasad v Gaya Prasad*, AIR 1975 Pat 312.
3597. *Mattancheri Municipality v Saheed Oil Mills*, (1957) ILR Ker 368.
3598. *Laxmichand v Indore Improvement Trust*, AIR 1975 SC 1303 : (1975) 1 SCC 565.

orders prescribing the scale of fees, there was no provision under which he could be said to be entitled to the payment of interest on delayed payment.[3599] In another Andhra Pradesh case, the plaintiff, owner of certain theatres, lent money to get a motion picture released from the producer for exhibition in the plaintiff's theatres. The condition was that the defendants (exhibitors) would deliver all prints for exhibition in the theatres of the plaintiffs and sister concerns. It was held that plaintiffs could not claim interest. In the first place, the agreement did not provide for interest. Secondly, such evidence as was led by plaintiff did not show that there was any such usage.[3600] In another case the Andhra Pradesh High Court held that where there was no agreement between parties for payment of interest *pendente lite*, the order of the trial judge denying interest for the relevant period was held to be proper.[3601]

In the *London, Chatham and Dover Railway Company's* case, the House of Lords held that interest cannot be given by way of damages for detention of a debt. The same view has been taken by the Privy Council in *Bengal Nagpur Railway Co v Ratanji Ramji*.[3602]

[s 34.10.2] Interest from Date of Suit to Date of Decree

The rate of interest from the date of the suit to the date of the decree is in the discretion of the court,[3603] and this discretion is not excluded even if a fixed rate is mentioned in the contract as payable up to realisation.[3604] But though the rate of interest for the aforesaid period is discretionary, the court should, in the exercise of that discretion, award interest at the contract rate, unless it would be inequitable to do so.[3605] A debt advanced against a negotiable instrument is governed by the Negotiable Instruments Act, 1881 till its nature is converted into a decretal debt. That being so, interest for the period between the date of the suit and decree would be governed by section 79 of the Negotiable Instruments Act, 1881 and not by this section.[3606] As to compound interest, (see note under the heading "Compound Interest") and the under mentioned cases.[3607] The court may, under this head, award interest in a suit for money, although interest is not specifically asked for in the plaint.[3608]

3599. *P Ram Reddy v State of Andhra Pradesh*, AIR 1990 AP76.
3600. *Premjit Theatres, Secunderabad v Rashi Mehata & Co*, AIR 1990 AP 272 (DB).
3601. *Kusa Lingaiah v Pandiri Laxmaiah*, AIR 2006 AP 121 : (2006) 2 Andh LT 228.
3602. *JH Pattinson v Bindhya Debi*, (1933) ILR 12 Pat 2161; *UOI v WP Factories*, AIR 1966 SC 394 : (1966) 1 SCR 580; *Shamlal v State*, AIR 1968 All 139 : (1967) ILR 2 All 129; *Mangalji v State*, AIR 1971 Raj 167; *ST Thimniappa v SL Prasad*, AIR 1978 Kant 251.
3603. *Hakim Rai v Ganga Ram*, AIR 1942 PC 61 : (1942) 47 Cal WN 113; *Gajadhar Marwari v Baidynath Mundal*, AIR 1950 Pat 379l : (1950) 29 Pat 545; *Anandram Mangturam v Bholaram Taunmal*, AIR 1946 Bom 1 : 47 Bom LR 719; *Panna Lal v Nihal Chand*, AIR 1922 PC 46 (PC) : (1922) 26 Cal WN 737; *Binapani v Rabindranath*, AIR 1959 Cal 213.
3604. *Magniram v Dhowat Roy*, (1886) ILR 12 Cal 569; *Carvalho v Nurbibi*, (1879) ILR 3 Bom 202; *Umes Chaunder v Fatima*, (1891) ILR 18 Cal 164 : 17 IA 201. The decision to the contrary in *Ramachandra v Devu*, (1889) ILR 12 Mad 485, is no longer law.
3605. *Orde v Skinner*, (1880) ILR 3 All 91, pp 106–07 : 7 IA 196; *Bhagwanti v Atma Singh*, AIR 1934 Lah 32.
3606. *Utsav Lal Gupta v Mohan Bross*, AIR 1975 Raj 236.
3607. *M.V Mahalinga Aiyar v Union Bank Ltd, Kumbakonam*, AIR 1930 Mad 216; *Kaluram v Chimniram*, AIR 1934 Bom 86 : (1934) 16 Bom LR 68.
3608. *Yadaorao Ganpatro Kadu v Ramrao Balashabe Dhote*, AIR 1943 Ngp 240 : (1943) ILR Nag 555; *Rup Ram v Harphu*, AIR 1921 Lah 125 : (1921) 2 Lah 256; *Lala Chhajmal Das v Brijbhukan Lal*, 22 IA 199; *Chatrabhuj v Ambar Singh*, AIR 1931 Bom 549 : (1931) ILR 55 Bom 657; *Parashram v Secretary of State*, AIR 1932 Bom 319 : (1932) 34 Bom LR 129.

It is well-established that no interest can be allowed on damages for any period prior to the suit,[3609] but there is a conflict of decisions whether interest can be allowed under this section on damages from the date of the suit, it being held in some cases that it can be allowed,[3610] and in some that it cannot be allowed.[3611]

Where the high court has refused to exercise its discretionary power to allow interest from date of suit, the judicial committee as a rule will not interfere.[3612] An application under section 31(1) of the State Financial Corporations Act, 1951 is something akin to an application for post-decree attachment. In the matter of future interest, the corporation could not have been put to more disadvantageous position than an ordinary creditor, in whose case the court could have awarded future interest from the date of the filing of the suit until realisation under section 34 of the CPC.[3613] A bank advanced a loan for the purchase of a truck. The minimum rate of interest was fixed at 13.5%. Defendant failed to pay the amount in terms of the agreement of loan. A suit was filed and the hypothecated property (namely, the truck) was attached by the order of the court. The defendant, in order to be released the attached vehicle, admitted his liability and offered to pay the full amount. On such admission, the suit was decreed without costs and without interest. It was held that there could not be any justification for relieving the defendant from liability to pay interest on the outstanding amount from the date of filing the suit until the date of payment of the amount which he was bound to pay even in terms of the agreement. Refusal to award interest affects the right of the claimant.[3614] The court has no discretion to grant different rate of interest than the contractual rate of interest from the date it is due and payable from the date it is actually paid. In case of commercial loans of the banks, section 34 is to be applied in the context of circulars/directions issued by the Reserve Bank of India. Also, it cannot be disputed that when a bank advanced loan or interest with quarterly rests, the interest is worked at the close of every quarter and added towards the outstanding balance for the purpose of computation of interest after deducting the amount paid by the customer, if any. In a case decided by the Supreme Court, the appellant was entitled to refund of the amount paid as excise duty on the price of packing material used for packing superfine cement which (according to the appellant), was paid under protest. It was held that the letter was in the nature of a protest. Therefore, the question of limitation did not arise for refund of the duty. The appeal court directed a refund of the amount. The appellant was directed to pay interest at the rate of six per cent from the date of refusal of refund, with costs of the appeal.[3615] According to the High Court of Andhra Pradesh, even as to interest *pendente lite*, the court cannot grant a higher rate of interest than what was contracted between the parties. The area is covered either by contract, or by statute. Section 34(1) of the CPC regulates the grey area. By implication, it is either the contractual rate or less, but not a rate in excess thereof. But, as no appeal or cross-objections were filed by the respondent, interference by the high court was not called for.[3616] If a plaintiff, suing for specific performance of an agreement

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3609. *Framji v Commr of Customs*, (1870) 7 Bom HCR 89; *Rutnessur v Hurrish Chunder*, (1885) ILR 11 Cal 221, p 225; *Dominion of India v Raj Bahadur Seth Bikhraj*, AIR 1957 Pat 586; *Hiranandani v BBC&D Mfg. Co*, AIR 1969 Bom 373; *Gujarat Electricity Board v SA Jais & Co*, AIR 1972 Guj 192; *Mangalji v State*, AIR 1971 Raj 167; *Vishnu Sugar Mills v Rameshwar Jute Mills*, AIR 1970 Pat 323.
3610. *Pannalal v Mukhram*, AIR 1924 Cal 637 : (1924) 39 Cal LJ 77, pp 84–85; *Ramalinga v Gokuldas*, AIR 1926 Mad 1021 : (1926) 51 Mad LJ 243.
3611. *Crewdson v Ganesh*, (1920) 32 Cal LJ 239.
3612. *Sourendra Mohan v Hari Prasad*, AIR 1925 PC 280 : (1926) ILR 5 Pat 13 : 52 IA 418.
3613. *Himachal Pradesh Financial Corp, Simla v Tourist Hotel and Restaurant*, AIR 1990 HP 27 (FB).
3614. *United Commercial Bank, Silchar v Satish Chandra Ghosh*, AIR 1991 Gau 19.
3615. *India Cements Ltd v Collector of Central Excise*, AIR 1989 SC 1496 : (1989) 2 SCC 676 : (1989) 2 SCR 715 : (1989) 1 Scale 1058 : JT 1989 Suppl SC 137.
3616. *Union Bank of India v P Krishnaiah*, AIR 1989 AP 211.

of sale, cannot be awarded specific performance, he should at least be awarded interest against the defendant, who has himself enjoyed use of the earnest money deposited by the plaintiff.[3617]

Minimum rate of interest in case of compensation for accidents is 12% pa from the date of application for compensation "as filed in the tribunal".[3618] The principal sum on which interest can be awarded, is the principal sum as adjudged by the court and not the principal sum stated to have been advanced. Interest accrues on the amount which the court determines, after adjudging the rights of the parties.[3619] Ordinarily, interest *pendente lite* should be granted under section 34 of the CPCunless there are cogent reasons for depriving the plaintiff of the interest during trial.[3620] Court is not bound to award interest in every case. If interest at very heavy rate has been charged on the initial amount of the loan, and for the subsequent period, court taking that into account, awards interest at only three percent, the order cannot be said to be unreasonable.[3621] Where proceedings for the acquisition of land are withdrawn, then compensation becomes payable under section 48 of the Land Acquisition Act, 1894 which shall be determined by the collector "for the damage suffered by the owner in consequence of the notice (of acquisition) or of any proceedings thereunder". Section 48 is silent as to interest on the amount of compensation. The Gujarat High Court has held that interest from the date of application for the damages can be awarded on equitable grounds, but section 34 of the CPCis not applicable.[3622]

A court sale which was defective for mistake of the court, was set aside. It was held that the auction purchaser (at whose instance the sale was set aside for gross irregularity, by overstating the upset price) was entitled to interest, not from the date of suit, but from the date of the order of the trial court to the date of realisation.[3623]

Suit was filed for the recovery of money by a bank against the widow and daughter of a debtor, who were guarantors for the debt. No attitude was shown by the widow or daughter to disown the loan. No sufficient financial resources were available to them, other than selling off the mortgaged house. Discretionary order of the court declining interest *pendente lite* and post-decree interest was held to be sustainable. *Pendente lite* as well as post-decree interest is in the nature of compensation or damages, which the court may award to the plaintiff for being kept out of the money due to him. Whether one looks to the general provisions of section 34 of the CPC or to those of O XXXIII, rule 11 (which are specially applicable to mortgage suits), the relevant provisions are patently governed and controlled by the expression "may" and, therefore, it can be concluded from these provisions, that the award of such interest is not obligatory, but only discretionary and the court may, or may not, award such interests.[3624] Where a pro-note is silent as to the rate of interest, the plaintiff is entitled to interest only from the date of suit till the date of decree and till realisation at the rate of six percent. Acceptance of the defendant, of calculation of interest at 18%, does not necessarily imply acceptance of that rate by him.[3625] *Pendente lite* interest should not exceed the contractual rate. Subject to that, it is in the discretion

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3617. *H Paramsivam v FCI*, AIR 1989 AP 124.
3618. *Jagbir Singh v General Manager, Punjab Roadways*, AIR 1987 SC 70; *State v Ashadevi*, AIR 1989 AP 97.
3619. *Kalyanpur Coal Storage v Sohanlal Bajpai*, AIR 1990 All 218 (DB); *Bank of India v Harish Chandra Srivastava*, AIR 1998 MP 243 (DB).
3620. *Satish Solvent Extractions Pvt Ltd v New India Assurance Co Ltd*, AIR 1996 Bom 293 (DB).
3621. *Kalyanpur Coal Storage v Sohanlal Bajpai*, AIR 1990 All 218 (DB).
3622. *Chinubahai Nanalal v Addl Special Land Acquisition Officer*, AIR 1989 Guj 123.
3623. *P Janikamma v Bulleyya*, AIR 1985 AP 234.
3624. *United Bank of India v Rashayan Udyog*, AIR 1990 Cal 146.
3625. *Syndicate Bank v NC Kalyani Raghavan*, AIR 1983 Mad 254.

of the court. It need not be awarded at the contractual rate.[3626] *Pendente lite* rate of interest is in the court's discretion. Court need not record reasons. The question whether discretion has been judiciously exercised or not, will have to be determined on the facts of each case.[3627] The rate of interest *pendente lite* should be at the contract rate, unless there are circumstances which would disentitle the plaintiff to have the same. The burden is on the defendant to show such circumstances.[3628] The court must grant some interest *pendente lite* when it passes a decree for the payment of money. It is only the rate of interest which is in the discretion of the court.[3629] In a Calcutta case, the suit was instituted in 1959. It was decreed in 1969. An appeal preferred in 1970 remained pending for 17 years. The trial court had not awarded interest *pendente lite*. The high court directed payment of interest at five per cent for 15 years.[3630]

[s 34.10.3] Interest from Date of Decree to Date of Payment

The rate of interest from the date of the decree to the date of payment is also in the discretion of the court. The plaintiff getting the security of a decree has his interest reduced in the generality of cases.[3631] If in a non-commercial transaction the interest awarded is 18% pa by the court below, the higher court can reduce it to six per cent pa.[3632] Where the rate of interest charged and decreed was 24%, the Lahore High Court refused to allow interest after decree.[3633] If the court awards interest from the date of the decree but no rate is specified, the decree-holder will be entitled to interest at the court rate, which is usually six percent.[3634] Although the court rate of interest is usually six percent if the court were to postpone the payment of decretal amount or grant instalments for such payment under O XX, rules 11 (1) and (2), this section would cease to apply and interest can be awarded at higher rate.[3635] But if no such interest is awarded by the decree, it will be deemed to have been refused;[3636] even though the omission happens to be accidental;[3637] see sub-section (2). A provision for future interest in a decree though the judgment is silent about it, it is valid and cannot be challenged on the ground that the decree is at variance with the judgment.[3638] The amounts sought to be realised by the bank from the defendants were stated from time-to-time in the notices issued by it. It was held that "the principal amount" found due, not only meant the principal as such, but also the amount due on interest which had become part of the principal amount as per the calculation of the bank.[3639] The decree which was put to execution, did not contain any order or direction for the payment of any interest on the amount which was payable to the decree-holder, consequent on the declaration made by the court decreeing the government servant's suit. It was held that in the absence of pleadings and directions in the judgment or decree,

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3626. *West Bengal Financial Corpn v Bertram Scott (Ltd)*, AIR 1983 Cal 381; *State Bank of India v B Gupta (Tea) Ltd*, AIR 1987 Cal 64 (DB).
3627. *State Bank of India v B Gupta (Tea) Ltd*, AIR 1987 Cal 64 (DB).
3628. *K Appa Rao v VL Varadaraj*, AIR 1981 Mad 94.
3629. *West Bengal Financial Corp v Bertram Scott (L) Ltd*, AIR 1983 Cal 387 (DB).
3630. *LIC of India v Kumar Purnandu Nath*, AIR 1988 Cal 311.
3631. *Umesh Chunder v Fatima*, (1891) ILR 18 Cal 164, 180 : 17 IA 201.
3632. *Rajni Kumar v Suresh Kumar Malhotra*, AIR 2003 SC 1322.
3633. *Bulaki v Pesricha*, AIR 1928 Lah 811.
3634. *Rani Lalun v Behari*, (1871) 7 Beng LR App 30; *LIC v NC Borl*, AIR 1974 Cal 339.
3635. *Gordhandas v V Khetsi*, AIR 1967 Guj 276.
3636. *Ambi v Srideri*, AIR 1924 Mad 102 : (1923) 45 Mad LJ 687 (decree silent as to interest on costs, see section 35(3)); *State of Uttar Pradesh v Reishma Devi*, AIR 1974 All 257.
3637. *Thirugnanavalli v Venugopala*, AIR 1940 Mad 29.
3638. *UOI v A. Venkataiah*, AIR 1975 Mad 29.
3639. *Jagdamba Rice Mills v Oriental Bank of Commerce Karnal*, AIR 1990 P&H 60; *PNB v Vidya Harbery*, AIR 1999 HP 24 (DB).

the executing court cannot award interest. The right of the decree-holder to obtain relief is determined in accordance with the terms of the decree.[3640] The bank which had advanced a loan, computed interests at quarterly rests and, after every quarter, added interest to the last balance, treating that balance as the principal sum for the next quarter for computing interest. It was held that in such a case, the "principal sum" for the purpose of section 34, would be the sum so arrived at, that is to say, the sum total of the original advance and the unpaid interest.[3641] According to the Calcutta High Court, interest *pendente lite* and interest for the post decretal period—

(a) are in the nature of compensation to the plaintiff, for being kept out of the money due to him; and

(b) are discretionary as indicated by the word "may".[3642]

Award of interest at 1.5% per month from date of filing of the suit till date of actual realisation of amount, is null and void. The provisions of section 34 are not procedural in nature and, in fact, deal with the jurisdiction of the court to direct payment of interest. To the extent the provision has been ignored, the decree is rendered null and void.[3643] With regard to the rate of interest awarded from the date of decree to till realisation, because the first appellate court had no discretion to award interest exceeding the rate of six percent pa from the date of decree as, admittedly, the amount adjudged as payable by the appellant was not of a commercial transaction as is clear from the case set up by the parties and as such, that requires to be restricted to 6% pa only. To hold so, no detail discussion is necessary.[3644] The Patna High Court has held that where interest from the date of the decree till payment is refused, reasons for such refusal should be given.[3645] But this would create an anomaly for, if the refusal is explicit, reasons would have to be given; while if it is implicit, no reasons would have to be given since silence is presumed to be refusal.

In a case decided by the Privy Council in 1878 it was held that when the decree is silent about future interest it cannot be recovered in execution proceedings but the decree-holder may by suit recover damages for the detention of the decretal amount.[3646] That was a case under the Code of 1859. Section 193 of that Code which relates to interest did not contain any such provision as is contained in sub-section (2) of the present section. This provision was first introduced by Act 7 of 1888. However, in cases decided under the present Code the Calcutta High Court allows interest by way of damages for wrongful detention of money due, irrespective of the provisions of the Interest Act.[3647]

[s 34.11] Interest in Mortgage Suits

The question is, if the suit was filed as a mortgage suit and a decree is made on that basis, while awarding interest, whether the court was required to apply the provisions of section 34 or O XXXIV, rule 11, of the CPC.[3648]

3640. *State of Punjab v Krishna Dayal Sharma*, AIR 1990 SC 2177 : (2011) 11 SCC 212; *Mehar Chand v Tulsi Ram*, AIR 1996 P&H 195.
3641. *Syndicate Bank v West Bengal Cement Ltd*, AIR 1989 Del 107.
3642. *United Bank of India v Rashyan Udyog*, AIR 1990 Cal 146 (DB).
3643. *Taria v Amar Singh*, AIR 1991 P&H 187.
3644. *UOI v Parasuram*, AIR 2003 Kant 333.
3645. *R Shahi v Bala Prasad Motani*, AIR 1978 Pat 91.
3646. *Seth Gokul Das v Murli and Zalim*, (1878) 3 Cal 602 : 5 IA 78.
3647. *Khetra Mohan v Nishi Kumar*, (1918) 22 Cal WN 488; *Naresh v Krishna*, (1926) 53 Cal 42 : (1926) AC 505; *Kumar Chandra v Narendra Nath*, (1930) 57 Cal 953 : (1930) AC 357.
3648. *Canara Bank v Chikkaswamy*, AIR 2002 Kant 100 (DB).

The law on the subject is now codified in O XXXIV, rule 11. The rate of interest in mortgage suits is determined by O XXXIV and not by this section,[3649] but a personal decree under O XXXIV, rule 6, is a money decree and so is governed by this section.[3650] In a dispute under section 90 of the Tamil Nadu Co-operative Societies Act, 1983, the Arbitration Tribunal awarded interest at the rate of 18%, but the Co-operative Tribunal exercising powers under section 152 of the Act reduced the interest rate to 6% pa, the Madras High Court held that the discretion exercised by the Co-operative Tribunal was proper.[3651] In a suit on mortgage, the court is bound to decree interest, *pendente lite*, on the mortgage debt, though it has got a discretion as to the rate at which it should be allowed.[3652] Interest payable in mortgage suits is governed not by section 34, but by O XXXIV, rule 11, of the CPC.[3653] The liability to pay interest under a decree is wholly different from the liability to pay interest on the contract on which the decree is based. It has, accordingly, been held that the judgment-debtor is not absolved from liability to pay interest under the decree, though, no interest was payable on the debt under the provisions of the Burma Accrual of Interest Act, 1947.[3654] In case of mortgage suits, the court has a discretion under O XXXIV, rule 11 of the CPC for not granting contractual rate of interest, for the period after the suit.[3655]

[s 34.12] This Section and the Interest Act, 1978

The general statutory provisions in regard to the award of interest by a court are contained in the Interest Act, 1978 and the CPC. Both the Interest Act, of 1839 and the Interest Act of 1978 provide for the award of the interest up to the date of institution of the proceedings. Neither the Interest Act, 1839 nor the Interest Act, 1978 provides for the award of *pendente lite* interest. The law relating to the award of interest *pendente lite* is provided in section 34 of the CPC. Section 34, however, applies to arbitrators in suits for the simple reason that where a matter is referred to arbitrator in a suit, the arbitrator will have all the powers of court in deciding the dispute.

In the absence of any contract regarding payment of interest the plaintiff would be entitled to interest "at the current rate" as defined in section 2(6) of the Interest Act, 1978.[3656]

The provisions of Interest Act, 1978 debar award interest upon interest.[3657]

Where the earnest money was refunded to a party after an inordinate delay of 10 years, the Patna High Court held that the condition in the contract that no interest would be payable

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3649. *Jagannath v Surajmal*, 54 IA 1 : AIR 1927 PC 1; *Chhote Lal v Raja Mohammad*, (1933) ILR 8 Luck 315 : AIR 1933 Oudh 128; *KV Satyanarayana v State Bank*, AIR 1975 AP 113; *NM Veerappa v Canara Bank*, (1998) 2 SCC 317.
3650. *Firm Daulat Ram Vaidya Prakash v Sodhi Gurbaksh Singh*, AIR 1949 EP 213; *Narasimhamurthy v Jagannaikulu*, AIR 1959 AP 619.
3651. *Nasiyanur Co-op Housing Society Ltd v V Kolandayammal*, AIR 2010 Mad 104 : (2010) 1 Mad LJ 295.
3652. *Nilmani v Baidyanath*, AIR 1957 Cal 140.
3653. *Executive Engineer (Irrigation) Galimela v Abhadula Jena*, (1988) 1 SCC 418; *Everest Industrial Corpn v Gujarat State Financial Corp*, (1987) 3 SCC 597; *Nand Lal Bijariya v United Commercial Bank*, 2007 (4) Civil Court Cases 354 (Raj).
3654. *Raman Chettair v Raman Chettair*, AIR 1957 Mad 680 : (1957) ILR Mad 75 : (1957) 2 Mad LJ 103 : 70 LW 634.
3655. *State Bank of Mysore v GP Thulasi Bai*, ILR 1985 Kar 2976; See also *Canara Bank v Chikkasamy*, AIR 2002 Kant 100 (DB).
3656. *Yogesh Kant Bhageria v Deepak Jain*, AIR 2000 Del 42 (DB).
3657. *State of Bihar v Mijaj International*, AIR 2004 Jhar 29.

on earnest money cannot be invoked by the State. That would give arbitrary advantage to the State causing undue loss to the other party and unjust enrichment to state.[3658]

The Calcutta High Court has held that clause in general conditions of contract prohibits arbitrator from entertaining any claim of interest, but this will not debar a party from claiming interest for pre-reference period and post-award interest.[3659] It was observed in the case that once a reference commences, the delay thereafter is not within the control of the party making a claim for interest. The disputes are frozen at the time immediately prior to reference and the arbitrator proceeds to adjudicate upon the claim and find the principal sum due. Such principal sum would be deemed to have become payable at the time the disputes were frozen. The time taken for the reference to be concluded and the further time taken for the award-debtor to make payment on the basis of the adjudication should not be held against the award-holder and he should be compensated for receiving the money not on the date that he is found to have been entitled to the sum but on a much later date. This is the principle that is recognised in section 34 of the Code.

In a case under the Railways Act, 1989 and Railways Accident and Untoward Incidents (Compensation) Rules, 1990, the Gujarat High Court held that there is no specific provision in the Railways Act for grant of interest, but the principles of section 34 of the Code and Section 3 of the Interest Act, 1978 could be invoked to award interest from the date of award till realisation thereof.[3660]

Reaffirming its views expressed in two earlier decisions,[3661] the Supreme Court held the order of the Railway Claims Tribunal directing payment of interest in default of payment within 45 days as unsustainable and observed that for grant of interest on any amount due, the court and even tribunals have been held to be entitled to award interest in their discretion under the provisions of section 3 of the Interest Act, 1978 and section 34 of the Code.[3662]

Where death occurred in an untoward incident in 2001 and the Railway Claims Tribunal passed award in 2007, the Karnataka High Court held that due to delay of 6 years the claimant had to suffer hardship and financial distress. Therefore, interest may be awarded from the date of institution of the case at the discretion of the tribunal.[3663]

A Division Bench of the Kerala High Court has made the matter more explicit by the following observation:

> There is no dispute regarding the amount to be computed in railway accident claims as amount of compensation for death and other injuries is prescribed by the schedule. Whatever be the income, age *etc.*, the same amount is payable if a person is injured in an untoward accident while travelling in train with ticket. So it cannot be stated that the amount is determined only at the time of final adjudication of the award and interest can be directed to be paid only from the date of award...[3664]

The Orissa High Court has held that from the definition of "Court" as defined in section 2(a) of the Interest Act, 1978 read with section 34 of the Code it is clear that a Court

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3658. *Ram Barai Singh v State of Bihar*, 2007 (1) Pat LJR 249.
3659. *UOI v Ambica Construction*, 2007 (3) Cal LT 587.
3660. *UOI v Ashokbhai Gobindbhai Patni*, AIR 2009 Guj 149.
3661. *Jagdish Rai & Brothers v UOI*, AIR 1999 SC 1258 : (1999) 3 SCC 257; *Hindustan Construction Co Ltd v State of Jammu & Kashmir*, AIR 1992 SC 2192 : (1992) 4 SCC 217.
3662. *Tahazhathe Purayil Sarabi v UOI*, JT 2009 (8) 515 : AIR 2009 SC 3098 : (2009) 7 SCC 372.
3663. *Smt S Devamma v UOI*, AIR 2009 Kar 96 : (2009) 2 Kant LJ 683.
3664. *UOI v Smt Brigeet Chacko*, AIR 2007 Ker 268 : 2008 ACJ 348 (DB), Koshy J (as he then was) speaking for the Bench.

can grant interest. Since the Railway Tribunal comes under the definition of Court, it can award interest on compensation payable to a claimant.[3665]

[s 34.13] This Section and Gratuity Act, 1972

In suits for money lent, however, this section has to be applied, subject to the provisions regarding interest made in Acts regulating money lending in different states. The controlling authority under the Payment of Gratuity Act, 1972 is not a court for the purpose of section 34 of CPC.[3666]

[s 34.14] Consumer Protection Cases

Interest cannot be claimed under section 34 of the CPC in proceedings under Consumer Protection Act, 1986, as the provisions of CPC have not been specifically made applicable to the proceedings under the Act. However, the general provision of section 34 being based upon justice, equity and good conscience would authorise the redressal forum and commission to also grant interest appropriately under the circumstances of each case.[3667]

The power and duty to award compensation does not mean that irrespective of facts of the case interest can be awarded in all matters at a uniform rate of 18% pa. What is being awarded is compensation, i.e., a recompense for the loss or injury. It, therefore, necessarily, has to be based on a finding of loss or injury and has to correlate with the amount of loss or injury. Thus the forum or the commission must determine that there has been deficiency in service and/or misfeasance in public office, i.e., by the development authority which has resulted in loss or injury. No hard and fast rule can be laid down, however, a few examples would be where an allotment is made, price is received/paid but possession is not given within the period set out in the brochure. The commission/forum would then need to determine the loss. Loss could be determined on basis of loss of rent which could have been earned if possession was given and the premises let out or if the consumer has had to stay in rented premises then on basis of rent actually paid by him. Along with recompensing the loss the commission/forum may also compensate for harassment/injury both mental and physical. Similarly, compensation can be given if after allotment is made and there has been cancellation of scheme without any justifiable cause. Compensation cannot be the same in all cases irrespective of the type of loss or injury suffered by the consumer. The National Forum has been awarding interest at a flat rate of 18% pa irrespective of the facts of each case which, is unsustainable. What is being awarded is compensation, i.e., a recompense for the loss or injury. It therefore necessarily has to be based on a finding of loss or injury and has to correlate with the amount of loss or injury. Thus the forum or commission must determine that there has been deficiency in service and/or misfeasance in public office that is by development authority which has resulted in loss or injury. No hard and fast rule can be laid down, however, a few examples would be wherein allotment is made, price is received/paid, but possession is not given within the period set out in the brochure. The commission/forum would then need to determine the loss. Loss could be determined on the basis of loss of rent which could have been earned if possession was given and the premises let out or if the consumer has had to stay in rented premises, than on basis

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3665. *UOI v Smt Nalini Parida*, AIR 2009 Ori 56; *UOI v Trilochan Nayak*, AIR 2009 Orissa 91 : 2008 (2) Orissa LR 615. (Held, that right of compensation under section 124 of Railways Act, 1989 being a statutory right, Tribunal can grant interest on compensation amount even from date of application.)
3666. *Charan Singh v Birla Textiles*, (1988) 4 SCC 212.
3667. *Sovintorg (India) Ltd v State Bank of India*, (1999) 4 LRI 259.

of rent actually paid by him. Along with recompensing the loss, the commission/forum may also compensate for harassment/injury, both mental and physical. Similarly, compensation can be given if after allotment is made, and there has been cancellation of scheme, without any justifiable cause. Compensation cannot be the same in all cases irrespective of the type of loss or injury suffered by the consumer. The national forum has been awarding interest at a flat rate of 18% pa irrespective of the facts of each case, which is unsustainable. Award of compensation must be under different heads and must vary from case to case depending on the facts of each case. It is clear that in all these cases, interest is being awarded as and by way of compensation/damages. Whilst awarding compensation/damages, it must be shown that there is relationship between the amount awarded and the default/unjustifiable delay/harassment. It is thus necessary that there be separate awards under each such head with reasons why such award is justified. However, the principle that interest must be granted at the current rate of interest is only applicable where the proceeding are for recovery of debt or damages. They apply where a refund of amount is being claimed and the direction is to refund amounts with interest. The principles which govern grant of interest do not apply to grant of compensation. For this reason also, it becomes necessary to consider facts and award damage/compensation under various heads. Normally, in cases of refund, interest will be payable from the date the monies were deposited with the body till they are returned either by payment to that party or deposited in court. In cases where compensation is directed to be paid, the commission/forum must direct payment within a particular period and further direct that if payment is not made within that time the authority will also pay interest. Such interest must be based on the current rate of interest.[3668]

Where allotment of plot was made long ago, i.e., about 17 years back and its possession given the, allottee suffered mental agony and harassment, hence, interest at the rate of 12% awarded by the district forum was held proper and taken as compensation for mental agony and harassment. However, in spite of clarification given in *Ghaziabad Development Authority v Balbir Singh*,[3669] amounts were paid late, hence, for the said period from 17 March 2004, i.e., date of clarification to 28 July 2004, i.e., date of actual payment; interest at the rate of 15% was awarded by the Supreme Court.[3670]

[s 34.15] Lok Adalat

Lok Adalats are not meant for pressurising people and bringing pressure on public officials. A suit filed by a bank for the recovery of loan amount with interest had not become ripe for hearing, but it was hustled through the *Lok Adalat*. In the *Lok Adalat*, the defendants admitted the claim of the bank, but prayed for instalments and of rate of interest. The court, being obsessed with the idea of certain number of disposals in *Lok Adalat*, passed a compromise decree, asking the plaintiff bank to adopt a flexible and pragmatic approach and granted instalments despite the objections raised by the plaintiff bank to the decree being passed as suggested by the defendants. It was held that the judgment and decree passed by the trial court

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3668. *Ghaziabad Development Authority v Balbir Singh*, AIR 2004 SC 2141 : (2004) 5 SCC 65 : 2004 (3) Scale 671 : 2004 (3) SCR 68 : JT 2004 (5) SC 17.
3669. *Ghaziabad Development Authority v Balbir Singh*, AIR 2004 SC 2141.
3670. *Haryana Urban Development Authority v Rekha Sharma*, AIR 2004 SC 4143 : (2005) 9 SCC 457. See also *Haryana Urban Development Authority v RS Banga*, AIR 2004 SC 4429 : 2004 AIR SCW 4582 : (2005) 9 SCC 460; *G.S. Sharma v HUDA*, AIR 2003 P&H 128 (DB); *Seven Seas Educational Soc v HUDA*, AIR 2002 P&H 83.

were not legally tenable. The high court, in appeal, remanded the matter to the trial court, for proceeding further in accordance with law.[3671]

[s 34.16] This Section and Motor Vehicles Act

There cannot be any hard and fast rule in awarding interest, and the award of interest is solely at the discretion of the tribunal or the high court, as the case may be and on the facts and circumstances of each case. The discretion conferred by statute must be exercised judicially on the basis of the facts and circumstances of a particular case. When a specific provision has been made under the statute, such provision has to govern the field. When the statute has not fixed any rate of interest to be awarded on the award of compensation amount, it is not open for the court to read into the provision and fix certain rate of interest. Section 171 of the Motor Vehicles Act, 1988, in unequivocal terms, conferred discretion on the tribunal to grant interest on the amount of compensation awarded at such rate as it may specify in that behalf. Therefore, the court has to take all the relevant factors into consideration while awarding the rate of interest on the compensation. Such factors may include inflation, change of economy, policies being adopted by the Reserve Bank of India from time to time, how long the case has been pending for determination of compensation, permanent injuries suffered by the victim, enormity of the suffering, loss of future income, loss of enjoyment of life. If any rate of interest is imported into the section by the court, it would be contrary to the intent of the Motor Vehicles Act, 1988. The legislature, in its wisdom, thought it fit to confer such discretion only on the tribunal or the court with the object that the tribunal or the court, while awarding the rate of interest, will take into account the facts and circumstances of each case and other relevant guiding factors prevalent at the time of awarding compensation. In the nature of the provision made under section 171 giving discretion to the tribunal to award interest at such rate as it may specific in that behalf, no principle could be deduced or any interest can be fixed to have a general application in all motor accident claim cases arising under the Motor Vehicles Act, 1988.[3672]

[s 34.17] This Section and Workmen's Compensation Act, 1923

Interest of 12% provided under section 4A(3) of Workmen's Compensation Act, 1923 may not be a guiding factor for awarding the interest at 12% pa or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, in a case arising under the provisions of the Motor Vehicles Act, 1988.[3673]

While granting interest on the compensation amount awarded, the tribunal or the court shall award the rate of interest, which is just and reasonable, on an analysis of the facts and circumstances obtaining in the case. Thus, the rate of interest on the compensation amount shall be awarded by the tribunal or the court depending upon the facts and circumstances of each case and the above said relevant guiding factors if the compensation amount is enhanced. interest can be awarded at the discretion of the bench either from the date of the petition or from the date of the award, as the case may be.[3674]

3671. *Union Bank of India, Bhavnagar v Narendra Plastics*, AIR 1991 Guj 67 (DB).
3672. *APSRTC v B. Vijaya*, AIR 2002 AP 441 (FB).
3673. *Union Bank of India, Bhavnagar v Narendra Plastics*, AIR 1991 Guj 67.
3674. *Union Bank of India, Bhavnagar v Narendra Plastics*, AIR 1991 Guj 67.

[s 34.18] Rule of *damdupat*

This is a rule of Hindu law, according to which, interest exceeding the amount of the principal sum cannot be recovered at any one time. This rule is in force in the Bombay State,[3675] Sind,[3676] and in Berar,[3677] and in the presidency-town of Calcutta,[3678] but it is not recognised outside that town.[3679] It is also not recognised in the Madras State.[3680] The meaning of the rule is that interest must not exceed the principal; so if a Hindu lends Rs 500 to another Hindu, and the loan is not repaid till the interest amounts to Rs 600, the lender is not entitled to recover more than Rs 500 for principal and Rs 500 for interest. But the court may, under this section, award further interest to the lender from the date of the suit, though the aggregate interest may thereby exceed Rs 500. The reason is that the rule of *damdupat* ceases to operate from the date of the suit.[3681] But this is entirely in the discretion of the court.[3682] It has been held by the High Court of Madras that the rule of *damdupat* does not apply where interest is claimed under a mortgage governed by the Transfer of Property Act, 1882.[3683] A different view has been taken by the High Court of Bombay[3684] and Calcutta.[3685] The decision of the Privy Council in *Kusum Kumari v Debi Prasad*,[3686] seems to lend support to the Calcutta and Bombay view. This case has further held that the rule of *damdupat* is only during the contractual relation of debtor and creditor. The rule of *damdupat* does not apply where the mortgagee has been placed in possession, and is accountable for the rents and profits received by him as against the interest due.[3687]

[s 34.19] Penal Interest

Charging of additional interest for the period of default in terms of contract of guarantee does not amount to charging of penal interest.[3688]

In a case relating to work contract where the plaintiff-appellant failed to complete the computerisation work entrusted to them, it was held by the Patna High Court that the defendant-respondent was justified in withholding payment of the bill. It was further held that the plaintiff-appellant would not be entitled to claim penal interest under the Interest on Delayed Payment to Small Scale and Ancillary Industries Undertakings Act, 1993, over and above the interest awarded by the trial court.[3689]

3675. *Ali Saheb v Shabji*, (1897) ILR 21 Bom 85.
3676. *Karamchand v Balchand*, (1908) 2 SLR 10.
3677. *Bapurao v Anant Kashinath*, AIR 1946 Ngp 210 : (1946) ILR Nag 407; *Ramchandra v Radha*, (1914) 10 NLR 91.
3678. *Nobin Chunder v Romes Chunder*, (1887) ILR 14 Cal 781.
3679. *Het Narain v Ramdeni*, (1883) 12 CLR 590.
3680. *Annaji v Raghubhai*, (1871) 6 Mad HCR 400.
3681. *Dhondshet v Ravji*, (1898) ILR 22 Bom 86; *Re Hari Lall Mullick*, (1906) ILR 33 Cal 1269; *Nagin Singh v Gagan Nath*, AIR 1944 Lah 422; *Ishwar Nath v Surrender Singh*, AIR 1969 Del 289.
3682. *Hiralal v Narsilal*, 40 IA 68 : 37 Bom 326 (PC)—(no interest given); *Achyut v Ramchandra*, AIR 1925 Bom 362 : (1925) 27 Bom LR 492 (interest allowed at six percent only), both these were suits for redemption.
3683. *Modhwa v Venkata*, (1903) ILR 26 Mad 662.
3684. *Jeewanbai v Manorada*, (1911) ILR 35 Bom 199.
3685. *Kunja Lal v Narsamba*, (1915) ILR 42 Cal 826.
3686. *Kusum Kumari v Debi Prasad*, 63 IA 114 : 15 Pat 210 : 40 Cal WN 329.
3687. *Sundarabai v Jayavant*, (1990) ILR 24 Bom 114.
3688. *Mukesh Gupta v SICOM Ltd, Mumbai*, AIR 2004 Bom 104 (DB).
3689. *Computeronix Bihar Pvt Ltd v Bihar State Madarsa Education Board*, AIR 2007 Pat 75 : 2007 (1) Pat LJR 183.

[s 34.20] Enhanced Interest

If the value of suit claim is not ascertainable, the plaintiff cannot claim enhanced rate of interest as a matter of right.[3690]

[s 34.21] No Interest

In a case, where the petition regarding denial of encashment of Indira Vikas Patra remained pending for several years, the respondent post office could not be saddled with the liability to pay interest, especially when technically they were justified in withholding the payment. Therefore, the claim of interest at the rate of 15% pa as made by the petitioner was held not justifiable and liable to be rejected.[3691]

Where in the plaint, the plaintiff, after referring value of claim, had not specifically pleaded for interest anywhere, the trial court decreed his suit claim but no interest was granted. No independent appeal claiming interest was filed by the plaintiff nor was cross-objection filed in appeal filed by defendants. The relief of interest cannot be granted to plaintiff.[3692]

[s 34.22] Equitable Interest

The court must balance the equities between the claim of the petitioners and the liability of the respondents to pay interest. Award of such interest is not based upon the principle of enrichment of a kind of compensation which is awarded to the petitioners against the state functionaries for their delayed action, particularly unsupported by any plausible cause.[3693]

The trial court can award interest even in the absence of a contract, if the same is equitable. Obviously, even if the money received by the first defendant had been kept in a fixed deposit, that would have earned interest for it. If the money had been invested by defendant in its business, the return would have been more. In such a situation, when the trial court has awarded interest at the rate of six percent pa in its discretion, it cannot be said that the court has acted illegally or has exercised its discretion in an arbitrary or unreasonable manner.[3694]

In a case relating to delayed payment for supply made by a Small Scale Industrial Undertaking to Government of Bihar, it was held by the Patna High Court that it is not the date of agreement or the date on which payment became due, which is material in determining whether the provisions of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993 would be attracted. The crucial date is the date of supply order. Therefore, when order for supply was placed prior to the coming into force of the Act, interest in terms of the Act cannot be allowed, rather interest at the rate of 9% pa in terms of section 34 of the Code was allowed.[3695]

3690. *Punjab & Sind Bank v Ramji Dass Khanna*, AIR 2002 Del 305 (DB). *State of Maharashtra v Mishrilal Tarachand Lodha*, AIR 1964 SC 457.
3691. *Narendrabhai S Joshi v Post Master General, Gujarat Circle*, AIR 2002 Guj 180.
3692. *Union Govt of India v Rajmohan*, AIR 2001 Mad 172.
3693. *ASJS Rice Mills Owners v State of Punjab*, AIR 2004 P&H 320 (DB).
3694. *Mahanadi Multipurpose Industries v State of Orissa*, AIR 2002 Ori 150 (DB).
3695. *State of Bihar v Shakti Tubes Ltd*, AIR 2006 Pat 177 : (2006) 1 BLJR 700. The Supreme Court dismissed appeal against the same in *Shakti Tubes v State of Bihar*; (2009) 7 SCC 673 and held that the supply order having been placed herein prior to the coming into force of the Act, any supply made pursuant to the said supply orders would be governed not by the provisions of the Act but by the provisions of section 34 of the CPC.

In a case relating to Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993, a Bench of Supreme Court held as follows:

> We, therefore, are of the opinion that in relation to the transactions made prior to coming into force of the said Act, simple interest at the rate of 9% pa, which was the bank rate at the relevant time, shall be payable both prior to date of filing of the suit and *pendente lite* and as future interest in terms of section 34 of the Code of Civil Procedure. Interest, however, will be payable in terms of the provisions of the 1993 Act……[3696]

In a suit between a sugar factory owned by a Co-operative Society and a private engineering company, the dispute over an interim order was taken to the high court. The high court directed that in the event a party succeeds, 12 % interest be granted on the awarded amount. However, when the sugar factory went in appeal before the high court against the dismissal of the suit, the high court, construing the indemnity given by the Bank to be a Bank Guarantee, decreed the suit and directed the Bank to pay the amount with interest at the rate of 14% pa It was held in the case by Supreme Court that the approach of the high court was erroneous.[3697]

A Division Bench of the Delhi High Court held that where Bank was directed to keep specified amounts in fixed deposits pursuant to order of high court and the Bank enjoyed the benefits of the amount, it was liable to pay interest for utilisation of the said amount.[3698] The Bench relied on the decision of the Supreme Court in *Secretary, Irrigation Department, Government of Orissa v GC Roy*,[3699] wherein it has been observed: "a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages". The observation of the Division Bench is very revealing:

> The records of this case reveal that the said amounts have been lying with the appellant-bank since 9.10.1993 and the bank has been consistently absolving itself of its responsibility to pay interest for thirteen years by invoking unjustifiable grounds leading to this avoidable litigation. This is in spite of an order of this Court dated 8-4-1999 and subsequent directions on 6.5.1999 to deposit the said amounts with interest. The appellant-bank has with impunity chosen to disregard this order on the basis of a belated review petition which was not taken up for years.[3700]

It has been held by the Rajasthan High Court even where two parties agree for not charging interest, but when one party without lawful authority, retains other's money, then he could do so at least with a liability to pay interest.[3701]

In a decree passed against the State, the high court directed to deposit the amount in court within a specified time and further directed the State to pay 15% interest from the date of order until actual deposit in case of default. On appeal, the Supreme Court modified the rate of interest to 10%.[3702]

Once the principal sum was allowed by the arbitrator under the Arbitration and Conciliation Act, 1996, he was entitled to award interest. But the interest awarded by the arbitrator at the

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3696. *Assam Small Scale Ind. Dev Corp Ltd v JD Pharmaceuticals*, AIR 2006 SC 131 : (2005) 13 SCC 19 (SB Sinha J speaking for the Bench).
3697. *State Bank of India v Mula Sahakari Sakhar Karkhana Ltd*, AIR 2007 SC 2361 : (2006) 6 SCC 293.
3698. *Standard Chartered Bank v Pure Drinks Ltd*, AIR 2007 Del 93 : (2006) 135 DLT 651 (DB).
3699. *Secretary, Irrigation Department, Government of Orissa v GC Roy*, AIR 1992 SC 732 : (1992) 1 SCC 508.
3700. *Secretary, Irrigation Department, Government of Orissa v GC Roy*, AIR 1992 SC 732, p 97 : (1992) 1 SCC 508, (Mudgal J speaking for the Bench).
3701. *Shah Chunni Lal Shanti Lal Jain v Gopal Industries*, (2007) 4 Civil CC 327 (Raj) : 2007 (3) Raj LW 2238.
3702. *State of Karnataka v Gopal Ramachandra Nagagauda*, AIR 2010 SC 1438 : (2010) 2 SCC 327.

rate of 18.5% and that too compounded on quarterly basis, rest was modified by Division Bench of Calcutta High Court to simple interest at the rate of 18%.[3703]

Interest in equity has been awarded on money paid under a contract to convey, of which specific performance could not be decreed,[3704] and on money paid under a mistake of fact, and wrongfully retained.[3705] For partnership cases, see the under mentioned decisions.[3706] An applicant for compensation for land acquisition can be granted interest on equitable principles, even if recourse cannot be had to section 34 of the CPC.[3707]

[s 34.23] Compound Interest

It is in the power of the court to allow compound interest from the date of the institution of the suit. Where compound interest was charged during the course of the dealings between the parties, the Bombay High Court awarded compound interest from the date of suit.[3708] On the perusal of the draft lease agreement exchanged between the parties and other correspondence, it is crystal clear that there is no stipulation whatsoever, at in any contingency for the charging of compound interest on the loan advances or in default of any instalment thereof. It, therefore, follows that under no circumstances compound interest could be recovered.[3709] In a contract to supply gas, price of which was increased by ONGC, the purchaser requested for reduction of supply and claims were made by purchaser based on force *majeure*, the purchasers were drug-manufacturing companies and the prices of drugs were controlled by the government. On these facts it was held that the interest payable would be simple and not compound.[3710]

In a case, where the Bank had refused to encash demand draft presented by firm on account of certain dues, the Allahabad High Court held that grant of 12% compound interest was improper. It was held that although the firm suffered loss for a considerable long period due to withholding of draft amount which the Bank could not do legally, since the bank was ready to pay interest at the rate of 12%, simple interest would be proper, as it was not a commercial transaction.[3711]

The Supreme Court has held that the power to levy compound interest can be exercised only if there is specific contract or authority under the statute. Courts and tribunals do not have general discretion to award interest on interest.[3712] Speaking for the Bench, Raveendran J in the above case relating to an award by tribunal under the Arbitration and Conciliation Act, 1996, observed as follows:

> 14. Section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of award, to be treated as part of the principal from the date of award for calculating the post-award

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3703. *Bhilai Wires Ltd v Bharat Sanchar Nigam Ltd*, AIR 2010 Cal 172 : (2011) 1 Arb LR 74 (DB).
3704. *Sat Pradash v Bodh Raj*, AIR 1958 P&H 111; *RA Patil v Janaki Bai*, AIR 1959 Bom 468; differing from *Dwarka Prasad v Kathleen Florence Burns*, AIR 1955 Ngp 38 : (1955) ILR Nag 538.
3705. *Joseph v UOI*, AIR 1957 Ker 3.
3706. *Suleman v Abdul Latif*, (1930) 57 IA 245 : 58 Cal 208 : 59 Mad LJ 121 (PC); *Lala Hakm Rai v Lala Ganga Ram*, (1943) 1 Mad LJ 16; *Thulsi Ammal v Ramachandra Naidu*, AIR 1955 Mad 171; *Mohanasundaram v Neelambal*, AIR 1955 Mad 442 : (1955) ILR Mad 1191; *Jubedabi v Jainabi*, AIR 1975 Kant 7 : (1974) Kant 1473.
3707. *Chinubhai Nanalal v Addl Special Land Acquisition Officer*, AIR 1989 Guj 122 (DB).
3708. *Kaluram v Chimniram*, AIR 1934 Bom 86 : (1934) 36 Bom LR 68 (78).
3709. *HP Fruit Growers Co-op Mark Processing Society Ltd v Himachal Pradesh Housing Board*, AIR 1996 HP 94.
3710. *ONGC Ltd v Assn of Natural Gas Consuming Industries*, AIR 2001 SC 2797 : (2001) 6 SCC 627.
3711. *State Bank of India, Deoria v Firm Jamuna Prasad & Sons*, (2008) 6 All LJ 697.
3712. *State of Haryana v SL Arora & Co*, AIR 2010 SC 1511 : (2010) 3 SCC 690.

> interest. The use of the words 'where and in so far as an arbitral award is for the payment of money' and the use of the words 'the arbitral tribunal may include in the sum for which the award is made, interest……on the whole or any part of the money' in clause (a) and the use of the words 'a sum directed to be paid by an arbitral shall carry interest' in clause (b) of sub-section (7) of section 31 clearly indicate that the section contemplates award of only simple interest and not compound interest or interest upon interest.[3713]

The Supreme Court quoted with approval its earlier judgment in *Renusagar* case,[3714] wherein it has been observed as follows:

> Merely because in Section 3(3)(c) of the Interest Act, 1978, the court is precluded from awarding interest on interest does not mean that it is not permissible to award such interest under a contract or usage or under the statute. It is common knowledge that provision is made for the payment of compound interest in contracts for loans advanced by banks and financial institutions and the said contracts are enforced by courts. Hence it cannot be said that award of interest on interest, *i.e.*, compound interest, is against public policy of India.

In *Central Bank of India v Ravindra*,[3715] a Constitution Bench of the Supreme Court observed as follows:

> The English decisions and the decisions of this Court and almost all the High Courts of the country have noticed and approved long established banking practice of charging interest at reasonable rates on periodical rests and capitalising the same on remaining unpaid. Such a practice is prevalent and also recognised in non-banking money lending transactions. Legislature has stepped in from time to time to relieve the debtors from hardship whenever it has found the practice of charging compound interest and its capitalisation to be oppressive and hence needing to be curbed. The practice is permissible, legal and judicially upheld excepting when superseded by legislation. There is nothing wrong in the parties voluntarily entering into transactions, evidenced by deeds incorporating covenant or stipulation for payment of compound interest at reasonable rates……

A Division Bench of the Guwahati High Court held that tea plantation or tea production is agriculture or agricultural production and compound interest is not permissible on agricultural loan.[3716]

The executing court has no jurisdiction to go behind decree. The executing court has no right to vary terms of the decree, however erroneous it may be in execution proceedings. Thus, where the trial court passed decree for payment of principal amount with simple interest only, the executing court cannot grant compound interest thereby varying terms of decree. The order passed by executing court construing simple interest as compound interest. The revision against such order is therefore maintainable.[3717]

[s 34.24] Interest on *mesne* Profits/Damages

Mesne profits as defined in section 2, sub-clause (12), includes interest on profits which have been actually received or might, with ordinary diligence, have been received. This is a substantive provision and has reference to the rights of the parties prior to suit. Interest on *mesne* profits, *pendente lite*, is a matter of procedure and is within the discretion of the court.[3718] It is for the court passing a decree, to decide whether interest should be allowed on *mesne* profits

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3713. *State of Haryana v SL Arora & Co*, AIR 2010 SC 1511, p 1516 : (2010) 3 SCC 690
3714. *Renusagar Power Co Ltd v General Electric Co*, AIR 1994 SC 860 : 1994 Supp (1) SCC 644.
3715. *Central Bank of India v Ravindra*, AIR 2001 SC 3095 : (2002) 1 SCC 367.
3716. *Tezalpatty Tea Pvt Ltd v Eastern Tea Brokers Ltd*, AIR 2008 (NOC) 2865 (Gau—DB).
3717. *State of Bihar v Mijaj International*, AIR 2004 Jhar 29.
3718. *Narayan Dossjee v Board of Trustees*, AIR 1959 AP 64 : (1958) 1 Andh WR 427; *Mahant Narayana Dasjee v Board of Trustees, Tirupathi Devasthanam*, AIR 1965 SC 1231.

and not for the execution court, unless it is reserved for decision by the latter. Accordingly, where the decree awards a lump sum as *mesne* profits, it is not open to the execution court to award interest thereon.[3719]

Where the interest on *mesne* profit was claimed at the rate of six percent and the preliminary decree was passed against which appeal was filed, in which the plaintiff sought amendment claiming interest at the rate of 13%, the appellate court, allowed amendment and also passed order on the preliminary decree on the same day granting interest at the rate charged by nationalised banks on commercial transaction, i.e., exceeding 13%. No opportunity of being heard was given to the defendant against proposed amendment, and the procedure followed was found illegal and unsustainable as the suit for account was filed prior to the 1997 Amendment and the plaintiff was not entitled to interest exceeding six percent on the basis of amended section 34 coming into force due to pendency of litigation.[3720]

The plaintiff can claim, and the court has power to grant interest on damages from the date of filing of the suit until the realisation of the amount.[3721]

[s 34.25] Negotiable Instruments

Section 79 of the Negotiable Instruments Act, 1881 does not prevail over section 34 of the Code of Civil Procedure, 1908. Both are Central Acts covering the same field, *viz*, the power of discretion given to the court to fix a date for payment of interest *pendente lite*. In addition, section 34 of the CPC gives power to fix rates of interest also. A reading of section 34 clearly indicates that the court is given discretion to award rate of interest in certain circumstances. Section 34(1) engrafts language, taking within its ambit not only the money due on a negotiable instrument but also any claim for payment of money. The Negotiable Instruments Act is of 1881, whereas the Code of Civil Procedure is of 1908. Further, the CPC was amended from time-to-time up to the Act of 1976. The legislature is aware of the existence of section 79 of the Act, but no exception has been engrafted in section 34(1) of the CPC, with regard to the rate of interest in respect of the claims based on negotiable instruments. Therefore, the later Act (Code) prevails over the earlier Act. Section 34 prescribes not only the period, but also the interest. Accordingly, section 34 applies to the claims based on negotiable instruments as well. No exception by judicial interpretation could be engrafted.[3722] The High Court of Andhra Pradesh has, accordingly, held that the provisions of section 34 of the CPC override those of section 79 of the Negotiable Instruments Act, 1881. It has further held that since section 34 gives a discretion regarding the rate of interest, it cannot be laid down that the court ought to grant interest at the contractual rate.[3723] The high court dissented from the Rajasthan ruling in *Usav Lal v Mohan Brothers*,[3724] to the effect that section 79 of the Negotiable Instruments Act, 1881, prevails over section 34 of the CPC. It further held that the court cannot, under section 34, grant interest *pendente lite*, at a rate higher than the contractual rate, dissenting on this point from *Lehru Narain v Kanhaialal*.[3725] Suit for recovery of money, after *Hundi* was

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3719. *Ouseph Ouseph v Thomman*, AIR 1954 TC 473.
3720. *RV Madhvani v TP Madhvani*, AIR 2004 SC 1084 : (2004) 1 SCC 497 : JT 2004 (6) SC 144.
3721. *Kishan Lal Kalra v NDMC*, AIR 2001 Del 402; *Mahabir Prasad Rungta v Durga Datta*, AIR 1961 SC 990; *Mahant Narayana Dasjee Varu v Board of Trustees, The Tirumalai Tirupathi Devasthanam*, AIR 1965 SC 1231; *Bhagwant Gennji v Gangabisan Ramgopal*, AIR 1940 Bom 369; *VP Ganesan v The Tamil Nadu Civil Supplies Corp Ltd, Salem*, AIR 2006 Mad 4 : (2006) 1 CTC 277.
3722. *United Bank of India v P Krishnaiah*, AIR 1989 AP 211 (K Ramaswamy J).
3723. *United Bank of India v P Krishnaiah*, AIR 1989 AP 211.
3724. *Usav Lal v Mohan Brothers*, AIR 1975 Raj 236.
3725. *Lehru Narain v Kanhaialal*, AIR 1973 Raj 316.

dishonoured, was filed in the absence of a stipulation in the *Hundi*. As regards payment of interest, in such cases, specified sum of money only is payable. However, since the defendant failed to pay the amount due on the *Hundis*, it was liable to pay interest thereon from the date of the suit and future interest at the rate of six percent pa under section 34 of the CPC.[3726]

[s 34.26] Award of Interest by Arbitrator

The general statutory provisions in regard to the award of interest by a court are contained in the Interest Act, 1978 and the CPC. Both the Interest Act of 1839 and the Interest Act of 1978 provide for the award of the interest up to the date of institution of the proceedings. Neither the Interest Act, 1839 nor the Interest Act, 1978 provides for the award of *pendente lite* interest. The law relating to the award of interest pendente lite is provided in section 34 of the CPC. Section 34, however, applies to arbitrators in suits for the simple reason that where a matter is referred to arbitrator in a suit, the arbitrator will have all the powers of court in deciding the dispute. Section 34 does not, otherwise, apply to arbitrations as arbitrators are not court within the meaning of section 34 of the CPC. While under the Interest Act, 1978, the expression, "court" was defined to include an arbitrator, under the Interest Act of 1839 it was not so defined. The result is that while in cases arising after the commencement of the Interest Act, 1978 an arbitrator has the same power as the court to award interest up to the date of institution of the proceedings, in cases which arose prior to the commencement of the Interest Act, 1978.

Since the arbitrator is required to conduct himself and make the award in accordance with law, court must look to the substantive law for the power of the arbitrator to award interest before the commencement of the proceedings. If the agreement between the party entitles the arbitrator to award interest, no further question arises and the arbitrator may award interest. Similarly, if there is a usage of trade having the force of law, the arbitrator may award interest. Again, the arbitrator may award interest if there are any other provisions of the substantive law enabling the award of interest, eg, section 80 of the Negotiable Instruments Act, 1881, or section 61(2) of the Sale of Goods Act, 1930. There may also be a case where one of the parties is forced to pay interest to a third party, say, on an overdraft, consequent on the failure of the other party to the contract not fulfilling the obligation of paying the amount due to them. In such a case also, equity may compel the payment of interest. Loss of interest in the place of the right to remain in possession may be rightfully claimed in equity by the owner of a property who has been dispossessed from it.[3727] The arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of the CPC provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply.[3728] The arbitrator has jurisdiction to award interest under both old and new Arbitration Act on the sum found due and payable for pre-reference period, in the absence of any specific stipulation or prohibition in contract to claim or grant any such interest.[3729]

3726. *Canara Bank, New Delhi v Sanjeev Enterprises*, AIR 1988 Del 372.
3727. *Executive Engineer (Irrigation) Balimela v Abhadula Jaina*, (1988) 1 SCC 418; *SK Samanta & Co v Central Coalfields Ltd*, AIR 2000 Pat 36.
3728. *Hindustan Construction Co Ltd v State of Jammu & Kashmir*, (1992) 4 SCC 217.
3729. *Executive Engineer, DMI, Divn, Orissa v NC Budharaj*, AIR 2001 SC 626 : (2001) 2 SCC 721.

Future interest becomes payable on amount of claim upheld and also on interest awarded. While passing a decree in terms of the award, not only the amount of claim upheld by the arbitrator or the court but the pre-suit and *pendente lite* interest awarded in favour of the decree-holder crystallises into the decretal amount and the future interest becomes payable on the entire amount comprised of the claims as well as the pre-suit and *pendente lite* interest. Therefore, from the date of the passing of the decree, the future interest is not to be calculated merely on the amount of the claims upheld by the arbitrator/court but also on the amount of the interest awarded by the arbitrator or the court, more so when the amount of interest up to the date of the passing of the award or passing of the decree is much higher than the principal amount.[3730] The power to award interest *pendente lite* has to be inferred on the analogy of section 34 of the CPC for doing complete justice between the parties. Whether interest should be awarded *pendente lite* or not is a matter of discretion for the court or the arbitrator. When parties go before an arbitrator, they expect that the disputes will be decided in accordance with law, as they would have been decided, had the decision been of a court of law.[3731] The arbitrator is entitled to award interest *pendente lite* and future interest at the rate not exceeding the current rate of interest. Under section 34 of the CPC interest at a rate higher than six percent be awarded where the liability in relation to the sum so adjudged had arisen out of a commercial transaction.[3732]

The Supreme Court has held in the undernoted case[3733] that section 34 of the CPC has no application to arbitration proceedings since the arbitrator cannot be said to be a "court" within the meaning of the Code. But an arbitrator has power and jurisdiction to grant interest for all the three stages provided the rate of interest is reasonable.

In another case, where the award of interest at the rate of 12% pa by arbitrator all throughout was not found illegal by the civil court but the high court reduced the post award interest to 6% pa, the Supreme Court held that the order of the high court who not justified.[3734] It was observed in the case as follows:

> 13. As far as arbitration proceedings are concerned, it is well established that an arbitrator, in absence of any prohibition in an arbitration agreement, has power to award interest. Though it is not a 'court' within the meaning of Section 34 of the Code of Civil Procedure, 1908, an arbitrator has power to grant reasonable rate of interest at all the three stages; *i.e.* pre-reference, *pendente lite* and post-award period.[3735]

Section 34 does not, in terms, apply to arbitrators. But the arbitrator has been held to have power to award interest for the period of pendency of arbitration.[3736] Contrary decisions are no longer good law.[3737] The interest for the future period from the date of the arbitration award till payment can be granted by the court. The original award was dated 21 June 1971 and was filed in court on 7 November 1977, for making it rule of the court. Interest from the date of the award would, therefore, be calculated from 21 June 1977 and not the date when the

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3730. *Saraswati Construction Co v Delhi Development Authority*, AIR 2004 Del 412.
3731. *Ram Nath International Construction Pvt Ltd v State of Uttar Pradesh*, (1997) 11 SCC 645.
3732. *State of Jammu and Kashmir v Dev Dutt Pandit*, AIR 2000 Pat 36 : (1999) 4 LRI 646.
3733. *Bhagwati Oxygen Ltd v Hindustan Copper Ltd*, AIR 2005 SC 2071 : (2005) 6 SCC 462.
3734. *Manalal Prabhudayal v Oriental Insurance Co Ltd*, AIR 2006 SC 3026 : 2006 Supp (4) SCR 666 : (2009) 17 SCC 296 : (2006) 8 Scale 129 : JT 2006 (7) SC 464.
3735. *Manalal Prabhudayal v Oriental Insurance Co Ltd*, AIR 2006 SC 3026, p 3028 : 2006 Supp (4) SCR 666 : (2009) 17 SCC 296 : (2006) 8 Scale 129 : JT 2006 (7) SC 464, at. (CK Thakker J speaking for the Bench).
3736. *Re Secretary, Irrigation Department, Government of Orissa*, (1992) 1 SCC 508.
3737. *Executive Engineer v Abdulla Jena*, AIR 1988 SC 1530; *State of Orissa v Concrete Jodia*, AIR 1988 SC 1530.

arbitrator submitted his decision after reconsideration under section 16 of the Arbitration Act, 1940 (now replaced by Arbitration and Conciliation Act, 1996).[3738] An arbitrator has power to award interest *pendente lite*. Though section 34 does not, in terms, apply, the arbitrator has the same power as the court has. The court can award *pendente lite* interest at such rate as the court deems reasonable. If the arbitrator's award of interest is reasonable, the law forbids the court to interfere with it.[3739] Keeping in view the facts and circumstances of the case and to sub serve the interest of justice, the respondent can be directed to pay pre-reference and *pendente lite* interest at the appropriate rates.[3740] If all disputes between the parties or the dispute regarding interest is referred to arbitration, the arbitrator has power to award interest on a principle analogous to the one embodied in section 34 of the CPC. Also, all disputes are referred for arbitration, the arbitrator has power to award interest *pendente lite*, ie, interest during the pendency of arbitration proceedings. Moreover, future interest or future *mesne* profits are incidental matters and may be awarded, even though not specifically claimed, if the same are not inconsistent with the other relief claimed.[3741] The power to order interest on an award from the date of the decree to date of payment is regulated by section 29 of the Arbitration Act, 1996 and not by section 34 of the CPC.[3742] Neither the Interest Act of 1839 nor the Interest Act of 1978 applies to the State of Jammu and Kashmir. Hence, the arbitrator cannot award interest thereunder. But the court's jurisdiction to allow interest from the date on which the award was made a rule of court, is not taken away.[3743] An arbitrator also has a jurisdiction to award interest after the date of the award until a decree is passed in terms of the award, if the reference is with regard to all disputes between the parties which would include a dispute or difference as to interest which the court trying such suit could have awarded.[3744] Where there is express reference, the arbitrator can award interest for the period anterior to his entering upon the reference, provided such interest is claimable either under the agreement between the parties or under the Interest Act, 1978.[3745] The main part of sub-section (1) of section 34 of the CPC laying down that during the period the suit was pending in court, interest is to be awarded at a reasonable rate and for the period subsequent to passing of the decree, interest is to be awarded at the rate of 6% pa and future interest at a higher rate can be awarded if the proviso is attracted.[3746] The opening words of section 41 of Arbitration Act, 1940 themselves make it clear that the provision of the Code of Civil Procedure shall apply to all proceedings before the court, subject to the provision of Arbitration Act, 1940 (now replaced by Arbitration and Conciliation Act, 1996) and of rules made thereunder. When specific provision has been made under section 29 of the Act regarding the permissibility of payment of interest from the date of the decree such specific provision has to govern the field and provisions of section 34 of the CPC must give way to section 29 of the Arbitration Act, 1940 (now replaced by Arbitration and Conciliation Act, 1996). If the court intends to grant interest in a case where interest has not been awarded by the arbitrator it can do so under section 29 of the Arbitration Act, 1940 Procedure must give

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3738. *UOI v Swadeshi Karyalaya*, AIR 1991 Del 53 (DP Wadhwa J).
3739. *Krishna Kumar Madhok v UOI*, AIR 1982 Del 332 (DB).
3740. *BLGC (P) Ltd v Bharat Co-op Group Hsg Society Ltd*, AIR 2004 SC 319 : (2004) 1 SCC 110.
3741. *Gujarat WS&S Board v Unique Electors (Guj) Pvt Ltd*, AIR 1988 Guj 233.
3742. *Krishna Kumar Madhok v UOI*, AIR 1982 Del 332 (DB).
3743. *Managing Director, J&K Handicrafts, Jammu v Goodluck Carpet*, AIR 1990 SC 864 : (1990) 4 SCC 740 : (1990) 1 ALR 367.
3744. *UOI v Bungo Steel Furniture Pvt Ltd*, AIR 1967 SC 1032; see also *RB Somappa v Mysore Co-op Appellate Tribunal*, AIR 1973 Mys 37.
3745. *Varkey v Pacific Procon Ltd*, AIR 1977 Ker 24 : (1976) ILR 2 Ker 168.
3746. *Mahesh Chander Bansel v Krishna Swaroop Singhal*, (1997) 10 SCC 681.

way to section 29 of the Arbitration Act, 1940 (now replaced by Arbitration and Conciliation Act, 1996) and not under section 34 of CPC.[3747]

[s 34.27] Proviso to Sub-section (1): Rate of Interest in Commercial Transactions

The operative portion of the proviso as contained in sub-section 1 and sub-section 2 of section 34 of the CPC clearly goes to indicate that the discretion in the court vested under the said proviso is not only with regard to the rate of interest but it also considers whether the interest should be awarded or not.[3748]

The Delhi High Court has held that in commercial transactions (after the amendment of 1976), the grant of interest at the contractual rate ought to be the rule and the grant of interest at reduced rate, "a rare exception". The defaulting borrower cannot be given the benefit of reduced rate of interest as a matter of rule, only because the bank had to resort to legal recourse on account of non-payment by borrower except, of course, in exceptional circumstances.[3749]

The court is not bound to grant interest at the contractual rate, even in a commercial transaction, according to the Kerala High Court.[3750]

In an Orissa case, the claim was in respect of the value of goods. The supplier was guilty of serious lapses in the matter of supply. It was held that he cannot claim interest at rate higher than six percent, by relying on the proviso to section 34 in the circumstances.[3751]

The executing court cannot interfere with the interest awarded by the arbitrator.[3752] The plaintiff in a Patna case claimed a specific sum from the insurers, which was found due and decreed. It was held that he was entitled to interest at the rate of six per cent pa.[3753]

A cold storage concern being an industrial concern, is liable to pay interest on loan at the rate in accordance with the terms of agreement executed by them. The plea that the loan being given to cold storage which was for agricultural purposes, no compound interest could be charged to debtor agriculturist would not be tenable.[3754]

Where the government's health department purchased medicines to supply the same to various government hospitals for the benefit of citizens and to be provided to common persons subjected to various ailments, it cannot be said to be commercial transaction as it cannot be said to be connected with any industry, trade or business of the party who has incurred the liability and therefore, the proviso of section 34 will not be applicable to the said transaction.[3755]

Where, in a government contract, the bidder withdrew the tender but the amount of earnest money was unjustifiably retained by the corporation and the corporation had driven the contractor to series of litigation, it was held that in such a case it is the duty of court to see that the party is adequately compensated, and the award of interest of 12% by trial court was

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3747. *State of Orissa v United Commercial Co, Engineers and Builders*, AIR 1996 Ori 217.
3748. *Associated Construction and Engineering Co v Dhan Laxmiben*, AIR 1997 Guj 39.
3749. *Syndicate Bank v WB Cements Ltd*, AIR 1989 Del 107.
3750. *Union Bank of India v K Kumaranunni Nair*, AIR 1991 Ker 118.
3751. *Jain Mills and Electrical Stores v State of Orissa*, AIR 1991 Ori 117.
3752. *K Sambandam v Srikati Co-op Urban Bank*, AIR 1983 Mad 36.
3753. *LIC v OP Bhalla*, AIR 1989 Pat 269.
3754. *Nafees Ahamad v Tehsildar/Magistrate, Tehsil Patiyale Heta*, AIR 1998 All 78 (DB).
3755. *Meenakashi Pharma Distributors v State of Karnataka*, AIR 1999 Kant 192.

found proper.[3756] Where, the plaintiff had not been able to avail fruits of decree for last many years, the parties had not produced any evidence to establish any statutory rate of interest, the case pertained to a business transaction, the award of interest at the rate of nine percent pa was found proper.[3757] When, corporate loan contract provided for payment of interest at the rate of 30% on expiry of 90 days, contractual rate of interest admittedly ran beyond a period of 90 days, the plea of borrower that loan will carry no interest beyond period of 90 days was found opposed to all principles of justice and equity as the period of 90 days in fact protected the borrower from any action on the ground that he had agreed to pay the interest at 30 % during that period.[3758] If the plaintiff is deprived of money for long in a commercial transaction, the award of interest at 18% pa on the principle amount is not improper.[3759]

[s 34.28] Commercial Transaction

Explanation II—For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

Loan by a bank for the development of coffee estate, is not loan for "commercial transaction". It is a loan for agricultural or horticultural operation.[3760] Development of coffee estate is not a commercial purpose, it is agricultural.[3761] In commercial transactions, for the period after the passing of the decree, contractual rate ought to be the rule and a reduced rate should be an exception.[3762] The share of a partner on his retirement is in the nature of a pure debt, with effect from the date on which he ceases to be a partner and the relevant date for the purpose of ascertaining the value of the share is the date on which he ceases to be a partner. Since, the partnership was a commercial transaction, the retiring partner would be entitled to interest at the rate at which the monies are lent or advance by nationalised banks in relation to commercial transactions.[3763]

Explanation II to section 34 clearly says that a transaction would be commercial only if it is connected with trade or business of the party incurring liability. Thus, where "Culled Apple" was supplied to the Corporation, it cannot be said that it was by way of a commercial transaction, as the said purchase was made under a Support Price Scheme introduced to save the farmers from financial crisis. The "Culled Apple" was not marketable and therefore, support price scheme was introduced that year. There is nothing on the record to suggest even remotely that the support price scheme was introduced to earn profits or as a commercial venture. It was held that the supplier was entitled to interest at the rate of 6% pa from the date of decree as the title of the owner of fruit orchard was under cloud.[3764]

The Bombay High Court has held that hand loan between relatives is not a commercial transaction and as such rate of future interest must be restricted 6% pa from the date of the

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3756. *Aditya Mass Communications (Pvt) Ltd v APSRTC*, AIR 2003 SC 3411 : (2003) 11 SCC 17 : JT 2003 2 SC 363 : (2004) 136 Punj LR 461 : (2003) 8 Scale 37. See also *Ajeet International v HPHPM & P Corp Ltd*, AIR 2002 HP 159.
3757. *Dwarika Prasad Bajaj v State of Uttar Pradesh*, AIR 2004 All 368.
3758. *Shaw Wallace & Co Ltd v Ghoom Investment Co Pvt Ltd*, AIR 2004 Cal 126 (DB).
3759. *Minerals & Metals Trading Co Ltd v Dimple Overseas Ltd*, AIR 2001 Del 427 (DB).
3760. *CS Shyamala v SC Srikantiah*, AIR 1990 Kant 145.
3761. *Canara Bank v KS Kushalapa, supra.*
3762. *Syndicate Bank v West Bengal Cements Ltd*, AIR 1989 Del 107; *State Bank of Travancore v K Vinayachandran*, AIR 1989 Ker 302.
3763. *Chillakuru Chandrasekhakra Reddy v Pamuru Vishnu Vinodh Reddy*, AIR 1995 AP 49.
3764. *Charu Bhatnagar v HPMC*, AIR 2006 HP 119 : (2006) 1 Shim LC 465.

decree. It has been further held that in absence of agreement to pay interest on the said amount, assessment of interest on the principal amount prior to decree would also be a "nullity."[3765]

In a case relating to supply of goods there was no stipulation with regard to interest payable in the case of default on the part of the defendant. It was a commercial transaction between the parties and as such keeping in view the existing bank rate of interest, the Himachal Pradesh High Court allowed simple interest at the rate of 12% pa.[3766]

Construction of bridges, roads, and highways on reckoning can be said to be "industry" or "trade". Such activity is for the benefit of people at large without any profit even in the remotest possibilities. The court was required to make these observations, as there was no definition of trade or industry in the CPC.[3767] Contract for supply of goods is a commercial transaction under the proviso to section 34(1) of the CPC; future interest could be more than 6%.[3768]

The Himachal Pradesh High Court has held that the court is empowered to increase post-decretal interest in relation to liability arising out of a commercial transaction as clarified in *Explanation II* to section 34 of the Code. However, where the Corporation had purchased fruit under the Support Price Scheme which was designed to help the farmers from financial crisis, the same cannot be said to be a commercial transaction.[3769]

In cases where the liability had arisen out of a commercial transaction, the rate of such interest may exceed pa 6% pa but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which monies are lent or advanced by nationalised banks in relation to commercial transactions.[3770] It may be noticed that before the Amendment of 1976, the maximum interest which the court could award was six percent pa. However, in appropriate cases, the court had the discretion to award interest at a lesser rate but in no case exceeding six percent. Now the courts are empowered to increase post decretal interest in relation to a liability arising out of a commercial transaction on the principal sum adjudged.

[s 34.29] Five Propositions

As regards interest for the post decretal period, an Andhra Pradesh case lays down the following five propositions:

(i) Where loan is a commercial transaction, even if there is no contract for payment of interest, interest can be allowed for the post-decretal period.

(ii) In such a transaction, the proviso to section 34 enables the court to award interest at the rate currently allowed by nationalised banks on deposits.

(iii) But the claimant must adduce acceptable evidence as to the current rate so allowable by banks.

(iv) In the absence of such evidence, the court can allow reasonable rate of interest.

(v) In the particular case, award (by the trial court) of interest at the rate of 12% pa for the post-decretal period was held not to be wrong or incorrect.[3771]

3765. *Manesh Rajkumar Kanhed v Ramesh Bhagwansa Walale*, AIR 2007 Bom 86 : 2007 (3) All MR 84 (Aurangabad Bench).
3766. *Rakesh Kumar Dinesh Kumar v UG Hotels and Resorts Ltd*, AIR 2006 HP 135 : (2006) 2 Shim LC 384.
3767. *State of Maharashtra v Saifuddin Mujjaffarali Saife*, AIR 1994 Bom 48 (DB).
3768. *Nagesh Sales Corp v Kerala Soaps and Oils Ltd*, AIR 1994 Ker 150; *Satish Solvent Extraction Pvt Ltd v New India Assurance Co Ltd*, AIR 1996 Bom 293 (DB).
3769. *Madan Mohan v HPMC*, 2007 (4) Civil Court Cases 313 (HP).
3770. *APSRTC v B Vijaya*, AIR 2002 AP 441 (FB).
3771. *Sir Srinivas Co v Firm VDHA Sethi*, AIR 1985 AP 21.

[s 34.30] Judicial and Reasonable Exercise of Discretion

Section 34 of the CPC leaves it to the discretion to the court as to what interest is to be decreed by way of *pendente lite* interest. So far as future interest or further interest is concerned, that too is left entirely to the discretion to the court but subject to a limit of six percent. However, the edit provision would remove the limit to the future interest in a case arising out of a commercial transaction. But, the proviso does not take away the discretion left to the court, nor does it limit the scope of exercise of such discretion. The judicial discretion in this regard must depend upon consideration of all the attending facts and circumstances including the circumstances that the amount decreed was in respect of a liability arising out of a commercial transaction. The exercise of such discretion shall necessarily be judicial and reasonable.[3772]

[s 34.31] Bank Rate of Interest — Reduction of Interest

As the relationship between the plaintiff and defendant was found to be not merely of a lender and borrower, but there was an agreement similar to cash credit arrangement with the bank and as the bank rate of interest at the relevant time was 12% pa, the Supreme Court reduced the future interest from 18%–12%.[3773]

Where the high court directed payment of 18% interest but the rate of interest which was prevailing at the relevant time was 18%. However, the bank rate of interest has since gone down drastically. Grant of interest *pendente lite* and for future is a discretionary remedy. The court of appeal can, therefore, exercise the same power while finally disposing the *lis* as that of the high court keeping in view the principle engrafted in section 34 of the CPC. The rate of interest may have to be fixed having regard to the principle of restitution. In the facts and circumstances of this case it was held that grant of nine percent interest shall meet the ends of justice.[3774]

In a case relating to recovery of dues of overdraft facility given by Bank to contractor, where interest *pendente lite* was granted at the rate of 25% pa and interest till realisation was allowed at 19% pa, the Supreme Court held that levy of interest has to be at reasonable rate. Even though the power is discretionary, the principle of section 34 of the Code would apply. The interest was modified by the Supreme Court at 9% pa.[3775] It was observed by the court as follows:

> 8. The quantum and rate of interest which the appellant in the present case is entitled to would be in accordance with the provisions of Section 34 of the Code. According to the provisions of Section 34 of the Code interest is to be awarded at a reasonable rate and on the principal amount. It is needless to point out that although the amount of interest from the date of filing of the suit till the date of the decree and thereafter till realisation is in the discretion of the court as is confirmed by the use of the word 'may' but such discretion has to be exercised by the court properly, reasonably and on sound legal principles and not arbitrarily and while doing so the court is also to consider the parameter, scope and ambit of Section 34 of the Code.[3776]

3772. *Bangalore Water Supply and Sewerage Board v Sugesan & Co Pvt Ltd, Madras*, AIR 1999 Mad 49(DB).
3773. *Mahinder Singh Jaggi v Dataram Jagnnath*, (1998) 9 SCC 28.
3774. *DDA v Joginder S Monga*, AIR 2004 SC 3291.
3775. *CK Sasankan v Dhanalakshmi Bank Ltd*, AIR 2009 SC 3171 : (2009) 11 SCC 60.
3776. *CK Sasankan v Dhanalakshmi Bank Ltd*, AIR 2009 SC 3171 : (2009) 11 SCC 60, (Dr M Sharma J speaking for the Bench).

[s 34.32] Suit by Bank

(i) In the case of a suit by a bank against a person who has executed a promissory note in favour of a bank, the rate of interest in the pro-note was to be taken and should be allowed *pendente lite* unless there are compellable and inescapable reasons to the contrary[3777] (the judgment contains observations that for the purpose of calculating the agreed rate, RBI circulars would be needed).

(ii) The Calcutta view as to pre-suit interest is, that if a claim for interest at the agreed rate is made by a banking company, the court has no discretion to ignore the same, in view of section 21A of the Banking Regulation Act, 1949.[3778]

(iii) The Kerala High Court, while awarding 12% pa rate of interest in a money suit (not based on mortgage), filed by a bank, has noted that banking business can be carried forward only when recoveries of advances are effected.[3779]

(iv) The Karnataka High Court, in a suit for recovery of money borrowed on credit card and service charges was of the view that the trial court was very liberal in granting interest at the rate of 12% despite the contract rate of 2.5% per month which works out 30 % pa. The bank appeared to be satisfied with the judgment and decree and had not preferred any appeal against the rejection of the contract rate of interest. The grant of interest by the trial court was found quite reasonable.[3780]

(v) Section 21 of Banking Regulation Act, 1949 enables the Reserve Bank of India to take note of public interest to regulate the charging of interest on loan advanced from time to time. It is in exercise of that power that Reserve Bank of India circulars fixing rate of interest. Any breach of those directives is liable to be penalised under section 47 of the Banking Regulation Act. Therefore, it was stated that the court was not justified in denying interest at the rate of 17 % pa on the principal sum adjudged in a suit substituted by bank for recovery of loan amount together with interest that is, Rs 11,21,333.45. The judgment was accordingly modified and decreed that the appellant-bank was entitled to get interest at the rate of 17%pa on the amount of Rs 11,21,333.45, the principal sum adjudged from the date of the suit till realisation of the whole amount. All other directions of the trial court would stand.[3781]

(vi) The plaintiff bank has not given evidence as to what is the rate of interest as prescribed by the nationalised bank during the pendency of the suit. It is not shown how the interest at the rate of 16.5% was arrived at. Further, when it is a case where defaulted interests are added to the principal amount, a uniform rate of interest of 9% from the date of suit until date of realisation will be reasonable.[3782]

(vii) In another case, the plaintiff bank asked for interest at the rate of 21 percent pa on the amount due by the defendants. It was an admitted position that the defendants 1 to 3 had availed the said loan for the purpose of business of the first defendant

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3777. *Indian Bank v Textile Inland Agencies*, AIR 1992 Cal 296.
3778. *Vijaya Bank v Art Trend Export*, AIR 1992 Cal 12.
3779. *Catholic Syrian Bank Ltd v NV Varkey*, (1982) 2 KL 789 (DB); noted in *Bank of India v Mary George*, AIR 1992.Ker 125.
3780. *B Dhanraj v Central Bank of India*, AIR 2004 Kant 416.
3781. *Indian Bank, Mattancherry v MR Prabhu & Sons*, AIR 2002 Ker 44 (DB).
3782. *Veluswamy Gounder v State Bank of India*, AIR 2001 Ker 366. See also *Appana Pullam Raju v Central Bank of India*, AIR 2006 (NOC) 1413 (AP) : (2006) 1 SCC 262.

firm. Considering the transaction between the parties, the court was of the view that the interest claimed by the plaintiff at 21 percent pa was neither excessive nor unreasonable. Therefore, the plaintiff was entitled to interest at 21% pa.[3783]

(viii) In a suit for recovery of money advanced by Bank based on promissory note, the defendant admitted the execution of the promissory note, which did not contain any stipulation regarding rate of interest. The Karnataka High Court held the grant of interest by way of damages at the rate of 15 % as not proper and reduced the same at the rate of 6% *pendente lite* and future interest on principal amount.[3784]

(ix) The Punjab and Haryana High Court has held that interest can be recovered by Bank on suit amount which included principal amount as well as interest and the order of Executing Court that the Bank was entitled to further interest on original loan amount only was liable to be rejected.[3785]

[s 34.33] Sub-section (2): Recourse When Decree Silent on Interest

All statutory notifications which are legislative in nature, amount to "law". Notification was issued bringing proviso to section 34 into force. Court is bound to take judicial notice of it under section 57 of the Indian Evidence Act, 1872. Mistake in judgment in not taking such notice is obviously a patent mistake. Petition for review of judgment is maintainable. Discretion under the proviso to section 34 must be exercised on sound judicial principles. Future interest at contractual rate should not be refused, except for sufficient reasons. Refusal to award future interest at the contractual rate is only the exception and not the rule. Review of judgment on this ground must be allowed.[3786] General rule is that interest should be allowed at the contractual rate. If the trial court has refused to allow future interest at the contractual rate and an application is made for review, refusal to review the judgment cannot be sustained.[3787]

In a Bombay case, the court was concerned with a situation in which the transaction was admittedly not a commercial one. Nevertheless, the circumstances were such that in the interest of justice, a high rate of interest was considered *prima facie* desirable. The decree was for Rs 16,200 and the amount was in the nature of a claim against the railway administration. In the circumstances of the case, a rate of 15% pa as interest was just and proper, for the period from the date of the suit until the date of the decree. The court took note of the fact that the stand taken by the railway administration was "unbecoming". Besides this, the amount actually awarded to the plaintiff did not amount to even half the amount of the real claim at the present rupee value. It was for this reason that the rate of 15% pa from the date of suit up to the date of decree was considered proper.[3788]

In the absence of rate of interest specified in the decree, the executing court is not empowered to award interest at 12%.[3789]

3783. *Lakshmi Vilas Bank Ltd v Shreechakra Enterprises*, AIR 2003 Mad 1.
3784. *MA Parthasarathy v Bank of Baroda*, 2007 (1) Civil Court Cases 692 : 2007 (1) Kant LJ 200.
3785. *New Bank of India v Suba Singh*, AIR 2006 P&H 84 : (2006) 142 PLR 255.
3786. *State Bank of Travancore v K Vinayachandran*, AIR 1989 Ker 302.
3787. *State Bank of Travancore v K Vinayachandran*, AIR 1989 Ker 302.
3788. *Amrutlal v Vishwasrao*, AIR 1989 Bom 410.
3789. *Triyamvak Venkatesh Hebsur v Dharmarddi Fakiraddi Khyadad*, AIR 1996 Kant 92.

A commercial loan was advanced by bank. The loanee was to pay interest from the date of loan till the date of payment in full with quarterly rest. Interest accrued and added to principal amount on date of suit is "principal amount" for purposes of the interest and not the amount of loan originally advanced.[3790]

Costs

[3791]**[S 35] Costs.**—(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

[3792][(3) * * *]

AMENDMENT FOR COMMERCIAL DISPUTE OF A SPECIFIED VALUE

Substitution of new section for section 35.—For section 35 of the Code, the following section shall be substituted, namely:—

35. Costs.—(1) In relation to any commercial dispute, the Court, notwithstanding anything contained in any other law for the time being in force or Rule, has the discretion to determine:

(a) whether costs are payable by one party to another;

(b) the quantum of those costs; and

(c) when they are to be paid.

Explanation.—For the purpose of clause (a), the expression "costs" shall mean reasonable costs relating to—

(i) the fees and expenses of the witnesses incurred;

(ii) legal fees and expenses incurred;

(iii) any other expenses incurred in connection with the proceedings.

(2) If the Court decides to make an order for payment of costs, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party:

Provided that the Court may make an order deviating from the general rule for reasons to be recorded in writing.

3790. *Indian Bank v Kamalaya Cloth Store*, AIR 1991 Ori 44.

3791. See Amendment for Commercial Dispute of a Specified Value *vide* the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), section 16 and the Schedule (wref 23 October 2015).

3792. Sub-section (3) omitted by CPC (Amendment) Act 66 of 1956, section 3 (w.e.f. 1-1-1957). Before omission it stood as under:—

"(3) The Court may give interest on costs at any rate not exceeding six per cent per annum, and such interest shall be added to the costs and shall be recoverable as such".

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[s 35.1] High Court Amendment

Calcutta.—Omit sub-section (2) *vide* Cal. Gaz Pt I, dated 20 April 1967.

[s 35.2] Object

The object of awarding cost is to indemnify a party against the expense of successfully indicating his rights in court.[3793]

[s 35.3] Subject to Such Conditions and Limitations As May Be Prescribed

"Prescribed" means by rules contained in, or made under the Act; see section 2 (16) and (18). These include rules framed under sections 122 and 125 of the Code of Civil Procedure,

3793. *Mahindra v Aswini*, (1920) ILR 48 Cal 427; *Anandji Haridas & Co v State*, AIR 1977 Guj 140, 18 Guj LR 271.

1908.[3794] The following rules contain express provision as to costs: O XI, rule 3 (costs of interrogatories); O XII, rule 2 (proof of documents); O XXI, rule 72 (3) (application to set aside a sale), O XXIII, rule 1(3) (withdrawal of suit); O XXIV, rule 4 (cost on payment into court); O XXXII, rules 4 and 5 (next friends and guardians); O XXXIII, rules 10, 11 and 16 (pauper suits); O XXXV, rule 3 (inter-pleader suits); O XXXIV (mortgage suits). But nothing in the rules as to pauper suits limits the discretion of the court under section 35 to apportion costs. Under Sch II, para 13, the court could make an order as to costs of the arbitration where a suit was referred to such arbitration and the award made no provision as to costs and also an order as to the costs of the proceedings in court, with reference to the arbitration. But the court could not pass an order as to the costs of the suit prior to the reference.[3795] Sch II has, however, been repealed.

[s 35.4] "The provisions of any law"

The discretion to award costs is limited by certain enactments, eg the Presidency Small Causes Courts Act, 1882, section 22;[3796] the Land Acquisition Act, 1894, section 27.[3797]

[s 35.5] Costs as Penalty

Costs cannot be imposed as a penalty beyond the costs of suit.[3798] "It is not according to law to give to a party, by way of damages, the costs as between attorney and client of the litigation in which the damages are recovered."[3799] Where a review application was misconceived but both the parties were at fault, exemplary costs were not awarded, but normal costs were awarded.[3800] The assessors of Delhi Municipal Corporation determined the rental value and the rateable value of the property situated in Delhi and also determined the taxes payable thereon. Thereafter, the owner filed a suit in the court in the State of Uttar Pradesh for declaration that the assessment order passed by the assessor of Delhi Municipal Corporation was illegal, invalid and void *ab initio* and for prohibitory injunction against the attachment of the owners property. The decree for prohibitory injunction restraining Municipal Corporation from attachment of owners property was passed *ex parte*.

The fact that the appeal against the assessment order was pending, was deliberately suppressed. Such practices of gross abuse of the processes of the court ought to be put down with a stern hand so that similarly-minded others may desist from indulging in similar acts. Exemplary cost, in a sum of Rs 50,000 was awarded against the legal representative of the deceased owner.[3801]

3794. *Nandlal v Jayadev*, AIR 1962 Pat 36.
3795. *Hira v Gaya*, AIR 1932 All 183 : (1932) 54 All 122.
3796. *Manmatha v Abu Zafer*, AIR 1929 Cal 560 : (1929) ILR 56 Cal 484.
3797. *Assistant Collector, Salsette v Damodardas*, AIR 1929 Bom 63 : (1929) ILR 53 Bom 178.
3798. *Willmott v Barber*, (1881) 17 CD 772.
3799. *Cockburn v Edwards*, (1881) 18 CD 449; *RK Karanjia v Thackersey*, AIR 1970 Bom 424 : 72 Bom LR 94 106.
3800. *Harsh Wood Products v State*, AIR 1989 MP 112.
3801. *Municipal Corp of Delhi v Kamla Devi*, AIR 1996 SC 1733 : (1996) 8 SCC 285 : 1996 (3) Scale 403 : (1996) 3 SCR 1192. See also *Mahendra Baburao Mahadik v Subhash Krishna Kanitkar*, AIR 2005 SC 1794 : (2005) 4 SCC 99 : 2005 (3) Scale 235; *Karnataka Slum Clearance Board, Bangalore v HT Annaji*, AIR 2006 Kant 241; *Shibu Chandra Dhar v Pasupati Nath Auddya*, AIR 2002 SC 1252 : (2002) 3 SCC 617 : 2002(2) SCR 249 : 2002 (3) JT 94 : 2002 (2) Scale 468.

In the case of admission of a student in Medical College, she was allotted a seat in the Dental Course. However, she was again called for centralised counselling and was selected for the MBBS course. She left the BDS course and took admission in the MBBS course. But due to lackadaisical action of authorities and for no laches on her part, she was made to run from pillar to post and eventually she lost one valuable year of her academic and professional career. The Orissa High Court directed that she should be admitted to MBBS course in next Academic Session 2008-2009 in any Government Medical College of the State and further directed the authorities and State to pay costs to meet the ends of justice.[3802]

In the case of frivolous proceedings, the Bombay High Court held that time is required to be spent by Court for adjudicating upon such matters. Therefore, considering the status of the plaintiff and nature of transaction, cost of Rs 30,000 was imposed to be payable to the state.[3803]

Since the university had forced the respondent to come to the court, and be dragged up to the Supreme Court, ordinarily the court would have directed the cost to be paid to the respondent, however, as an interim order was passed directing the appellant to pay to the respondent all his dues without requiring the respondent to work. In the circumstances, while dismissing the appeal, the Supreme Court left the parties to bear their own cost.[3804] Arbitrary allotment of petrol pumps by Minister of State for Petroleum and Natural Gas was challenged by way of public interest litigation. In view of the able assistance to the court, by the petitioner, the Supreme Court imposed a cost of Rs 50,000 and directed the same to be paid by the minister personally.[3805] In a case, the Supreme Court imposed cost, by way of penalty against a party, who launched the unnecessary litigation by filing writ petition in the high court. The Punjab National Bank, which further complicated the litigation and which was held responsible for dereliction of statutory duty, was made responsible for payment of cost.[3806] The distribution of surplus land by the revenue authority was done with unjust and undue haste. The action performed on the part of the authority was found to be *mala fide* against the petitioner, hence a cost of Rs 5000 was imposed against the revenue authority.[3807] When the adopted son was not given his due share in joint family property and so was compelled to litigate in civil court for nearly 35 years, the case was found fit for awarding exemplary costs and a sum of Rs 5,000 was awarded as cost.[3808] If the plaintiffs have unnecessarily been dragged into litigation, it is a fit case where exemplary costs should be awarded to the plaintiffs and accordingly a cost of Rs 1,500 was awarded to the plaintiff.[3809] The plaintiff, a young man of 21 years, was struck with deadly disease like cancer. The plaintiff was treated by renowned doctors and was indeed inflicted by various ailments. The plaintiff was genuinely labouring under a belief that all the ailments were because of second course of radiation and that the doctors treating him were negligent in administrating the same to him. The plaintiff had his own reasons to arrive at this conclusion. The conclusion arrived by him may be scientifically wrong, but he cannot be prevented for that reason to take recourse to any legal remedy which is available

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3802. *Medical Council of India, New Delhi v Sonali Singh*, 2008 (106) Cut LT 477 : 2008 (2) Orissa LR 467.
3803. *Ramesh Bhodhraj Nagpal (HUF) v Smt. Prakash Kaur Sardar*, 2009 (4) AIR Bom R 191 : 2009 (4) All MR 370.
3804. *Madurai Kamraj University v K Rajayan*, (1988) Supp SCC 97.
3805. *Common Cause, a (Registered Society) v UOI*, AIR 1996 SC 3538 : (1996) 6 SCC 530 : 1996 (8) JT SC 613 : 1996 (7) Scale 156.
3806. *Life Insurance Corporation of India v Escorts Ltd*, (1986) 1 SCC 264.
3807. *Akhileshwar Mishra v State of Bihar*, AIR 1995 Pat 10 (DB). See also *Stella Silks Ltd v State of Karnataka*, AIR 2001 Kant 219.
3808. *Heera Lal v Board of Revenue*, AIR 2001 Raj 318 (DB).
3809. *Hindustan Metals v Vishal Goods Transport Co*, AIR 2002 Raj 248.

to him. The plaintiff is no doubt a layman, but he is not an illiterate person. The plaintiff approached the court, when he thought that there was wrong committed by the respondents and that he should approach the court for redressal of this wrong. In such circumstances, the plaintiff cannot be saddled with the cost of litigation much less the exemplary cost.[3810] During the period counting was stopped due to breakdown of electricity, some additional ballot papers not issued by the presiding officers were found to have been mixed up with the bundle belonging to respondent number 4, which is a serious malpractice and the respondent number 4 was made to pay a cost of Rs 10,000.[3811] In admission to MBBS course, a seat was reserved for sportsman. A candidate, in his application, stated that his father was an IAS officer. The member secretary of the Sports Development Authority made a special recommendation in favour of the said candidate and addressed a letter to the selection committee to do the needful. The selection committee introduced the rules of reservation despite the rules in the prospectus. The selection committee was held vitiated by gross nepotism. It being a clear case of *mala fide* in the eyes of law, the candidate, the member secretary and the other authorities were made liable to pay the cost out of their personal funds.[3812] Since petition after petitions have been filed without disclosing the same, in subsequent petition in separation, therefore, all the petitions were dismissed with cost and the same shall be recoverable from the petitioners as arrears of land revenue if not deposited voluntarily within two months.[3813]

In a suit filed by the plaintiff for possession, *mesne* profits and permanent injunction in respect of a tenanted premises, the defendant took the plea of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1986 and suspension of legal proceedings thereunder, when the trial Court dismissed the plea, the defendant challenged the order before high court under Article 227 the Constitution. Dismissing the petition of the defendant, the high court held that the petition is most bogus and frivolous one and been filed just to squander public money and to harass a common man who committed blunder by giving his property on rent to the very public undertaking." With these observations the court imposed exemplary cost of Rs 50,000[3814]. The further observations of the court may serve as a deterrent for unscrupulous litigants and as such worth taking not of:

> 19. Public Sector undertakings spent more money on contesting cases than the amount they might have to pay with regard to the premises which have been taken on rent by them. In addition there to, precious time, effort and other resources go down the drain in vain. Public Sector undertakings are possibly an apt example of being penny wise, pound foolish. Rise in frivolous litigation is also due to the fact that Public Sector undertakings though having large number of legal personnel under their employment, do not examine the cases properly and force poor litigants to approach the court.
>
> 20. Frivolous litigation clogs the wheels of justice making it difficult for courts to provide easy and speedy justice to the genuine litigants. Public Sector undertakings should not indulge in mindless litigation and unnecessarily waste the time and public exchequer's money. A strong message is required to be sent to those litigants (whether Government or Private) who are in the habit of challenging each and every order of the trial court even if the same is based on sound reasoning and also to those litigants who go on filing frivolous applications one after another.[3815]

3810. *Venketesh Iyer v Bombay Hospital Trust*, AIR 1998 Bom 373.
3811. *Ambika Prasad Dubey v District Magistrate, Allahabad*, (1991) Supp 1 SCC 255.
3812. *Midhuna Nathan v State of Tamil Nadu*, AIR 1996 Mad 178 (DB).
3813. *Brij Mohan Rice Mill v Regional Manager, UPFC*, AIR 1997 All 291 (DB). Regarding compensatory costs in cases of false or vexatious claims or defences, see section 35A below.
3814. *National Textile Corp Ltd v Kunj Bahari Lal*, AIR 2010 Del 199.
3815. *National Textile Corporation Ltd v Kunj Bahari Lal*, AIR 2010 Del 199, p 202–203.

[s 35.6] "Costs of" and "incident to suit"

This expression includes not only costs of suits, but costs of applications in suits also. If there has been an invalid reference to arbitration out of court, the court cannot make an order for costs incurred before the arbitrator as they are not costs of the suit.[3816] As to cost of applications, the court may make an order directing either party to pay the costs of the other, or it may make no order as to costs, or it may reserve costs or make costs, as costs in the cause. Where an official receiver was appointed pending a suit for partition but he had no power to bring suits of a certain nature without the leave of court, it was held that costs incurred for obtaining such leave were incidental to the suit of the nature contemplated,[3817] so also costs of an application under section 476 of the CPC.[3818] The expression, "costs of any proceeding or costs incidental to any proceeding" means costs of any proceedings such as may be determined at the conclusion of the hearing and does not include costs payable in advance or to be incurred in future by a party. An order, therefore, directing the party to a proceeding to pay the travelling and halting allowances of another party irrespective of the final decision is not warranted by law.[3819] Every objection or counter affidavit or application of mind involves some amount of cost and waste of energy. That should be suitably compensated in cost. That is how, even assuming that an order has put the other side to inconvenience, it cannot be irreparable as it can be compensated by mulcting the other side with cost.[3820]

[s 35.7] Costs of this Suit

The expression "costs of this suit" means all costs incurred in the suit. Therefore, if one of the defendants is ordered to pay plaintiff's "costs of the suit" and no qualifying words are added, the costs include costs which the plaintiff has incurred by impleading another defendant against whom the suit has been dismissed with costs.[3821] Thus the word "cost" includes costs incidental to the suit.[3822]

The general order for costs of' the suit does not displace a specific order for costs made on an application.[3823] If it is intended to supersede previous interlocutory orders for costs, that fact should be stated in the final decree.[3824] The practice of the Calcutta High Court is that orders for costs made by the court of appeal during the progress of the suit are taxed forthwith and execution levied therefore, but interlocutory orders in the original court await taxation at the final termination of the suit.[3825] In a consent decree, if the order as to costs is intended to supersede previous interlocutory orders as to costs, that fact should be stated specifically, as one of the terms of the agreement that the parties have agreed to abandon the rights which had already accrued to them under the previous orders of the court.[3826] If the order is "costs reserved", those costs remain to be dealt with at the hearing. If the order is "costs in the cause", the Bombay High Court at one time held that the court had a discretion to deal with those

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3816. *Arunachala v Louis Dreyfus*, AIR 1928 Mad 370 : (1928) 54 Mad LJ 580.
3817. *Rai Bahadur Sermal Dalmia v Manindra Lal*, (1935) 40 Cal WN 762.
3818. *Surya Narain Prasad v Surya Manjha*, AIR 1947 Pat 106.
3819. *Punjab National Bank v Sri Ram Kunwar*, AIR 1957 SC 276 : (1957) SCR 220 : (1957) SCJ 225 : (1957) SCA 598.
3820. *Kancherla Sardha Devi v Saripella Sivaramaraju*, AIR 1995 AP 291.
3821. *Ramgopal v Secretary of State*, AIR 1933 Bom 106 : (1933) ILR 57 Bom 589.
3822. *TS Radhakrishnan v State Bank of India*, AIR 1978 Mad 163.
3823. *Radha Persshad v Ram Permeswar*, (1882) ILR 9 Cal 797 : 10 IA 113.
3824. *Kedarnath v Johormull*, AIR 1930 Cal 465 : (1930) ILR 57 Cal 469.
3825. *Kedarnath v Johormull*, AIR 1930 Cal 465 : (1930) ILR 57 Cal 469.
3826. *Kedarnath v Johormull*, AIR 1930 Cal 465 : (1930) ILR 57 Cal 469.

costs in "any manner it thought fit.[3827] In other words, "costs in the cause" stood on the same footing as costs reserved except that in the case of "costs in the cause" if nothing was said about those costs in the final judgment, they were taken to be included in the costs of the suit.[3828] But these decisions are no longer law, and it has now been held that where the costs of an application are made costs in the cause, the party to whom the costs of the suit are awarded is entitled as a matter of course to the costs of the application.[3829] If the order is "costs to abide the result" the court has a discretion to apportion costs at the hearing, but if the order is "costs to follow the event" or "costs to abide and follow the result" the court has no discretion and the successful party is entitled to his costs.[3830]

[s 35.8] Agreement of Costs

The discretion of the court in awarding costs cannot be taken away or controlled by agreement of parties as to how it has to be borne.[3831] Where a party entered into an agreement with his agent for payment of a specified amount as costs, he is not entitled to recover more than that amount as costs from the opponent as costs are in the nature of indemnity and not penalty.

[s 35.9] Offer of Compromise — Effect on Costs

When an offer of compromise is made which the court considers proper for acceptance but is refused, the court, as a general rule, relieves the party making the offer from payment of costs incurred after the date of the offer; but an offer which the court considers insufficient is no bar to a plaintiff's right to costs.[3832]

A three-Judge bench of the Supreme Court has rendered a decision of far-reaching consequence. In a case relating to section 138 of the Negotiable Instruments Act, 1881, the court felt that the tendency of litigants to go for compounding of offence of dishonour of cheque as a last resort, is putting unnecessary strain on the judicial system and contributing to the increase in number of pending cases. It was also felt that unlike section 320 of the Code of Criminal Procedure, 1973, (CrPC), section 147 of the Negotiable Instruments Act, 1881 does not carry any guidance on has to proceed with compounding of offences.[3833]

Pursuant to the above view, the Bench proceeded to frame guidelines evolving a graded system of costs for compounding of offences with the following observations:

> 15. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:—

3827. *Templeton v Laurie*, (1901) ILR 25 Bom 230.
3828. *Jivabai v Teja*, AIR 1924 Bom 398 : (1924) 26 Bom LR 282.
3829. *American Trading Co v Bird & Co*, AIR 1926 Bom 596 : (1926) ILR 50 Bom 430.
3830. *Godavarthi v Godavarthi*, (1915) ILR 39 Mad 476.
3831. *Dawood Bhai v Sheik*, AIR 1953 Bom 445 : (1954) ILR Bom 29 : 58 Bom LR 618.
3832. *Fennessy v Day and Martin*, (1886) 55 LT 161.
3833. *Damodar S Prabhu v Sayed Baba Lal H*, AIR 2010 SC 1907 : (2010) 5 SCC 663.

THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any cost on the accused.

(b) If the accused does not make an application for compounding as aforesaid, than if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

Let it also be clarified that any cost imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the court before which compounding takes place. For instance, in case of compounding before a Magistrate's Court or a Court of Sessions, such costs should be deposited with the District Legal Services Authority. Likewise, costs imposed in connection with composition before the High Court should be deposited with the State Legal Services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority.[3834]

The further observation of the Supreme Court is worth noticing:

> We are also conscious of the view that the judicial endorsement of the above quoted guidelines could be seen as an act of judicial law-making and therefore an intrusion into the legislative domain. It must be kept in mind that section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. We have already explained that the scheme contemplated under section 320 of the CrPC cannot be followed in the strict sense. In view of the legislative vacuum we see no hurdle to the endorsement of some suggestions which have been designed to discourage litigants from unduly delaying the composition of the offence in cases involving section 138 of the Act. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the *status quo*, valuable time of the Court is spent on the trial of these cases and the parties are not liable to pay any Court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties. Even though the imposition of costs by the competent court is a matter of discretion, the scale of costs has been suggested in the interest of uniformity.[3835]

[s 35.10] Proportionate Costs

If a plaintiff recovers less, but not a trifling less, amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not according to the sum

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3834. *Damodar S Prabhu v Sayed Baba Lal H*, AIR 2010 SC 1907, pp 1913–1914.
3835. *Damodar S Prabhu v Sayed Baba Lal H*, AIR 2010 SC 1907, pp 1914–1915.

claimed.[3836] As to the rule in the Privy Council, see the undernoted case.[3837] The proper mode of apportionment is to calculate the amount of the costs of the suit as laid, and then divide the entire sum between the parties according as they have respectively succeeded or failed.[3838]

In a case, the trial court awarded costs of the suit. In appeal, the appellate court did not reverse, vary or modify the direction passed by the trial court to pay cost to plaintiff and did not direct the parties to bear their own costs. It was held by Kerala High Court that in the matter of realisation of cost the plaintiff cannot be denied proportionate cost awarded by the trial court by the application of doctrine of merger as doctrine of merger is not doctrine of universal or unlimited application.[3839]

[s 35.11] Costs by Appellate Court Interpretation

For realisation of costs, the specific order of the court, passed in exercise of the discretion conferred by section 35 of CPC, shall be the guiding factor. If the court of appeal passes an order that the parties shall bear their respective or own costs, such a direction is confined to the costs of the appeal alone. If, on the other hand, the direction is to the effect that the parties shall bear their respective or own costs throughout, the parties shall bear their respective costs, both in the court of appeal and in the trial court. If, in appeal, a direction is given to the effect that any of the parties shall bear the costs of the appeal or suit, such party shall bear the costs accordingly. Where the appellate court directed that the parties "shall bear their respective costs" and the trial court had decreed the suit with costs to be paid by the defendants, the costs of the suit would be recoverable by the plaintiffs, despite the direction of appellate court that the parties shall bear their respective costs.[3840] It is well-settled proposition of law, imposition of costs follows results and the exercise discretion of the any court in awarding cost shall not ordinarily be interfered with by the superior court.[3841] The opportunity of adjournment is granted to the appellant on payment of cost in the circumstances of the case.[3842] The conduct of the appellant shows that they had willfully flouted the undertaking given to the court after taking the advantage of the allotment order, though court has the power to extract obedience of the undertaking given to the court. However, in the circumstances of the case and the antecedent history of the litigation, the Supreme Court gave an opportunity to the appellants to purge themselves of the conduct of the court by vacating the premises within the specified date.[3843] It is clear from section 28(1) of the Specific Relief Act, 1963 that the court does not lose its jurisdiction after the grant of the decree of the specific performance nor it becomes *functus officio*. The court has the power to increase the time in favour of the judgment-debtor to pay the amount or to perform the conditions mentioned in the decree of specific performance. The court shall also be justified in awarding the cost to compensate the petitioner for loss of enjoyment of money in case of delay of payment of money in terms of decree of specific performance.[3844] Three claim petitions were filed against a truck driver, truck owner and the

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3836. *Madhun Mohun v Gokul Doss*, (1866) 10 Moo Ind App 563; *Velu v Ghose* (1894) ILR 17 Mad 293, p 296; *Abdulkadar v Kashinath*, AIR 1968 Bom 267 : 69 Bom LR 848, p 854; *Anandji Haridas & Co v State*, AIR 1977 Guj 140 : 18 Guj LR 271.
3837. *Grish Chunder v Soshi Shikhareswar*, (1900) ILR 27 Cal 951 : 27 IA 110.
3838. *Leckie v Joy Gobindo*, (1881) 7 CIR 114.
3839. *KC Thomas v Thomas*, (2006) 4 Ker LT 739 : (2005) 1 Andh LD (Cri) 35.
3840. *Dambarudhar Bhunya v Muralidhar Bhunya*, AIR 1986 Ori 15.
3841. *Bhagyashree Combines v District Magistrate, Bellary*, AIR 1998 Kant 238 (DB).
3842. *K Patel Chemo Pharma Pvt Ltd v Laxmi Bai Ram Chandra Iyer*, (1993) Supp 2 SCC 174.
3843. *Kanta Dutta v Eighth Additional District Judge, Meerut*, 1991 Supp (1) SCC 219.
3844. *Sardar Mohar Singh v Mangi Lal*, (1997) 9 SCC 217.

appellant company which had entered into a hire purchase agreement with the truck owner. The true relationship between the truck owner and hire purchase company was suppressed by withholding the real documents executed between them, hence, the appellant was directed to pay the cost of Rs 10,000 to each claimant.[3845]

[s 35.12] Costs: A Discretion of the Court

Since, under sub-section (1) the question of costs is in the discretion of the court, ordinarily the appellate court would decline to interfere with the order as to costs passed by the lower court.[3846] A perusal of O LXXXII, rule 2 of the Rules of Supreme Court of England also does not indicate that costs can be awarded only as a matter of right and not by way of discretion.[3847] Such discretion must be a judicial discretion to be exercised on legal principles, not by chance, medley, nor by caprice nor in temper.[3848] In the exercise of this discretion the court is not confined to the consideration of the conduct of the parties in the actual litigation itself, but may also take into consideration matters which led up to, and were the occasion of that litigation.[3849] The discretion conferred upon the court by this section is very wide.[3850] Thus, the court may order the costs to be paid by the parties in definite proportions, or it may order one party to pay to the other, a fixed sum, in lieu of taxed costs.[3851] Similarly, it may disallow costs to a successful plaintiff, as where the rate of interest claimed by the plaintiff, and allowed to him, under the Usury Laws Repeal Act, 1855, is usurious;[3852] or where the successful appellant was not sufficiently careful in giving the valuation in his Special Leave Petition[3853] or it may make a successful plaintiff pay the whole costs of the other side.[3854] It may also allow the expenses of witness, though not summoned through the court.[3855] It may disallow costs of either parties on the ground that neither of them had come with clean hands.[3856] It may also disallow the costs of a party on the ground that there was unnecessary cross-examination.[3857] Where the suit is dismissed, it may disallow the costs of a pro forma defendant.[3858] But though the discretion conferred upon the courts by this section is wide, it is a judicial discretion, and must be exercised on fixed principles, i.e., according to the rules of

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3845. *Mohan Benefit Pvt Ltd v Kachraji Raymalji*, (1977) 9 SCC 103.
3846. *Chaturbhuj Pande v Collector*, AIR 1969 SC 255; *Krishneshwari v Rameshchandra*, AIR 1965 All 228; *Om Sarup v Gur Narain*, AIR 1965 P&H 367 : 67 Punj LR 634; *Kaushalya v Ramlal*, AIR 1972 Del 126.
3847. *Janardhan Mohandas Rajan Pillai v Madhubhai Patel*, AIR 2003 Bom 490.
3848. *Maharajadhiraj Sir Kameshwar Singh v Nabilal Mistri*, AIR 1945 Pat 184 : (1944) ILR 23 Pat 929; *Ralliram Dingra v Governor-General of India in Council*, AIR 1946 Cal 249 : (1944) ILR 2 Cal 487 : (1944) 48 Cal WN 554; *Huxley v West London Ex Ry.*, (1886) 17 QBD 373, p 376; *Justain Hull v Paull*, (1919) 24 Cal WN 352, p. 357; *Bacha Rowther v Alagappan*, AIR 1959 Mad 12 : (1958) 2 Mad LJ 157; *Rangappa v Marappa*, AIR 1951 Mad 575.
3849. *Bhagwanji Morarji Gokuldas v Alembic Chemical Works Co Ltd*, AIR 1944 Bom 205 : 46 Beng LR 265; *Bhugobati v Mahomed*, AIR 1925 Cal 569 : (1902) 7 Cal WN 297, p 299; *Naramme v Kotamme*, AIR 1966 AP 28; *A Yousuf v Souramma*, AIR 1971 Ker 261 : (1971) ILR 1 Ker 154.
3850. As to discretion of taxing-master, *Sadasukh v Baijnath*, AIR 1921 Bom 87; *Jivanlal v Bai Manchha*, AIR 1925 Bom 355 : (1925) 27 Bom LR 532; *FCI v Willianson Magor & Co*, AIR 1999 Cal 219.
3851. *Hakim Rai v Gangaram*, AIR 1942 PC 61 : (1942) 47 Cal WN 113; *Willmott v Barber* (1881) 17 Ch D 772, p 774.
3852. *Carvalho v Nurbibi*, (1879) ILR 3 Bom 202.
3853. *Shanker v Ghisuji*, AIR 1971 SC 281 : (1970) 2 SCC 84.
3854. *Harris v Petherick*, (1879) 4 QBD 611; *Fane v Fane* (1979) 13 Ch D 288; *Deviah v Nagappa*, AIR 1965 Mys 102.
3855. *Ganga Bishan v Muree Brewery Co*, AIR 1928 Lah 800 : (1928) 10 Lah LJ 401.
3856. *Gulabchand v Manikchand*, AIR 1960 MP 263.
3857. *United Bank of India v Nederlandsche Standard Bank*, AIR 1962 Cal 325.
3858. *Ramaswami v Lakshmi*, AIR 1962 Ker 313.

reason and justice, not according to private opinion, or benevolence,[3859] or even sympathy,[3860] nor arbitrarily and capriciously.[3861] Where there are no materials before the court on which it can exercise its discretion, it is not justified in depriving a successful party of his costs.[3862] The following are the leading rules on the subject.

[s 35.12.1] Costs Shall Follow the Event

The normal rule is that costs must follow the event unless the court, for good reasons, otherwise orders.[3863] Such reasons must be in writing.[3864] This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him;[3865] and this rule applies even to proceedings in writ jurisdiction.[3866]

However, where the judgment is silent about the incidence of cost, it shall be presumed that the court did not intend to determine the cost aspect and it intended their parties should be left to bear their own costs.[3867] In case of breach of contract, actual cost and not nominal cost should be imposed.[3868]

It has been held by the House of Lords that the expression "the costs shall follow the event" means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word "event" should be read distributively and the costs of any particular issue should go to the party who succeeds upon it. An issue, in this sense, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment, in whole, or in part. *A* sued *B* for 164*l* for the price of 34 bags of goat's hair sold to *B*. *B*, by his defence, pleaded:

(i) that the goods were not according to sample and were consequently worth 24*l* less;

(ii) that there was an overcharge on the bags for 2*l*; and

(iii) payment into court of the balance.

B succeeded on the first issue, but failed on the second. The court of first instance gave judgment for *A* for 2*l* beyond the amount paid into court with costs. On appeal, it was held by the House of Lords, reversing the decision of the court of appeal, that the issue as to quality (first issue) was an "event" within the meaning of the expression "the cost shall follow the event", and that B was entitled to the costs of that issue.[3869]

3859. *Kierson v Joseph L. Thompson & Sons Ltd*, (1913) 1 KB 587.
3860. *Bevington v Perks*, (1925) 2 KB 229, p 231.
3861. *Bacha Rowther v Alagappan*, AIR 1959 Mad 12 : (1958) 2 Mad LJ 157.
3862. *Civil Service Co-operation Society v General St Nav Co*, (1903) 2 KB 756 (CA).
3863. *Jugraj Singh v Jaswant Singh*, AIR 1971 SC 761 : (1970) 2 SCC 386; *Nandlal v Ramchandiram*, AIR 1968 Bom 208 : 69 Bom LR 364; *Parvati Devi v Tibbia College Board*, AIR 1965 P&H 379.
3864. *Shankar v Parwatibai*, AIR 1976 Bom 241 : 78 Bom LR 186.
3865. *Ghansham v Moroba*, (1894) ILR 18 Bom 474; *Kuppuswami v Zamindar of Kalahasti*, (1904) ILR 27 Mad 341; *Cooper v Whittingham*, (1880) 15 Ch D 501; *Roadeshwar v Manroop*, 13 IA 20, p 31 (successful plaintiff); *Monohur v Ramanauth*, (1878) ILR 3 Cal 484; *Bhubaneswari v Nilcoomul*, (1886) ILR 12 Cal 18 24 : 12 IA 137 (successful defendant); *Forster v Farguhar*, (1893) 1 QB 564; *Huxley v West London Extension Rly. Co*, (1889) 14 App Cas 26, 32.
3866. *Board of Education v Ramakrishna*, AIR 1959 All 226.
3867. *Omveer Singh v District Judge, Haridwar*, AIR 2009 Uttr 55 : 2009 (1) UC 572.
3868. *Thyseen Krupp werkstoffe GMBH v Steel Authority of India*, (2010) 168 DLT 250.
3869. *Reid, Hewitt & Co v Joseph*, AIR 1918 Cal 71; *Myres v Defries*, (1880) 5 Ex D 180; *Ellis v De Selva* (1881) 6 QBD 521; *Abbot v Andrews*, (1882) QBD 648; *Jones v Curling*, (1884) 13 QBD 262.

The court fails to exercise its discretion properly where a defendant denies from the very start that he is a partner, is ultimately held not to be a partner and yet is denied his costs.[3870] The court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation.[3871] A refusal to go to arbitration is no ground for refusing costs;[3872] nor is the fact that the plaintiff brought his action without previous notice to the defendant;[3873] nor the fact that the plaintiff-mortgagee waited to file the suit for a long time with the result that the mortgagor had to pay a large amount of interest.[3874]

In an account suit, costs generally follow the result of the account unless the defendant has falsely denied his liability to account.[3875] But if the right to claim partition is wrongly disputed, the disputing party will be made liable for costs unnecessarily incurred.[3876] An assignee of a decree made respondent without his consent but who actively supports the decree under appeal will be made liable for costs of the appeal but not of the lower court.[3877] A successful party is not to be deprived of his costs merely because the suit proceeds *ex parte*;[3878] nor also because the parties are related.[3879] Where the respondent official receiver intimated the registrar that he was not defending the appeal for want of funds and that no order for costs should be made against him, it was held by the Supreme Court that this was not a sufficient ground for depriving the successful appellant of his costs.[3880] A successful defendant cannot be deprived of his costs merely because he refused before the filing of the suit, to disclose the evidence by which he proposed to substantiate his defence.[3881] It has been held to be a good reason for depriving a successful respondent of his costs that the appeal was filed on the strength of a decision which was overruled after the filing of the appeal[3882] or it failed by reason of a law enacted during the pendency of the appeal.[3883] Unreasonable conduct of the successful defendant was held to be sufficient ground for depriving him of costs,[3884] and even for directing him to pay the costs of the plaintiff.[3885] In *Keshavlal v Lalbhai*,[3886] it was held by the Supreme Court that it was a good ground for depriving the respondents of their costs that they succeeded on a ground taken for

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3870. *Ghasiram v Mahadevamma*, AIR 1975 Kant 158 : (1975) ILR Kant 691.
3871. *Ramsevak Bhurelal v Hiralal Swamiprosad*, AIR 1943 Ngp 273 : (1943) ILR Nag 462; *Bostock v Ramsey Urban District Council*, (1900) 1 QB 357, 360; affd (1900) 2 QB 616; *Sukumari v Gopi Mohan*, (1916) ILR 43 Cal 190; *Walter v Chief Secretary*, AIR 1953 TC 286; *United Industries v The Agriculture Income-Tax and CIT*, AIR 1953 Tr & Coch 531.
3872. *Beckett v Stiles*, (1888) 5 Times Law Rep 88.
3873. *Allah Diya v Sana Devi*, (1942) 25 Ch D 182; *Wittman v Oppenheim*, (1884) 27 Ch D 260; the remarks of North J, in *Walter v Steinkopff*, (1892) 3 Ch D 489.
3874. *Rajagopalswamy v Karaikudi Bank*, AIR 1965 Mad 537 : (1965) 2 Mad LJ 233.
3875. *Mani Devi v Anupurna Dai*, AIR 1943 Pat 218 : (1942) ILR 22 Pat 114; *Harinath v Krishna*, (1888) ILR 14 Cal 147 : 13 IA 123; *Hyam v Bengal Stone Co*, (1916) 20 Cal WN 368.
3876. *Bepin Behari v Promotho Nath*, AIR 1930 Pat 336, (1930) ILR 9 Pat 773; *Satya Kumar Kirpal*, (1910) 10 Cal LJ 503.
3877. *Ramji v Ellis*, (1898) ILR 20 Bom 167; *contra Thimappa v Thangavelu*, AIR 1941 Mad 76.
3878. *Maharajadhiraj Sir Kameshwar Prasad Singh v Nebilal Mistri*, AIR 1945 Pat 184 : (1944) ILR 23 Pat 929; *Upendra v Bisweswar*, (1924) 29 Cal WN 267 : AIR 1925 Cal 596.
3879. *Haribux Gouri Sankar v Subhakaron Tulsiram*, AIR 1965 Ori 211.
3880. *Swaminatha v Official Receiver*, (1957) SCR 775 : AIR 1957 SC 557 : (1957) SCJ 501 : (1957) SCA 962.
3881. *Moos v Gulamali*, AIR 1930 Bom 152 : (1930) 32 Bom LR 200.
3882. *Ramasami Naiken v Venkatasami*, (1919) 43 Mad LJ 61; distinguished in *ALSPPL Sub-ramania Chettiar v Moniam P Narayanaswami Gounder*, AIR 1951 Mad 48 (FB).
3883. *Krishnan v Hindustan Commercial Bank*, AIR 1957 Punj 310 : (1957) ILR Punj 656.
3884. *Margarent v Spain*, AIR 1953 Mad 313.
3885. *State of Uttar Pradesh v Shamsundar*, AIR 1961 All 418.
3886. *Keshavlal v Lalbhai*, AIR 1958 SC 512; *Seethamma v Life Insurance Co*, AIR 1954 Mys 134; *Nagachari v Subbamma*, AIR 1955 AP 114; *Nana Saheb v Appa*, AIR 1957 Bom 138 : 59 Bom LR 303.

the first time in appeal. It is not a ground for depriving a successful plaintiff of his costs that he was in breach of the government order when the defendant was also in breach thereof.[3887]

The power of court to award costs to a successful party is discretionary. This discretion extends to directing the successful party to pay litigation expenses to an unsuccessful party including court-fee payable. But the court case exercise such discretion only if the conduct of the successful party towards the unsuccessful party before, at the time or after the institution of the proceeding in relation to matter in issue is perverse and obstinate. Thus, where no such reprehensible conduct on the part of the successful party was describe, the mere fact that the unsuccessful party hailed from poor strata, cannot itself be a circumstance to direct the successful party to meet the cost of unsuccessful party.[3888]

Where a party successfully enforces a legal right and in no way misconducts himself, he is entitled to costs as of right.[3889] But if he acts oppressively or if there be lapses on his part,[3890] he may be deprived of his costs, though successful.[3891]

But where a successful defendant had set up a false case, he was deprived of his costs of the suit.[3892]

If a plaintiff substantially succeeds, he is entitled to his costs, though he may not have got the precise form of relief he wanted,[3893] and even though the damages awarded to him have been reduced.[3894]

Where a plaintiff succeeds on part of his claim, but fails on the most important and expensive heads of controversy, he may be made to pay the whole cost of the suit to the defendant.[3895]

Everything which increases the litigation and the costs, and which places on the defendant, a burden which he ought not to bear in the litigation, is a perfectly good cause for depriving the plaintiff of costs,[3896] or even directing him to pay part of the costs to the other side.[3897] A successful party will be deprived of the costs of issues which he has unnecessarily raised.[3898]

A successful party ought not to be deprived of part of his costs because some of his witnesses were guilty of exaggeration.[3899]

A person, wrongfully made a party, should get his costs.[3900] When, in a suit for possession, due to accidental error on the part of plaintiffs in describing survey number in plaint,

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3887. *Baboolal v Mangilal Balkishan*, AIR 1957 MP 90 : 1957 Jab LJ 83.
3888. *NSS. Medical Mission Hospital v Sulbeth Beevi*, 2009 (4) AIR Bom R 765 : (2009) 2 Ker LT 779.
3889. *Cooper v Whittingham*, (1880) 15 CD 501; *Upmann v Forester*, (1883) 24 CD 231; *Civil Service Co-op Society v General St Nav Co*, (1903) 2 KB 756 (CA); *Luximibai v Radhabai*, (1918) 42 Bom 327.
3890. *Kailash Chandra v Nand Kumar*, AIR 1944 Cal 385.
3891. *Khetro Swami v Sri Sri Padmanabha Singh Deo*, AIR 1943 Pat 403; *Parkinson v College of Ambulance*, (1925) 2 KB 1, p 17.
3892. *Sukul Bros v Kavarana*, AIR 1958 Cal 730.
3893. *Ghansham v Moroba*, (1894) ILR 18 Bom 474.
3894. *Ademma v Varadareddi*, AIR 1949 Mad 31 : (1948) ILR Mad 803; *Englishman v Lajput Rai*, (1909) 14 Cal WN 713.
3895. *Forster v Farquhar*, (1893) 1 QB 564.
3896. *Justain Hull v Paull*, (1919) 24 Cal WN 352, p 359; *Huxley v West London Extension Rly*, (1889) 14 AC 26, 32.
3897. *UOI v KK Goswami*, AIR 1974 Cal 231 : (1973) ILR 1 Cal 421 : 78 Cal WN 154.
3898. *Esmail v Abdulla*, AIR 1931 Bom 118 : (1931) ILR 55 Bom 525.
3899. *Lipman v Pulman*, (1904) WN 139 : 91 LT 132.
3900. *Bishen Dayal v Bank of Upper India*, (1891) ILR 13 All 290, p. 295.

the defendants were dragged to one more litigation, the cost of Rs 2,500 was awarded to defendants.[3901]

Where both the parties advanced pleas far in excess of their legal rights, each party will he made to bear his own costs.[3902]

Where there is a misconceived review application and both the parties are at fault, then:

(a) the applicant for review cannot he burdened with exemplary costs;

(b) but he can be ordered to pay nominal costs.[3903]

Where the decree of the lower court is confirmed by the appellate court, the mere fact that the grounds upon which the confirmation proceeds are not the same is the *ratio decidendi* of the court below, is no ground for departing from the rule that the costs shall follow the event.[3904]

In a case from Karnataka, the plaintiffs, a multi-national corporation of USA, filed a suit for injunction for infringement of their trade mark BIG MAC, McDonald's and corporate Logo "M" in India. The defendant was using trade mark Sterlings Mac Fast Food or Mac Fast Food for its restaurants. The defendants had been carrying on with its business since 1983 while the plaintiffs got registered in India in the year 1993 only. It was held by the Karnataka High Court that except for the word "MAC" which was common in both other words were altogether different. Therefore the plaintiffs cannot claim exclusive trade mark right on word "MAC". Moreover, there was delay of five years in filing the suit. It was observed that the suit was imaginary and vexatious and held the dismissal of the suit with costs as proper.[3905]

In a case, where an application was moved for waiving the costs imposed by the court, the Delhi High Court held that seeking adjournment repeatedly one or the other ground was not permissible and as such held the dismissal of the application as proper. The high court further depricated the tendency to drag proceedings by filing frivolous applications and/or seeking adjournments as also misusing the courtesy extended to counsels by courts for passing-over matters when called out.[3906]

In a suit for partition and rendition of account which was dismissed for default the Delhi High Court held that where plaintiffs prosecuted the case with diligence and no *mala fide* was reflected on their part, the delay in filing restoration petition can be condoned subject to payment of costs to defendants for putting them to inconvenience.[3907]

In case relating to Municipal Council elections, a petitioner filed a delayed petition challenging the election of Municipal Councillor, although he was aware that the petition was hopelessly barred by limitation. Thereafter, he filed a writ petition in the high court and managed to secure an interim order from the writ court halting the election process on the ground of pendency of the election petition. The fact that the election petition was filed just two days before the filing the writ petition, come to the notice of the court. The writ petition was dismissed with costs of Rs 50,000.[3908]

3901. *Narhari Balku Kavade v Hanmanta Timma Pujari*, AIR 2004 Bom 342.
3902. *Ramkumar v Kalikumar*, (1887) ILR 14 Cal 99 p 108 : 13 IA 116; *Lachmeshwar v Manow*, (1892) ILR 19 Cal 256 : 19 IA 48.
3903. *Harsh Wood Products Pvt Ltd Gwalior v State of Madhya Pradesh*, AIR 1989 MP 111.
3904. *Peek v Gurney*, (1873) LR 6 HL 377; *Fischer v Kamala Naicker*, (1860) 8 Moo Ind App 170.
3905. *McDonald's Corp v Sterling's Mac Fast Food*, AIR (2007) 5 Kant 318 : (2007) 5 Kar LJ 638.
3906. *Uttar Pradesh State Bridge Corp v Overseas Water Proofing Corp*, AIR 2006 Del 211 : 2006 (130) DLT 182.
3907. *Smt Santosh v Tek Chand*, (2006) 134 DLT 332.
3908. *Rajendra Dhanji Sakhala v State Election Commission*, 2008 (1) Mah LJ 398 : 2008 AIHC 1322 (DB).

Where unwarranted litigation had been brought before the high court and proceedings were initiated with lack of *bona fide* and were misconceived, the high court dismissed the reference application under section 113 of the Code with costs.[3909]

Where a party entered into an agreement with his agent for payment of a specified amount as costs, he is not entitled to recover more than that amount as costs from the opponent, as costs are in the nature of indemnity and not penalty.[3910]

[s 35.12.2] Costs in a Partition Suit

It is a general rule that up to the passing of a preliminary decree in a partition suit, each party will bear his own costs, unless there are exceptional circumstances, such as unnecessary costs incurred by a frivolous defence.[3911] The court may also direct that the costs of all the parties should come out of the properties which are to be partitioned.[3912] It may also direct a party setting up an exclusive title in himself to pay the costs.[3913]

In a partition suit, where application was filed for recalling an *ex parte* order to allow the defendant to file written statement and the trial court condoned the defendant's delayed appearance, the Jharkhand High Court held that having done so, the defendant's prayer for filing written statement should have been considered by the trial Court bearing in mind the interest of justice. The high court allowed time to file written statement subject to payment of cost.[3914]

Court fees paid during execution proceedings as *mesne* profits ascertained in final partition decree is recoverable as costs implied, though not specifically mentioned in the decree.[3915]

[s 35.12.3] Costs in an Administration Suit

As expounded in Williams on *Executors*;[3916] Ingpen on *Executors*;[3917] *Danniell's Chancery Practice*,[3918] and the undermentioned cases.[3919]

[s 35.12.4] Costs in Company Matters

On a petition under section 395 of the Companies Act, 1956, costs should, in normal course, follow the event.[3920]

In a case relating to winding up of Company, the Bombay High Court held that interest to Workmen on amount due after the date of winding up can be awarded by Court only if there

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3909. *State of Gujarat v Dadabhai Hathibahi Chitrasani*, (2008) 1 Guj LR 441 : 2008 (1) Guj LH 1.
3910. *Peddanna v KVSS Sons*, AIR 1954 SC 26.
3911. *Dildar Ali Khan v Bhawani Sahai Singh*, (1907) ILR 34 Cal 878; *Satya Kumar v Satya Kirpal*, (1909) 10 Cal LJ 503; *Ambika Prasad v Perdip*, (1915) ILR 42 Cal 451; *Bipin Behari v Rai Promotho Nath*, AIR 1930 Pat 336 : (1930) ILR 9 Pat 773.
3912. *Melappa v Guramma*, AIR 1956 Bom 129.
3913. *Makkanalal v Sushama Rani*, AIR 1953 Cal 164.
3914. *Mosstt. Gyanu Sharma v Hari Ram Sharma*, 2009 (2) AIR Jhar R 468.
3915. *Kolluri Subha Rao v Kolluri Subha Rao*, AIR 1943 Mad 689.
3916. Williams on *Executors*, 12th Edn, vol 2, p 1304, *et seq*.
3917. Ingpen on *Executors*, 2nd Edn, p 352, *et seq*.
3918. *Danniell's Chancery Practice*, 8th Edn, p 1075.
3919. *National Insurance Co Ltd v Nissim*, AIR 1929 Cal 477 : (1929) ILR 56 Cal 447, p 452; *Ismail v Hari Ibrahim*, AIR 1935 Bom 178.
3920. *See Government Telephones Board v Hormusji M. Seervai*, AIR 1943 Bom 325 : 45 Bom LR 633, p 656 : (1943) ILR Bom 581.

is surplus fund. The court is empowered to award interest strict by in accordance with the provisions of rule 179 of the Companies (Court) Rules 1959.[3921]

[s 35.12.5] Costs in a Partnership Suit

In suits for dissolution of partnership, the costs are ordinarily ordered to come out of partnership assets unless there is some good reason to the contrary. But where the action is really instituted to try some disputed right, the unsuccessful litigant will be ordered to pay the costs. The cost of taking the accounts directed at the hearing are, although disputed, usually defrayed out of the partnership assets, and if necessary, by contribution between the partners.[3922]

[s 35.12.6] Costs of Mortgagee[3923]

The court would be justified in refusing costs to the mortgagee in a redemption suit where he wrongly denies the mortgagor-plaintiff's right to redeem and unreasonably exaggerates the mortgage amount due to him.[3924]

[s 35.12.7] Costs of Trustee

A decree for costs against a trustee, without any further directions, makes him personally liable to pay to the party, in whose favour the order is passed.[3925] Whether he would be entitled to recoup himself from the trust estate, is, however, a different question.

[s 35.12.8] Costs in Pre-emption Suits

See *Bajirao v Abdul Gaffar.*[3926]

[s 35.12.9] Costs under Lease and Rent Control Acts

It is not proper to mulct a landlord who is refused an order of eviction under the provisions of the Buildings (Lease and Rent Control) Act, with costs of the other side.[3927]

[s 35.12.10] Costs of Suits Referred to Referee

Where a suit is referred to a referee for ascertainment of the amount due to a plaintiff, the practice of the Calcutta High Court is to award costs in the suits only on a consideration of the report received.[3928]

[s 35.12.11] November 1984 Riot Affected Borrowers

A debt relief scheme for November 1984 riot affected borrowers had been framed by Government of India, Ministry of Finance, which scheme was thereafter revised by the Reserve

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3921. *Pravin S Shah v Rashtriya Mill Mazdoor Sangh*, 2009 (2) AIR Bom R 107.
3922. See also *Lindley on the Law of Partnership*, 12th Edn, p 545.
3923. See *Halsbury's Laws of England*, 3rd Edn, vol 27, p 400, para 12, *et seq.*
3924. *Mannunthi Beary v Neelamma*, AIR 1976 Kant 21.
3925. *Vasa Panshakshari v Manem Venkataratnam*, 58 Mad 160.
3926. *Bajirao v Abdul Gaffar*, AIR 1953 Ngp 376.
3927. *Natesan v Surya*, (1957) 2 Mad LJ 586.
3928. *UOI v Khetra Mohan*, AIR 1960 Cal 191.

Bank of India called "Central Interest Subsidy Scheme (Revised) for November 1984 Riot Affected Borrowers". The Central Subsidy Scheme was self-contained and took care of loans advanced to borrowers, who were riot affected, before or after the November 1984 riots. In such cases, benefit of "complete write off" or interest thereon, as the case may be, was to be given. There is no scope for the bank to have misunderstood the import of the scheme framed by the Reserve Bank of India to rehabilitate the riot victims of 1984. Having treated the appellants as riot victim borrowers under a rehabilitation scheme, there was no justification of not treating the appellants' case as one covered under the Central Interest Subsidy Scheme and demanding of them, interest at a rate greater than permissible under the Central Scheme. The suit filed was an attempt to cover up the plaintiff-bank's own defaults of not having claimed the subsidy in accordance with the scheme. In any event of the matter, whether the plaintiff-bank claims the subsidy or not is its internal matter and has got nothing to do with its claim against the appellants-defendants. This is a case where the effort of the government to ameliorate the miserable lot of the riot victims of 1984 has been deliberately subverted by the bank. The profound agony of the appellants magnified and prolonged for nearly 18 years.

The judgment and decree dated 25 August 1999 passed in suit No 600/1986 was set aside. Since the appellants have been deprived of benefits of the Central Interest Subsidy Scheme for nearly 18 years, the high court imposed costs quantified at Rs 25,000 payable to respondents No 1 and 2 equally.[3929]

The Supreme Court has held that imposition of cost is in the discretion of the court. Therefore, when the court, in the light of the facts before it, is satisfied that the defendant wanted to delay the proceeding. It would not be appropriate for the appellate court to interfere with the order imposing costs.[3930] For award of costs the value of the claim involved and the financial capacity of the parties are also to be taken into account.[3931]

[s 35.13] Co-plaintiffs

Where two plaintiffs join in one action, claiming for separate and distinct causes of action, and judgment is entered in favour of one plaintiff and against the other, the successful plaintiff is entitled to recover, from the defendant, the whole of his general costs of the action, and the defendant is entitled to recover from the unsuccessful plaintiff, the costs occasioned by his joinder as plaintiff.[3932]

[s 35.14] Co-defendants

The court may order one defendant to pay the costs of another defendant.[3933] In a suit against a partnership of several partners, some of whom admitted and some of whom denied the partnership, those who denied were ordered to pay the costs of those who admitted.[3934] Where the claim of the plaintiff is in the alternative against different defendants and it is not unreasonable, the unsuccessful defendant might be asked to pay the costs of the successful defendant in addition to the costs payable to the plaintiff.[3935] Where, in an action for damages

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3929. *Swarn Kaur v Union Bank of India*, AIR 2003 Del 359 (DB).
3930. *Laxman Prasad v Prodigy Electronics Ltd*, AIR 2008 SC 685 : (2008) 1 SCC 618.
3931. *Oriental Insurance Co Ltd v Avira Foods (India) Ltd*, 2010 (166) DLT 27.
3932. *Viscount Gort v Rowney*, (1886) 17 QBD 625.
3933. *Sree Sree Sridhar Jiu v Kanta Mohan Mullick*, AIR 1941 Cal 213 : (1945) 50 Cal WN 14 : 81 Cal LJ 167; *Tayabji v South British Insurance Co*, (1917) 11 SLR 1.
3934. *Juggat Chunder v Roochand*, (1881) ILR 6 Cal 811.
3935. *Wasudev v National Saving Bank*, AIR 1953 Bom 209.

under the Fatal Accidents Act, 1855, an insurance company was impleaded as additional defendant at the instance of the original defendant, it was held that the original defendant can be asked to pay the costs of both — the plaintiff and the defendant company.[3936]

Separate costs should not be allowed to defendants if the defence is common to all, or their interests are the same.[3937] But if their interests are diverse, they are entitled to appear by separate counsel and to costs so incurred.[3938] When a suit is laid against several defendants in possession of different items of properties, costs should be awarded to or against each defendant in proportion to the plaintiff's claim falling or succeeding against him.[3939]

Where two defendants join in defending an action, and judgment is entered for one and against the other, the successful defendant is prima facie entitled to receive from the plaintiff, half the cost incurred in the joint defence.[3940]

[s 35.15] Cost Upon Advocate

The section does not confer any disciplinary jurisdiction, and a legal practitioner cannot be ordered personally to pay the costs of an application which is an abuse of the process of the court.[3941] But a solicitor who purports to act for a non-existent party is personally liable to pay costs.[3942]

Where an advocate filed a petition which was not maintainable and it appeared that the parties concerned were not consulted, the Supreme Court ordered him to pay the costs personally.[3943] The court has a discretion to award costs against a legal practitioner who has been found guilty of professional misconduct.[3944] Where an advocate appears as *amicus curiae*, an order should be made for payment of his costs.[3945] Where an application for probate failed by reason of the mistake of the counsel, it was held that the court had a discretion to refuse costs to the successful defendant.[3946]

Where suit was decreed *ex parte* in consequence of non-appearance of counsel on date fixed for hearing on the premise of strike call given by advocates, and an application for setting aside *ex parte* order was made by appellant-company stating that appellant-company, being situated in another city it was not possible for it to make arrangements for appearance in court at short notice of strike call and from such a long distance, in special circumstances of case, non-appearance of appellant-company is attributable entirely to his counsel, *ex parte* order can be set aside subject to payment of cost. The advocate can be mulcted with cost of setting aside of *ex parte* decree. Since the court is adopting such a measure for the first time and the

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3936. *Krishna Goundan v Narasingan Pillai*, AIR 1962 Mad 309.
3937. *Girija Prasana Deb v NM Khan*, AIR 1942 Cal 257 : (1941) ILR 2 Cal 556; *Kashinath Balkrishna v Anant Murlidhar*, AIR 1942 Bom 284 : 44 Bom LR 629; *Francisco v Dos Angos*, (1872) 17 WR 188 (common defence); *Kossella Beharee* (1869) 12 WR 70 (separate interest); *Shah Makhan Lall v Shree Kishen*, (1868) 12 Moo Ind App 157.
3938. *Trimbak Yeshwant v Abdulla Ahmed*, AIR 1942 Bom 81 : (1942) ILR Bom 163 : 44 Bom LR 105; *Kashinath Balkrishna v Anant Murlidhar*, AIR 1942 Bom 284 : 44 Bom LR 629; *Manilal v Bharat Spinning and Weaving Co Ltd*, AIR 1936 Bom 242 : (1936) ILR 60 Bom 659.
3939. *Udmiram v Balarama Doss*, AIR 1956 Ngp 76.
3940. *Beaumont v Senior*, (1903) 1 KB 282.
3941. *Shantanand v Basudevanand*, AIR 1963 All 225 : (1930) ILR 52 All 619.
3942. *Narsingirji v Payne & Co*, AIR 1933 Bom 317 : (1933) 35 Bom LR 554.
3943. *Vidya Verma v Shiv Narain*, AIR 1956 SC 108 : (1955) 2 SCR 983 : 1956 SCJ 121.
3944. *Krishna Rao v State of Orissa*, AIR 1955 Ori 65 : (1954) ILR Cut 623.
3945. *Hirjibhoy v State of Bombay*, AIR 1953 Bom 228, (1953) ILR Bom 748.
3946. *Srimathi Umrao v Bakshi Gopal*, AIR 1957 Raj 180.

counsel would not have been conscious of such a consequence befalling them, the court may direct the party to realise half of the amount of cost from the firm of the advocate or any one of its partners.[3947]

[s 35.16] *Forma pauperis*

When a suit instituted *in forma pauperis* is partly successful, the court has power to make such order for costs as it considers, in its discretion, proper not under O XXXIII, rules 10 and 11, but under this section;[3948] and the words "costs of and incidental to all suits" would include costs of the pauper application[3949] and the court fee payable on the plaint.[3950]

[s 35.17] Nominal/No Cost

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite the fact that section 35(2) of the Code. Such a practice also encourages filing of frivolous suits, or taking up of frivolous defences. Further wherever costs are awarded ordinarily the same are not realistic and are nominal. Section 35(2) provides for cost to follow the event. It is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court, in its discretion, may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs, including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court-fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the high courts to examine these aspects and wherever necessary, make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.[3951]

The court may direct parties to bear their own costs where the law is settled for the first time,[3952] or where the litigation arose because of ambiguity in the statute,[3953] or where the court itself was in error,[3954] or where the appellant does not press part of his claim,[3955] or where the case involves important questions of law for decision,[3956] or where it is a test case and the unsuccessful respondent had to bear the brunt of the fight,[3957] or when the question related to interpretation of a recent statute,[3958] or where the court clarifies a confused juridical situation.[3959]

Where a suit for specific performance was dismissed and the defendant was found entitled to costs throughout, however, in view of pecuniary position of plaintiff, it was held that the

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3947. *Ramon Services Pvt Ltd v Subhash Kapoor*, AIR 2001 SC 207 : (2001) 1 SCC 118 : JT 2000 (2) SC 546.
3948. *State v Chandradass*, AIR 1977 Ker 30 : (1976) ILR 2 Ker 56.
3949. *Ram Sarna v State of Bihar*, AIR 1959 Pat 384.
3950. *Parasmal v Jayalakshmamma*, AIR 1962 Mys 201.
3951. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344.
3952. *Ranganatha v Kumaraswami*, AIR 1959 Mad 253 : (1959) ILR Mad 298.
3953. *Santokchand v Bhusaval Borough Municipality*, AIR 1966 SC 1358 : (1966) 1 SCR 695.
3954. *Trinkari Sen v Dulal Chandra*, AIR 1967 Cal 518.
3955. *Viswanatha v Shanmugham*, AIR 1969 SC 493 : (1969) 1 SCC 182.
3956. *Khimiji Poonja & Co v Ramlal & Co*, AIR 1960 Bom 532 : 62 Bom LR 277.
3957. *Dominion of India v Shrinbai*, (1955) 1 SCR 206 : (1954) SCJ 813.
3958. *Makkanlal v Chatterjee*, 58 Cal WN 617.
3959. *CIT, Madras v RMC Pillai*, AIR 1977 SC 489 : (1977) 1 SCC 431 : (1977) 2 SCR 111.

parties shall bear their own costs.[3960] Where the second appeal was dismissed, but since the respondent had not appeared and contested the appeal, no order as to cost was passed.[3961] In the suit for recovery of money and for specific performance of agreement of sale, there was close relationship between parties, ie, they were real brothers, parties were directed to bear their own costs.[3962] Although the applicant practiced fraud and suppressed the material facts before the tribunal under the Forest (Conservation) Act, 1980 as well as before high court, and so was liable to pay heavy costs to the state, but, since in the earlier part of the proceedings, forest officials then in-charge as well as the counsel engaged at that time were not properly conducting the case, the cost was declined.[3963] The plaintiffs suit for specific performance of agreement to sell immovable property was decreed. But the lower court, after considering the facts and circumstances of the case, exercised its discretion in not allowing costs to the plaintiff-respondent. After careful consideration of the facts and circumstances of the case and the evidence on record and also the arguments advanced by the counsel for the respondent, the high court found no ground to interfere with the discretion exercised by the lower court in disallowing costs to the respondent in the suit and also found it appropriate in this appeal also to direct both sides to suffer their costs.[3964]

[s 35.18] Discretion not to be Delegated

The discretion given to the court under this section cannot be delegated to the taxing officer.[3965]

[s 35.19] Costs Against Person not a Party to Suit

Under the Code of Civil Procedure 1882, it was held that an order for costs cannot be made against a person who is not a party to the suit.[3966] The decision, however, turned upon the phrase "party to the suit which it omitted in the present section". A Full Bench of the Allahabad High Court has observed that the omission is significant and that the present section has a wider scope.[3967] But costs should not be awarded against a stranger without giving him an opportunity to be heard on the point.[3968] But, apart from cases where a next friend has been made liable for costs, there is no reported decision except the under-mentioned cases[3969] in which an order has been made for costs against a person not a party to the suit, but a decree for costs against a minor plaintiff would not be interpreted to be a decree for costs against his next friend.[3970] Court may award costs against a litigant appearing in person, where

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3960. *Mehdi Hussain Khan v Nusrat Hasan*, AIR 2004 AP 123 (DB).
3961. *Kulsome Bibi v Abdul Mannan*, AIR 2002 Cal 1.
3962. *KR Janardhane Gupta v DV Usha Vijaya Kumar*, AIR 2006 Kant 243.
3963. *Niyamavedi v UOI*, AIR 2004 Ker 81 (DB).
3964. *Kumaresan v MP Seshadri*, AIR 2002 Ker 198 (DB).
3965. *Lambton v Parkinson*, (1886) 35 WR 545.
3966. *James Bevis v Turner*, (1883) ILR 7 Bom 486.
3967. *Sripal Singh v Maharaj Singh*, AIR 1942 Oudh 279; *Shantanand v Basudevnand*, AIR 1930 All 225 : (1930) ILR 52 All 619.
3968. *Chandra Sekhar v Monoharlal*, AIR 1942 All 233.
3969. *Sridhar Jiu v Manindra Kumar Mitra*, AIR 1941 Cal 273 : (1940) ILR 2 Cal 285; *Marutitao v Secretary, Municipal Committee, Balaghat*, AIR 1934 Ngp 250; *Kanta Gupta v Eighth Addl. District Judge, Meerut*, (1991) Supp 1 SCC 219.
3970. *Vinayak Pandurangrao v Shavanappa*, AIR 1944 Bom 100 : (1944) ILR Bom 12 : 45 Beng LR 1029; *Satyanarayana v Rama Lakshmamma*, AIR 1959 AP 662; *Shyam Sunder v Shani Devi*, AIR 1961 All 563.

his behaviour has been reproachable.[3971] The Rajasthan High Court, in one case, directed payment of "exemplary" costs of Rs 1000, in an appeal against the decision of a claims tribunal under the Motor Vehicles Act, 1988. The costs were awarded, because of the baseless defence put forth by the state road transport corporation. Order was made to recover the amount from the functionaries, who had given the advice to the corporation to contest the claim.[3972] Persons interested on whose behalf a suit is brought under O I, rule 8, cannot be ordered to pay costs.[3973] As regards an action for costs against a third person on the ground that he was the mover of, and had an interest, in the suit, it has been held by the Privy Council that such an action cannot be maintained in the absence of malice and want of probable cause.[3974]

Where a third party with no sufficient reason appears and defends an action separately, he must bear the costs of so doing, even though the plaintiff is unsuccessful in the action.[3975] This is also so in the case of a formal defendant, against whom no relief is claimed.[3976]

[s 35.20] Court Having no Jurisdiction to Try the Suit

Court returning the plaint for presentation to the proper court, can grant costs against the plaintiff, but cannot make the payment a condition precedent to the presentation of the plaint in the proper court.[3977]

[s 35.21] Out of What Property

The court is not bound to order costs to be paid out of the estate. Such an order is generally made in favour of trustees, and in probate suits when the difficulty of construction is caused by the testator.[3978] Where, in a suit under section 92 of the CPC, the surviving appellant is not solvent enough to pay the costs of the successful respondent, it is competent to a court to make an order for costs against the estate of the deceased appellant.[3979]

[s 35.22] Costs Where Relief is Claimed Against Defendants in the Alternative

See note under the same head to O I, rule 3.

[s 35.23] No Separate Suit for Costs

Where a court has jurisdiction to deal with the question of costs, no separate suit will lie to recover costs, but where it has no jurisdiction to order costs, and costs are incurred, they may be made the subject of consideration as to damages in a subsequent suit.[3980] A suit was filed for permanent injunction for restraining the defendant from asserting any right, title or interest in the motorcycle of the plaintiff. The defendant filed a miscellaneous application for an order directing the plaintiff to hand over the motorcycle to him. The hearing was adjourned

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3971. *B Varadha Rao v State of Karnataka*, AIR 1987 SC 287.
3972. *Rajasthan State Road Transport Corp v Jhani*, AIR 1987 Raj 68.
3973. *Sajedar Raj v Baidyu Nath*, (1986) 1 Cal WN 65.
3974. *Ram Coomar Coonmar Coondoo v Chunder Kanto Mookerji*, (1878) ILR 2 Cal 233 : 4 IA 23.
3975. *Sourendra Mohun v Murarilal*, (1920) 24 Cal WN 888; *Megh Raj v Allah Rakhia*, AIR 1942 FC 27 : (1942) Lah 622 : (1942) Cal WN 61 (FC).
3976. *Rangalal v URPC and P Society*, AIR 1975 Ori 137 : (1975) ILR Cut 386.
3977. *Kesavalu v Venkatarama*, AIR 1945 Mad 35 : (1942) ILR Mad 35.
3978. *Indar Kunwar v Jaipal*, (1889) ILR 15 Cal 725 : 15 IA 127; *Re Taramoni Dasi*, (1900) ILR 25 Cal 553
3979. *Ram Ghulam v Shyam Sarup*, AIR 1934 All 1 : (1934) ILR 55 All 687.
3980. *Chandra Shekar v Manohar Lal*, AIR 1942 All 233; *Maharam Das v Ajudhia*, (1986) ILR 8 All 452. p 461.

on failure of the plaintiff to file his reply, subject to payment of costs. On the adjourned date, the plaintiff failed to appear. Held, that the suit cannot be dismissed for non-payment of costs. Only the defendant's application can be disposed of.[3981]

[s 35.24] Sub-section (2): Reasons in Writing

If the court does not abide by the rule that costs should follow the event, it should record its reasons.[3982]

[s 35.25] Costs Disallowed When Delay Arises in Appeals to the Privy Council: Supreme Court

The Privy Council has said that litigants should use all speed to bring their cases to trial and make this injunction effectual by disallowing costs in case of delay in appeals to the Privy Council.[3983] These observations would also be applicable to the Supreme Court, which can deprive a successful litigant of his costs on the ground of unreasonable delay in prosecuting the appeal.

[s 35.26] Sub-section (3): Omitted

The deletion of sub-section 3[3984] of the Code in 1956 does not affect the right of the party to claim interest by way of restitution. Section 144 of the Code expressly provides that the court may order refund of costs and payment of interest, damages, compensation, which are properly consequential on such variation or reversal.[3985]

[s 35.27] Appeal for Costs Only

Decisions of a court of law fall into three classes, namely:

(i) decrees (every decree is appealable (section 96));

(ii) appealable orders (section 104);

(iii) non-appealable orders (section 105).

[s 35.27.1] When the Appeal is Against Decrees

It is settled that an appeal lies for costs only when the costs are awarded by a "decree" if the order as to costs involves a question of principle, but it is not settled whether such an appeal lies if no question of principle is involved. A decree contains:

(i) a decision on the rights of parties, hereinafter called item no 1; and

(ii) a direction as to costs, hereinafter called item no 2.

3981. *Raj Kumar v Girdharilal*, AIR 1989 P&H 45.
3982. *Rajabapayya v Basavayya*, AIR 1942 Mad 713; *Ramprasad v Shrinivas*, AIR 1925 Bom 527 : (1925) 17 Bom LR 1122; *Salem Advocates Bar Assocn v UOI*, AIR 2005 SC 3353.
3983. *Virabhadrauna v Mahalakshmamma* (1930) 34 Cal WN 512 : AIR 1930 PC 42; see also *Bangachandra v Jagat Kishore*, (1916) 43 IA 249; *Dreyfus v Arunachala*, AIR 1931 PC 289 : 52 IA 381 : 35 Cal WN 1287.
3984. Sub-section (3) omitted by CPC (Amendment) Act 66 of 1956, section 3.
3985. *UOI v Ummer Sait*, AIR 1969 Mad 212.

A party, while appealing from item No 1 or any part thereof, may appeal also from item no 2. He may, at the hearing, abandon the appeal from item no 1 and may proceed with the appeal from item no 2.[3986] But can he appeal from item no 2 only, without appealing from item no 1? In other words, does an appeal lie on a matter of costs only? All the high courts are agreed that such an appeal does lie:

(i) where the order as to costs involves a matter of principle,[3987] as where a formal party to a suit against whom no relief is claimed is made to pay the costs of the suit;[3988] or

(ii) where there has been no real exercise of discretion in making the order as to costs. This may happen when a successful party is deprived of his costs[3989] or is made to pay the costs of the losing party.[3990] If the discretion was exercised in fact, the appellate court would not interfere merely because it would itself have exercised the discretion differently;[3991]

(iii) where the order as to costs proceeds upon a misapprehension of fact or law.[3992]

For brevity's sake, one may describe all the three cases as cases where a question of "principle" is involved. Therefore, one may say that it is settled law that an appeal lies for costs only where the order as to costs involves a question of principle. But it is not settled whether an appeal lies for costs only, where no question of principle is involved. It has been held by the High Court of Calcutta that no appeal lies on a question of costs unless there is a question of principle involved.[3993] On the other hand, it has been held by the High Court of Bombay that an appeal will lie for costs only, whether the order as to costs involves a question of principle or not.[3994] The ground of the Bombay decisions is that every decree being appealable, any part of it is appealable, though it be the part relating to costs, whether there is a matter of principle involved or not. But even according to the Bombay decisions, though an appeal may lie for costs only, the appellate court will not, as a rule, vary or set aside the order of the lower court as to costs unless there is a principle involved and the principle has been violated.

Does a second appeal lie on a matter of costs only? It has been held that it does, provided there is a question of law or principle involved.[3995]

3986. *Vasudev v Bhavan*, (1892) ILR 16 Bom 241.
3987. *Girdharilal v Sunder Bibi*, (1866) Beng LR Supp vol 496; *Secretary of State v Marjum*, (1885) ILR 11 Cal 359; *Dildar Ali Khan v Bhawani Sahil Singh*, (1907) ILR 34 Cal 878; *Aga Mahomed v Syed Mahomed*, (1916) 21 Cal WN 339; *Ahmedbhai v Petit* (1911) 13 Bom LR 1061; *Bipin Behari v Rai Promotho Nath*, AIR 1930 Pat 336 : (1930) ILR 9 Pat 773.
3988. *Bunwari Lall v Drup Nath*, (1886) ILR 12 Cal 179.
3989. *Civil Service Co-op Society v General Steam Navigation Co*, (1903) 2 KB 756; *Westgate v Crown*, (1908) 1 KB 24; *Lalman v Chintamani*, (1919) ILR 41 All 254; *Assistant Collector, Salsette v Damodardas*, AIR 1929 Bom 63 : (1929) ILR 53 Bom 178; *Lalta Prasad v Misri Lal*, AIR 1931 Oudh 9 : (1931) ILR 6 Luck 378; *Modgil Krishna v Modgil Krishna Dai*, AIR 1994 AP 16 (DB).
3990. *Moshingan v Mozari*, (1886) ILR 12 Cal 271; *Radhey Shiam v Bihari Lal*, (1918) ILR 40 All 558.
3991. *Parshram v Dorabji*, (1900) 2 Bom LR 254.
3992. *Ranchordas v Bai Kasi*, (1892) ILR 16 Bom 676; *Justain Hull v Paull*, (1919) 24 Cal WN 352; *Aspee (India) Ltd v Dahanukar*, AIR 1954 Bom 35 : (1954) ILR Bom 21.
3993. *Umesh Chandra v Bibhuti*, (1920) ILR 47 Cal 67; *Bunwari Lall v Drup Nath*, (1886) ILR 12 Cal 179; *Amirul Hossain v Khairunnessa*, (1901) ILR 28 Cal 567.
3994. *Ranchordas v Bai Kasi*, (1892) ILR 16 Bom 676; *Khushal v Punamchand*, (1898) ILR 22 Bom 164.
3995. *Bunwari Lall v Drup Nath*, (1886) ILR 12 Cal 179; *Daulat Ram v Durga Prasad*, (1893) ILR 15 All 333; *Daulat Ram v Durga Prasad*, (1893) ILR 15 All 333; *Desaji v Bhavanidas*, (1871) 8 BHC (AC) 100; *Futeek v Hohender*, (1876) ILR 1 Cal 385; *Karman Kaur v Kirpa Singh*, (1920) 2 Lah LJ 310.

[s 35.27.2] When the Appeal is Against an Appealable Order

In case of an appeal from a direction as to costs contained in an appealable order: the law as to appeal from a decision as to costs contained in an order (as distinguished from a decree) is that if the order is itself appealable, an appeal will lie from that part of the order which relates to costs.[3996] But no second appeal lies on a matter of costs awarded by an appealable order, for no second appeal lies from any order passed in appeal under section 104.[3997]

[s 35.27.3] When the Appeal is Against an Non-appealable Order

In case of an appeal from a direction as to costs contained in a non-appealable order, since no appeal lies from a non-appealable order, no appeal can lie from a direction as to costs contained in such order. Thus, if an order is made adjourning the hearing of a suit, and one of the parties is directed to pay the costs occasioned by the application for adjournment, he cannot appeal from the direction as to costs, for an order adjourning the hearing of a suit is not an appealable order, it not being in section 104(1) below.[3998] But an order for costs which is not appealable is open to revision under section 115.[3999]

[s 35.28] Letters Patent Appeal

An order for costs is a judgment under clause 15 of the Letters Patent Appeal and an appeal lies against it. The maintainability of the appeal has nothing to do with the question as to under what circumstances the appellate court could interfere with the discretion of the trial court.[4000]

[s 35.29] Costs against Government

The government, in an unsuccessful litigation, is liable to pay costs like any other unsuccessful party.[4001] Irreversible damage had occurred to the eyes of a patient, operated upon in an eye camp. Social organisation espoused the cause of unfortunate victims and prosecuted it with diligence. State government was saddled with costs of the organisation, in the circumstances.[4002] The distribution of surplus land by the revenue authority were done with unjust and undue haste. The action performed on the part of was found to be *mala fide* against the petitioner hence a cost of Rs 5000 was against the revenue authority.[4003] While the state cannot be treated differently from any other litigant in the matter of condonation of delay, the court is "bound" to take into consideration the following factors:

(a) red-tapism in government;

(b) delays in correspondence;

3996. *Balkissen v Luchmeetput*, (1882) ILR 8 Cal 91, p 94, *Vasudev v Bhavan*, (1892) ILR 16 Bom 241; *Shib Kumar v Sheo*, (1833) ILR 8 Cal 91.
3997. See the Code of Civil Procedure 1908, section 104(2).
3998. *Balkissen v Luchmeeput*, (1882) ILR 8 Cal 91.
3999. *Rikhiram Bhagwandas vv Ramlal*, AIR 1961 MP 169. But see the amended section 115 of the Code of Civil Procedure 1908.
4000. *Aspee (India) Ltd v Dahunukar*, AIR 1954 Bom 35 : (1954) ILR Bom 21; *Kulasekara Naicker v Jagadambal*, (1919) ILR 42 Mad 352 (FB); overruling *Saravana Mudaliar v Rajagopala Chetty*, (1907) 17 Mad LJ 569.
4001. *Secretary of State v Lown Karan*, (1920) 5 Pat LJ 321, 327.
4002. *AS Mittal v State of Uttar Pradesh*, AIR 1989 SC 1570 : (1989) 3 SCC 223.
4003. *Akhileshwar Mishra v State of Bihar*, AIR 1995 Pat 10 (DB).

(c) habitual indifference of government officials or governments pleaders as distinct from the usual diligence of ordinary litigant or lawyers for private parties;

(d) collusion or negligence by government officers or government pleaders or fraud;

(e) damage to public interest or to public funds or interests of the state;

(f) institutional or bureaucratic procedure as well as delays arising thereon; and

(g) need to render substantial justice on merits.

In the circumstances, an application for condonation of delay under section 5 of the Limitation Act, 1963 was allowed subject to cost of Rs 5,000 to be paid to the Legal Aid Board by the government initially and later fix the reasonability of delay on the concerned officers/ employees and recover the same from them.[4004] The petitioner has lost the best period of his life due to the callous and unjust attitude of the Calcutta University, hence, he should be adequately compensated. The case was pending for a period of seven years and on a number of occasion the case had to be adjourned, therefore, a cost of Rs 10,000 was imposed against the university.[4005] The building of the petitioner company was unauthorisedly demolished by Regional Development Authority, hence, a cost of Rs 50,000 was awarded by the court against the Regional Development Authority.[4006] The telephone connection of the petitioner, a doctor, was arbitrarily disconnected on account of non-payment of bill. In the facts and circumstance of the case, a cost of Rs 20,000 was awarded in favour of the petitioner.[4007] In the interest of parties, all cases shall be heard together by same court.[4008]

[s 35.30] Matrimonial Causes

It is customary in the divorce division of the Calcutta High Court to direct a respondent husband to secure the costs of the petitioner-wife. But if the parties are members of the Jewish community and the cause is tried in the original civil jurisdiction of the high court and neither clause 35 of the Letters Patent Appeal nor the Indian Divorce Act, 1869 applies, then section 25 of the CPC will not justify such an order.[4009] In a divorce petition, the husband alleged ground of adultery against the wife. The character of wife was assassinated without any reason. The husband falsely implicated the dependant and obedient servant of the family; besides, false witnesses were brought to ruin the entire family. In the circumstances, a cost of Rs 10,000 was imposed against the husband which the wife was entitled to recover from the assets of the husband.[4010] In a matrimonial petition, the wife's appeal was dismissed by the Supreme Court, however, the cost was awarded in favour of the wife as the court cannot ignore the social reality of a divorced wife in Indian society.[4011]

4004. *UOI v RP Builders*, AIR 1995 Del 57 (DB).
4005. *Rasaraj Debnath v Calcutta University*, AIR 1998 Gau 112.
4006. *Hindustan Petroleum Corpn v State of Bihar*, AIR 1996 Pat 163; *BM Habibullah v State of Tamil Nadu*, AIR 1994 Mad 222; *K Sai Reddy v Deputy Executive Engineer, Irrigation and Command Area Development*, AIR 1995 AP 208.
4007. *Azeemur Rehman Siddiqui v UOI*, AIR 1995 All 317 (DB); *K Sajan Singh v AP Electricity Board*, AIR 1997 AP 279 (DB).
4008. *Manjula Singh Chouhan v Vishal Singh Chouhan*, (2019) 13 SCC 660 : Civil Appeal No. 11412 of 2018, decided on, 27 November 2018 (SC).
4009. *Samuel v Samuel*, (1930) ILR 57 Cal 1089.
4010. *Rajee v Babu Rao*, AIR 1996 Mad 262.
4011. *Saroj Rani v Sudshran Kumar Chadda*, (1984) 4 SCC 90.

[s 35.31] Suit for Contribution Towards Costs

A defendant is not entitled, as against a co-defendant to contribution in respect of costs to which both are liable unless there be some equity existing between him and the co-defendant.[4012]

This view has however not been accepted in *Kulada Prasad Mitra v Giribala Debya,*[4013] where all the important cases on the point are considered.

[s 35.32] Review of Taxation

The court will always interfere and entertain a review of taxation where a question of principle is involved, but the court is generally unwilling to interfere where it is a question whether the master exercised his discretion properly, or if it is only a question of the amount to be allowed.[4014] But the discretion of the master is not final even on a question of quantum, for, he is not at liberty to lay down a scale for discretionary charges which are out of all proportion to the work done.[4015] If any point of principle is to be taken upon a review of taxation, the point of principle must have been properly raised in writing delivered to the other party and carried in to the taxing master; and this is a condition precedent to the right to apply for review to the judge in chambers.[4016]

In taxation between two parties, only those costs are allowed which are strictly necessary for the purpose of the prosecution of the litigation, while in taxation between attorney and client, a party is allowed as many of the charges which he would have been compelled to pay to his own solicitor, as being costs of the suit which fair justice to the other party would permit. In *VV Ruia v S Dalmia*,[4017] the High Court of Bombay allowed costs as between attorney and client, although the stock exchange, not a party to the suit, had appeared in response to a notice by the court to answer the contention that it was not a legal institution and that its rules were not valid. The high court justified its order on the ground that the exchange appeared and incurred costs not only to defend the validity of the institution but in protection of a large section of the public which dealt with or through it. If a solicitor incurs unusual or extraordinary expenses in excess of what would be allowed in taxation between party and party, without express authority from his client, such costs may be disallowed in taxation between attorney and client. In taxation between attorney and client, separate counsel for two sets of defendants will be disallowed, if the defences were not diverse, or if there was no reasonable probability of there being a substantial difference between the defences.[4018] Rule 546 (now 562) of the Bombay High Court Rules which disallows costs not necessary or proper for the attainment of justice or defending the rights of the party refers to party and party costs.[4019] Rule 559 (now 576) of the same rules provides that in case the solicitor's bill is reduced in taxation by a sixth, the solicitor shall pay all costs regarding the taxation. This is a penalty

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4012. *Mulla Singh v Jagannath*, (1910) ILR 32 All 585; *Bhawani Prasad v Ram Prasad*, AIR 1937 All 227.
4013. *Kulada Prasad Mitra v Giribala Debya,* 40 Cal WN 1089.
4014. *Langley v D'Arcy*, (1930) ILR 54 Bom 62 : AIR 1930 Bom 24; *Hill v Peel* (1870) 5 CP 172; *Mahindra v Chandar Singh*, AIR 1957 Pat 79.
4015. *D Parashuram v Tata Industrial Bank*, AIR 1926 Bom 18 : (1925) ILR 50 Bom 69.
4016. *Arnavaz v Hormusji*, AIR 1930 Bom 536 : (1930) 32 Bom LR 1079.
4017. *VV Ruia v S Dalmia*, AIR 1970 Bom 424 : 72 Bom LR 64, p 106.
4018. *Gorakhram v Pirozshaw*, AIR 1930 Bom 92 : (1933) ILR 57 Bom 570.
4019. *Parshuram Shamdasani v Tata Industrial Bank*, AIR 1923 Bom 18 : (1925) ILR 50 Bom 69 : (1933) ILR 57 Bom 570.

for an exaggerated bill of costs, but the court has a discretion in exceptional cases to make a different order.[4020]

A solicitor, who purports to act for a non-existing person, is personally liable for costs.[4021]

A solicitor is not bound by the bill of costs which he once delivers to his client. He is at liberty to present another and revised bill for taxation.[4022] An attorney instructing an advocate (OS) to appear on the appellate side of the high court is entitled to have the costs taxed by analogy on the scale in Appendix E to the Rules on the Appellate Side.[4023]

A solicitor can recover by summary proceedings, his taxed costs from the deposit made in court under O XLV, rule 7.[4024] Discussing the rights of a solicitor with respect to his costs, the High Court of Bombay has stated in *Jamaithram v Custodian of Evacuee Property*:[4025]

(i) that he can obtain an order in chamber for payment of his costs and execute it against his client as a decree;

(ii) that he has got a lien over any property recovered or proceeds of any judgment obtained by his exertion; and

(iii) that he can obtain a charging order.

[s 35.33] Public Interest Litigation

A petition was filed requesting that the police force camping in the college premises to check unruly elements be removed. The petitioners were neither student nor parents of any student, hence, they had no *locus standi* to move the high court and consequently, the petitioner was saddled with the cost of Rs 5,000.[4026] On a petition by an environmentalist organisation bringing to light pollution hazards caused by chemical industries in Bichhri village, the polluting industries were directed to pay cost of Rs 50,000 to the petitioner organisation.[4027]

Arbitrary allotment of petrol pumps by Minister of State for Petroleum and Natural Gas was challenged by way of public interest litigation. Able assistance to the court, by the petitioner, held petitioner entitled to a cost of Rs 50,000, which was directed to be paid by the minister of state concerned personally.[4028]

It is necessary to discourage people from bringing the petition which are motivated by merely personal interest in the name of public interest, for which they have no locus standi. Abuse of the process of the court, in the garb of public, adds to the court's already heavy docket. This, at times, also results in manifest in justice to a public cause, because of interim orders. A cost of Rs 10,000 was imposed upon the petitioner for bringing frivolous litigation.[4029]

In a case, the petitioner claiming himself to be a public spirited person filed a writ petition under Article 226 of the Constitution seeking action against officials responsible for wasteful expenditure of public funds in elections in Patna. The Delhi High Court found the petition to

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4020. *Gorakhram v Pirozshaw*, AIR 1930 Bom 92 : (1933) ILR 57 Bom 570.
4021. *Narsingirji v Payne & Co*, AIR 1933 Bom 317 : (1934) ILR 58 Bom 1.
4022. *Rege v Vijaykar*, AIR 1935 Bom 150 : (1935) ILR 59 Bom 443.
4023. *Doosabhoy v Edulji* (1941) 43 Bom LR 336.
4024. *Wilson & Co v Hari*, AIR 1939 Bom 250 : (1839) ILR Bom 307.
4025. *Jamaithram v Custodian of Evacuee Property*, AIR 1959 Bom 162 : 60 Bom LR 999; *Shamdasani v Central Bank of India Ltd*, (1941) 43 Bom LR 655.
4026. *President, Mahavidyalaya Shiksha Sudhar Sangharsh Samiti v State of Bihar*, AIR 1995 Pat 7 (DB).
4027. *Indian Council for Enviro-Legal Action v UOI*, AIR 1996 SC 1446 : (1996) 3 SCC 212.
4028. *Common Cause (A Registered society) v UOI*, AIR 1996 SC 3538 : (1996) 6 SCC 530.
4029. *Prayag Vyapar Mandal v State of Uttar Pradesh*, AIR 1997 All 1 (DB).

be vague and also found that material facts relating to earlier petitions filed in Patna and Ranchi had been withheld. It was held that the petitioner was interest in filing frivolous petitions and dismissed the same with cost of Rs 25,000.[4030]

[s 35.34] Delay in Deposit of Cost — Condonation of

Where the writ petition was directed against an order whereby the application of the petitioner for deposit of cost; which ought to have been deposited within 15 days, failing which the order setting aside the *ex parte* order was to revive; has been filed after a lapse of six months and only explanation that has been given was that there was advocates' strike it was held that such strike cannot be a ground for the condonation of delay because even if the advocates were on strike, the petitioner could have deposited the money in person.[4031]

[s 35.35] Failure to Deposit Cost and Absence of Party — Effect

On failure of petitioner to appear on a particular date and his non-payment of costs, he could be proceeded with *ex-parte*, order striking off his defence is not proper.[4032]

[4033][**S 35A**] **Compensatory costs in respect of false or vexatious claims or defences.**—(1) If in any suit or other proceedings, [4034][including an execution proceeding but [4035][excluding an appeal or a revision]], any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, [4036][if it so thinks fit], may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation.

[4037](2) No Court shall make any such order for the payment of an amount exceeding [4038][three thousand rupees] or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts

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4030. *National Problem Solution Suggestion Board v UOI*, 2007 (138) DLT 627 (DB).
4031. *Mohd Hanif v Niyat Adhikari, Laghoovad Nyayadhish*, AIR 2002 All 288.
4032. *Black Diamond Glassware Pvt Ltd v Kusumlata Gupta*, AIR 2004 Del 88.
4033. Section 35A was inserted by Act 9 of 1922, section 2, which, under section 1(2) thereof may be brought into force in any State by the State Government on any specified date. It has been so brought into force in Bombay, Bengal, U.P., Punjab, Bihar, C.P., Assam, Orissa and Tamil Nadu.
4034. Substituted by Act 66 of 1956, section 4, for "not being an appeal" (w.e.f. 1-1-1957).
4035. Substituted by Act 104 of 1976, section 14, for "excluding an appeal" (w.e.f. 1-2-1977).
4036. Substituted by Act 66 of 1956, section 4 for "if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof".
4037. See Amendment for Commercial Dispute of a Specified Value *vide* the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016), section 16 and the Schedule -III (w.r.e.f. 23-10-2015).
4038. Substituted by CPC (Amendment) Act 104 of 1976, section 14 (wef 1 -2-1977) for "one thousand rupees".

Act, 1887 (9 of 1887), [4039][or under a corresponding law in force in [4040][any part of India to which the said Act does not extend]], and not being a Court constituted [4041][under such Act or law], are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.]

***SPECIAL AMENDMENT**

Commercial dispute of a Specified Value.—In its application to any suit in respect of a commercial dispute of a Specified Value, in section 35A, omit sub-section (2).

[*Vide* Act 4 of 2016, Sec. 16 and Sch.—3 (w.r.e.f. 23-10-2015).]

SYNOPSIS

[s 35A.1] State Amendment	656	[s 35A.4] Party	660
[s 35A.2] History of the Section	657	[s 35A.5] Sections 35-A and 35-B	660
[s 35A.3] Scope	657	[s 35A.6] Appeal	661

[s 35A.1] State Amendment

Uttar Pradesh.—The following amendments were made by Uttar Pradesh Act No. 24 of 1954 section 2 and Schedule, Item 5, Entry 1 (wef 30 November 1954).

(a) In Section 35A, for the existing sub-section (1) substituted as below:—

(1) if in any suit or other proceeding, including proceedings in execution, but not being an appeal or revision, the court finds that the claim or defence or any part thereof is false or vexatious to the knowledge of the party by whom it has been put forward and if such claim or defence or such part is disallowed, abandoned or withdrawn in whole or in part, the court may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the successful party of costs by way of compensation irrespective of the decision on other issues in the case.

(b) Sub-section (1A) has been inserted by Act 57 of 1976:—

(1A) The provisions of sub-section (1) shall *mutatis mutandis* apply to an appeal where the Appellate court confirms the decision of the trial court and the trial court has not awarded, or has awarded insufficient, compensatory cost under that sub-section.

4039. Inserted by Act 2 of 1951, section 7 (w.e.f. 1-4-1951).
4040. Substituted by the Adaptation of Laws (No. 2) Order, 1956, for "a Part B State".
4041. Substituted by Act 2 of 1951, section 7, for "under that Act" (w.e.f. 1-4-1951).

[s 35A.2] History of the Section

This section was added into the Code by Act 9 of 1922, and by section 7 of the Code of Civil Procedure (Amendment) Act, 1951, in the first proviso to sub-section (2) the words and letter—"or under a corresponding law in force in a Part B State" were inserted after the figures "1887" and the words 'under such Acts or law' were substituted for the words "under that Act". The section did not come into operation until the local government, with the previous sanction of the Governor-General in Council, by notification in the local Official Gazette, directed that the Act shall come into force in the province on such date as may be specified in the notification. But, now, by section 19 of the Code of Civil Procedure (Amendment) Act, 1951, this section, together with other amendments made by the said Act IX of 1922, has been extended to the whole of India except a few states specified in section 1, sub-section (3) of the Code. By the Civil Procedure Code Amendment Act, 1956, in sub-clause (1) the words "including an execution proceeding but excluding" were substituted for the words not being and the words "if it so thinks fit' were substituted for the words "if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof". In sub-clause (2) the words "in any part of India to which the said Act does not extend' were substituted for "a Part B State" by the Adaptation of Laws O II of 1956. The Amendment Act, 1976, has further amended sub-section 1 to exclude from its operation revision proceedings. By substituting for the words "one thousand rupees" the words "three thousand rupees" the legislature has as a deterrent to false or vexatious claims and defences, authorised the courts to award a higher amount by way of compensation.[4042]

The Law Commission of India, in its 240th Report has recommended that section 35A (Compensatory costs for false or vexatious claim/defence) should be recast to have a better check against false and frivolous litigation. The thrust of the proposed amendment is to raise the ceiling from rupees three thousand to rupees one lakh and creation of Judicial Infrastructure Fund into which part of the costs shall be ordered to be deposited.

[s 35A.3] Scope

The award of costs under this section is in the discretion of the court.[4043] This section is intended to deal with exceptional cases in which costs under section 35 would not afford sufficient compensation. Therefore, before awarding costs under this section, the court should satisfy itself that the claim was false or vexatious to the knowledge of the party who put it forward and that the interests of justice require the award of such costs and that further, a claim therefore had been made by the party at the earliest opportunity.[4044]

The court while exercising powers for award of compensatory costs under section 35-A should exercise discretion. Discretion means judicial discretion, not whim, caprice or fancy of a judge. Thus, where an examinee had challenged the evaluation of his answer-scripts by the Higher Education Council, it was held by a Full Bench of the Calcutta High Court held that the court directing pre-trial deposit for production of answer-sheets before Court, is to decide how the amount deposited has to be appropriated and to what extent costs are to be paid.[4045]

4042. But see, *Sri Krishnapur Mutt vv Gopalakrishnayya*, (1965) 2 Mys LJ 93.
4043. *Vittal vv Parasuram*, AIR 1954 Ngp 192.
4044. *Pedda Rangasamy vv State of Madras*, AIR 1953 Mad 583 : (1953) ILR Mad 721 : (1953) 1 Mad LJ 552 : 66 LW 208, 1953 Mad WN 109; *Sriramamurthy vv Andhra University*, AIR 1966 AP 179.
4045. *Secretary, West Bengal Council for Higher Education v Soumyadeep Banerjee*, AIR 2010 Cal 161 (FB).

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs as awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite section 35(2) of the CPC. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further, wherever costs are awarded, ordinarily, the same are not realistic and are nominal. When section 35(2) of the Code provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court, in its discretion, may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee lawyer's fee, typing and other cost in relation to the litigation. It is for the high courts to examine these aspects and wherever necessary make requisite rules regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.[4046]

It has been held that a bare perusal of section 35A shows that the bar operates on the Indian courts with regard to the imposition of costs in respect of false or vexatious claims or defences. The bar was not found to be attracted in *Alcon Electronics Pvt Ltd v Celem, SA of FOS 34320 Roujan*, as the court that had ordered the costs was the High Court of Justice in England, which was not governed by the provisions of the CPC and that the respondent merely approached the Indian courts for the satisfaction of a foreign decree. Moreover, the nature of compensatory costs prescribed in section 35A is different from "costs" dealt with in section 35 as the former is limited to the claims of defences of a party which are frivolous or vexatious. It is settled that before awarding costs under section 35A, the court should satisfy itself that the claim was false or vexatious to the knowledge of the party who put it forward and that the interests of justice require the award of such compensatory costs. In the instant case, no claim had been advanced by the appellant that the claim filed by the respondents was false or vexatious; therefore, the bar in section 35A was not applicable.[4047]

It cannot be said of a claim that it is frivolous when it involves complicated questions calling for elaborate consideration.[4048] Where a suit was filed for damages for breach of a contract and it was found that the contract was forged, compensatory costs were awarded under this section.[4049] The Supreme Court has, in a recent case, exhorted the trial courts to exercise power under this section once they are satisfied that the litigation was inspired by vexatious motives and was altogether groundless.[4050] Costs under this section have been awarded in writ petitions.[4051] Extraordinary jurisdiction under Article 226 of the Constitution should not be allowed to be misused. Where the high court comes to the conclusion that the petitioner has approached the court with unclean hands, or has filed a writ petition stating facts which are false, the petitioner must be penalised with penal consequences. If the high court finds either that a false statement has been made by the petitioner, or that he has come with unclean hands, the court should suitably penalise such a person.[4052] Section 35(1) of the Code itself

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4046. *Salem Advocate Bar Assn v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344.
4047. *Alcon Electronics Pvt Ltd v Celem, SA of FOS 34320 Roujan*, AIR 2017 SC 1 : (2016) 12 Scale 645 : (2017) 2 SCC 253.
4048. *Kotturusami v Viravva*, AIR 1952 Mad 609.
4049. *Venkatasamy v Lakshmi Narayan*, AIR 1959 AP 204.
4050. *T Arivandandam v TV Satyapal*, AIR 1977 SC 2421 : (1977) 4 SCC 467.
4051. *Thulsi Das v Alleppy Chamber of Commerce*, AIR 1953 Tr & Coch 26 : (1951) TC 667; *Board of High Court v Ramakrishna*, AIR 1959 All 226.
4052. *Suraj Kumari v District Judge, Mirzapur*, AIR 1991 All 75 (RB Mahrotra J).

excludes appeals and revisions from its scope. Compensatory costs under section 35A cannot be awarded by the appellate court even if the claim or defence raised by the parties is false, vexatious or frivolous.[4053]

A lady litigant appeared in the Supreme Court in person but refused to argue on merits of the case, the points raised by the counsel for the opposite party. She also used foul language for some of the counsels associated with the proceedings in spite of being cautioned by the court. The lady was well aware with the conduct of judicial process and there were no extenuating factors for her behaviour. Under these circumstances the court imposed exemplary cost of Rs 5 lacs.[4054] Bedi J speaking for the Division Bench of Supreme Court observed as follows:

> A resume of the facts clearly reveal the incorrigible and recalcitrant attitude of the respondent. We could perhaps condone her errant conduct if she was merely a highly strong and impetuous lady oversensitive to her case and unaware of the nuances of the law and the decorum to be maintained in court but we are satisfied that no ignorance nor mental imbalance is discernible which can be pleaded in extenuation of her behaviour. The record reveals that she is well aware of the conduct of judicial process and the law and facts relating to her case, but she has evolved a strategy which has thus far kept her in good stead as it has been designed to filibuster the proceedings in case she finds that they are not taking the direction that she has chalked out and that despite her conviction for contempt of court on two occasions and numerous admonitions and warnings notwithstanding, she has remained unfazed and has in a most unbecoming manner relentlessly and ruthlessly pursued the litigation.[4055]

In a suit for eviction, where the tenants had deliberately prolonged harassment of the landlord in lingering on frivolous litigation, the high court directed to pay cost of Rs 10,000, apart from the arrears rent.[4056]

In a case relating to fire insurance, the Branch Manager as well as the Divisional Manager of the Insurance Company had recommended specifically that the claim of the insured should be paid. But the company still rejected the claim without giving specific reasons. The Himachal Pradesh High Court held that Insurance Company is a public body and is accountable to the public; it cannot waste time and money on frivolous and vexations litigation. With this observation the high court imposed exemplary cost of Rs 10,000/- on the insurance company.[4057]

In execution proceedings of an eviction decree, the judgment-debtor avoided the execution of the decree for a year and a half and subjected the decree-holder to litigation costs before different forums, the high court imposed a cost of Rs 1 lac to be paid to the decree-holder. It was observed that cost imposed should be actual and reasonable including the cost of time spent by the successful party in pursuing the litigation.[4058]

The Supreme Court has held that power to levy exemplary cost should be exercised sparingly to advance justice. It should not be used as a threatening and oppressive tool. It was observed that exemplary costs should be levied only when the claim is found to be false or the party is guilty of fraud, misrepresentation etc. Thus, in a writ petition against eviction order passed against a Government servant from Government quarter, it was held that imposition of

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4053. *Manak Lal v Mahindra Singh*, AIR 1987 Raj 14 : 15–16, para 7 (SS Byal J).
4054. *Ila Vipin Pandya v Smita Ambalal Patel*, AIR 2007 SC 2404 : (2007) 6 SCC 750.
4055. *Ila Vipin Pandya v Smita Ambalal Patel*, AIR 2007 SC 2404, p 2414 : (2007) 6 SCC 750.
4056. *Smt Sadhna Agarwal v Smt Malti Devi*, (2007) 2 All LJ 46 : (2007) 66 All LR 702.
4057. *National Insurance Co Ltd v Lehnu Mal ram Krishna*, AIR 2007 HP 41 : (2007) 1 Shim LC 428 (DB).
4058. *KL Diwan v Mohan Malhotra*, (2009) 158 DLT 442.

exemplary cost was improper as the Government servant had retained the quarter for 10 years on the basis of an interim stay order granted by the Appellate Court.[4059]

The petitioner making reckless and wanton allegations against respondent, especially in the matter of his personal and private life. The petitioner pursued the allegations despite stout denial by the respondent in his counter affidavit. The main charge of *mala fide* against the respondent not proved, hence, a cost of Rs 5000 imposed against the petitioner.[4060] The only question is whether the judgment-debtors need be arrested as ordered by the court in execution of a decree. The Kerala High Court observed that the judgment-debtors must be given an opportunity to avert the order for their arrest by compensating the plaintiff in a reasonable manner for their act of violation. A compensatory cost of Rs 5000 was imposed against the judgment-debtors to avert the arrest as per the order of the lower court. [4061] In a suit for possession of a church building, the defendant, a priest, is unnecèssarily involving himself into litigation arising out of the objection as to valuation of suit the suit was filed in the year 1986. However, written statement was not filed for almost 10 years, hence, an exemplary cost imposed upon the priest. [4062] The officers of the electric board filed false or incorrect statement in the counter affidavit; it was held that in the circumstances, exemplary cost and the cost of the petition were directed to be paid to the petitioner board by way of adjustment towards future bills. The electricity board was also permitted to recover the said cost from the officers who issued the impugned bill.[4063] The Supreme Court[4064] has approved the imposition of costs to the tune of Rs 10 lakhs for filing a false or misleading affidavit in the court. The court also took a strong view against such filing and held that it should be strongly discouraged.

[s 35A.4] Party

The section introduces the word "party" which has been omitted in section 35. But an order for compensatory costs has been made against a next friend.[4065] Compensatory costs can be awarded against a defendant who instigated the plaintiff to bring the unsuccessful suit.[4066] The court has no power to award compensatory costs without giving reasons and unless the point is raised.[4067]

[s 35A.5] Sections 35-A and 35-B

Section 35B, which is narrower than section 35A, concerns itself with the "hearing of a suit or for taking any step therein". In contrast, section 35A uses the words "any suit or other proceedings". Section 35B(1) would not, ordinarily, apply to the type of proceedings such as notice of motion, taken out for restoration of the suit itself.[4068]

4059. *Satyapal Singh v UOI*, AIR 2010 SC 1138 : (2010) 12 SCC 70.
4060. *P Ramchandaran Nair v State of Kerala*, AIR 1997 Ker 322.
4061. *Rajappan v Sankaran Sudhakaran*, AIR 1997 Ker 315 (DB).
4062. *Rev Theodore Ekka v Evangenlical Church of India*, AIR 1996 MP 77.
4063. *K Sajjan Singh v AP Electricity Board*, AIR 1997 AP 279 (DB).
4064. *Sciemed Overseas Inc. v Boc India Ltd*, AIR 2016 SC 345 : (2016) 3 SCC 70 : (2016) 1 Scale 264.
4065. *Meenakshi v Ayamperumal Udayan*, AIR 1944 Mad 81; *Rajkumar v Mangal*, AIR 1930 All 577 : (1930) ILR 52 All 907.
4066. *Chittam Subbaya v Muthyala Ram Chandrappa*, AIR 1945 Mad 84 : (1945) ILR Mad 407.
4067. *V Swarnam Iyer v Veeragu Ammal*, AIR 1943 Mad 286.
4068. *Venekar Industries v Starit Eng Co*, AIR 1985 Bom 253.

[s 35A.6] Appeal

An order awarding compensation under this section is appealable under section 104(ff). But an Appellate Court cannot make an order when the original court has omitted or refused to do so.[4069] See proviso to O XLI, rule 33.

In a case where there was utter lack of legal authority for deprivation of the respondent's property by the appellants who were state authorities, the appeal was dismissed with exemplary costs of Rs 25,000.[4070] When the entire history of litigation showed cussedness and lack of bona fides on part of tenant, apart from his tenacity and determination to prevent landlord from enjoying the fruits of the decree, exemplary costs of Rs 20,000 were imposed on the tenant-respondent.[4071]

The appeal which was bereft of any merit is liable to be dismissed. The Supreme Court was at pains to note that by his acts of omission and commission, the said secretary had consistently and persistently deprived the respondent no 1 of the duty to assume and discharge his duties as member and president of the municipal council, despite his election from 2 January 1998 till date. The term of the office of the municipality was a fixed term out of which three years of the respondent no 1 had been wasted in uncalled for and forced litigation upon him. No law can compensate the loss of opportunity provided to the respondent no 1 for serving the people after his election as member and president of the municipality. The Supreme Court found it a fit case to award exemplary costs and was of the firm view that such costs should not be burdened upon the state exchequer. The said secretary who was responsible for the violation of the statutory provisions and weakening the concept of rule of law, was therefore personally liable to pay the costs from his own pocket. While dismissing this appeal, the Supreme Court directed the said secretary to personally pay the costs of Rs 25,000 to the respondent no 1 within a period of two months.[4072]

[4073][S 35B] **Costs for causing delay.**—(1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party, to the suit—

(*a*) fails to take the step which he was required by or under this Code to take on that date, or

(*b*) obtains an adjournment for taking such step or for producing evidence or on any other ground,

the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of—

(*a*) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,

(*b*) the defence by the defendant, where the defendant was ordered to pay such costs.

4069. See Code of Civil Procedure 1908, proviso to O XLI, rule 33.
4070. *State of Uttar Pradesh v Manohar*, AIR 2005 SC 488, 2004 : (2005) 2 SCC 126 : AIR SCW 7176.
4071. *Gayatri Devi v Shashi Pal Singh*, AIR 2005 SC 2342 : (2005) 5 SCC 527.
4072. *State of Punjab v Bhajan Singh*, AIR 2001 SC 1098 : (2001) 3 SCC 565.
4073. Inserted by CPC (Amendment) Act 104 of 1976, section 15 (wef 1-2-1977).

Explanation.—Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1), shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons.]

SYNOPSIS

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[s 35B.1] Scope

The section has been added to discourage parties to litigation from causing undue or unnecessary delay in the prosecution of the suit at any of its stages. To that end, it empowers the court to order compensatory costs, which are irrespective of the ultimate result of such suit. The section further makes payment of such costs a condition precedent to the further prosecution of the suit or the defence, as the case may be, by the concerned plaintiff or the defendant.

The explanation clarifies that in the case of different groups of defendants who have raised different defences, the group that fails to comply with the order of costs will be deprived of the right to defend but not the other group or groups.[4074]

The facts of the case showed that litigants and his successors-in-interest tried all possible methods to outwit the law and, in the process, stifled the justified cause for a period of 36 years. They changed their stand, depending upon their convenience from time to time and were undeterred even in concealing the proceedings instituted in one court to another where they shifted their stand. Their natural anxiety to save the land within the frame work of law is understandable but then in such a pursuit, if they were to go against law and base their defence totally on false and frivolous grounds, they would certainly earn the wrath of the court and would be asked to pay compensatory costs. The high court was thinking of burdening them with one lakh rupees as costs but the fact that they, in this long drawn litigation, were able to get one order in their favour also from the learned single judge of high court, where proper facts could not be projected, the high court reduced the costs to Rs 50,000.[4075]

In an eviction suit, the judgment-debtor was able to avoid execution of the decree by involving the landlord in a series of frivolous litigations and even after 39 years the landlord was unable to reap the fruits of decree. It was held by the Allahabad High Court that it was a fit case where instead of directing the Executing Court to conclude the execution proceedings.

4074. *Hakmi v Pitambar*, AIR 1987 P&H 145.
4075. *Jawan v Mewa Singh*, AIR 2001 P&H 344 (DB).

direction should be issued to judgment-debtor to hand over vacant possession. The court further imposed a fine of Rs 50,000.[4076]

In *Jhau Lal*,[4077] the trial court had dismissed the suit by invoking its powers under section 35-B for non-payment of costs. Being aggrieved by the said order, the appellant-plaintiffs had filed civil revision petitions. While disposing of the said civil revision petitions, the high court observed that the suit filed by the plaintiffs/appellants was not maintainable, based on the claim made that they are the owners of the property on the basis of adverse possession. The Supreme Court held that while deciding the civil revision petitions, the high court should have concentrated primarily on the ground on which the trial court had dismissed the suit of the plaintiffs/appellants. There was no reason for the high court to have observed in its order that the suit itself was not maintainable before the trial court and remanded the matters to the high court for fresh disposal in accordance with law.

[s 35B.2] Sections 35-A and 35-B

See notes under section 35-A.

[s 35B.3] Judicial Notice

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs as awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite section 35(2) of the CPC. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs as awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion, may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging if any or any other incidental cost besides the payment of the court fee lawyers fee, typing and other cost in relation to the litigation. It is for the high courts to examine these aspects and wherever necessary to make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate country to follow.[4078]

[s 35B.4] "Directory"

The provision in section 35B is "directory", according to the Patna High Court,[4079] dissenting from the High Court of Punjab and Haryana.[4080]

The reasoning of the Patna High Court is as under:

> It will be noticed that in Section 35B, there are two parts—one providing for dismissing of suit or striking out the defence, as the case may be, and the other for realisation of the test by execution. If the first part of the section is mandatory, then not only the suit is dismissed when the defaulter is the plaintiff or the defence is struck off if the defaulter is

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4076. *Jugdish Saran v IXth Addl District Judge, Moradabad*, 2008 (4) All LJ 493 : 2008 (72) All WR 568.
4077. *Jhau Lal v Mohan Lal*, (2013) 9 SCC 446.
4078. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344.
4079. *Raj Kishore Gupta v Shanti Devi*, AIR 1989 Pat 21.
4080. *Anand Parkash v Bharat Bhushan Rai*, AIR 1981 P&H 269 (FB).

> the defendant, but also he cannot escape in paying the cost. The party, thus, suffers twice. This could not be the intention of the Legislature.

The Himachal Pradesh High Court has held that the provisions of section 35-B for imposition of costs for causing delay is directory and not mandatory. The court may not stop further prosecution of the suit by plaintiff for non-payment of costs. It has been further held that an order dismissing the suit for non-payment of costs in essentially an order dismissing the suit for non-prosecution and would not amount to a decree. The remedy available to an aggrieved party is to apply to the court under section 151 of the code for recalling that order and provisions of O IX, rule 9 of the Code are not applicable.[4081]

Final word on this point has been pronounced by the Supreme. It has been held that the words further prosecution of suit' mean further participation, but non-payment of cost does not entail dismissal of suit.[4082]

Raveendran J speaking for the Supreme Court Bench, has explained the point in the following words:

> Section 35B provides that if costs are levied on the plaintiff for causing delay, payment of such costs on the next hearing date, shall be condition precedent to the further prosecution of the suit by the plaintiff. Similarly, if costs are levied on the defendant for causing delay, payment of such costs on the next date of hearing, shall be a condition precedent to the further prosecution of the defence of the suit by the defendant. This takes us to the meaning of the words 'further prosecution of the suit' and 'further prosecution of the defence'. If the legislature intended that the suit should be dismissed in the event of non-payment of costs by plaintiff, or that the defence should be struck off and suit should be decreed in the event of non-payment of costs by the defendant, the legislature would have said so. On the other hand, legislature stated in the rule that payment of costs on the next date shall be a condition precedent to the further prosecution of the suit by plaintiff (where the plaintiff was ordered to pay such costs), and a condition precedent to the further prosecution of the defence by the defendant (where the defendant was ordered to pay such costs). This would mean that if the costs levied were not paid by the party on whom it is levied, such defaulting party is prohibited from any further participation in the suit. In other words, he ceases to have any further right to participate in the suit and he will not be permitted to let in any further evidence or address arguments. The other party of course be permitted to place his evidence and address arguments, and the court will then decide the matter in accordance with law. We therefore reject the contention of the respondents that section 35-B contemplates or requires dismissal of the suit as an automatic consequence of non-payment of costs by plaintiff.[4083]

Where an application for the dismissal of the suit for non-payment of costs for adjournment is filed one year after the date fixed for the payment of costs, section 35 is not attracted. Such dismissal by the trial court is illegal and can be revised.[4084] Though the language employed in section 35B is pre-emptory, the word "shall" does not necessarily indicate that a court which was seized of the case had no discretion in the matter. Further, no injustice had been caused in the instant case, as the rights of the parties were duly safeguarded. Hence, the high court would not interfere under section 115.[4085] A suit cannot be dismissed merely because plaintiff fails to pay costs ordered by the court to be paid by the plaintiff, being costs occasioned by an adjournment granted at the plaintiffs request on condition of payment of costs.[4086]

4081. *Piaro Devi v Anant Ram*, AIR 2008 HP 107.
4082. *Manohar Singh v DS Sharma*, AIR 2010 SC 508 : (2010) 1 SCC 53.
4083. *Manohar'Singh v DS Sharma*, AIR 2010 SC 508, p 510 : (2010) 1 SCC 53.
4084. *Assa Nand v Harish Kumar*, AIR 1983 P&H 23.
4085. *Manjit Singh v State Bank of India*, AIR 1980 P&H 317.
4086. *Surendra Mohan v Khetrinath*, AIR 1988 Gau 74; *Hakm v Pitamber*, AIR 1978 P&H 145.

Where, for the non-payment of costs, a provision prohibited further prosecution of the suit or defence, the provision is directory. It does not mean that the party against whom costs are awarded, should be given a long rope to keep the proceedings deferred until it is pleased to deposit the costs. The enlargement of time in this connection, by exercising power under section 148 of CPC has to be granted, only in cases where the court is satisfied that the default is not willful or the conduct of the party is not contumacious. The party ordered to pay costs cannot be allowed to defeat the very purpose of section 35B, by acting negligently or contumaciously. Section 35B does not apply to rent control proceedings. But the rent controller can adopt its principle.[4087] Plaintiff was allowed to file certain documents on payment of costs to the defendant. The plaintiff failed to pay costs, on the date next following the date of order. It was held that the plaintiff cannot, under section 35B, be debarred from prosecuting the case. Section 35B is an extreme penalty and it should not be imposed unless the case squarely falls within the four corners of the section. Being a penal section, it is to be construed very strictly.[4088] Plaintiff was allowed time to file replication on payment of costs. Costs were not paid along with the replication. Court permitted payment of costs on subsequent date. The order is neither invalid nor did it cause injustice to defendant. Interference in revision is not warranted. Hence, the high court would not interfere under section 115.[4089]

Section 35B does not debar the defendant from prosecuting the case for ever if he fails to pay the costs ordered by the court under section 35B. The court can order that unless the defendant pays the costs, he will not be allowed to enter upon his defence. Where no date is fixed in the order for the payment of costs, such a condition cannot be read into the order.[4090]

Section 35B is mandatory. If a party fails to pay the costs on the next date, the court is bound to disallow prosecution of the suit or defence (as the case may be). In the event of the party failing to pay the costs on the date next following the date of the order imposing the costs, it is mandatory on the court to disallow the prosecution of the suit or defence, as the case may be. No other extraneous consideration would weigh with the court in exercising its jurisdiction against the delinquent party. However, in cases where costs are not paid as a result of the circumstances beyond the control of the defaulting party, the court will be within its jurisdiction to exercise its powers under section 148 of the Code in favour of the defaulting party, if a strong case is made out for the exercise of such jurisdiction.[4091]

[s 35B.5] Condonation of Delay

Condonation of delay is in the discretion of the court. Courts should be liberal in the matter of condoning delay in the interest of justice and the party should not be penalised for the fault of his advocate and should be given opportunity to defend the suit.[4092] Defendant failed to pay costs, even on the last date, when the written statement was filed. But he offered to pay the costs on the date, when the case was taken up for hearing. It was held that the trial court should not have ordered that the defendant be debarred from prosecuting the suit.[4093]

In a case under the Delhi Rent Control Act, 1956 there was late deposit of rent amount and the court imposed costs to be paid within 30 days as a condition for giving the benefit under

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4087. *LD Arora v Sushila Devi*, AIR 1982 P&H 105.
4088. *Simpy Films No. 12, Jullunder v Rajasthani Films (Pvt) Ltd*, AIR 1981 P&H 24.
4089. *Manjit Singh v State Bank of India*, AIR 1980 P&H 317.
4090. *Prakash Narain v Addl District Judge*, AIR 1981 All 120.
4091. *Anand Prakash v Bharat Bhushan Rai*, AIR 1981 P&H 269.
4092. *Anand Prakash v Bharat Bhushan Rai*, AIR 1981 P&H 269.
4093. *UOI v Ram Niwas*, AIR 1984 Raj 42.

section 14(2) of the Act. The cost was not paid ever during the extended period. It was held by the high court that the appeal was rightly dismissed by the Rent Control Tribunal.[4094]

Discretion of condonation of delay is with the court and courts should be liberal in the matter of condoning delay in the interest of justice and the party should not be penalised for the fault of his advocate and should be given opportunity to defend the suit. Where the party came to know of *ex parte* decree only when he received the notice of its execution though he had duly handed over written statement to his counsel and was expecting communication from him, considering *bona fide* that the suit was yet pending, the delay, even though inordinate, in making application to set aside ex parte decree ought to be condoned. However, the applicant was saddled with costs of Rs 1,000.[4095]

[s 35B.6] Cost Should Be Reasonable

In view of the fact that the costs occasioned by the adjournment ought to be reasonable and not by way of penalty, the award of Rs 20,000 as costs after arguments are concluded, and that also to enable learned counsel for the appellant to cite few decisions are by way of penalty. The same cannot be treated as adjournment costs to compensate the opposite party. The costs imposed in the facts and circumstances cannot be said to be reasonable one. They are punitive in nature and cannot be said to be the costs, which would be costs commensurate with the costs occasioned by the adjournment. Thus discretion in the case was not properly exercised in the matter of imposing costs.[4096]

[s 35B.7] Repeated Applications

If repeated applications calling for the records are made without good or sufficient reasons, the court will be at liberty to impose cost for wasting public time and delaying the proceeding.[4097]

[s 35B.8] Waiver of Right

According to a Full Bench of the High Court of Punjab and Haryana, where the issue as to non-payment of costs ordered under section 35B is not raised by the parties, nor taken note of by the court, then there is a waiver of the right arising under the section by the party entitled to costs, and the issue cannot be raised on subsequent dates. The court gave the following reasoning in support. The high court pointed out that an order for the payment of costs, is plainly one in favour of the individual litigant. "Now, on general principles even, it is plain that (the) person in whose favour such a right accrues, may waive the same. Obviously, it would be untenable to hold that a party must be compelled to exercise a right vested in him. Therefore, it would follow that if such a right can be waived expressly, then, equally, it may be so done impliedly, or at least deemed to be so in the eye of the law. In the context of section 35B, if, on the date next following the date of the order of the payment of costs, the issue is not raised by either of the parties or taken notice of by the court, and the case is allowed to proceed further, it would follow that the party having the right to bar the further prosecution of the suit or the

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4094. *Hanuman Mal Bothra v Suraj Mal Jain*, (2010) 167 DLT 452.
4095. *Sagayam Engineering Works v Srivatsa Tube Corp*, AIR 1989 Mad 237.
4096. *PC Ltd v Sharma Associates & Contractors*, AIR 2001 Del 494 (DB).
4097. *Tripura State Co-op Bank Ltd v Shambhu Paul*, AIR 2004 Gau 157.

defence has waived its right. "Thereafter, it would not be possible to again exercise the ghost of the stringent provisions of section 35B at any and every subsequent date".[4098]

Placing reliance on the above mentioned Full Bench decision, the Delhi High Court held that where the party entitled to cost awarded by court fails to raise object as to non-compliance on the date fixed for such payment, it will not be open to the party to re-open the issue of their Will on subsequent date and seek barring of further prosecution or defence under section 35-B. Implied waiver of the right would arise.[4099]

4098. *Prem Sagar v Phul Chand*, AIR 1983 P&H 385. (FB) (Sandhwalia CJ speaking for the Bench).
4099. *Milkha Singh v Parshottam Dass*, (2001) 2 RCR (Civil) 649 (SC).

PART II

EXECUTION

General

[1][**[S 36] Application to orders.**—The provisions of this Code relating to the execution of decrees (including provisions relating to the payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).]

SYNOPSIS

[s 36.1] High Court Amendment 669
[s 36.2] Section Prior to its Substitution 669
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[s 36.4] What Decrees may be Executed 670
[s 36.4.1] Decree of the Court of First Instance Until Appeal and After That, the Decree of the Court of Last Instance 670
[s 36.4.2] The Decree to be Executed must be a Subsisting Decree 672
[s 36.4.3] The Decree must not be Time-Barred 672
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[s 36.5.1] Order 673
[s 36.5.2] Interim Injunction Order 674
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[s 36.6] Merger of Decree 675

[s 36.1] High Court Amendment

Calcutta.—Insert the words "and of the presidency Small Cause Courts Act, 1882", after the words "of this Code" and before the words "relating to"; and the words "and except as therein otherwise provided", after the words "are applicable" and before the words "be deemed to".—Calcutta Gazette, Pt I, dated 20 April 1967.

[s 36.2] Section Prior to its Substitution

The section, prior to its substitution ran as below:

> The provisions of this Code relating to the execution of decrees shall, as far as they are applicable, be deemed to apply to the execution of orders.

The only change made in the new section is that whereas the section did not expressly state that provisions relating to the execution of a decree or order include payment under a decree or order, the amended section declares this by including an express provision to that effect. The effect of the amendment is only clarificatory. The inclusive provision therefore does not make any material difference to the commentary set out below.

1. Substituted by Act 104 of 1976, section 16, for section 36 (w.e.f. 1-2-1977).

[s 36.3] Execution

Execution is the enforcement by the process of the court, of its own decrees. The main rules of procedure are enacted in this part of the Code of Civil Procedure, 1908 (CPC) and minor rules are relegated to O XXI. These provisions apply to the decrees, which are capable of execution. There is no question of execution in regard to decrees that are purely declaratory.

In a case relating to a decree for specific performance of agreement to sell, where the judgment-debtor objected to execution on the ground that it was an agricultural land and Agricultural Tenancy Act was applicable, it was held by the Bombay High Court that neither the defendants nor their father were tenants and no certificate to that effect was filed and as such the provisions of the said Act would not apply.[2]

[s 36.4] What Decrees may be Executed

[s 36.4.1] Decree of the Court of First Instance Until Appeal and After That, the Decree of the Court of Last Instance

When the appellate court makes a decree, the decree of the original court is merged in that of the superior court, and it is the latter decree alone that can be executed.[3] Where, pending an appeal, the execution of the first court's decree was stayed and it was revived after the appeal from the decree was dismissed, the omission to file a new application for execution of the appellate decree was treated as a mere technical defect.[4] If the appellate court rejects the appeal under O XLI, rule 10, its order is not a decree;[5] nor if it dismisses the appeal for default of appearance;[6] or for want of prosecution;[7] nor if the appeal abates[8] or is withdrawn.[9] In all these cases, there is no decree of the appellate court, and the decree to be executed is that of the original court. This would also seem to be the case when the appeal is summarily dismissed without notice to the respondent, but the cases are conflicting.[10] But when the appeal is heard, O XLI, rule 32 requires that the judgment should confirm, vary or reverse the decree from which the appeal is preferred;[11] and the decree capable of execution is the decree of the court

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2. *Gokuldas Rama Gaude v VG Quenium*, 2007 (3) AIR Bom R 353 : (2007) 4 All MR 463 : (2007) AIHC 2022.
3. *Jowad Hussain v Gendan Singh*, AIR 1926 PC 93 : (1925-26) 53 IA 197 : (1927) ILR 6 Pat 24, 28; affirming, *Saiyid Jowad Hussain v Genda Singh*, (1922) ILR 1 Pat 444; *Ekram Hussain v Musammat Umatul Rasul*, AIR 1931 Pat 27 : (1930) ILR 9 Pat 829; *SM Hashim v JA Martin*, AIR 1927 Rang 104 : (1926) ILR 4 Rang 562; *Dayaram Kashiram Shimpi v Bansilal Raghunath Marwadi*, AIR 1953 Bom 214 : (1953) ILR Bom 387 : (1953) 55 Bom LR 30.
4. *Pateshwari Prasad Singh v Abdul Karim*, AIR 1946 All 496 : (1946) ILR All 475; *Baburam Lal v Debdas Lala*, AIR 1959 Cal 73.
5. *Lekha v Bhauna*, (1896) ILR 18 All 101.
6. *Rifaqat Husain v Bibi Tawaif*, (1917) ILR 39 All 393; *Shyam Mandal v Satinath Banarjee*, (1916) ILR 44 Cal 954, p 960.
7. *Batuk Nath v Munni Dei*, AIR 1914 PC 65 : (1914) ILR 36 All 284 : 41 IA 104; *Abdul Majid v Jawahir Lal*, (1914) ILR 36 All 350 PC.
8. *Kalimuddi Ahammad v Eshakuddin*, AIR 1924 Cal 530 : (1924) ILR 51 Cal 715.
9. *Patloji v Ganu*, (1891) ILR 15 Bom 370.
10. *Bapu v Vajir*, (1897) ILR 21 Bom 548; *Batuk Prasad Singh v Ambica Prasad Singh*, AIR 1932 Pat 238 : (1932) ILR 11 Pat 409; but see *Uma Sundari Devi v Bindu Bashini Chowdhrani*, (1897) ILR 24 Cal 759; *Munisami v Munisami*, (1897) ILR 22 Mad 293; *Ahmad Husain v Asma Bibi*, (1908) ILR 30 All 290.
11. *Kailash Chandra Bose v Girija Sundari Debi*, (1912) ILR 39 Cal 925.

of appeal.[12] When the decree of the court of first instance is confirmed by the high court and the latter decree by the Privy Council, the decree capable of execution is the decree of the Privy Council.[13] The same principle would now apply in respect of decrees of the Supreme Court.

The question which decree should be executed arises in the following cases:

(i) Amendment of Decree When there has been an Appeal.—The only decree that can be amended is the decree that has to be executed. If the court of appeal confirms, varies or reverses the decree of the lower court, the decree of the appellate court is the only decree that can be amended.[14]

(ii) Limitation, When there has been an Appeal.—Time runs from the date of the decree capable of execution, and that is the decree of the appellate court superseding that of the court of first instance,[15] and it has been held that this is so even if the appellate court holds that no appeals lies.[16]

(iii) Time for Payment Fixed by Decree.—When a time is fixed for payment by the decree of the lower court, as in a decree for redemption, and the decree is affirmed on appeal, the decree capable of execution is the appellate decree. Nevertheless, the time for the performance of the condition is not extended.[17] Thus, in *Ghanshyamlal v Ram Narian,*[18] the suit was on a bond in which interest was stipulated at 30% and the decree of the first court said that if the defendant deposited the money within three months of the date of the decree, he would be liable only for interest at 12%. This was confirmed on appeal by the high court and the Privy Council, but the defendant was not allowed extension of time till three months after the decree of the Privy Council. On the other hand, in *Noor Ali v Kopti Meah,*[19] a rent decree rendered a tenant liable to ejectment if the rent was not paid within 15 days. This was confirmed on appeal and it was held that he would be protected from ejectment if he paid within 15 days of the appellate decree. In a subsequent case, Mookerjee J said that the balance of judicial opinion is in favour of the view that when time is fixed by the decree of the lower court for the payment of money, and the decree is confirmed on appeal, time runs from the date of the decree of the appellate

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12. *Veerappa v Sivagami*, AIR 1942 Mad 291; *Shorat Singh v Bridgman*, (1882) ILR 4 All 376 (FB); *Luckman v Kishun*, (1882) ILR 8 Cal 218; *Daulat and Jagjivan v Bhukandas Manekhand*, (1886) ILR 11 Bom 172; *Muhammad Sulaiman v Muhammad Yar Khan*, (1889) ILR 11 All 267 (FB); *Nourang Rai v Latif Chaudhri*, (1891) ILR 13 All 394; *Sakhalchand Rikhawdas v Velchand Gujar*, (1893) ILR 18 Bom 203; *Manavikraman v Unniappan*, (1892) ILR 15 Mad 170; *Nanchand v Vithu*, (1894) ILR 19 Bom 258; *Satvaji Balajirao Deshmukh v Sakharlal Atmaramshet*, (1915) ILR 39 Bom 175 : (1914) 16 Bom LR 778.
13. *Raja Bhup Indar Bahadur Singh v Bijai Bahadur Singh*, (1901) ILR 23 All 152 : (1900) LR 27 IA 209.
14. *Shorat Singh v Bridgman*, (1882) ILR 4 All 376; *Muhammad Sulaiman v Muhammad Yar Khan*, (1889) ILR 11 All 267 (FB); *Shivlal v Jumaklal*, (1893) ILR 18 Bom 542; *Pichuvayyangar v Seshayyangar*, (1895) ILR 18 Mad 214; *Abbas Khan v Nibarani Dassi*, (1910) 11 Cal LJ 159; *Lala Brij Narain v Kunwar Tejpal Bikram*, (1910) ILR 32 All 295 : 37 IA 70 : 1910 (12) Bom LR 444.
15. *Saiyid Jowad Hussain v Gendan Singh*, AIR 1926 PC 93 : (1926) LR 53 IA 197 : (1927) ILR 6 Pat 24, affirming, (1922) ILR 1 Pat 444; *Luchman Persad Singh v Kishun Persad Singh*, (1882) ILR 8 Cal 219; *Sakhalchand Rikhawdas v Velchand Gujar*, (1894) ILR 18 Bom 203; *Mahomed Mehdi Bella v Mohini Kanta Saha Chowdhry*, (1907) ILR 34 Cal 874; *Gajadhar Singh v Kishan Jiwan Lal*, (1917) ILR 39 All 641.
16. *Rup Narain v Sheo Prakash*, AIR 1921 All 13 : (1921) ILR 43 All 405.
17. *Chiranji Lal v Dharm Singh*, (1896) ILR 18 All 455; *Manavikraman v Unniappan*, (1892) ILR 15 Mad 170; *Bhola Nath v Kanti Chundra*, (1898) ILR 25 Cal 311; *Ramaswami v Sundra*, (1908) ILR 31 Mad 28; *Basanta Kumar v Radha Rani*, AIR 1922 Cal 329 : (1922) 26 Cal WN 440; dissenting from *Satwaji v Sakharilal*, (1914) ILR 39 Bom 175; *Sukhram Das v Nazar Muhammad*, AIR 1925 Lah 380 : (1925) 6 Lah 316.
18. *Ghanshyamlal v Ram Narian*, (1909) ILR 31 All 379.
19. *Noor Ali v Kopti Meah*, (1886) ILR 13 Cal 13.

court.[20] It is submitted that the correct view is that the appellate decree, not being complete in itself, must be construed with reference to the decree of the lower court and that time is not extended. The appellate court can, however, by its decree, alter the time of payment, and should so frame its decree as to make it clear whether or not it intends to do so.[21] In *Abdul Shaker v Abdul Rahiman,*[22] a decree for specific performance of an agreement to sell was passed conditionally on the plaintiff depositing the purchase price within two months. The plaintiff failed to make the deposit. In the meantime, the defendant had appealed against the decree, granting specific performance and the question was raised whether the plaintiff had not lost, under the terms of the decree, his right to specific performance, as an affirmance of the decree would not extend time for performance. It was held that the principle that the time given in a decree does not become extended by its affirmance on appeal had no application to a decree for specific performance which is in the nature of a preliminary decree and that the time fixed could be extended both by the original and by the appellate court.

(iv) Mesne Profits.—Mesne profits can be ordered from the date of institution of the suit until the expiry of three years from the date of the decree. This means the decree is capable of execution, even if the decree is confirmed on appeal, three years run from the date of the appellate decree.[23] But though the decree to be executed is the appellate decree, yet the terms of it must be ascertained by reference to the decree of the lower court. Therefore, when the original decree gave mesne profits from the date of its decree till the date of delivery of possession and was affirmed by the Privy Council, and the plaintiff got possession subsequent to the latter decree, he was held entitled to mesne profits from the date of the original decree.[24]

[s 36.4.2] The Decree to be Executed must be a Subsisting Decree

A obtains a decree against *B* and *C*. *B* subsequently, sues *A* to set aside the decree on the ground of fraud, and the decree is set aside as against him. *A* cannot execute the decree as against *B*, for, the decree does not subsist as against *B*. But he may execute the decree as against *C* for the decree is a subsisting decree as against *C*.[25]

[s 36.4.3] The Decree must not be Time-Barred

See Limitation Act, 1963, Article 136.

[s 36.4.4] Decree should not be a Nullity

When an order is made for the payment of a fictitious sum without giving any opportunity to a person against whom the order is made, to show cause against the passing of such an order for the said sum, the order is a nullity. When a decree or order is a nullity, it will be deemed to have no existence at all, and any sale held in execution of such a decree or order must also be held to be null and void.[26]

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20. *Sashikanta v Sarat Chandra*, AIR 1921 Cal 699 : (1921) 34 Cal LJ 415.
21. *Ramaswami v Sundra*, (1908) ILR 31 Mad 28.
22. *Abdul Shaker v Abdul Rahiman*, AIR 1923 Mad 263 : (1923) ILR 46 Mad 148 : 44 Mad LJ 107 : 17 Mad LW 216 : 1923 Mad WN 1.
23. *Bhup Inder v Bijai*, (1901) ILR 23 All 152 : 27 IA 209.
24. *Nand Kumar v Bilas Ram*, (1918) 3 Pat LJ 116.
25. *Pasupati v Nando Lal*, (1903) ILR 30 Cal 718; *Chettiatti v Kunhi Koru*, (1906) ILR 29 Mad 175.
26. *Surinder Nath Kapoor v UOI*, 1998 (Supp) SCC 626.

[s 36.5] Execution of Orders

[s 36.5.1] Order

The provisions relating to the execution of decrees are applicable under the section to execution of orders.[27] The term "Order" is defined in section 2 of clause 14, as the formal expression of any decision of a civil court which is not a decree. It is not limited to orders made under the CPC.[28] An order under section 34 of the Guardians and Wards Act, 1890, directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is not an "order" within the meaning of section 2, clause 14, and it cannot be enforced against the ward after he has attained majority and the guardian has been discharged.[29] But an order made after the dismissal of a partition suit directing the plaintiff to deposit in court, a certain sum of money, as remuneration for work done by the commissioners of partition, is an order within the meaning of section 2, clause 14 and it may be executed as a decree,[30] but no appeal will lie against the order passed in the execution as the matter would not come within section 47, as the commissioner is not a party to the suit.[31] Where in execution of a money-decree, the executing court grants a lease of land belonging to the judgment-debtor for a certain period and directs the lessee to pay the amount of the decretal debt by instalments, the direction of the court amounts to an order within the meaning of this section.[32]

An order passed under section 24(8) of the West Bengal Non-Agricultural Tenancy Act, 1949, is capable of execution under this section as a decree.[33] An order obtained by an attorney against his client for payment of his costs under section 48 of Chapter 38 of the Original Side Rules, Calcutta, can be executed as a decree under this section and the attorney is accordingly entitled to apply for rateable distribution under section 73.[34] An order for payment of money made by a court under the provisions of the Companies Act, 1956 is executable as a decree.[35] An executable order falls within the meaning of section 36 of the CPC, and therefore the provisions in O XXI of the CPC as to execution, are equally applicable as to the execution of decrees, or in other words, an executable order is kept as a part as that of an executable decree under the provisions of section 36 of the CPC.[36] A fascicule reading of sections 36–38 points out that:

(i) execution of decree includes the execution of order;

(ii) the decree passed in exercise of appellate jurisdiction can be executed by the court of first instance; and

(iii) the decree may be executed by the court which passes it, or by the court to which it is sent for execution.[37]

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27. *Manikayala Rao v Narasimhaswami*, AIR 1966 SC 470 : (1966) 1 SCR 628.
28. *Kilachand Devchand v Ajudhya Prasad*, AIR 1934 Bom 452 : (1934) ILR 59 Bom 10.
29. *Parvathammal v Chokkalinga*, (1918) ILR 41 Mad 241.
30. *Chandra Kumar v Kusum Kumari*, AIR 1925 Cal 57 : (1925) ILR 52 Cal 269; *Ramkeshwar v Babu Girija Prasad*, AIR 1957 Pat 501.
31. *Dharanidhar Ghose v Phani Bhusan Mukerji*, AIR 1947 Cal 18 : (1946) 50 Cal WN 837 : 82 Cal LJ 152; *Ramkeshwar v Babu Girija Prasad*, AIR 1957 Pat 501.
32. *Punjab National Bank Ltd v Shamsher Singh*, AIR 1936 Lah 696.
33. *Tarapada v Hare Krishna*, AIR 1957 Cal 335.
34. *Moni Manjuri v Razik*, AIR 1954 Cal 6.
35. *Radhe Shyam v Karan Chand*, AIR 1941 Lah 273.
36. *Shanoor Begum v Rukh-Ul-Mulk S Abdul Wazid*, AIR 1997 Kant 199.
37. *N Tombi Singh v Mutum Ongbi Meipak Devi*, AIR 1995 Gau 20.

[s 36.5.2] Interim Injunction Order

In a suit for declaration and injunction, both the plaintiff and defendant filed separate applications for grant of temporary injunction and application filed by plaintiff was dismissed while application by defendant was allowed under O XXXIX, rule 1, and plaintiff was restrained from interfering with possession of defendant. However, thereafter, the suit was disposed of for want of prosecution in view of *pursis* filed by plaintiff for grant of permission to withdraw the suit, the order allowing application of defendant would not be executable. In such a case, section 151 could not be invoked because though applications were made by parties under O XXXIX, rule 1 read with section 151, the court exercised its powers only under O XXXIX, rule 1 and not under section 151. Moreover, whenever there is a statutory provision/ remedy provided under the CPC or statute, parties to the litigation are required to exhaust those remedies, and in such situation, the court is not expected to exercise inherent powers. Further, an interlocutory order having temporary existence during pendency of the main suit and same must merge in the final order passed in the suit unless contrary is proved. Further, once having held that the said order has come to an end, it loses its force and effectiveness and same is not executable *viz* section 36, since the same is not in existence. In view of the facts and circumstances of the present case, the provisions of section 36 were not attracted and therefore, the application which was filed by the defendants for issuance of warrant of possession under section 36 would not be maintainable (para 22). Similarly, contingencies contemplated under O XXI, rule 32(1) are entirely different and operate in a different area altogether and cannot be equated with the issue in question and, therefore, same also cannot be said to be attracted in the present case.[38]

An order granting an interim mandatory injunction pending a suit can be executed under this section as if it were a decree.[39] Order XXI, rule 32 read with this section is intended to apply to orders granting interim injunctions under O XXXIX. These provisions deal with execution of such orders and enable parties to enforce them. But they cannot be availed of by the court acting *suo motu* to penalise their disobedience.[40]

[s 36.5.3] Order on Contempt

An order made on a notice of motion for contempt of court is an order to which this section applies.[41]

The court, in exercise of its contempt jurisdiction, does not decide any issue or question such less on merits. Therefore, the consent terms incorporated in the final order passed in contempt petition do not amount to a decision within the meaning of the term as used in section 2(14) of the CPC and therefore, it is not an order within the meaning of that section. Consequently, such an order cannot be said to be executable under O XXI read with section 36 of the CPC.[42]

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38. *Ramesh Akre v Mangalabai Pralhad Akre*, AIR 2002 Bom 487.
39. *Abdul Rajack v Abdul Lateef*, AIR 1961 AP 482.
40. *Hiralal v Popatlal*, AIR 1969 Guj 28.
41. *Kilachand v Ajodhyaprasad*, AIR 1934 Bom 452 : (1934) ILR 59 Bom 10.
42. *Re Siddharth Srivastava*, AIR 2002 Bom 494.

[s 36.6] Merger of Decree

The doctrine that the decree of the lower court merges in that of the appellate court has been adopted by the Supreme Court in a number of decisions.[43]

[S 37] Definition of Court which passed a decree.—The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

[44][*Explanation.*—The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.]

SYNOPSIS

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[s 37.2] Court Which Passed a Decree 676
[s 37.2.1] When Decree to be Executed is a Decree of the Court of first Instance..... 677
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[s 37.1] Changes Introduced in the Section

This section differs from the corresponding section 649 of the Code of Civil Procedure, 1882 in that the expression "the court of first instance" in clause (a) has been substituted for

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43. *Collector of Customs v East India Commercial Co Ltd*, AIR 1963 SC 1124; *Election Commr of India v Sabu Venkatasubba Rao*, AIR 1953 SC 210 : (1953) SCR 1114 : (1953) SCJ 293; *CIT v Amritlal Bhogilal & Co*, AIR 1958 SC 868 : (1959) SCR 713 : (1958) SCJ 1007; *Madan Gopal v Secy. to Govt. of Orissa*, AIR 1962 SC 1513; *Lakshmi Achi v Kailasa Thevar*, (1964) 1 SCJ 54; *State of Uttar Pradesh v Muhammad Nooh*, AIR 1958 SC 86 : (1958) SCR 595 : (1958) SCJ 242 : (1958) SCA 73, which is a decision on peculiar facts; *Gujraj v Swaminath*, (1917) ILR 39 All 13; *Kedarnath v Jainarayan*, AIR 1954 Pat 497; *Ratan Mala v Gopal Lal*, AIR 1955 Cal 14 : 58 Cal WN 994. See also notes to O IX, rule 13, "Hearing of Application after Disposal of Appeal".
44. Inserted by Act 104 of 1976, section 17 (w.e.f. 1-2-1977).

the expression "the court which passed the decree against which the appeal was preferred". As to the effect of this alteration, see notes below.

The explanation now added to the section by the Amendment Act, 1976 solves the question which often arose, *viz*, where an area is transferred from the jurisdiction of the court of first instance to the jurisdiction of another court, which of the two courts would have jurisdiction to execute the decree. That question is now answered by the explanation that in such an event, the court of the first instance, by reason only of such transfer of an area, does not cease to have jurisdiction to execute the decree. It further provides that the other court to whose jurisdiction such area is transferred, would also have jurisdiction to execute such a decree provided that at the time of making the application for execution of the decree, it would have jurisdiction to try the said suit.

As per the explanation to section 37 of CPC, the court of first instance will have jurisdiction to execute a decree, and the jurisdiction of the court would not cease on the ground that after the institution of the suit or after the passing of the decree, any territory has been transferred from the jurisdiction of that court to the jurisdiction of any other court. Further, the latter court shall also have jurisdiction to execute the decree, if that court would have jurisdiction to try the said suit, at the time of making the execution petition.[45]

Moreover, the bar of section 39(4) does not apply to explanation to section 37 and is operative to section 39 only. It means that the explanation to section 37 is an exception to the bar that the execution court cannot proceed against the property, situated outside the local limits of its jurisdiction.[46]

[s 37.2] Court Which Passed a Decree

Section 38 indicates the courts by which decrees may be executed. A decree may be executed either by the court which passed it, or by the court to which it is sent for execution. It may also be executed by the court to which it is transferred under section 24 above.[47] The present section explains the meaning of the expression "court which passed a decree".

An application for the enforcement of arbitral award need not always be filed under section 36 of the Arbitration and Conciliation Act, 1996 before the district court, such awards can be enforced or executed by competent civil court having territorial and pecuniary jurisdiction to entertain the matter.[48] VVS Rao J, speaking for the Division Bench, explained the point as follows:

> **22.** After CPC (Amendment) Act, 1999, inserting Section 89 in Part V, any Civil Court can refer the suit or proceeding before it to arbitration if there are elements of settlement acceptable to the parties. When the matter is referred to arbitration as per Section 87(2)(a) of CPC, the provisions of Arbitration Act shall apply as if the matter is referred to arbitration under the provisions of Arbitration Act. It is not only the District Court which is empowered under Section 89 of CPC to refer the disputes to arbitration but also all civil Courts in the hierarchy including High Court can refer the disputes to arbitration. In a given case, a Junior Civil Judge may refer the dispute to arbitration and after the award is passed, if the successful party has to enforce the award only before a District Court, it would violate provisions of CPC and Civil Courts Act. As seen from Sections 37 and 38 of

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45. *Sandhya MN v Binu G Pillai*, (2019) 5 KHC 287 : 2019 Ker LR 967 : (2019) 4 Ker LJ 889.
46. *Sandhya MN v Binu G Pillai*, (2019) 5 KHC 287: (2019) Ker LR 967 : (2019) 4 Ker LJ 889.
47. *Muhammad v Tikachand*, AIR 1925 All 276 : (1925) ILR 47 All 57; *N Tombi Singh v Mucum Ongbi Meipah Devi*, AIR 1995 Guh 20.
48. *Bhoomatha Para Boiled Rice and Oil Mills v Maheshwari Trading Co*, AIR 2010 AP 137 : (2010) 1 Andh LD 522 (DB).

> CPC, a decree has to be executed by the Court, which passed the decree. Therefore, if an arbitral award is made pursuant to reference by a Court within its pecuniary jurisdictional limits, it is only that Court, which can execute/enforce such award and not any other Court.[49]

The expression "court which passed a decree" includes not only the court which actually passed the decree, but the courts mentioned in clauses (a) and (b) of the present section. The following rules are deducible from this section and section 38:

[s 37.2.1] When Decree to be Executed is a Decree of the Court of first Instance

When the decree to be executed is a decree of a court of first instance, the proper court to execute it is the court of first instance. A court of small causes which has passed a decree can execute it (subject to O XXI, rule 82). Hence, it can execute the decree by attachment and sale of movable property of the judgment-debtor.[50]

[s 37.2.2] When Decree to be Executed is a Decree of the Court of first Appeal

When the decree to be executed is a decree passed by a court of first appeal, the proper court to execute it is also the court of first instance.

[s 37.2.3] When the Decree to be Executed is a Decree of the High Court on Second Appeal

When the decree to be executed is a decree passed by the high court in second appeal, then also the proper court to execute it is the court of first instance. Thus, where a suit is instituted in the court of a subordinate judge, and an appeal from the decree is preferred to the district court, and a second appeal is preferred to the high court, the proper court to execute the decree of the high court is the court of first instance, that is, the court of the subordinate judge. The substitution of the expression "court of first instance" in clause (a) of the present section for the expression "court which passed the decree against which the appeal was preferred", gives legislative recognition to the practice followed by the courts when the present CPC was enacted. The expression "appellate jurisdiction" includes also revisional jurisdiction. Therefore, it is only the court of first instance that could execute a decree for costs in a revision preferred against its decree or order.[51] The plaintiffs' suit for declaration of their title to the disputed land and for restraining the principal defendants from disturbing possession was dismissed by the trial court. The plaintiffs' appeal therefrom was allowed by the subordinate judge and further the defendants' appeal from his judgment and decree was dismissed by the high court. The plaintiffs put the decree of subordinate judge (lower appellate court) to execution for the recovery of possession of the suit lands after evicting the defendants therefrom and for recovery of costs, etc. It was held that this execution petition must be taken to be an application for execution of high court's decree. There was no necessity for amending the execution petition.[52] In section 37, the expression "court which passed a decree" includes newly established court having jurisdiction over a part of the territory. The latter court can execute the decree, without transfer of the decree to it. Contrary decision of the Mysore High Court is no longer good law,

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49. *Bhoomatha Para Boiled Rice and Oil Mill v Maheshwari Trading Co*, AIR 2010 AP 137, p 144 : (2010) 1 Andh LD 522 (DB).
50. *Mahade v Prasad v Ram Lochan*, AIR 1980 SC 416 : (1980) 4 SCC 354.
51. *Bhagwan Dass v Ganga Prasad*, AIR 1959 All 92; *Chappan v Moideen Kutty*, (1899) ILR 22 Mad 68 : 8 Mad LJ 231 (FB).
52. *Lichubala Biswas v Jindar Mondal*, AIR 1990 Cal 151.

after the 1976 amendment which has added the explanation.[53] The newly created court also acquires jurisdiction, besides the court which passed the decree.[54]

[s 37.2.4] When the Court of First Instance has Ceased to Exist

When the court of first instance has ceased to exist, the only court that can execute the decree is the court which, at the time of making the application for execution, would have jurisdiction to try the suit in which the decree was passed. The application for execution must be made to that court. This is as a result of clause (b) of the section giving a wider meaning to the expression "the court which passed the decree" for the purpose of executing the decree.[55] But if the application is to execute the decree by the attachment and sale of immovable property not situated within its jurisdiction, the court must nevertheless entertain the application, and then transfer the application to the court having territorial jurisdiction. Thus, in *Sreenath v Priyanath*,[56] a rent decree was passed by the third *munsiff's* court at Bhanga. That court was then abolished and became the court of the second *munsiff* at Gopalgunje. The rent suit fell within the pecuniary limits of the second *munsiff's* court at Gopalgunje and therefore the court at Gopalgunje was the court which passed the decree under section 37 (b). The application to execute the decree was, therefore, made to the Gopalgunje Court. But the application was to execute the decree by the attachment and sale of immovable property, not within the jurisdiction of the Gopalgunje court but within the jurisdiction of the first *munsiff's* court at Bhanga. Nevertheless, it was held that the Gopalgunje Court had jurisdiction to entertain the application, but, that it should not itself order the sale of property outside its jurisdiction but should transfer the application to the Bhanga court for making and executing the order for sale. Justice Mitter said that the Gopalgunje Court did not function merely as a sort of post office for receiving and transmitting the application but that it could determine questions as to the executability of the decree. A court vested with the powers of a court of small causes, ceases to exist as a court of small causes, when those powers are withdrawn.[57] A court does not cease to exist merely because its headquarters are removed to another place, or because the local limits,[58] or the pecuniary limits of its jurisdiction[59] are altered. If a court is abolished and then revived without diminution of jurisdiction, execution of the decree passed by the abolished court can be ordered by the revived court.[60] The executing court found that the nomenclature of the court had only changed and the work of the Additional Civil Judge, Gorakhpur was being done by First Additional Civil Judge, Gorakhpur before which court the execution application was filed. The court of First Additional Civil Judge, Gorakhpur, before which the execution application has been filed, bears the impression and the identity of the courts which passed the decree, but which has now been abolished. Consequently, the said court had jurisdiction to entertain and hear the execution application as per the provision of section 37(b) of the CPC.[61]

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53. *Gopal Krishna v TG Laxman Shanbhogue*, AIR 1964 Mys 34.
54. *Syndicate Bank v Mahadevappa*, AIR 1985 Kant 85.
55. *Gulab Chand v Saraswati Devi*, AIR 1975 Del 210.
56. *Sreenath v Priyanath*, AIR 1931 Cal 312 : (1931) ILR 58 Cal 832.
57. *Zamindar of Vellur v Adinarayadu*, (1896) ILR 19 Mad 445.
58. *Latchman v.Maddan Mohun*, (1881) ILR 6 Cal 513.
59. *Iswari Prasad v Farkat Hussain*, (1917) 2 Pat LJ 113.
60. *Sahde v Prasad v Raja Ram*, AIR 1984 All 169.
61. *Lalita Devi v Kamla Devi*, AIR 1995 All 21.

[s 37.2.5] When the Court of First Instance has Ceased to have Jurisdiction to Execute the Decree

This section 37 of the CPC clearly lays down that where a court which has passed a decree loses the jurisdiction to execute it (*sic*), then the other court, which has jurisdiction over the subject-matter that has been transferred, has an authority to execute the decree. Thus, the court to which subject-matter has been transferred can also execute the decree, and the court to which the case transferred acquires an inherent jurisdiction to execute the same.[62]

In this case the court of execution is the court which, at the time of the application, would have jurisdiction to entertain the suit in which the decree was passed. But the jurisdiction of the original court is not entirely excluded. A decree is passed by court *X* directing the sale of immovable property within its jurisdiction. After the decree and before the application in execution for sale, the property directed to be sold is transferred by the local government's notification from the jurisdiction of court *X* to the jurisdiction of court *Y*. Has court *X* the jurisdiction to entertain the application for execution and to order the sale of the property? According to the Calcutta decisions, both court *X* and court *Y* have jurisdiction to entertain the application, but if the application is made to court *X*, it should not, itself, make an order for the sale of the property, but transfer the application to court *Y* for making and executing the order for sale.[63] The Madras decisions have not been consistent. In one case, it was held that court *X* had jurisdiction to entertain an application for execution, but the question whether it could itself order the sale of the property was not decided.[64] In a case of 1914, it was said that court *X* had no jurisdiction to entertain the application,[65] but this was overruled in a full bench decision in 1919. Chief Justice (CJ) Wallis observed that the power of sending the decree to another court was sufficient to meet the case. The learned CJ construed section 150 as conferring upon court *Y*, jurisdiction to entertain the application for execution but was of opinion that the section could not be construed as taking away from court *X*, the power which it had, according to the unbroken current of authorities of entertaining the application.[66] The decision of Wallis CJ, has been followed by the Patna High Court.[67] In a case decided in 1927, it was said that court *X* had power to entertain the application for transmission to court *Y* but has no power to sell the property.[68] In 1932, a Full Bench of the Madras High Court distinguished notifications which effected a change of jurisdiction in the future from those which effected a transfer of past business; and held that section 150 only applied to the latter. If the notification only effects a change of jurisdiction for the future, the court which passed the decree has jurisdiction to entertain an application for execution of the decree though the decree-holder may, as a matter of convenience, apply for transfer of the decree for execution to court *Y*, but

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62. *Indra Singh v Ramcharan*, AIR 2003 MP 144. See also *Merla Ramanna v Nallaparaju*, AIR 1956 SC 87.
63. *Latchman v Maddan Mohun*, (1881) ILR 6 Cal 513; *Premchand v Mokhoda*, (1890) ILR 17 Cal 699 (FB); *Jahar v Kamini Debi*, (1901) ILR 28 Cal 238; *Udit Narain v Mathura Prasad*, (1908) ILR 35 Cal 974; *Kali Pado v Dino Nath*, (1989) ILR 25 Cal 315 which is sometimes cited in this connection, is not a case of transfer of jurisdiction; there was in that case, an order merely for the distribution of businessbetween two courts, each of which had jurisdiction; *Jahar v Kamini Debi*, 1901 ILR 28 Cal 238 and *Udit Narain Chaudhuri v Mathura Prasad*, (1908) ILR 35 Cal 974; but see *Masrab Khan v Debnath Mali*, AIR 1942 Cal 321 : (1942) ILR 1 Cal 289; *Thyagaraja v Sambasiva*, AIR 1934 Mad 283 : (1934) ILR 57 Mad 795 : 66 Mad LJ 492.
64. *Panduranga v Vythilinga*, (1907) ILR 30 Mad 537.
65. *Subbiah v Ramanathan*, (1914) ILR 37 Mad 462 : 471.
66. *Seeni Nadan v Muthusami*, (1919) ILR 42 Mad 821; *Muthukaruppa v Paiya*, AIR 1924 Mad 32 : (1923) 45 Mad LJ 210.
67. *Chandmal v Shib Prasad*, AIR 1934 Pat 192 : (1934) ILR 13 Pat 21.
68. *Sivaskandu v Raja of Jeypore*, AIR 1927 Mad 627 : (1927) ILR 50 Mad 882.

court *Y* would not be competent to entertain the application for execution as it cannot be deemed to be included in the expression "court which passed the decree under clause (b)".[69] This question came up for consideration before the Supreme Court in *Ramanna v Nallappa Raju*.[70] There, it was observed that it was settled law that the court which actually passed a decree did not lose its jurisdiction to execute it by reason of the subject matter thereof being transferred subsequently to the jurisdiction of another court. And, as regards the competence of the court to whose jurisdiction the subject matter has been transferred to entertain an application for execution, their Lordships referred to the conflict of authorities on the subject and held without deciding the point that if the latter court entertained an application, it would at the worst, be an irregular assumption of jurisdiction and not a total absence of it and that if objection is not taken at the earliest opportunity, it must be held to have been waived and cannot be raised at the later stages of the proceedings. The Patna High Court has held that final decree proceeding arising out of a preliminary decree in a partition suit is akin to and exactly in nature of an execution proceeding. The original court which passed the preliminary decree and where the records of the partition suit were pending does not become *functus officio* for final decree proceedings merely because after passing the preliminary decree, the area where the property is situated has been transferred from the jurisdiction of that court to the jurisdiction of some other court.[71]

Objection regarding want of territorial jurisdiction of civil court does not relate to subject-matter of suit and court's inherent jurisdiction. It must, therefore, be raised before court which passed decree at earliest possible opportunity and if rejected, it must be raised before competent court in appeal. But it can be entertained by such court only where there is consequent failure of justice.[72]

In *Lalithamba v Mangamma,*[73] properties which had been attached in execution of a decree passed by court *A* were subsequently transferred to the jurisdiction of court *B*. Thereafter, the decree-holder presented an application for execution to court *B* directly. An objection having been raised by the judgment-debtor that court *B* was not competent to entertain the application, it was held upholding the objection that court *B* had no jurisdiction to entertain the application as a decree could be executed under sections 37 and 38 only by the court which passed it or by one to which it was transferred for execution.[74] The question was recently considered by a Full Bench of the Punjab High Court in *Meher Singh v Kasturi Ram,*[75] and it was held that where after the passing of a decree by court *A*, territorial jurisdiction is transferred to court *B*, application for execution of the decree could be presented to either court. The new explanation resolves the conflict of opinion by legislatively confirming the view consistently held by the Calcutta High Court. Where a notification regarding redistribution of territorial jurisdiction applies only to "future business", an application under section 144 of the CPC for restitution arising out of a suit pending at the time of the notification cannot be treated as

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69. *Rama Iyer v Muthukrishnan*, AIR 1932 Mad 418 (FB) : (1932) ILR 55 Mad 801 : 62 Mad LJ 687; *Masral Khan v Debnath Mali*, AIR 1942 Cal 321 : (1942) ILR 1 Cal 289.
70. *Ramanna v Nallappa Raju*, AIR 1956 SC 87 : (1955) 2 SCR 938 : 1956 SCJ 101; *Balkrishna v Linga Rao*, AIR 1943 Mad 449 : (1943) ILR Mad 804 : (1943) 1 Mad LJ 119, which was approved therein; *Raghunandan Singh v Narain Das*, AIR 1960 All 730; *Dasarath Prasad v Baijnath Prasad*, AIR 1960 Pat 285.
71. *Mansoor Alam v Nasseeruddin Khan*, AIR 2009 Pat 79 : 2009 (2) Ci v LJ 925.
72. *Sneh Lata Goel v Pushplata*, AIR 2019 SC 824 : 2019 SCC On Line SC 45 : (2019) 3 SCC 594.
73. *Lalithamba v Mangamma*, AIR 1958 AP 763 : (1958) 2 Andh WR 511.
74. But see *Gouramma v Lingappa*, AIR 1968 Mad 99 : (1968) ILR 1 Mad 122 : (1967) 1 Mad LJ 281.
75. *Meher Singh v Kasturi Ram*, AIR 1962 P&H 394 : (1961) ILR 2 Punj 445.

future business.[76] But a court to which a decree is transferred for execution has no jurisdiction to order either the attachment or sale of immovable property, if at the time of the order, such court had no territorial jurisdiction over the property.[77]

[s 37.3] Clause (b): Ceased to Have Jurisdiction to Execute

The expression "where the court of first instance has ceased to exist", without doubt, envisages "the abolition or total extinguishment of the court which passed the decree". Further, to attract first part of clause (b) of section 37, what is required is the complete abolition of the court which passed the decree and not mere alteration in its pecuniary or territorial jurisdiction. The expression "where the court of first instance has ceased to have jurisdiction to execute the decree" as envisaged by second part of clause (b) of section 37, obviously refers to such a decree where the court loses jurisdiction to execute the decree according to its tenor.[78]

A court does not cease to have jurisdiction to execute its decree merely because the decree is transferred to another court for execution[79] or because it is abolished and re-established,[80] or merely because its business is transferred by the district judge under the Act constituting it to another court,[81] or because the area in which the judgment-debtor resides is transferred from its jurisdiction to that of another court.[82] If, after a court has passed a decree, the local area in which the property is situated is transferred to a different court, the decree-holder can apply for execution to the latter court. That court can directly entertain an application for execution without an order of transfer by the court which had, in fact, passed the decree. The transfer of local area, automatically gives, jurisdiction to the court, to which the area has been transferred.[83] Clause (b) of this section applies where the court which passed the decree is abolished and a new court, in its place, is established.[84] A distinction has also been made between a notification of the government, transferring jurisdiction under section 13(1) of the Bengal, Assam and Agra Civil Courts Act, 1877, and assigned jurisdiction under section 13(2) of the said Act and it has been held that a court which passed a decree does not cease to have jurisdiction within this section, if the notification issued is under section 13(2).[85] Where an order was made by the High Court of Calcutta rejecting a petition for leave to appeal to the Privy Council, and directing the petitioner to pay the respondent's costs, but the order was silent as to the court by which it was to be executed, it was held that the circumstance that the high court on its appellate side does not, in practice, execute its own decrees and orders, did not make, that court, as regards the execution of the order, a court that had "ceased to have jurisdiction to execute" its decree[86] (O XLV, rule 15). Nor

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76. *Skinner v Skinner*, AIR 1937 All 515 : (1937) ILR All 670.
77. *Veerappa v Ramasami*, (1920) ILR 43 Mad 135.
78. *Pearey Lal & Sons Pvt Ltd v Jamuna Properties Pvt Ltd*, AIR 2004 Del 126. See also *Gulab Chand Sharma v Saraswati Devi*, AIR 1975 Del 210.
79. *Surendranath v Harihar*, AIR 1971 Ori 77 : (1970) ILR Cut 1178.
80. *Khodaijatul v Harihar*, AIR 1926 Pat 209 : (1925) ILR 4 Pat 688; *Khairulla v Jai Ram*, AIR 1953 All 201.
81. *Masrab Khan v Debnath Mali*, AIR 1942 Cal 321 : (1942) ILR 1 Cal 289; *Kali Pado v Dino Nath*, (1898) ILR 25 Cal 315; *Jagannath v Sheonandan*, AIR 1921 Pat 152 : (1921) 6 Pat LJ 304; *Saryug Barhi v Devendra*, AIR 1970 Pat 393.
82. *Muthukaruppa v Paia Kavundan*, AIR 1924 Mad 32 : (1923) 45 Mad LJ 210.
83. *Hamir Singh v Bhawani Shankar*, AIR 1980 Raj 134.
84. *B Lakshminarayana v R. Rajmall*, AIR 1972 Mys 342 : (1972) 1 Mys LJ 652.
85. *Shibnath v Life Insurance Corporation of India*, AIR 1961 Cal 170 : 65 Cal WN 766; *Jahar v Kamini Devi* 28 Cal 238; *Udit Narain v Madura Prasad* 35 Cal 974.
86. *Hurro Pershad v Bhupendro*, (1881) ILR 6 Cal 201.

does a court which passed a decree "cease to have jurisdiction to execute it", because after the passing of the decree, a party [eg court of wards] is added in execution who, had he been a party when the suit wherein the decree was passed was instituted, would have deprived the court to its jurisdiction.[87] In a Madras case,[88] the court said with reference to clause (b) of the section:

> In fact this portion of section 37 of the Civil Procedure Code clearly has reference to transfers of territorial jurisdiction from one Court to another.

The new explanation makes it clear that in such cases both the court from whose territorial jurisdiction an area is withdrawn but wherein the suit was instituted, and the decree was passed and the court to whose jurisdiction the area is transferred, have jurisdiction to execute such decree. But the latter court must be such that it would have, at the time of the execution, application jurisdiction to try the said suit. A court, which passed a decree, does not lose jurisdiction to execute it merely because subsequent to the decree, its pecuniary jurisdiction is curtailed. If the successor of a judge, who passed a decree, has a more limited jurisdiction so that he could not have entertained the suit, he may yet entertain the application for execution.[89] It has been held in *P Mary Arul Nadar v M Nanu Pillai*,[90] that a court does not cease to exist within section 37(b), when there is mere withdrawal from it, of a part of its territorial jurisdiction. In applying this section, the nature of the cause which put an end to the jurisdiction of a court is immaterial.[91] Where a court does not lack inherent jurisdiction but has irregularly assumed jurisdiction, the proceedings before it are not vitiated. In a Karnataka case, the *munsiff*, thinking that in view of the amended law, he was not competent to execute an eviction decree passed by him, transferred it to the court of the civil judge, without an application by the decree-holder. It was held that there was, at the highest, an irregular assumption of jurisdiction by the transferee court. There was no inherent lack of jurisdiction for the transferee court to execute the decree. Hence, proceedings in the transferee court are not vitiated.[92]

[s 37.4] Which Decrees May Be Executed

Preliminary decree is a decree within the meaning of section 2 (2) of the CPC but is not capable of execution normally till a final decree is passed. In that sense, the court dealing with a preliminary decree before passing a final decree may not be designated in law as an executed court within the meaning of section 37 of the CPC.[93]

Courts by which decrees may be executed

[S 38] Court by which decree may be executed.—A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

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87. *Bandoo v Narsingrao*, (1914) ILR 38 Bom 662.
88. *Suryanarayan Agarwalla v Maheshwar Kest*, AIR 1950 Assam 115 : (1950) ILR 2 Assam 113; *Venkatasami Naik v Sivanu Mudali*, (1919) ILR 42 Mad 461, 464.
89. *Abdus Sattar v Mohini Mohan*, AIR 1933 Cal 684 : (1933) 37 Cal WN 679.
90. *P Mary Arul Nadar v M Nanu Pillai*, AIR 1957 TC 69 : (1956) TC 1314.
91. *Gauskha v Abdul*, (1893) ILR 17 Bom 162.
92. *N Pariyakkal v Co-op Tourist and Transport Society Ltd*, AIR 1980 Kant 75.
93. *Atava Akkulamma v Gajjela Papi Reddy*, AIR 1995 AP 166. See note under the same heading to section 36 above.

SYNOPSIS

[s 38.1]	Court Which Passed a Decree	683	[s 38.5]	Construction of Decree by Executing Court	690
[s 38.2]	"Court to which it is sent for execution"	683	[s 38.6]	Distinction Between Section 38 and Section 63	691
[s 38.3]	Jurisdiction of Court Executing a Decree	684	[s 38.7]	Sections 38 and 39(4) — Harmonious Reading	691
[s 38.4]	Powers of Executing Court: Court Executing a Decree Cannot go behind the Decree	686	[s 38.8]	Execution of Arbitration Award	691

[s 38.1] Court Which Passed a Decree

See notes to section 37 under the same heading. The primary court competent to execute a decree is the one which passed the decree. It remains competent to do so even though the decretal amount at the date of the execution exceeds the limits of its pecuniary jurisdiction.[94]

In view of the new explanation to section 37, the court to which an area from the jurisdiction of the court which passed the decree has been transferred would also be competent to execute the decree.

The court which passed the decree can transfer it for execution to another court, even when execution proceedings are pending before it.[95]

[s 38.2] "Court to which it is sent for execution"

See under sections 39 and 40

An *ex parte* decree passed in 1949 by a court in Bankura in West Bengal in a personal action against a resident of Morena in the former Madhya Bharat State is valid if the cause of action had arisen within the jurisdiction of Bankura court and the notice of the suit was served on the defendant. Such a decree can be transferred to Morena court for execution on the CPC having been made applicable in 1951 to Madhya Bharat.[96] The Rajasthan High Court has held that the Disciplinary Committee of the Bar Council can resort to this section for the purpose of executing its order of costs.[97] The term "proceeding" in section 29 of Administrative Tribunal Act, 1985 is a very wide term to mean a prescribed course of action to enforce the legal right. It indicates the prescribed mode in which the judicial business is conducted. The execution is a step in judicial process. It seeks to enforce the final order to realise the result of the adjudication. Therefore, the tribunal constituted under the Act gets jurisdiction and power to enforce order passed by the tribunal and which attained finality.[98] On account of increase of pecuniary jurisdiction of district courts, the execution petition pending before high court, pursuant to decree passed by high court, is not liable to be transferred to district courts and should be dealt with by the high court.[99]

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94. *Gordhanlal v CP Industries, Khandwa*, AIR 1971 Raj 254.
95. *Gumdas Adhya v Jnanendra*, (1934) 39 Cal WN 165.
96. *Lalit Raja & Sons v Hansraj Nathuram*, AIR 1971 SC 974 : (1971) 1 SCC 721 : 1971 (3) SCR 815; *Narhari v Pannalal*, AIR 1977 SC 164 : (1976) 3 SCC 203 : (1976) 3 SCR 149.
97. *Sohanlal Soni v Mani Ram*, AIR 1974 Raj 20.
98. *PL Kantha Rao v State of Andhra Pradesh*, (1995) 2 SCC 471.
99. *Pearey Lal and Sons Pvt Ltd v Jamuna Properties Pvt Ltd*, AIR 2004 Del 126.

The Kerala High Court has held that an award passed by the Joint Registrar Chits can be enforced by civil court in Kerala.[100]

[s 38.3] Jurisdiction of Court Executing a Decree

The following are the leading rules relating to the jurisdiction of courts executing decrees:

Rule I.—*No court can execute a decree in which the subject matter of the suit or of the application for execution is property situated "entirely" outside the local limits of its jurisdiction.* Territorial jurisdiction, in other words, is a condition, precedent to a court executing a decree.[101] Security bond was furnished to the court under O XXXVII, rule 3. Property covered by the bond was situated outside the jurisdiction of the court. Sale of property in execution of the decree was sought. It was held that the court which passes the decree has no jurisdiction for property outside the local limits. Decree-holder must obtain transfer certificate. As a general rule, territorial jurisdiction is a condition precedent to a court executing a decree. Merely because a security bond had been furnished to the court which passed the decree, that court could not order sale of property which is not situated in its jurisdiction. The decree-holder must obtain transfer of the decree.[102]

Exception I.—*The court which passed a decree for the "enforcement of a mortgage of immovable property" has power in execution of its decree to order the sale of such property, though it may be situated "beyond" the local limits of its jurisdiction. A* sues *B* in a court in district *X* on a mortgage of two properties, one situated in district *X* and the other in district *Y*. A decree is passed for the sale of both the properties. The court in district *X* having jurisdiction to entertain the suit in respect of the property situated in district *Y* (section 17), has also jurisdiction to sell that property in execution of its decree, though the property is situated beyond its jurisdiction. It is not bound to send the decree for execution as regards the property in district *Y* to the court of that district under section 39 (c) but it may do so.[103] In the latter case, the decree as regards the property in district *Y* may be executed by the court of district *Y*.[104]

Exception II.—*Where "after the passing of a decree" in a "suit for the enforcement of a mortgage" the whole of the immovable property included therein falls by transfer of jurisdiction, within the local limits of the jurisdiction of another court, the application for execution of the decree according to the Calcutta rulings may be made either to the court which passed the decree (though the properly is no longer within its jurisdiction) or to the court within the local limits of whose jurisdiction, the immovable property falls by such transfer but where the application is made to the former court it*

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100. *Saraswathi v Matheran Pillai*, 2008 (1) Ker LT 84.
101. *Prem Chand v Mokhoda Devi*, (1890) ILR 17 Cal 699, p 703; *Begg Dunlop & Co v Jagannath*, (1912) ILR 39 Cal 104; *Ambika v Manikganj Loan Office*, AIR 1929 Cal 818 : (1930) ILR 57 Cal 67; *Sreenath v Priyanath*, AIR 1931 Cal 312 : (1931) ILR 58 Cal 832; *Veerappa Chetiar v Ramasami Chettiar*, AIR 1920 Mad 505 : ILR 43 Mad 135 : 37 Mad LJ 442; *Sri Raja Sethucherla Sivaskanda v Raja of Jaipore*, AIR 1927 Mad 627 : 52 Mad LJ 605; *Bank of Bengal v Sarath Chandra Mitra*, AIR 1918 Pat 126 : 4 Pat LJ 141; *Maharaj Kishore v Rajaram Singh*, AIR 1954 Pat 164; *Bajpai v Hanuman Das*, AIR 1958 All 425.
102. *Citibank, NA, New Delhi v Indo-American Electricals Ltd*, AIR 1981 Del 27.
103. *Maseyk v Steel*, (1887) ILR 14 Cal 661; *Kaeritcki Nath v Tilukdhari*, (1888) ILR 15 Cal 667; *Gopi Mohan v Doybaki*, (1892) ILR 19 Cal 13; *Tincouri v Shib Chandra*, (1894) ILR 21 Cal 639; *Jagernath v Dip Rani*, (1895) ILR 22 Cal 871; *Srimanthu v Venkatappiah*, AIR 1947 Mad 347 : (1948) ILR Mad 18.
104. *Aziz Baksh v Sultan Singh*, (1918) PR No 43, p 152; *Jagernath v Dip Rani*, (1895) ILR 22 Cal 871. *Sakti Nath v RJC Bank Ltd*, (1939) ILR 1 Cal 493 : 43 Cal WN 453 where all the important cases are considered. See also notes to section 17.

should not itself order the properly to be sold, but should transfer it to the latter court for passing and executing the order for sale.[105]

It is submitted that the view of the Calcutta High Court still holds good, even after the insertion of the new explanation to section 37, since that explanation does not say that the court from whose jurisdiction the immovable property is transferred to another court can direct the sale of such property.[106]

Exception III.—*The salary of public officer or of a servant of a railway company or local authority may be attached by a court, though the disbursing officer may not be within the local limits of the court's jurisdiction.*[107]

Exception IV.—*The executing court can appoint a receiver for properties situated outside its territorial jurisdiction and order their sale.*[108]

Exception V.—*It is competent to the court executing a decree to order execution against property in the custody of any court of public officer, though such court or officer is not within the territorial jurisdiction.*[109]

Rule II.—Where a decree has been passed for the payment of money, and the decree-holder applies for attachment and sale of immovable property (belonging to the judgment-debtor) which forms one estate apart whereof is situated within the local limits of the jurisdiction of the court executing the decree and part beyond such limits.

The court executing the decree has the power to attach and sell the whole estate including the portion situated beyond the local limits of its jurisdiction.[110]

Rule III.—Does a court to which a decree has been sent for execution under section 39 have the jurisdiction to execute the decree, if the amount of the decree exceeds the limits of the pecuniary jurisdiction of the court? There is a conflict of decision as to whether the court of execution is restricted to the pecuniary limits of its jurisdiction. To put the question in a concrete form, if a decree for Rs 7,000 is sent for execution to a court whose pecuniary jurisdiction does not exceed Rs 5,000, can the latter court execute the decree? "Yes" according to Madras[111] and Allahabad.[112] "No", according to the High Courts of Calcutta,[113] Bombay,[114] Patna[115] and Orissa.[116] This conflict has now been resolved by the new sub-section 3 to section 39 added by the Amendment Act, 1976, which provides that a court shall be deemed to be a court of competent jurisdiction if at the time of application for transfer to it, it would have jurisdiction to try to suit in which such decree was passed.

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105. *Latchman v Maddan*, (1881) ILR 6 Cal 513; *Jahar v Kamini Debi*, (1901) ILR 28 Cal 238; *Seeni Nandan v Muthusami*, (1919) ILR 42 Mad 821; *Jugul Kishore v Pankajini*, AIR 1961 Cal 183.
106. See note to section 37 "Court which passed a decree", rule 5.
107. See CPC, O XXI, rule 48, and notes thereto.
108. *Prema Nath v HV Low & Co*, AIR 1930 Cal 502; *Bhagwati Prasad v Jainarain*, AIR 1958 All 425; *Benares Ice Factory v Shuklal*, AIR 1961 Cal 422.
109. *Bhagwati Prasad v Jainarain*, AIR 1958 All 425; but see *Gyarsilal v Shankarlal*, AIR 1950 Ngp 46 : (1950) ILR Nag 18; *Gayour Ahmad v Hazarimal*, AIR 1965 Raj 41 : (1964) ILR 14 Raj 1122.
110. See CPC, O XXI, rule 3, and notes thereto.
111. *Narasayya v Venkata*, (1884) ILR 7 Mad 397; *Shanmuga v Ramanathan*, (1894) ILR 17 Mad 309.
112. *Shanti Lal v Mt Jammi Kuer*, AIR 1940 All 331 : (1940) ILR All 318.
113. *Durga v Umatara*, (1889) ILR 16 Cal 465; *Gokul v Aukhil*, (1889) ILR 16 Cal 457; *Shamsundar v Anath Bandhu*, (1910) ILR 37 Cal 574; *Ganeshdas Badrunarayana v Amulak Chand*, AIR 1940 Cal 161.
114. *Sideshwar v Harihar*, (1888) ILR 12 Bom 155.
115. *Amrit Lal v Murlidhar*, AIR 1922 Pat 188 : (1922) ILR 1 Pat 651.
116. *Matrumal v Madanlal*, AIR 1957 Ori 177.

In a suit for recovery of loan filed by a bank, the decree passed by the civil court was less than 10 lacs. But when the bank applied for execution, the outstanding decretal dues including interest had grown to nearly 50 lacs. Relying on the decision of the Supreme Court in *Punjab National Bank v Chajju Rao*,[117] a Division Bench of the Orissa High Court held that since the amount due has become were than 10 lacs, it can be recovered by the Debt Recovery Tribunal only and not by civil court, notwithstanding the fact that the decree was for less than 10 lacs at the initial stage.[118]

Rule IV.—Where the decree sought to be executed is passed by a competent court, the court will not be deemed to be incompetent to execute the decree merely because by reason of the amount of interest or *mesne* profits ascertained for a period subsequent to the institution of the suit, the pecuniary limits of the jurisdiction of such court are exceeded — *A* obtains a decree against *B* for Rs 4,000 and interest in a court of which the pecuniary jurisdiction is limited to Rs 5,000. *A* then applies to the court for execution. At the date of the application for execution, the total amount of the decree by reason of accumulation of interest exceeds Rs 5,000. The court has jurisdiction to execute the decree. All the courts are agreed on the point,[119] for, if the court had jurisdiction at the time of the institution of the suit, incidental causes such as the accumulation of profits or interest or a rise in price will not affect its jurisdiction.[120]

Rule V.—A court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immovable property in execution, if at the time of the order such court had no territorial jurisdiction over the property.[121]

[s 38.4] Powers of Executing Court: Court Executing a Decree Cannot go behind the Decree

A court executing a decree cannot go behind the decree. It must take the decree as it stands.[122] It cannot entertain any objection that the decree is incorrect in law or on facts. That is because until the decree is set aside by an appropriate proceeding in appeal or in revision, a decree, even if it is erroneous, is binding between the parties.[123] Hence, it is not open to an executing court to say that a part of the decree is violative of section 23 of the Bombay Money

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117. *Punjab National Bank v Chajju Rao*, AIR 2000 SC 2671.
118. *Krishan Kumar Pareek v State Bank of India*, AIR 2009 Ori 100 : 2009 (107) Cut LT 362 (DB).
119. *Bidyadhar v Munindra Nath*, AIR 1925 Cal 1076 (FB) : (1925) ILR 53 Cal 14; overruling in effect *Bhupendra v Puma*, (1910) ILR 43 Cal 650; and *Bai Kunta v Mohananda*, (1919) 24 Cal WN 342; *Sudarshan Das v Ram*, (1911) ILR 33 All 97; *Arogya v Appachi*, (1902) ILR 25 Mad 543; *Kannayya v Venkata*, (1917) ILR 40 Mad 1; *Sheikh Mohammad v Mahtab*, (1917) 2 Pat LJ 394; *Dinanath v Mayawati*, AIR 1921 Pat 118 : (1921) 6 Pat LJ 54; *Shamrav v Niloji*, (1886) ILR 10 Bom 200; *Rameshwar v Dilu*, (1894) ILR 21 Cal 550; *Panchuram v Kinoo*, (1913) ILR 40 Cal 56.
120. See notes to section 6.
121. *Vasireddi Srimanthu v Venkatappayya*, AIR 1947 Mad 347 (FB) : (1948) ILR Mad 18; *Veerappa v Ramasami*, (1920) ILR 43 Mad 135; *Khirod Chandra v Panchu*, AIR 1939 Pat 532.
122. *Bank of Bihar v Sarangdhai Singh*, AIR 1949 PC 8 : 75 IA 300 : 51 Beng LR 936; *Ramaswami v Kailasa*, AIR 1951 SC 189 : (1951) SCR 292; *Venkata Subba Rao v Venkataramanayya*, AIR 1948 Mad 397; *Ramphal v Ram Baran*, (1883) ILR 5 All 53; *Muttia v Virammal*, (1887) ILR 10 Mad 283; *Sheik Budan v Ramchandra*, (1887) ILR 11 Bom 537; *Venkatachala Reddi v Venkatarama Reddi*, (1901) ILR 24 Mad 665; *Mataur v Abdul*, AIR 1926 Cal 109 : (1925) 30 Cal WN 86; *Appa Rao v Krishna*, (1902) ILR 25 Mad 537; *Shankar v Rikhavdas*, AIR 1932 Bom 843 : (1932) 34 Bom LR 941; *Ganesh Das v Haridwar*, AIR 1936 Lah 704 : (1936) 17 Lah 187; *Krishnayya v Meghraj*, AIR 1940 Bom 10 : (1939) 41 Bom LR 1170; *Abdul Ahmad v Brij Narain*, AIR 1935 All 269; *Palai Central Bank v Ramasami Nadar*, AIR 1959 Ker 194.
123. *VD Modi v RA Rehman*, AIR 1970 SC 1475 : (1970) 1 SCC 670 : (1971) SCR (1) 66.

Lenders Act, 1947 and therefore should not be executed.[124] Likewise, a judgment-debtor cannot object in execution proceedings that the decree passed in terms of an award was illegal since the award was not registered.[125] This rule holds good only between parties to the decree and their representatives.[126] It has no power to entertain any objection as to the validity of the decree[127] or that it was obtained by fraud[128] or as to the legality or correctness of the decree,[129] eg, an objection that the decree sought to be executed was passed against a wrong person,[130] or that it was passed against a lunatic or a minor not properly represented.[131] The reason is that a decree, though it may not be according to law, is binding and conclusive between the parties until it is set aside either in appeal or revision.[132] A decree against a Hindu Joint Family firm can be executed against all the persons who have been personally served though the suit arose out of a claim of misappropriation by the *karta* as immunity of the members from liability therefore was a question which should have been raised and determined in the suit.[133] For the same reason the court executing a decree cannot alter, vary or add to the terms of the decree,[134] even by consent of parties.[135] As to enforceability of a compromise entered in the course of execution proceedings.[136] Where a decree was passed against an unregistered firm in violation of section 69(2) of the Indian Partnership Act, 1932, the case is one of error in the exercise of jurisdiction and not want of it, and the decree cannot be treated as a nullity.[137] The grievance of the objectors to the execution of the decree of the subordinate judge as passed in appeal against dismissal of the title suit was that the interest of one minor plaintiff who attained majority during pendency of suit could not be represented by the holder of the power of attorney on behalf of all the plaintiffs. This point, though raised in the trial court, was not considered by it. The high court, in second appeal, did not enter into the question as it was one of fact. The executing court cannot go into it.[138] A decree passed in terms of an award before the period prescribed for filing an application to set it aside had expired, is not void and the objection is not one which could be taken in execution proceedings.[139] A decree however passed in a

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124. *Yusufbhai v Manilal*, AIR 1965 Guj 282.
125. *Chhutan Lal v PN Bank Ltd*, AIR 1972 Raj 159; *Moolchand v Maganlal*, AIR 1965 MP 75.
126. *M&SM Railway v Rupchand Jitagi*, AIR 1950 Bom 155 : (1950) ILR Bom 185.
127. *Jatru Paban v Ambikajit Prasad*, AIR 1946 Pat 214 : (1945) ILR 24 Pat 741; *Gomathan v Komandur*, (1904) ILR 27 Mad 118; *Rangasamy v Thirupati*, (1905) ILR 28 Mad 26; *Kumaretta v Sabapathy*, (1907) ILR 30 Mad 26; *Liladhar v Chaturbhuj*, (1899) ILR 21 All 277.
128. *Suddinadra v Budan*, (1886) ILR 9 Mad 80; *Dhani Ram v Luchmeswar*, (1896) ILR 23 Cal 639.
129. *Chhoti v Rameshwar*, (1902) 6 Cal WN 796; *Girish Chunder v Soshi Shikareshwar*, (1900) ILR 27 Cal 951 : 27 IA 110; *Jai Gobind v Patesri Partap*, (1907) 1 All WN 286; *Sheo Shanker v Sangram Singh*, AIR 1938 All 259.
130. *Kudratulla v Upendra*, AIR 1925 Cal 203 : (1924) 40 Cal LJ 254.
131. *Kalipada v Hari*, (1917) ILR 44 Cal 627; *Lahore Bank v Ghulam*, AIR 1924 Lah 448 : (1924) 5 Lah 54; *Kalicharan v Bibhuti*, AIR 1933 Cal 85 : (1932) ILR 60 Cal 191; *Umar v Mahabirlal*, AIR 1940 Pat 59.
132. *Papamma v Vira Pratapa*, (1896) ILR 19 Mad 249 : 23 IA 32; *Abdul Alam v Amirunnissa*, AIR 1954 Hyd 219.
133. *Sheonath v Balaswami*, AIR 1959 Pat 484.
134. *Udwani v Tokhan Singh*, (1901) ILR 28 Cal 353 : 28 IA 57; *Forester v Secretary of State*, (1878) ILR 3 Cal 161 : 4 IA 137; *Hurro v Surut*, (1882) ILR 8 Cal 332 : 9 IA 1; *Ishwargar v Chudasama*, (1889) ILR 13 Bom 106; *Subhana v Krishna*, (1891) ILR 15 Bom 644; *Ranmalsangji v Kundankwar*, (1902) ILR 26 Bom 707; *Dambar Singh v Kaliansingh*, AIR 1922 All 27 : (1922) ILR 44 All 350; *Chettyar v Narayanan*, AIR 1934 Rang 165 : (1934) 12 Rang 320; *Gaya Singh v Ram Piari*, AIR 1955 All 622 in which a decree was amended by an execution court.
135. *Kanhya Lal v Court of Wards*, (1871) 16 WR 275; *Debi Rai v Gokal Prasad*, (1881) ILR 3 All 585; *Re Chidambaram Chettiar*, (1958) 1 Mad LJ 314.
136. See *Md Hasan v Motilal*, AIR 1961 All 1 (FB); see notes to section 47.
137. *Kuldip v Sheo Mangal*, AIR 1957 Pat 4.
138. *Lichubala Biswas v Jindar Mondal*, AIR 1990 Cal 151.
139. *Madhav v Rajaram*, AIR 1958 AP 417.

suit based on an award is a nullity in view of section 32 of the Arbitration Act, 1940 (now replaced by Arbitration and Conciliation Act, 1996) and the execution court can refuse to execute it.[140] It is not open to the executing court to go into the validity of an order amending a decree which is sought to be executed.[141] Broadly speaking, the distinction is one between a plea that the decree sought to be executed is a nullity and a plea that it is invalid, improper or erroneous.[142] It has also generally been held that a court executing a decree has no power to entertain an objection that the court which passed the decree had no jurisdiction to pass it.[143] A Full Bench of the Calcutta High Court has held that when a decree is made by a court which "apparently" had no jurisdiction to make it, the executing court is entitled to refuse to execute it.[144] The word "apparently" means that the decree appears, on the face of it, to have been passed by a court which had no jurisdiction.[145] An executing court, therefore, cannot refuse to execute a decree where its illegality is not patent but has to be established after an investigation. Most often, such illegality would be one relating to jurisdiction.[146] Accordingly, when a court passed a decree in terms of an award under the Arbitration Act, 1899, the Calcutta High Court held that the court of execution was entitled to refuse to execute it; but as such awards are under section 15 of that Act, enforceable as decrees, the high court directed the application to be treated as an application to execute the award.[147]

A Full Bench of the Rangoon High Court has expressed emphatic dissent from the Calcutta decision and holds that it is against public policy and good sense that the validity of the decree should be questioned by the executing court.[148] This case has been followed in a later decision of the same high court;[149] but the point seems to be concluded by the pronouncement of the Privy Council in *Jnanendra Mohan v Rabindra Nath*,[150] that, if the court which passed the decree has no inherent jurisdiction, the decree is incapable of execution.

Dealing with this question, the Supreme Court observed in *Kiran Singh v Chaman Paswan*,[151] that a decree passed by a court without jurisdiction was a nullity and that its invalidity could be set up whenever and wherever it was sought to be enforced or relied upon and even at the stage of its execution or even in collateral proceedings but where the defect in jurisdiction was of a kind which falls within the saving of section 21 of the Code of Civil Procedure or section 11 of the Suits Valuation Act, 1887, it could not be raised except in the manner and subject to the conditions mentioned therein. A Full Bench of the Calcutta High Court has again considered

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140. *Kanhyalal v Ramchandra*, AIR 1959 MP 415.
141. *Md Jabir v Narayan Prasad*, AIR 1960 Pat 126.
142. *Har Kishan Das v Gulab Das*, AIR 1956 Bom 513.
143. *Gulam Mohamed v Fazul Nishan*, AIR 1932 Lah 289 : (1932) 13 Lah 25; *Krishnan Nair v Ramchandra*, AIR 1956 Bom 268; *Sheonath v Balasami*, AIR 1959 Pat 484; *CM Pillai v HS Kadhiri Thaikal*, AIR 1974 Mad 199.
144. *Krishna Chandra v Radha Kanta Saha Choudhury*, AIR 1948 Cal 111; *Gora Chand v Profulla*, AIR 1925 Cal 906 : (1926) ILR 53 Cal 166; *Baboo Ram v Ajmersingh*, AIR 1966 HP 77.
145. *Amalabala v Surat Kumari*, AIR 1932 Cal 380 : (1932) 54 Cal LJ 593; *Kali Charan v Bibhuti*, AIR 1933 Cal 85 : (1932) ILR 60 Cal 191.
146. *Bherusingh v Ramgopal*, AIR 1972 MP 217; *Ulhannan v Prudential Trust*, AIR 1965 Ker 16.
147. *Rabindra v Jnanendramohan*, AIR 1932 Cal 9 : (1931) ILR 58 Cal 1018; affirmed by the privy council in, *Jnanendra Moban v Rabindra Nath*, AIR 1933 PC 61 : (1933) 60 IA 71 : 60 Cal 670.
148. *Nathan v Samson*, AIR 1931 Rang 252 (FB) : (1932) 9 Rang 480.
149. *Bank of Chettinad v SPKPVR Chettyar Firm*, AIR 1936 Rang 87 : (1936) 14 Rang 94.
150. *Jnanendra Mohan v Rabindra Nath*, AIR 1933 PC 61 : (1933) 60 IA 71; following in *Ram Narain v Lala Suraj Narain*, AIR 1934 Oudh 75 (FB) : (1934) ILR 9 Luck 435.
151. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 : (1955) 1 SCR 117 : (1954) SCJ 514; *Dynand Mohan v Rabindranath*, AIR 1933 PC 31 : (1933) ILR 60 Cal 670; *Hiralal v Kalinath*, AIR 1962 SC 199, affirming, AIR 1955 All 569; *Anand Rao v Kishen Das*, AIR 1954 Hyd 190; *Samikannu v Arumugam*, (1955) 2 Mad LJ 16; *Surinder Nath Kapoor v UOI*, (1998) Supp SCC 626.

the question in *UOI v Siddique Ahmed*,[152] and it has held, reviewing its previous decisions, that no objection based on absence of territorial jurisdiction could be taken in execution, unless it was apparent on the face of the decree.

In *Basant Singh v Trilokinath*,[153] it has been held that when on the allegation in the plaint, the suit is beyond the pecuniary jurisdiction of the court, a decree passed by it is a nullity and that the objection can be raised in execution.

In *Subbamma v Subbamma*,[154] it has been held by the Andhra High Court that a court has, under O XXIX, rule 12, no power to award *mesne* profits for more than three years and that a decree passed in contravention of the section is a nullity and that the objection could be taken in execution.

In a case in which an application was made to execute a final decree after the preliminary decree on which it rested, had been set aside on appeal, a Division Bench of the Calcutta High Court held that as the final decree was superseded the court of execution had power to determine whether the decree was a valid and operative decree and to refuse to execute it if it was no longer operative.[155]

This was approved by a Full Bench of the Calcutta High Court.[156] CJ Rankin observed that this case had not been considered in the previous Full Bench case.[157]

But a decree passed against a person who was dead at the date of the decree without bringing his legal representative on the record is a nullity, and it cannot be executed against his estate.[158] A decree passed in a suit instituted against a ruling prince without the certificate required by section 86 of the CPC, is a nullity and the court executing the decree can entertain the objection.[159] The Registrar of Co-operative Societies acting under the rules is a court, his award is a decree, and a court which is called upon to execute it has no power to go behind it.[160] A decree passed in terms of an award by a court acting under the Bombay Rent Control Act is a nullity as the Act contains no provision for reference to arbitration and that is an objection which can be taken in execution.[161] A decree directing a sale of *raiyati* holding in contravention of sections 46 and 47 of Chota Nagpur Tenancy Act, 1908, is void and the objection can be taken in execution proceedings but if the question had been raised in the suit and a finding given that the land is not *raiyati*, its correctness cannot be challenged in execution.[162] An objection that a decree in ejectment could not be executed by reason of the provision in House Rent Control Order is one which could be taken in execution proceedings as it is directed

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152. *UOI v Siddique Ahmed*, AIR 1961 Cal 92; *Benares Ice Factory v Shuklal*, AIR 1961 Cal 422.
153. *Basant Singh v Trilokinath*, AIR 1960 P&H 610 : (1959) ILR Punj 1588.
154. *Subbanna v Subbanna*, AIR 1962 AP 500.
155. *China Gounden v Kalyanasundaram*, AIR 1947 Mad 126 : (1940) 2 Mad LJ 881; *Ugra Narain v Basanta*, (1919) 17 Cal WN 868.
156. *Talebali v Abdul Aziz*, AIR 1929 Cal 689 (FB) : (1927) ILR 57 Cal 1013.
157. *Gora Chand v Prafulla*, AIR 1925 Cal 906.
158. *Jungli Lall v Laddu Ram*, (1919) 4 Pat LJ 240; *Rup Narain v Ramayee*, (1878) 3 Cal LR 192; *Narendra v Gopal*, (1912) 17 Cal LJ 634; *Imdad Ali v Jagan Lal*, (1895) ILR 17 All 478; *Radha Prasad v Lal Saheb*, (1891) ILR 13 All 53 : 17 IA 150; *Janardhan v Ramchandra*, (1902) ILR 26 Bom 317; *Vishwanath v Lallu*, (1909) 11 Bom LR 1070; *Subramania v Vaithinatha*, (1913) ILR 38 Mad 682; *Radha Kishen v Bihari Lal*, AIR 1934 Lah 117; *Ram Khelwan v Ramuddar*, AIR 1939 Pat 534; *Bariruddin v Saradindu* 38 Cal WN 1124.
159. *Bai Shakri v Bapu Singhji Takhat Singhji*, AIR 1958 Bom 30.
160. *Gopalji v Indore Premier Co-op Bank Ltd*, AIR 1957 MB 56.
161. *Sabavva v Basappa Andaneppa*, (1955) ILR Bom 386 : 57 Bom LR 261.
162. *Chintamani v Zahiruddin*, AIR 1956 Pat 57.

not against the passing of the decree but against its execution.[163] Such an objection could be taken in execution even if the House Rent Control Order came into force after the institution of the suit in which the decree in ejectment was passed.[164] Where the execution of a decree in ejectment was resisted by the tenant on the ground that the title of the landlord to the lands had ceased as a result of the Madhya Pradesh Jagir Abolition Act, 1951, it was held that the objection was one which could be raised in execution.[165] A preliminary decree for partition cannot be executed.[166]

[s 38.5] Construction of Decree by Executing Court

If the decree is free from ambiguity, the court of execution is bound to execute it whether it be right or wrong.[167] But it cannot, under the guise of interpretation, make a new decree for the parties.[168] Altering the terms of the decree must be clearly understood in contrast of construing a decree or interpreting a decree or giving clarity to its terms and conditions. In the garb of the latter, the court cannot create a new decree which is neither intended nor passed by the court of competent jurisdiction. Executing court can provide clarity, interpret or construe the decree, by keeping the decree as passed by the court of the competent jurisdiction intact and undisturbed. While exercising its jurisdiction, if the executing court, in the guise of these ingredients, materially alters the terms and conditions of the decree, to the prejudice of any of the parties to the decree, which ought to have, if at all, fallen in the domain of courts of competent jurisdiction, i.e., appellate or the court that passed the decree, certainly the executing court would outgress its jurisdiction as an executing court. Permitting an executing court to alter the terms of the decree would be opposed to all settled canons of civil jurisprudence. A decree which has been passed and has not been assailed in the regular appeals which were available to the parties against whom the decree was passed, such party cannot be permitted to abuse the process of law before the executing court to alter the decree, which has attained finality in all aspects.[169] But though a court executing a decree cannot go behind the decree, it is quite competent to construe the decree where the terms of the decree are ambiguous, and to ascertain its precise meaning, for, unless this is done, the decree cannot be executed.[170] There is no question in such a case of the executing court going behind the decree. If, on examination of the nature and contents of the decree, the court finds that it is a purely declaratory decree, it must refuse to execute it.[171] If the decree creates a charge on property in which the judgment-debtor had a widow's estate, the executing court has jurisdiction to inquire if the charge continued after the widow's death and if it could be enforced against the property in the hands of her legal representative.[172] The construction of a decree must be

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163. *Patanker v Sastri*, AIR 1961 SC 272 : (1961) 1 SCR 591 : (1961) 1 SCJ 221; affirming, (1954) ILR Mys 440.
164. *K Punnen v P Kurup*, AIR 1956 Tr & Coch 1.
165. *Narsing v Rao Nihalkaran*, AIR 1962 MP 318.
166. *Vishwasrao v Ushapai*, AIR 1988 Bom 393. As to whether a decree passed by a court which has irregularly assumed jurisdiction can be executed, see section 21: "Section 21 and Execution Proceedings". As to the powers of a court to which a decree is transferred for execution, see notes to section 42 and O XXI, rule 7.
167. *Pirbhu v Rup Singh*, (1898) ILR 20 All 397; *Udwant v Tokhan Singh*, (1901) ILR 28 Cal 353 : 28 IA 57.
168. *Ramasami v Kailasa*, AIR 1951 SC 189 : (1951) SCR 292 : (1951) SCJ 78.
169. *Gurde v Singh v Punjab National Bank*, AIR 1988 P&H 106.
170. *Satrughna v Sridhari*, AIR 1966 Ori 203 : (1966) Ori LR 368.
171. *Thapar v Sudhir*, AIR 1966 J&K 13.
172. *Radhamoni v Gobind Chandra*, AIR 1942 Pat 196; *Meenambal v Aburubammal*, AIR 1930 Mad 688 : (1930) ILR 53 Mad 750.

governed by the pleadings and the judgment.[173] And the court should, if possible, put such a construction upon the decree as would make it in accordance with law.[174] When a particular construction has been put upon a decree in a former execution proceeding, it is not open to the court in a subsequent application to treat that construction as erroneous.[175]

[s 38.6] Distinction Between Section 38 and Section 63

Section 38 is a general section dealing with execution. It contemplates only one decree-holder applying to execute only one decree. Section 63 applies when there are more decree-holders than one, but the same property has been attached by more courts than one. Section 63 cannot be controlled by this section. Hence, where acting under section 63, the decree of the court of lower grade is called up by the court of higher grade, the latter court has jurisdiction to sell the property attached in execution of that decree.[176]

By virtue of Uttar Pradesh Civil Laws Amendment Act, 1972, the decree could not have been set aside or invalidated and the only consequence which would ensue is that the decree would be lying dormant and could not be executed. Once the bar placed by the 1972 Act is removed, by virtue of the doctrine of eclipse, the decree will revive and become at once operative and executed.[177]

[s 38.7] Sections 38 and 39(4) — Harmonious Reading

In view of the aforesaid insertion of sub-section (4), it has been made clear, removing all doubts that the court which has passed a decree, is not authorised to execute the decree against any person or property outside the local limits of its jurisdiction. Therefore, the doubts which might or could have arisen on the question of jurisdiction of an executing court, have been removed. In a harmonious reading of both the sections 38 and 39(4), it appears that the court which has passed a decree cannot have any jurisdiction to proceed with the execution of a decree when circumstances and conditions mentioned in section 39 exist.[178]

[s 38.8] Execution of Arbitration Award

It may be noted that if one juxtaposes the expression "court" occurring in section 36 with section 2(e) of the Arbitration and Conciliation Act, 1996, it would mean that the award shall be enforced in the same manner as if it were a decree made by a court having jurisdiction to decide questions forming the subject-matter of the arbitration if the same had been the subject-matter of the suit. If that be so, the inquiry would be which is the court having jurisdiction to decide the question forming the subject-matter of the arbitration, if the same had been the

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173. *Radhamoni v Gobind Chandra*, AIR 1942 Pat 196; *Seth Manakchand v Chaube Manoharlal*, 71 IA 65 : (1944) ILR Nag 597 : 48 Cal WN 435; *Ram Kirpal v Rup Kuari*, (1884) ILR 6 All 269 : 11 IA 37; *Kali Krishna v Secretary of State*, (1889) ILR 16 Cal 173 : 15 IA 186; *Jagatji v Sarabjit*, (1892) ILR 19 Cal 159 : 18 IA 165; *Lachmi v Jwala*, (1896) ILR 18 All 344; *Shivlal v Jumaklal*, (1894) ILR 18 Bom 542; *Topan Mal v Kundomal Gangaram*, AIR 1960 SC 388; affirming, AIR 1953 All 710; *Ratanmala v Gopal Lal*, AIR 1955 Cal 14; *Bhagwati Prasad v Babulal*, AIR 1957 Pat 8; *Gouri Kumari v Krishna Pasad* 36 Pat 323 : AIR 1957 Pat 575; *Raman v Narayanan*, AIR 1957 Ker 31.
174. *Amolak v Lachmi*, (1897) ILR 19 All 174; *Bakar v Udit Narain*, (1899) ILR 21 All 361; *Radha Kishan v Collector of Jaunpur*, (1901) ILR 23 All 220 : 28 IA 28.
175. See note to section 11, "Orders in Execution Proceedings".
176. *Pabbati Venkata v Doredla Venkataratnam & Sons*, AIR 1939 Mad 169 : (1939) ILR Mad 248.
177. *Dularey Lodh v Third Addl District Judge, Kanpur*, (1984) 3 SCC 99.
178. *Uma Kanoria v Pradip Kumar Daga*, AIR 2003 Cal 162.

subject-matter of a suit. Then, that court which has the jurisdiction to decide the subject-matter of the arbitration would have jurisdiction to levy execution. That takes us to the CPC.

On a combined reading of sections 38 and 20 of the CPC, it can be seen that the court which can entertain a suit with respect to the subject-matter of arbitration dispute alone can exercise the power under section 36 of the Arbitration and Conciliation Act, 1996 as well.[179]

[S 39] Transfer of decree.—(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another court [180][of competent jurisdiction],—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

[181][(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.]

[182][(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]

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180. Inserted by Act 104 of 1976, section 18 (w.e.f. 1-2-1977).
181. Inserted by Act 104 of 1976, section 18 (w.e.f. 1-2-1977).
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[s 39.1] State Amendment

Uttar Pradesh.—The following amendments were made by Uttar Pradesh Act No. 31 of 1978, section 2 (w.e.f. 1-8-1978).

In its application to the State of Uttar Pradesh, sub-section (3) substituted as under:—

"(3) For the purpose of this section a Court shall be deemed to be a Court of competent jurisdiction if the amount or value of the subject-matter of the suit wherein the decree was passed does not exceed the pecuniary limits, if any, of its ordinary jurisdiction at the time of making the application for the transfer of decree to it, notwithstanding that it had otherwise no jurisdiction to try the suit."

[s 39.2] Alterations in the Section

The words "of competent jurisdiction" in sub-section 2 were inserted by the CPC. The same words are added in sub-section 1 by the Amendment Act, 1976. The new sub-section 3 added by the Amendment Act, 1976, clarifies, in view of a conflict in judicial opinion, as to whether the transferee court must be one of competent pecuniary jurisdiction and if so, at what stage such competence should be judged. See notes on jurisdiction of court executing a decree—rule 3 under section 38. The new sub-section provides that it would be court of competent pecuniary jurisdiction if it has jurisdiction to try the suit in which the transferred decree is passed at the time when the application for transfer to it is made.

The new sub-section (4) has been inserted in the section by the latest amendment by Code of Civil Procedure (Amendment) Act, 2002 effective from 1-7-2002 to specify that the court which passed decree cannot execute the decree against any person or property outside the local limits of its jurisdiction.

The court explicated that even before amendment to section 39, the Apex Court in the landmark case of *Kiran Singh v Chaman Paswan*,[183] held that defect of jurisdiction whether pecuniary or territorial strikes at the very authority of the court and decree passed by the court which does not enjoy jurisdiction would become irrelevant and unenforceable. Further, court said that the Apex Court in the case of *Mohit Bhargava v Bharat Bhushan Bhargava*,[184] has reiterated that as per section 39(4) of CPC, the executing court has no discretion and the decree ought to be transferred to the court having jurisdiction over the property.[185]

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183. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 : 1955 SCR 117 : (1954) 2 Mad LJ 60.
184. *Mohit Bhargava v Bharat Bhushan Bhargava*, AIR 2007 SC 1717 : (2007) 4 SCC 795 : (2007) 5 SCR 397.
185. *K Gayathri Mallya v The Manager, The Urban Co-op Bank Ltd*, 2020 (3) Kar LJ 685.

Section 39 clearly states that a decree be executed by another court of competent jurisdiction:

(i) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other court, or

(ii) if such person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court, or

(iii) if the decree directs the sale or delivery of immovable property situated outside the local limits of the jurisdiction of the court which passed it, or

(iv) if the court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other court.

The court may on an application of the decree-holder under sub-section (1) of section 39 and on its own motion under sub-section (2) of section 39 transfer the decree for execution to courts of competent jurisdiction.

The Rajasthan High Court[186] has held that section 39 is an enabling provision, and the word "may" in the sub-section is not to be construed as "must" or "shall". Similarly, the Punjab,[187] Patna,[188] Mysore[189] and Rajasthan[190] High Courts have held that by transferring the decree to another court for execution, the court which passed the decree does not lose jurisdiction to pass appropriate orders. The insertion of sub-section (4) in section 39 is aimed at nullifying the effect of the above stated judgments passed by various high courts.

The situation emerging is that courts, which passed the decree, cannot execute the decree passed against any person or property outside the local limits of its jurisdiction. The decree must be transferred to the courts of competent jurisdiction.

[s 39.3] Sections 38 and 39(4) — Harmonious Reading

In view of the aforesaid insertion of sub-section (4), it has been made clear removing all doubts that the court, which has passed a decree, is not authorised to execute the decree against any person or property outside the local limits of its jurisdiction. Therefore, the doubts, which might or could have arisen on the question of jurisdiction of an executing court, have been removed. In harmonious reading of both, the two sections 38 and 39(4), it appears that the court which has passed a decree cannot have any jurisdiction to proceed with the execution of a decree when the circumstances and conditions mentioned in section 39 exist.[191]

[s 39.4] Sections 39(4) and O XXI, Rule 3 and O XXI, Rule 48

Section 39 does not authorise the court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, O XXI, rule 3 or O XXI, rule 48 which provide differently, would not be affected by section 39(4) of the CPC.[192]

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186. *Tara Chand v Misrimal*, AIR 1970 Raj 53.
187. *Punjab Co-op Bank v Bikram Lal*, AIR 1959 P&H 71.
188. *Darshan Singh v Baldeo Das*, AIR 1946 Pat 365.
189. *Sundra Rao v Appaiah Naidu* AIR 1954 Mys 1.
190. *Laxmi Narain v Firm Ram Kumar* AIR 1971 Raj 30.
191. *ICDS Ltd v Mangala Builders Pvt Ltd*, AIR 2001 Kant 364.
192. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344.

YK Sabharwal J, (as he then was), speaking for the three-judge Bench of the Supreme Court observed as follows in the above judgment:

> 23. Section 39(1) of the Code provides that the Court which passed a decree may, on the application of the decree-holder send it for execution to another court of competent jurisdiction. By Act 22 of 2002, Section 39(4) has been inserted providing that nothing in the section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The question is whether this newly added provision prohibits the executing court from executing a decree against a person or property outside its jurisdiction and whether this provision overrides Order XXI Rule 3 and Order XXI Rule 48 or whether these provisions continue to be an exception to Section 39(4) as was the legal position before the amendment.
>
> 24. Order XXI Rule 3 provides that where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure. Likewise, under Order XXI Rule 48, attachment of salary of a Government servant, Railway servant or servant of local authority can be made by the Court whether the judgment-debtor or the disbursing officer is not within the local limits of the court's jurisdiction.[193]

After noticing its earlier decision in the *Salem Advocate Bar Association case (supra)*, the Supreme Court clarified the matter and held that in case of a decree for sale of property outside the jurisdiction of the court passing the decree, the same has to be transferred to a court having jurisdiction over the property for execution.[194] PK Balasubramanyan J, speaking for the Bench, observed as follows:

> A decree could be executed by the court which passed the decree so long as it is confined to the assets within its own jurisdiction or as authorised by Order XXI Rule 3 or Order 21 Rule 48 of the Code or the judgment-debtor is within its jurisdiction, if it is a decree for personal obedience by the judgment-debtor. But when the property sought to be proceeded against, is outside the jurisdiction of the court which passed the decree acting as the executing court, there was a conflict of views earlier, some courts taking the view that the court which passed the decree and which is approached for execution cannot proceed with execution but could only transmit the decree to the court having jurisdiction over the property and some other courts taking the view that it is a matter of discretion for the executing court and it could either proceed with the execution or send the decree for execution to another court. But this conflict was set at rest by Amendment Act 22 of 2002 with effect from 1.7.2002, by adopting the position that if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing court, nothing in Section 39 of the Code shall be deemed to authorise the court to proceed with the execution. In the light of this, it may not be possible to accept the contention that it is a matter of discretion for the court either to proceed with the execution of the decree or to transfer it for execution to the court within the jurisdiction of which the property is situate.[195]

Declining to interfere with the judgment of the high court which refused to set aside the orders passed against the judgment-debtor, the Supreme Court further observed in the above case that the orders of restraint issued to a third person from handing over property in his possession to judgment-debtor along with concerned documents were in the nature of a "freezing order" or a "Mareva injunction" and an order akin to an Anton Piller order, orders that can be issued even if the property or the person concerned is outside the jurisdiction of the court.[196]

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193. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353, p 3361 : (2005) 6 SCC 344.
194. *Mohit Bargava v Bharat Bhushan Bhargava*, AIR 2007 SC 1717 : (2007) 4 SCC 795.
195. *Mohit Bhargava v Bharat Bhushan Bhargava*, AIR 2007 SC 1717, p 1719–1720 : (2007) 4 SCC 795.
196. *Mohit Bargava v Bharat Bhushan Bhargava*, AIR 2007 SC 1717 : (2007) 4 SCC 795, para 9.

[s 39.5] Sub-section (1) and (2) — Relative Scope — Power of Transfer Under Sub-section (2) is independent of Sub-section (1)

The question is whether sub-section (2) of section 39, CPC, providing for *suo motu* transfer is an independent one or is circumscribed by the contingencies as set out in sub-clauses(a) to (d) of sub-section (1) of section 39. The language of sub-section (2) does not contemplate any such fetter. While sub-section (1) deals with transfer to another competent court having jurisdiction or assets being located within its jurisdiction, sub-section (2) empowers the court passing the decree of its own motion to transfer it for execution to any subordinate court of competent jurisdiction. Sub-section (2) confers a *suo motu* power to assign a decree for execution of its own motion to any subordinate court. The exercise of the power under sub-section (2) of section 39, CPC, to send the decree for execution to a subordinate court, can be exercised without meeting the requirements of sub-clauses(a) to (d) under sub-section (1) of section 39 of the CPC. The expression used in sub-section (2) of section 39, CPC, is "to any subordinate Court for execution" in contradistinction to "another Court of competent jurisdiction", as used in sub-section (1) of section 39 of the CPC. The power under sub-section (2) of section 39 can be exercised for administrative reasons to ensure expedition in execution of the decree, etc. In case of Delhi, for instance, the Civil Nazarat is located at the district courts. The warrants for possession and warrants for sale or attachment of properties, etc, are executed through the administrative civil judge. In such circumstances, if the court may find that the decree can be conveniently and expeditiously executed by the district court, it may in the exercise of powers under sub-section (2) of section 39 of the CPC, send the decree for execution to the district courts. Accordingly, it can be said that the exercise of the powers to transfer under sub-section (2) of section 39, CPC, can be exercised independently of the powers under sub-section (1) of section 39 of the CPC.[197]

[s 39.6] Court Which Passed a Decree

See notes to section 37 under the same head above.

Where as section 39(1) deals with transfer of a decree on an application made therefore by a decree-holder, sub-section 2 deals with transfer of a decree *suo motu* by the court which passed the decree but only to a court subordinate to it.[198] The section is an enabling provision and the word "may" in both the sub-sections is not to be construed as "must" or "shall".[199] If a decree is transferred to another court, such transfer takes effect from the date of the order of transfer.[200]

By transferring the decree to another court for execution, the court which passed the decree does not lose jurisdiction to pass orders till the certificate is received from the transferee court under section 41.[201] It retains its jurisdiction to pass appropriate orders.[202] It does not lose its power to pass orders under this section by reason of the fact that the properties had been transferred to the jurisdiction of another court.[203] The court could

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197. *Pearay Lal & Sons Pvt Ltd v Jamuna Properties Pvt Ltd*, AIR 2004 Del 126.
198. *Chandravathi v Payapatillath*, AIR 1966 Ker 318 : (1966) ILR 2 Ker 74.
199. *Tarachand v Misrimal*, AIR 1970 Raj 53 : (1969) ILR 19 Raj 412.
200. *State of Rajasthan v R Savkasha*, AIR 1972 Guj 179.
201. *Darsan Singh v Baldeo Das*, AIR 1946 Pat 365 : (1946) ILR 25 Pat 145; *Punjab Co-op Bank v Bikram Lal*, AIR 1959 Punj 71.
202. *Radhe Shyam v Devendra*, AIR 1952 Pat 213 : ILR 31 Pat 56; *Sundara Rao v Appaiah Naidu*, AIR 1954 Mys 1 : (1954) ILR Mys 193; *Laxmi Narain v Firm Ram Kumar*, AIR 1971 Raj 30.
203. *Lalithamba v Mangamma*, AIR 1958 AP 763 : (1958) 2 Andh WR 511.

also pass orders for simultaneous execution.[204] The powers conferred by this section and section 44A are independent and alternative and it is accordingly open to the decree-holder to pursue either, at his choice.[205] An order of transfer under this section can be made only by the court which passed a decree and it was accordingly held that where a decree was passed by the court of the district judge, Gwalior, on 18 November 1948, when it was governed by the Madhya Bharat Code and subsequently the CPC was extended to it, it ceased to be the same court within this section and consequently an order of transfer of execution made by it was *ultra vires* the section and the transferee court acquired no power to execute the decree.[206] The transferee court has no authority to transfer the execution proceedings to another court as that could be done only by the court which passed the decree.[207]

[s 39.7] Decree on the Original Side

A Special Bench of the High Court of Bombay has held that the high court has jurisdiction, in the exercise of its original civil jurisdiction, to execute a decree passed on its original side anywhere within the Presidency of Bombay.[208]

The Calcutta High Court has held that the court which passed a decree can appoint a receiver over the property situated outside the territorial jurisdiction. It was held that the said practice or procedure is adopted in view of rule 3 of the Original Side Rules, which cannot be curtailed by section 39(4) of the CPC. The said practice and procedure followed by the high court for a long time also partakes the character of law by virtue of rule 3 Chapter XL of the Original Side Rules.[209]

[s 39.8] Decree Passed — Not by a Civil Court

An order passed by the Debt Relief Court under the Central Provinces and Berar Indebtedness Act, 1939, cannot be transferred to a civil court for execution.[210]

[s 39.9] Another Court

The court to which the decree is sent for execution must be a court in India.[211] Decrees cannot be sent to courts outside India except in the case for which section 45 makes special provision.[212] It was accordingly held by the Supreme Court that an order of transfer made on 28 August 1950 by the subordinate judge of Bankura to the court of the district judge, Morena, in Gwalior State, fell outside the section as the transferee court was not, on that day, governed by the CPC.[213] Such court must be of competent jurisdiction, i.e., it must be a court which, at the time of making the application for the transfer of the decree, would have jurisdiction to try the suit wherein the decree was passed.

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204. *Venkatarami Reddi v Rami Reddi*, (1951) ILR Mad 375 : (1950) 1 Mad LJ 787; *Ram Kumar v Hazari Lal*, AIR 1961 Raj 157 : (1960) ILR Raj 1624.
205. *Lakhpat Rai v Atma Singh*, AIR 1962 P&H 228 : (1961) ILR Punj 166.
206. *Moloji Narsing v Sankar Saran*, AIR 1962 SC 1737; affirming, AIR 1958 All 775.
207. *Nandram v Gopal Das*, AIR 1956 MB 255.
208. *Chimnabai v Kasturbhai*, AIR 1934 Bom 225 : (1934) ILR 58 Bom 729.
209. *Birla Corporation Ltd v Prasad Trading Co*, AIR 2007 Cal 38.
210. *Ramgopal Raghunath v Ramchandra Krishnarao*, AIR 1949 Ngp 359 : (1949) ILR Nag 187.
211. *Chinnaswami v Annamalai*, AIR 1941 Mad 309 : (1941) ILR Mad 574; *Kasturchand v Parsha*, (1887) ILR 12 Bom 230.
212. *Ratan v Khatoo*, (1902) ILR 29 Cal 400; *Pierce Leslie v Perumal*, (1917) ILR 40 Mad 1069.
213. *Firm Hansraj v Firm Lalji Raja & Sons*, AIR 1963 SC 1180.

[s 39.10] Applications for Transfer of a Decree

An application for a transfer of a decree under this section need not be in any particular form. It is enough if it gives sufficient particulars of the decree to be transferred.[214] Where, on the application of the decree-holder, the court which passed the decree granted leave to the transferee court to sell property and that order was communicated to that court, it was held by the Supreme Court that there was in substance, a transfer of the decree under this sub-section.[215] An objection raised by a judgment-debtor opposing the transfer of a decree for execution, is an objection relating to the execution of the decree and the order passed on such objection is an order falling under section 47 of CPC.[216] An objection that the order of transfer was *ex parte* can be raised by the judgment-debtor and if the objection is overruled, the order will fall under section 47.[217] Ordinarily, an order transferring a decree under this section is merely a ministerial order.[218] Such an order can be passed *ex parte* without notice to the judgment-debtor[219] and where the application is only for transfer of the decree, it can be ordered even without notice to the judgment-debtor under O XXI, rule 22.[220] Where the transferee court has jurisdiction inherently, absence of a formal order for transfer is a mere irregularity.[221]

In a case for execution of a decree for payment of money, where preliminary objection was raised with regard to the territorial jurisdiction of the court in receiving the execution application, it was held that the question of transferring the execution proceeding would arise only upon the examination of judgement-debtor in court on the question as to whether he holds any property within the territorial jurisdiction and as to whether he has any other debts within the territorial jurisdiction of the court.[222]

The provisions for filing an application for execution begins from rule 10 of O XXI. The provisions of rule 5 and 6 of the said Order precede rule 10. Therefore, order of transfer of an execution to some other court can be made even before reaching the stage of rule 10, i.e., before the application for execution of the decree is filed.[223]

[s 39.11] Entire Decree Should be Transferred

The High Court of Calcutta has held that the entire decree, and not a part of it, should be sent for execution to another court.[224]

[s 39.12] Jurisdiction of the Transferee Court

The court to whose jurisdiction the subject matter of the decree is transferred, acquires inherent jurisdiction over the same by reason of such transfer, and if it entertains an execution

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214. *Sheikh Hafeez Uddin v Ram Chunder Das*, AIR 1937 All 397.
215. *Mohanlal v Benoy Krishna*, AIR 1953 SC 65 : (1953) SCR 377 : (1953) SCJ 130.
216. *Manmatha Pal v Sarada Prosad*, AIR 1939 Cal 651.
217. *Firm Ganeshdas Badrinarayan v Amuluk Chand*, AIR 1940 Cal 161; *Saralabala v Shyam Prosad*, AIR 1953 Cal 765.
218. *Banares Bank Ltd v Jyoti Bhusan Gupta*, AIR 1951 All 362; *Devi Das v Mohamed*, AIR 1935 Lah 508 : (1935) 17 Lah 13; but see *Manmatha Pal v Sarada Prosad*, AIR 1939 Cal 651.
219. *Nehar Gang v Anath Nath*, AIR 1956 Pat 269.
220. *Re Mahalakshmamma*, (1956) Andh LT 997.
221. *Venkamamidi v Nannapaneni*, AIR 1943 Mad 449 : (1943) ILR Mad 804.
222. *DVM Construction v Sree Infrastructure Finance Ltd*, AIR 2009 Cal 227 (DB).
223. *Raj Kumar and Brothers v Hindustan Steel Works Construction Ltd*, AIR 2007 Jhar 7 : (2006) 4 JLJR 379.
224. *Kusum Kamini v Sattesh Chandra*, AIR 1935 Cal 118.

application with reference thereto, it would, at worst, be an irregular assumption of jurisdiction and not a total absence of it, and if objection to it is not taken at the earliest opportunity, it must be deemed to have been waived, and cannot be raised at any later stage of the proceedings.[225]

The transferee court gets jurisdiction to execute a decree only when there is an order of transfer by the court which passed the decree. Therefore, an execution application to a transferee court presented before an order of transfer is made, is incompetent.[226] But if an execution application is presented before a transfer order is passed and is continued after such an order is passed, the proceedings are not invalid, as the presentation of a fresh application after the date of the transfer order would cure the formal defect.[227] An application presented after an order of transfer is made but before the copy of the decree and the certificate as required by O XXI, rule 6 is sent, is valid.[228]

[s 39.13] Transfer of Decree for Execution

A decree passed by one court may be sent for execution to another court, either on the application of the decree-holder on one of the grounds stated in this section, or by the court which passed it of its own motion. When a decree is sent by the court which passed it for execution to another court, the court sending the decree must send a copy of the decree and other documents mentioned in O XXI, rule 6, to the court by which the decree is to be executed. The latter court must, on receiving the copy of the decree and the other documents, cause the same to be filed (O XXI, rule 7). A mere application to transfer a decree is not an application for execution;[229] and this is particularly so in chartered high courts where decrees are transferred by ministerial order.[230] The decree-holder who has applied for execution to the court which passed the decree need not make a fresh application to the transferee court.[231] When he has not applied to the court which passed the decree, he must apply to the transferee court for execution (O XXI, rule 10). The court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself (section 42).

Where one of the judgment-debtors does not reside voluntarily or works for gain or carries on business or has property within the jurisdiction of the court which passed the decree, it was held by the Kerala High Court that decree against the said judgment-debtor can be transferred to a court of competent jurisdiction while retaining the decree to be executed against other judgment-debtors. The transferee court can execute the decree only against that judgment-debtor and not against other judgment-debtors.[232]

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225. *Ramagonda Malagonda Patil v Bhajarang Tukaram Bhojane*, AIR 2003 Kant 154.
226. *Govind v Sadashiv*, AIR 1955 Bom 93.
227. *Arunachala v Lingayya*, AIR 1953 Mad 171 : (1952) 2 Mad LJ 347 : 65 LW 729 : 1952 Mad WN 817; *Theagaraya v Sambasiva*, AIR 1934 Mad 283 : 57 Mad 795 : 66 Mad LJ 492 : 39 LW 488 : 1934 Mad WN 90.
228. *Mohan Lal v Benoy Krishna, supra*; *Ademma v Venkatasubbiah*, AIR 1933 Mad 627 : 65 Mad LJ 137 : 38 LW 208 : 1933 MWN 577; dissenting from *Nanjundappa v Nallakaruppan* 55 Mad LJ 120; *Venkataratnam v Chenniah*, AIR 1940 Mad 214 : 50 LW 764. See notes to section 38 under the head: "Jurisdiction of Court Executing the Decree".
229. *Khetpal v Tikam Singh*, (1912) ILR 34 All 396.
230. *Banku Behary v Narain Das*, AIR 1927 PC 73 : 54 IA 129 : ILR 54 Cal 500; *Chutterput Singh v Sait Sumari*, (1916) ILR 43 Cal 903.
231. *KB Dutt v Taraprasanna*, AIR 1924 Pat 120 : (1923) ILR 2 Pat 909.
232. *PN Sree Kumaran Nair v Dhanalakshmy Bank*, AIR 2009 Ker 26 : (2008) 3 Ker LT 52 : (2008) 4 Civil Court C 449.

Provisions of CPC relating to execution apply to orders passed by the family court. Thus, where the judgment-debtor was not residing within the territorial limits of jurisdiction of the Family Court at Secunderabad and his place or residence was shown as Adilabad, it was held by the Andhra Pradesh High Court that the family court at Secunderabad should not have entertained the application for the arrest of judgment-debtor and should have transmitted the decree to a competent court in Adilabad district to execute the decree.[233]

[s 39.14] Initiation of Proceedings on Transfer of Decree

Where a decree is transferred for execution to another court, it is the application for execution to that court, which initiates the proceedings in execution. The receipt of the decree is a ministerial act. A decree passed by a sub-judge in Madras Presidency was transferred to a court in Burma. The papers in the proceeding were received in due course. The application for execution was made after the separation of Burma from British India. It was held that the decree of the Madras court became a foreign decree, and the Burma court had no jurisdiction to execute it, no reciprocation in respect of execution having been made.[234]

[s 39.15] Clause (A): Residence of Judgment-debtor Outside the Jurisdiction

This clause provides for transfer of the decree if the judgment-debtor is resident in the jurisdiction of another court. The power of the court, under this clause, to transfer a decree is not confined to the case where execution is sought against the person of the judgment-debtor. The decree-holder is not bound to state, in the application for transfer, the mode in which the decree is to be executed. If he satisfies the court that the judgment-debtor resides in the jurisdiction of another court, he may ask for transferring the decree to that court without stating anything more in his application.[235] If the judgment-debtor's garnishee is resident in another jurisdiction, the decree must be transferred there to serve a prohibitory order upon him.[236] Where a decree passed against three judgment-debtors was transferred to another court for execution as against two of them, the transferee court was held to have no jurisdiction to entertain an execution application against the third judgment-debtor.[237]

[s 39.16] Clause (B): Property of Judgment-debtor Outside the Jurisdiction

If the judgment-debtor's property is out of jurisdiction, the court which passed the decree cannot attach it, but must transfer the decree to the court within whose local limits, the property may be.[238]

[s 39.17] Clause (C): Decree for sale or possession outside the Jurisdiction

As stated in rule 1 under section 38, territorial jurisdiction is a condition precedent to a court excepting a decree. If the decree directs the sale of immovable property within the territorial limits of the jurisdiction of another court, it must be sent to that court for execution.

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233. *K Srinivas Rao v K Renuka Bai*, 2007 (1) Andh LD 691 : 2007 (2) Andh LT 659.
234. *Muthukarappan v Sellami*, AIR 1938 Rang 385 : (1938) ILR Rang 355.
235. *SA Ramanathan Chettiar v MP Kasi Chettiar*, AIR 1944 Mad 73; *Dwarka Nath v Imperial Bank of India*, AIR 1929 Cal 529 : (1929) ILR 56 Cal 1176.
236. *Begg Dunlop & Co v Jagannath*, (1912) ILR 39 Cal 104.
237. *Ayodhya Bai v Govind Trading Co*, AIR 1956 Ajm 39.
238. *Bank of Bengal v Sarat*, (1919) 4 Pat LJ 141; *Hari Das v National Insurance Co*, AIR 1932 Cal 213 : (1932) ILR 59 Cal 199.

There is an exception to this in the case of a decree for the enforcement of a mortgage; see exception 1 to rule 1 under section 38 above. As to such decrees, the court may either execute the decree itself or send it for execution to the court having local jurisdiction.[239]

[s 39.18] Clause (D): Court Considering that Execution Should be in Another Court

In a Bombay case, the court had expressed a doubt whether clause (d) of this section enables a subordinate judge to transfer a decree for execution to a small cause court, where the property attached was within the local jurisdiction of the subordinate judge.[240] An order for transfer is necessary even when the same judge holds office, both as a judge of the small cause court and as a judge on the original side and the same can be made by the judge either on the application of the party or otherwise.[241] Such an order of transfer could be implied when he orders execution against immovable property.[242] Under section 39(1), the decree-holder has no indefeasible right to get his application for transfer of the decree to another court *ipso facto* allowed, particularly when the case is outside section 39, clauses (a), (b) and (c).[243]

A transfer order under section 39(1)(d) should be proved. In the absence of such proof, it cannot be presumed that the transferee court has jurisdiction.[244]

[s 39.19] Sub-clause (2)

The exercise of the power under sub-section (2) of section 39, CPC, to send the decree for execution to a subordinate court can be exercised without meeting the requirements of sub-clauses(a) to (d) under sub-section (1) of section 39, CPC. The expression used in sub-section (2) of section 39 is "to any subordinate Court for execution" in contradistinction to "another Court of competent jurisdiction", as used in sub-section (1) of section 39, CPC. The power under sub-section (2) of section 39 can be exercised for administrative reasons to ensure expedition in execution of the decree, etc. In the case of Delhi, for instance, the Civil Nazarat is located at the district courts. The warrants for possession and warrants for sale or attachment of properties, etc, are executed through the administrative civil judge. In such circumstances, if the court may find that the decree can be conveniently and expeditiously executed by the district court, it may in the exercise of powers under sub-section (2) of section 39, CPC, send the decree for execution to the district courts. Accordingly, it is held that the exercise of the powers to transfer under sub-section (2) of section 39, of CPC can be exercised independently of the powers under sub-section (1) of section 39.[245]

Where a court which passed a decree transferred it for execution to district court *A*, an application for execution to court *B* which is subordinate to court *A*, is not legal.[246]

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239. *Kartick Nath v Tilukdhari*, (1888) ILR 15 Cal 667; *Chhatu Ram v LIC of India*, AIR 1974 Pat 371.
240. *Krishna v Bhau*, (1894) ILR 18 Bom 61.
241. *Abdul Khadar v Mohammed*, AIR 1956 TC 213 : (1956) TC 250.
242. *Nageshwar Prasad v Lakshman Prasad*, AIR 1960 Pat 171.
243. *Mahadeo Prasad v Ram Lochan*, AIR 1981 SC 416 : (1980) 4 SCC 354.
244. *Pera Khatika v Lal Behari*, AIR 1982 All 82.
245. *Pearay Lal & Sons Pvt Ltd v Jamuna Properties Pvt Ltd*, AIR 2004 Del 126.
246. *Mohammad Mehdi v Zainuddin*, AIR 1957 Pat 654.

[s 39.20] Simultaneous Execution of Decree in more Places than One

A court passing a decree has the power to send its decree to more courts than one for concurrent execution. But this power should be sparingly exercised, and, when exercised, it would be, in many cases, proper to impose terms on the decree-holder that he should not proceed to a sale under all the attachments at once.[247] The court executing the decree, may after notice to the judgment-debtor to send the decree for simultaneous execution to another court if it is satisfied that the assets in its jurisdiction are not likely to satisfy the decree.[248] The Allahabad High Court issued a warrant of arrest of the judgment-debtor after it had sent the decree for simultaneous execution to another court.[249] It has been held by the Allahabad High Court on a review of the authorities, that simultaneous execution in more courts than one is permissible.[250]

[s 39.21] Appeal

An appeal lies from an order rejecting an application for the transfer of a decree. The reason is that questions relating to the transfer of decrees are questions relating to "execution" within the meaning of section 47.[251]

[s 39.22] Award

An award filed under section 11 of the Indian Arbitration Act, 1899, is enforceable under section 15 of the Act "as if it were a decree of the court". It may, therefore, be transferred for execution as a decree under this section to another court.[252] So also, an award made under rules framed under section 43 of the Co-operative Societies Act, 1912.[253]

[s 39.23] Transfer of Decree by Small Cause Court

Section 31 (b) of the Presidency Small Cause Courts Act, 1882 contains a special provision for transfer of decrees passed by the Presidency Small Causes Courts. A transfer of a decree by small cause court, Calcutta, direct to the court of the district *munsiff* is valid under this section.[254]

[S 40] Transfer of decree to Court in another [255]**[State].**—Where a decree is sent for execution in another State, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that [255][State].

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247. *Saroda Prosad v Luchmeeput*, (1872) 14 MIA 529; *Krishto Kishore v Rooplall*, (1882) ILR 8 Cal 687; *Deb v Chowdhury*, AIR 1927 Rang 258 : (1927) 5 Rang 397; *Dwarka Nath v Imperial Bank of India*, AIR 1929 Cal 529 : (1929) ILR 56 Cal 1176; *Fatechand v Jitmal*, AIR 1929 Bom 418 : (1929) ILR 53 Bom 844 : 31 Bom LR 1105; *Athivarapu Venkatarami Reddi v Kotamareddit Ram Reddi*, AIR 1950 Mad 582.
248. *Gurudas v Jnandra*, AIR 1935 Cal 268 : (1935) 39 Cal WN 165.
249. *Makhan Lal v Mst Bhagwana*, AIR 1936 All 655 : (1936) All LJ 277.
250. *Bhagwan Das v Gomti Bai*, AIR 1962 All 619.
251. *Bhabani Charan v Pratap Chandra*, (1904) 8 Cal WN 575. But see section 2(2) as now amended.
252. *Sital v Clement Robson & Co*, AIR 1921 All 199 : (1921) ILR 43 All 394.
253. *Krishnaji v Mahadeo*, AIR 1922 Bom 377 : (1922) ILR 46 Bom 128.
254. *Jagu Ram v Pannalal*, AIR 1962 Pat 272; *Sarjoo Prasad v Second Addl. Dist. Judge, Kanpur*, AIR 1975 All 13.
255. Substituted for "Province" by AO 1950.

[s 40.1] Executed in Such Manner as may be Prescribed by Rules in Forces in that State

The manner of execution is that of the court which executes the decree, but as to whether execution of the decree is barred by limitation or not it is the law governing the court which passed the decree that applies.[256] Sections 40, 41 and 42 of the CPC prescribe only the procedure for executing the decree passed by one court, transmitted to the transferee court for execution, and these sections do not make any substantial law. That the transferor court retains substantial control over the decree, is evident from sections 41 and 46. The power conferred by section 42 on the executing court is the power for the limited purpose of execution of the decree. Matters concerning discharge or satisfaction of the decree and the like, have to be determined by the proper law of contract, *viz*, the substantive law of the place where the debt was contracted and where the decree was passed. Therefore, a debt which ripened into a decree in Bombay and was transmitted to a Tamil Nadu court for execution against the judgment-debtor, could not be declared to have been discharged under the provisions of the Tamil Nadu Debt Relief Act.[257] Where a decree of the Madras High Court was transferred to the district court of Bangalore in the State of Mysore, it was held that the judgment-debtor could not claim that the decree should be scaled and instalments fixed for payment of the amount in accordance with Mysore Agriculturists Relief Act, as these are matters of substantive rights on which the parties would be governed by the law of Madras.[258] Where a decree passed by a court of small causes is sent for execution to the original side, it has been held that an order for arrest passed by the transferee court was not open to appeal but could be revised.[259] It would be otherwise if the order were for attachment of immovable properties.[260] The word "rules" in the section means rules in the First Schedule or rules framed under section 122. Where no rules have been framed under section 122, the decree does not become un-executable. The execution in such cases would be governed by the rules in the First Schedule.[261] Section 5 of Madhya Pradesh Sahayata Upkram (Vishesh Upbandh) Adhiniyam 1978 operates even against execution of decree obtained against the relief undertaking by its creditors outside the State of Madhya Pradesh. The bar contained in section 5, by way of suspension of suits or other legal proceedings, is thus, an absolute bar, which is only for the period contemplated by the Act. All that is sought to be done is to suspend its animation for the period mentioned in the notification, without affecting the validity of the decree transferred to the State of Madhya Pradesh. Section 5, therefore, does not come into conflict either with section 40 or section 42 of the CPC.[262]

[S 41] Result of execution proceedings to be certified.—The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

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256. *Inderchand v Bansropan*, AIR 1948 Pat 245 : (1947) ILR 26 Pat 307; *Tincowri v Debendro Nath*, (1890) ILR 17 Cal 491; *Sree Krishna v Alumbu*, (1913) ILR 36 Mad 108; *Subbier v Metal Corp of India Ltd*, AIR 1954 Cal 169 : 93 Cal LJ 25.
257. *PS Ramamoorthy Sastry v Selver Paints and Varnish Works Pvt Ltd*, AIR 1984 Mad 172.
258. *Basheer Ahmed v Padmanabha*, AIR 1953 Mys 37; *Ramavtar v Pop Singh*, AIR 1970 Ori 36 : (1970) ILR Cut 504.
259. *Kunhiraman v Madhavan Nair*, AIR 1957 Mad 761.
260. *Ponnappa v Thiruvengadam*, 49 Mad LJ 104.
261. *Chhegalal v Shyamlal*, AIR 1960 MP 387; *Indore Soap Factory v National Industries Co*, AIR 1963 MP 153.
262. *Binod Mills Co Ltd v Suresh Chand Mahavir Prasad Mantri*, (1987) 3 SCC 99.

[s 41.1] Certify

The court of execution must certify the result of the execution to the court which passed the decree and transferred it for execution. When the certificate is sent, the transferee court ceases to have seizing of the execution proceeding; until then decree rests in the transferee court.[263] The court is not bound to certify failure of execution if the decree-holder wishes to make another attempt.[264] The court has no power to issue a certificate under this section, so long as the execution case is pending before it.[265] A certificate has to be issued under this section only when the transferee court has executed the decree and where it has failed to execute it, it has to certify the circumstances attending on such failure. Until such a certificate is issued, the transferee court retains its jurisdiction.[266] The Oudh Court has held that though the transferee court ceases after certification to have jurisdiction further to execute the decree, it has power to decide an objection taken before it in respect of anything done in the course of the execution proceedings taken by it.[267] Mere notification of payments made on account of the decree to the court which passed the decree does not amount to a certification under this section.[268] In a Bombay case, it was said that the section only means that the court of execution should keep the court which passed the decree informed of what has happened in the execution.[269] The Patna High Court has held that section 41 does not prescribe any particular form of certificate and sending intimation by the transferee court to the court which passed the decree that the execution case has been dismissed is sufficient compliance.[270] A covering letter forwarding a certificate is not essential.[271] Such a view, it is submitted, is not correct. A certificate as envisaged by the section is an important step having the effect of determining jurisdiction of the transferee court and is sent only after failure to execute or after execution to the extent it can.[272] The certificate required by the section enjoins the transferee court to apply its mind and affirm the statement of fact that execution was either made or could not be made after *bona fide* efforts to do so. The failure to execute as contemplated here, is failure after such *bona fide* efforts and not negligence or omission to perform duty. The words "certify" and "fails" in the section are used in their ordinary meanings and mean to make a declaration in writing under the hand or hand and seal as to the result of the execution proceedings in the transferee court and the circumstances thereof. The provisions of the section are mandatory and therefore the transferee court has to strictly adhere to them. Accordingly, merely sending a copy of the order of dismissal of the execution petition to the transferor court without a non-satisfaction report is not sufficient compliance with the section. There is no particular form of certificate but the certificate, whatever the form, must affirm the statement of facts relating to the result

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263. *Nagi Reddi v Thikkavarapu*, AIR 1947 Mad 431 : (1948) ILR Mad 117; *Pratabgir v Chandanmal Duddha*, AIR 1951 Hyd 65; *Abda Begum v Muzaffar*, (1898) ILR 20 All 129; *Vithu v Ganesh*, AIR 1923 Bom 396 : (1923) 25 Bom LR 453; *Shivlingappa v Shidmalappa*, AIR 1924 Bom 359 : (1924) 26 Bom LR 345; *Muhammad v Chhatto Lal*, AIR 1926 Pat 274 : (1926) ILR 5 Pat 398; *Radhe Shyam v Devendra*, AIR 1952 Pat 213 (FB).
264. *Vithu v Ganesh*, AIR 1923 Bom 396 : (1923) 25 Bom LR 453.
265. *Savithri v Kamal Singh*, AIR 1955 Pat 456.
266. *Prahlad v Thakur*, AIR 1961 Pat 149; *Suryanarayana v Bhavani Shankar*, (1960) 1 Andh WR 260; *Punjab Co-op Bank Ltd v Bikram Lal*, AIR 1959 P&H 71 : (1958) ILR Punj 2430; *Ram Kumar v Hazarimal*, AIR 1961 Raj 157 : (1960) ILR Raj 1624.
267. *Mst Jilai v Abdul Rahaman*, AIR 1929 Oudh 76 : (1929) ILR 4 Luck 209.
268. *Shivlingappa v Shidmalappa*, AIR 1924 Bom 359 : (1924) 26 Bom LR 345; *Vithu v Ganesh*, AIR 1923 Bom 396 : (1923) 25 Bom LR 453.
269. *Maniram v Vithu*, AIR 1923 Bom 371.
270. *Darsansingh v Baldeodas*, AIR 1946 Pat 365 : (1946) ILR 25 Pat 145.
271. *Benoy Krishna Mukerjee v Mohanlal Goenka*, AIR 1950 Cal 287.
272. *Shivlingappa v Shidmalappa*, (1924) 26 Bom LR 345.

of the execution proceedings.[273] In another case, the Bombay High Court held that where the transferee court dismisses the execution application at the instance of the decree-holder, the decree-holder can apply to the court passing the decree, to execute the decree even before the receipt of the certificate.[274] Where an execution application filed in a transferee court had been disposed of, a further execution application presented to the transferor court without a certificate from the transferee court under this section is not incompetent.[275]

It has been held by a Full Bench of the Allahabad High Court that even after the transferee court certifies to the transferor court, under this section, the result of execution, the former court has jurisdiction to entertain an application to set aside its previous order.[276]

[S 42] Powers of Court in executing transferred decree.—[277][(1)] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

[278][(2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree, namely:—

(*a*) power to send the decree for execution to another Court under section 39;

(*b*) power to execute the decree against the legal representative of the deceased judgment-debtor under section 50;

(*c*) power to order attachment of a decree.

(3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Court to which a decree is sent for execution any of the following powers, namely:—

(*a*) power to order execution at the instance of the transferee of the decree;

(*b*) in the case of a decree passed against a firm, power to grant leave to execute such decree against any person, other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI.]

SYNOPSIS

[s 42.1]	State Amendment	706	[s 42.4]	Powers of the Transferor Court after Transfer	709
[s 42.2]	Powers of Court Executing Transferred Decree	706	[s 42.5]	State Amendment in Uttar Pradesh	711
[s 42.3]	Limitation on the Powers of the Transferee Court	708			

273. *SO Mills v RO Mills*, AIR 1969 AP 263; *Pannalal v Appalabhuketula*, AIR 1969 Ori 147.
274. *Fatechand v Jitmal*, AIR 1929 Bom 418 : (1929) ILR 53 Bom 844 : 31 Bom LR 1105.
275. *Aftab Ahmed v Hindustan Commercial Bank*, AIR 1906 All 558; *Dharamchand v Sakalchand*, AIR 1967 Mys 24 : (1965) 2 Mys LJ 85.
276. *Mohammad Hanif v Ali Raza*, AIR 1933 All 783 (FB) : (1933) ILR 55 All 891.
277. Section 42 renumbered as sub-section (1) thereof by Act 104 of 1976, section 19 (w.e.f. 1-2-1977).
278. Inserted by Act 104 of 1976, section 19 (w.e.f. 1-2-1977).

[s 42.1] State Amendment

Uttar Pradesh.—The following amendments were made by Uttar Pradesh Act No. 14 of 1970, section 2 (w.e.f. 8-4-1970).

"**42. Power of Court in executing transferred decree.**—(1) The Court in executing a decree sent to it shall have the same powers in executing such decree as if it has been passed by itself. All persons disobeying or obstructing the execution of decree shall be punishable by such Court in the same manner as if it had passed the decree, and its order in executing such decree shall be subject to the same rule in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree, namely:—

(a) power to send the decree for execution to another Court under Section 39;

(b) power to execute the decree against the legal representative of the deceased judgment-debtor under Section 50;

(c) power to order attachment of a decree;

(d) power to decide any question relating to the bar of limitation to the executability of the decree;

(e) power to record payment or adjustment under r 2 of O XXI;

(f) power to order stay of execution under r 29 of O XXI;

(g) in the case of a decree passed against a firm, power to grant leave to execute such decree against any person other than a person as is referred to in clause (b) or clause (c) of sub-rule (1) of r 50 of O XXI.

(3) A Court passing an order in exercise of powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Court to which the decree is sent for execution, the power to order execution at the instance of the transferee of a decree."

[s 42.2] Powers of Court Executing Transferred Decree

The court executing a transferred decree has, as sub-section (1) clearly states, the same powers as if the decree had been passed by itself. The newly added sub-section (2) now declares that such transferee court has, when necessary:

(i) the power to send the decree for execution to another court under section 39;

(ii) the power to execute the decree against the legal representative of the deceased judgment-debtor under section 50; and

(iii) the power to order attachment of a decree.

Where such transferee court exercises any such power, it has, under the new sub-section (3), to transmit a copy of its order to the court which passed the decree. The new sub-sections have been added to avoid delay in execution proceedings.

The transferee court, having all the powers of the court which passed the decree, can sell properties outside its territorial jurisdiction under circumstances under which the transferor court could do so.[279] All applications arising out of execution proceedings transferred to it have, therefore, to be made to it and its jurisdiction continues until:

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279. *Jonalalgadda Seetharamayya v Kaja Sivaramakrishna Rao*, AIR 1944 Mad 145, in Letters Patent Appeal, AIR 1944 Mad 446.

(i) the execution proceedings are withdrawn from it; or

(ii) it has certified under section 41, execution, or execution as far as possible, or its failure to execute.[280] The mere striking off or rejection of an execution application for some informality in the application does not terminate the jurisdiction of the transferee court to execute the decree or render it necessary to send a certificate to the transferor court.[281] If the application is dismissed for non-prosecution and a certificate of failure of execution is sent, the only court that can entertain a fresh application is the court which passed the decree.[282]

In a Patna case,[283] court *X*, which passed a decree, transferred it for execution to court *Y*. An execution application was disposed of by court *Y* but no certificate under section 41 was sent to court *X*. Subsequently, the decree was confirmed on appeal and a second execution application was presented to court *Y* reciting the fact of the confirmation of the decree by the appellate court. This was construed as an application to execute the decree of the appellate court. It was then objected that the appellate decree had never been transferred for execution. This objection was overruled. It was held that court *X* had, under section 37(a), power to execute the appellate decree, and that as court *Y* had all the powers of court *X*, it retained its jurisdiction to execute the decree even after the appeal. A similar decision has been given by the Andhra Pradesh High Court.[284] Where a decree is, after its transfer for execution, modified in appeal, the transferee court can proceed with the execution after amending the pending petition in accordance with the appellate decree.[285]

The transferee court can decide all questions arising in execution as if it were its own decree.[286] It can, in executing a decree for specific performance, decide whether the defendant is in a position to perform his part of the decree.[287] On the section, as it stood before the amendment, judicial opinion was divided on the question whether a transferee court can pass orders under O XXI, rule 29, or decide a question under rule 50 of that order. See notes under those rules. This conflict of opinion has now been resolved by amending rule 29 of O XXI on the one hand and by enacting sub-section 4 in this section so far as rule 50 of O XXI is concerned. The amended rule 29 of O XXI provides that where a suit is pending in any court against the holder of a decree of such court or of a decree which is being executed by such court on the part of the person against whom the decree was passed, the court (that is the court before whom such suit is pending) may, on such terms as to security or otherwise, stay the execution of the decree until such pending suit is decided. It would seem that since it is the court before whom such a suit is pending which has the power to stay, an application for stay of execution would have to be filed in that court and not before the court to which the decree has been transferred for execution unless such a suit is pending before the transferee court. As regards the question under rule 50 of O XXI, clause (b) of the new sub-section (4) clearly excluded from the transferee court, the power to grant leave to execute the decree transferred to

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280. *Manorath Das v Ambika* (1910) 13 WN 533; *Vithu v Ganesh*, AIR 1923 Bom 396 : (1923) 25 Bom LR 453; *Shivlingappa v Shidmalappa*, AIR 1924 Bom 359 : (1924) 26 Bom LR 345; *Mohammed v Chhattoo*, AIR 1926 Pat 274 : (1926) ILR 5 Pat 398; *Sheshiyer v Madan Mohan*, AIR 1932 Pat 286 : (1932) ILR 11 Pat 513.
281. *Abda Begum v Muzaffar*, (1898) ILR 20 All 129.
282. *Mathura v Kailash*, (1898) 3 Cal WN 211. See note "Certify" under section 41 above.
283. *Ekram Hussain v Umatul*, AIR 1931 Pat 27 : (1930) ILR 9 Pat 829.
284. *Bangar Raju v Alluri Raja*, AIR 1957 AP 403.
285. *Bhagmal v Purshotham*, AIR 1963 MP 154.
286. *Sital Prasad v Clement Robson & Co*, AIR 1921 All 199 : (1921) ILR 43 All 394; *Sanwal Das v Collector of Etah*, AIR 1924 All 700 : (1924) ILR 46 All 560.
287. *Jai Narain v Kedarnath* (1956) SCR 62 : AIR 1956 SC 359, affirming, AIR 1954 Pat 497.

it against any person other than the person referred to in clause (b) or clause (c) of sub-rule (1) of rule 50 of O XXI, that is, a person who has appeared in the suit in his own name or who has admitted that he is, or, who has been adjudged to be a partner or a person though served individually as a partner has failed to appear. Sub-section (4) likewise excludes the power to order execution at the instance of a transferee of the decree.

[s 42.3] Limitation on the Powers of the Transferee Court

The court to whose jurisdiction the subject matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer, and if it entertains an execution application with reference thereto, it would, at the worst be an irregular assumption of jurisdiction and not a total absence of it, and if objection to it is not taken at the earliest opportunity, it must be deemed to have been waived, and cannot be raised at any later stage of the proceedings.[288]

On the section, as it stood before its amendment, the view held was that since the jurisdiction of the transferee court was limited to the execution of the decree transferred to it, it could not transfer the decree for execution to another court.[289] That view can no longer hold good since clause (a) of sub-section (2) expressly confers, on the transferee court, power to send the decree for execution to another court under section 39. In other respects, its powers are limited in the same way as if it were its own decree. It cannot entertain an objection as to the legality or correctness of the decree,[290] or that the decree is defective,[291] or that it was obtained by fraud,[292] or that it directs a sale of property which is not saleable under section 60 of the CPC.[293] It cannot alter, vary or add to the terms of the decree, or allow future interest where none is allowed by the decree;[294] nor can it question the right of a transferee of a decree whose name is on the record as the person entitled to execute it.[295] It can, however, refuse to execute the decree, if it finds that the decree was against a dead person.[296] Where certain persons are not served or adjudged as partners in the main suit and they are sought to be made liable as partners in execution proceedings the decree-holder must expressly apply and get the question of their liability determined.[297]

The transferee court has no power to question the jurisdiction of the court which passed the decree.[298] There was a conflict of decisions on this point but that was settled by the omission, from O XXI, rule 7, of the words "or the jurisdiction of the court which passed it" which occurred in section 225 of the Code of Civil Procedure, 1882. The Calcutta High Court has held that when a decree appears, on the face of it, to have been passed by a court which had

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288. *Ramagonda Malagonda Patil v Bhajarang Tukaram Bhojane*, AIR 2003 Kant 154.
289. *Shib Narain v Bepin Behary*, (1878) ILR 3 Cal 512.
290. *Maharaja of Bhurtpur v Rani Kanno Dei*, (1901) ILR 23 All 181; *Kashi v Jamuna*, (1904) ILR 31 Cal 922; *Subramania v Punjamma*, (1882) ILR 4 Mad 324; *Lakshmibai v Ravji*, AIR 1929 Bom 217 : 31 Bom LR 400.
291. *Rajerav v Nanarav*, (1887) ILR 11 Bom 528.
292. *Pexatav Digambar*, (1891) ILR 15 Bom 307.
293. *Sadashiv v Jayanti*, (1884) ILR 8 Bom 185; *Madho Lal v Katwari*, (1888) ILR 10 All 130.
294. *Gajadhar v Firm Manulal*, AIR 1925 Pat 807 : (1925) ILR 4 Pat 440.
295. *Ramchandra v Mohendro Nath*, (1874) 21 WR 141; *Dhunesh v Oolfat*, (1874) 21 WR 219; *Prithi Chand v Satya*, AIR 1932 Pat 168 : (1932) ILR 11 Pat 94.
296. *Radha Kishen v Behari Lal*, AIR 1934 Lah 117.
297. *S Vijaychandra Prabhatilal Sharma v Manek Metal Syndicate Bombay*, AIR 1990 Guj 190.
298. *Hari v Narsingrao*, (1914) ILR 38 Bom 194; *Sheopat Rai v Harakchand*, (1919) PR 22; *Ramanadan of Ettiyapuram v Chidambaram*, (1920) ILR 43 Mad 675.

no jurisdiction, the court of execution is entitled to refuse to execute it.[299] But the Rangoon High Court, in the case of a transferred decree, expressed dissent and held that the validity of a decree cannot be questioned by the executing court.[300]

If the court which passed the decree has ordered execution, the transferee court cannot question the legality or propriety of such an order.[301] But there is conflict of opinion on the point whether a transferee court can decide, in an application under this section, the question whether execution is barred by limitation. Where the court which passed the decree decides the question of limitation and then transfers the decree for execution, the transferee court cannot reopen such a decision.[302] The conflict of opinion has arisen in cases where the court merely makes an order of transfer without deciding the point of limitation. One view is that it is implied in the very order of transfer, that it is executable and the question is therefore constructively *res judicata*.[303] The other view is that the question of limitation does not arise for decision at the stage of transfer and it is for the transferee court to decide it.[304] The third view is that in such a case, the transferee court should stay execution and leave the objection to be decided by the court which passed the decree.[305] The submission is that since the plea of bar by limitation goes to the root of the executability of the decree, it is one which ought to be raised at the stage of transfer. The decision in *Jai Narain v Kedrnath*,[306] does not conclude the question. It is obvious that the judgment-debtor must have notice of the transfer to enable him to invoke the plea of limitation.

If the court transferring a decree enters a wrong amount in the certificate, the court executing the decree can correct the error.[307]

[s 42.4] Powers of the Transferor Court after Transfer

After transferring a decree to another court for execution, the court which passed the decree cannot execute the decree itself; and an application for execution made to it after the transfer and before a certificate of non-satisfaction under section 41 has been returned, is not even a step in aid of execution so as to save limitation.[308] This is one view. The other view is that there is no justification for holding that the transferor court cannot execute a decree after it is

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299. *Gora Chand v Profulla*, AIR 1925 Cal 907 : (1926) ILR 53 Cal 166.
300. *Nathan v Samson*, AIR 1931 Rang 252 (FB) : (1932) 9 Rang 480.
301. *Mulla Abdul v Sukkhinaboo*, (1897) ILR 21 Bom 456; *Ram Lal v Radhey Lal*, (1885) ILR 7 All 330; *Beerchunder v Maymana*, (1880) ILR 5 Cal 736.
302. See notes to section 11 under the heading "Orders in Execution Proceedings... Constructive *Res Judicata* in Execution Proceedings".
303. *Rajata Giripati v Bhavani Shankaran*, AIR 1924 Mad 673; *Abdul Afeez v Official Receiver*, (1958) 2 Mad LJ 526 : 1958 Mad WN 552; overruling *Appayya v Venkataratnam*, AIR 1954 Mad 1 : (1953) 2 Mad LJ 225; *Palaniappa v Mariappa*, AIR 1960 Mad 343; *Srinath Chakravarthi v Prianath*, AIR 1931 Cal 312; *Sunder Rao v Appiah Naidu*, AIR 1954 Mys 1 (FB) : 1954 ILR Mys 153; *Hussin v Saji* 15 Bom 28.
304. *Samasekhara v Seshagiri*, AIR 1960 AP 321 : (1959) 2 And WR 303 : (1959) And LT 670; *Chhotay Lal v Puran Mull*, (1896) ILR 23 Cal 39, p 41; *Leake v Daniel*, (1868) 10 WR 10 (FB); *Machimai v Subramaniam*, AIR 1928 Rang 40 : (1928) 5 Rang 775; *Arjun Das v U Ka ya*, AIR 1936 Rang 271 : (1936) 14 Rang 550; *Rama Rai v Dayal Singh*, (1894) ILR 16 All 390.
305. *Srihari v Murari*, (1886) ILR 12 Cal 257.
306. *Jai Narain v Kedrnath*, AIR 1956 SC 359 : (1956) SCR 62.
307. *Mangal Chand v Dulari*, AIR 1938 All 654 : (1938) All LJ 980.
308. *Krishna v Ganga*, AIR 1947 Pat 338 : (1946) ILR Pat 790; *Maharaja of Bobbili v Narasaraja*, 43 IA 238, affirming, (1914) ILR 37 Mad 231; *Jnanendra Nath v Kumar Jogendra*, AIR 1923 Pat 384 : (1923) ILR 2 Pat 247; *Jatendrakumar v Mahendra Chandra*, AIR 1933 Cal 906 : (1933) ILR 60 Cal 1186; *Ram Mohan v Radhey Lal*, AIR 1936 Oudh 64; *Rangaswami v Sheshappa*, AIR 1922 Bom 359 : (1922) ILR 47 Bom 56.

transferred to another court; and that when the transferor court transfers a decree, it does not divest itself of its power but only vests the transferee court with powers it would not otherwise have.[309] The difference of opinion mainly turns on the construction placed on the judgment in the case of *Maharaja of Bobbili v Narasaraja.*[310] But the court which passed the decree does not altogether surrender control of the execution proceeding. It has power under O XXI, rule 26 to make an order for stay of execution. It may withdraw execution by calling back the decree;[311] or it may make an order for simultaneous execution by another court;[312] or it may make an order for rateable distribution.[313] It has, moreover, jurisdiction to decide an objection as to limitation if referred to it by the transferee court.[314] The transferor court can decide whether the decree has been satisfied.[315] It can also entertain an execution petition even though it has passed an order for transfer so long as no certificate has been issued.[316] If the decree is assigned after transfer, the assignee must apply for the execution to the original court.[317] If after a decree has been transferred for execution the judgment-debtor dies, the court which passed the decree is, by section 50, the proper court to order that execution should proceed against the legal representative. This is, however, merely a question of procedure and if the transferee court makes the order, that would be only an irregularity which might be waived.[318] It has been held that the transferee court has no jurisdiction in certain cases to bring on record legal representatives of the deceased judgment-debtor.[319] Where the execution petition had been disposed of by the transferee court but no certificate had been sent under this section, it has been held that an execution application presented to the transferee court is not incompetent.[320] All orders passed by the transferee court in execution are appealable to the court to which appeals lie from decrees of that court. It has accordingly been held that where a decree of high court for over Rs 5,000 was transferred to the court of the district *munsiff*, an appeal against an order passed by him would lie not to the high court but to the district court.[321]

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309. *Mojibanisa v Kadir Bux*, AIR 1951 All 380; *Thakur Vishwanath Singh v Mahabir Prasad*, AIR 1937 Nag 305 : (1937) ILR Nag 440; *Makhan Lal v Mst Bhagwana Kuer*, AIR 1936 All 655; *KK Deb v NL Chowdhury*, AIR 1927 Rang 258 : (1927) 5 Rang 397; *Pedda Subb Rao v Lavu Ankamma*, AIR 1933 Mad 110; *Kanti Narain v Madan Gopal*, AIR 1935 Lah 465 (Skemp J, dissenting) (FB) : (1934) 16 Lah 442; *Sundardas v Kalliandas*, AIR 1940 Sau 111; *Ranjam v Golam* 39 Cal WN 129; *Fatechand v Jitmal*, AIR 1929 Bom 418 : (1929) 53 Bom 844; *Radhe Shyam v Devendra*, AIR 1952 Pat 213 (FB).
310. *Maharaja of Bobbili v Narasaraja*, 43 IA 238.
311. *Lang v Jaswantilal*, AIR 1926 Bom 271 : (1926) 50 Bom 439; *Dwarkadas v Saligram*, AIR 1939 Pat 144 : (1939) 17 Pat 617.
312. *Venkatarami Reddi v Rami Reddi*, AIR 1950 Mad 582; *Darsan Singh v Baldeo Das*, AIR 1946 Pat 365 : (1946) 25 Pat 145; *Bhagwan Das v Gomti Bai*, AIR 1962 All 619, overruling *Parsottam v Raj Narain*, AIR 1957 All 336; *Punjab Co-op Bank v Bikram Lal*, AIR 1959 Punj 71; *Saroda Prosad v Luchmeeput*, (1872) 14 MIA 529; *Kristo Kishore v Rooplall*, (1882) 8 Cal 687; *Deb v Chowdhury*, AIR 1927 Rang 258 : (1927) 5 Rang 397; *Dwarkanath v Imperial Bank of India*, AIR 1929 Cal 529 : (1929) 56 Cal 1176.
313. *Basheshar Das v Central Co-op Bank Ltd*, AIR 1934 Lah 113.
314. *Srihari v Murari*, (1886) 12 Cal 257.
315. *Ramchand v Vazirchand*, AIR 1962 P&H 293.
316. *Abdul Sattar v Masurya Din*, AIR 1961 MP 158; dissenting from *Nagireddi v Kolamma*, AIR 1947 Mad 431.
317. *Framji v Rattansha*, (1872) 9 Bom HCR 49; *Kadir v Ilahi Baksh*, (1880) 2 All 283; *Amar Chundra v Guru Prosunno*, (1900) 27 Cal 488; *Tameshar v Thakur Prasad*, (1903) 25 All 443; *Shamsul Huq v Abdul Rahaman*, (1935) 39 Cal WN 960.
318. *Jang Bahadur v Bank of Upper India Ltd*, AIR 1928 PC 162 : 55 IA 227.
319. *Punjab Co-op Bank v Bikram Lal*, AIR 1959 P&H 71.
320. *Aftab Ahmed v Hindustan Commercial Bank*, AIR 1906 All 558.
321. *Jambulinga v Vadivel Achari*, AIR 1956 Mad 390.

[s 42.5] State Amendment in Uttar Pradesh

Section 42 shall stand substituted as under and shall be deemed to have been substituted w.e.f. 2-12-1968:

> **Section 42. Power of Court in executing transferred decree.**—(1) The court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the decree shall be punishable by such court in the same manner as if it had passed the decree, and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.
>
> (2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree, namely:
>
> (a) power to send the decree for execution to another Court under section 39;
>
> (b) power to execute the decree against the legal representative of the deceased judgment-debtor under section 50;
>
> (c) power to order attachment of a decree;
>
> (d) power to decide any question relating to the bar of limitation to the executability of the decree;
>
> (e) power to record payment or adjustment under Rule 2 of Order XXI;
>
> (f) power to order stay of execution under Rule 29 of Order XXI;
>
> (g) in the case of a decree passed against a firm, power to grant leave to execute such decree against any person other than a person as is referred to in clause (*b*) or clause (*c*) of sub-rule (1) of rule 50 of Order XXI.
>
> (3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.
>
> (4) Nothing in this section shall be deemed to confer on the Court to which a decree is sent for execution, the power to order execution at the instance of the transferee of a decree. Uttar Pradesh Civil Laws Amendment Act, 1970 (14 of 1970).[322]

Where a decree of the small causes court is transferred to the court of *munsiff*, the latter cannot execute it by sale of immovable property, because under section 42 (as amended by Uttar Pradesh Act 24 of 1954), the transferee court can exercise the power, only if the transferor court can, by virtue of the provision contained in O XXI, rule 82, it has no power to order sale of immovable property.[323]

[324][**[S 43] Execution of decrees passed by Civil Courts in places to which this Code does not extend.**—Any decree passed by any Civil Court established in any part of India to which provisions of this Code do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends.]

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322. For the effect of this amendment see the following cases: *Ram Lachan v Mahadeo Prasad*, AIR 1970 All 554; *Bhola Koeti v Laxmi Devi*, AIR 1972 All 537.
323. *Mahadeo Prasad Singh v Ram Lochan*, AIR 1981 SC 416 : (1980) 4 SCC 354 : 1981 SCR (1) 732.
324. Substituted by Act 2 of 1951, section 8, for section 43 (w.e.f. 1-4-1951).

SYNOPSIS

[s 43.1] Alterations in the Section 712
[s 43.2] This Section and Sections 44 and 45 712
[s 43.3] "Any Part of India" 712

[s 43.1] Alterations in the Section

This section was substituted by section 8 of the Code of Civil Procedure (Amendment) Act 2 of 1951 for the old section which ran as follows:

> Any decree passed by a civil court established in any part of British India to which the provisions relating to execution do not extend, or by any court established or continued by the authority of the central government or by the Crown Representative in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the court by which it was passed, be executed in manner herein provided within the jurisdiction of any court in British India.

[s 43.2] This Section and Sections 44 and 45

Under this section, read along with sections 44 and 45, the Indian courts have power:

(i) to execute decrees of those Indian courts to which the CPC does not apply, such as scheduled districts;

(ii) to execute decrees of the civil courts outside India which are established by the authority of the central government;

(iii) to execute the decree of the revenue courts in any part of India to which the provisions of the CPC do not apply; and

(iv) to execute decrees of Indian courts in the states to which the state government has notified that section 45 would apply.[325]

[s 43.3] "Any Part of India"

A decree passed by the Gwalior Court on 18 August 1948 is outside this section as it is not one passed by any court established in any part of India to which the provisions of this CPC extend or by any court established or continued by the authority of the central government outside India.[326] A decree passed by the court in Madhya Bharat is not governed by this section as the CPC was not applicable to it.[327] The words "any part of India to which the provisions of this Code do not extend" have been construed as not applicable to sovereign states like former Indian states to which the CPC could not be extended.[328]

[329][**[S 44] Execution of decrees passed by Revenue Courts in places to which this Code does not extend.**—The State Government may, by notification in the Official Gazette, declare that the decrees of any Revenue Court in any part of India to which the provisions of this Code do not extend, or any class of such decrees, may be executed in the State as if they had been passed by Courts in that State.]

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325. *Kishendas v Indo-Carnatic Bank*, AIR 1958 AP 407.
326. *Moloji Narsingh Rao v Shankar Saran*, AIR 1962 SC 1737; affirming, AIR 1958 SC 775.
327. *Wahid Ali v Aziz*, AIR 1956 Bhopal 24.
328. *Kantilal v Dominion of India*, AIR 1954 Cal 67.
329. Substituted by Act 2 of 1951, section 9, for section 44 (w.e.f. 1-4-1951).

SYNOPSIS

[s 44.1] History of the Section 713
[s 44.2] By notification 713
[s 44.3] Limitation 713

[s 44.1] History of the Section

This section was substituted by section 9 of the Code of Civil Procedure (Amendment) Act 11 of 1951 for the old section which ran as follows:

> The Provincial Government may by notification in the Official Gazette declare that the decrees of any civil or revenue courts in any Indian State, not being courts established or continued by the authority of the central government or of the crown representative, or any class of such decrees, may be executed in the province as if they had been passed by courts of British India.

For courts situated in those parts of India to which the Code does not extend, see section 1, sub-section (3).

[s 44.2] By notification

A notification under this section does not alter the character or incidents of a foreign judgment.[330] And accordingly, an *ex parte* decree passed by a foreign court against a non-resident foreigner does not become executable by reason of the notification.[331]

The relevant date for executability is the date when the order is to be made, so that if the notification was made on or before that date the section would apply.[332]

[s 44.3] Limitation

The period of limitation for executing decrees executable in India under these sections is the period prescribed by the law of India in force at the place where execution is applied for.[333]

[334][**[S 44A] Execution of decrees passed by Courts in reciprocating territory.—** (1) Where a certified copy of a decree of any of the superior Courts of [335][***] any reciprocating territory has been filed in a District Court, the decree may be executed in [336][India] as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this

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330. *Nilratan v Cooch Behar Loan Office*, AIR 1941 Cal 64 : (1941) 1 Cal 171 : (1940) 45 Cal WN 113 : 72 Cal LJ 148.
331. *Rajendra v Shanker*, AIR 1958 All 775.
332. *Chunilal Kasturchand v Dundappa Damappa*, AIR 1951 Bom 190.
333. *Amarnath v Narain Das*, AIR 1947 Oudh 206 : (1947) 22 Luck 353; *Nabibhai v Dayabhai*, (1916) 40 Bom 504.
334. Inserted by Act 8 of 1937, section 2.
335. The words "the United Kingdom or" omitted by Act 71 of 1952, section 2.
336. Substituted by Act 2 of 1951, section 3 for "the States" (w.e.f. 1-4-1951).

section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (*a*) to (*f*) of section 13.

[337][*Explanation 1.*—"Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.—"Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.]]

SYNOPSIS

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[s 44A.1] History of the Section

This section was inserted by section 2 of the Code of Civil Procedure (Amendment) Act, 1937 (8 of 1937). By the Government of India (Adaptation of Indian laws) Order 1937, a few changes were made in the section. Thus, in Explanation 2, the words "Central Government" and "Official Gazette" were substituted in the said explanation for the words "Governor-General in Council" and "Gazette of India" respectively and by a subsequent supplementary Order of 1937, the words "or in India" were omitted from Explanation (2).

The words were after the word "Dominions", by the Code of Civil Procedure (Amendment) Act, 1952, the present Explanations 1 and 2 were substituted for the old explanations 1 to 3 which were as follows:

Explanation 1—'Superior courts' with reference to the United Kingdom means the High Court in England, the court of Session in Scotland, the High Court in Northern Ireland, the court of Chancery of the County, Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Explanation 2—'Reciprocating territory' means any country, or territory, situated in any part of His Majesty's Dominions which the central government may, from time-to-time, by notification in the Official Gazette, declare to be reciprocating territory for the purposes of this

337. Substituted by Act 71 of 1952, section 2, for *Explanations 1 to 3*.

section; and 'superior courts' with reference to any such territory, means such courts as may be specified in the said notification.

Explanation 3—'Decree', with reference to a superior court, means any decree or judgment of such court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of fine or other penalty, and:

(a) with reference to superior courts in the United Kingdom, includes judgments given and decrees made in any court in appeals against such decrees or judgments; but

(b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.

[s 44A.2] Policy Behind the Section

This section is meant to reciprocate the policy contained in the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and is a part of the arrangement under which on the one part decrees of Indian courts should be executable in the United Kingdom and on the other part decrees of courts in the United Kingdom and other notified parts of His Majesty's dominions should be executable in India.[338]

Presidency small cause courts cannot execute the decree of a foreign court of reciprocating territory as this section has not been extended to such courts.[339]

[s 44A.3] Decree of a Foreign Non-reciprocating Country

A decree passed by the Lahore Court prior to 15 August 1947 became, thereafter, a decree of the foreign court in relation to the courts in India and could not, in the absence of reciprocating agreement be executed in a court of Delhi.[340] Likewise, a. decree passed by a court in Burma cannot after it became a republic be executed in any court in India, there being no reciprocating agreement with that state.[341]

The Bombay High Court has held that the decree passed by the High Court of Hong Kong Special Administrative Region Court of the First Instance is a decree of a court in reciprocating territory. Hong Kong ceased to be a colony of the United Kingdom with effect from 1-7-1997 and sovereignty over Hong Kong has been resumed by China. Hong Kong does not cease to be a reciprocating territory upon its becoming a part of the Republic of China. After reunification of Hong Kong with the Republic of China, the Supreme Court of Hong Kong referred to in the Government notification dated 23 November 1968 issued under section 44-A continues to be in existence though by a different name *viz* high court. However, mere change in name/title of a court would not take it out of the purview of the notification issued under section 44-A. It was further held that the said court will be a "superior Court" within the meaning of section 44-A of the CPC.[342]

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338. See Statement of Objects and Reasons, Gazette of India, Pt V, p 24, dated 16 February 1935.
339. *Subramaniam v Srinibash*, AIR 1951 Mad 289.
340. *Said-ul-Hamid v Federal Indian Assurance Co*, AIR 1951 P&H 255 : (1951) Punj 111; *Punjab Co-op Bank v Naranjan Das*, AIR 1961 P&H 369 : (1960) 2 Punj 241.
341. *Muthia Chettiar v Firm Shwebo*, AIR 1957 Mad 25.
342. *Sumikin Bussan International (Hong Kong) Ltd v King Shing Enterprises Ltd (in Liquidation)*, 2008 (3) AIR Bom R 92 : 2008 (5) Bom CR 464.

[s 44A.4] District Court

The high court, for the purposes of execution of the decree, would be considered as the district court.[343]

The words "District Court" in the section include the high court in its original side. By virtue of section 12 of the Bombay City Civil Court Act, 1948 read with the notification dated 20 January 1950 issued under section 4 of the Act the Bombay City Civil Court is the district court under this section in respect of matters covered by the notification.[344]

Where a judgment of an English Court was sought to be executed in India, there was no dispute that the decree was of a court in a reciprocating territory. It was accordingly held that the provision of section 44-A has to be complied with, and the district court empowered to execute the decree can also execute decrees of superior courts of any reciprocating territory. It was further directed that the decree may be executed on its certified copy being filed in district court, whereafter it would be taken as if it is a decree passed by the district court itself.[345]

[s 44A.5] "As if it had been passed by the District Court"

The words "as if it had been passed by the District Court" have the effect of making the entire scheme of O XXI applicable, in respect of execution of decrees of foreign courts.[346] Consequently, an application for execution of such a decree would not be entertained where no step for its execution nor any step in aid of such execution, has been taken by the decree-holder in any court in India within three years from the date of the decree.[347] Likewise, notices under O XXI, rule 22 have to be taken out when an application for execution is made more than one year after the date of the decree or where the application is against the legal representatives of a party to the decree unless for reasons to be recorded, the court considers that the issue of such notice would cause unreasonable delay.[348] The induction of O XXI and its scheme do not, however, have the effect of barring the judgment-debtor from raising any plea based on clauses (a)–(f) of section 13.[349] The filing of a certificate required by the section is a condition precedent to the exercise of jurisdiction thereunder. If no such certificate is filed, the application for execution is liable to be dismissed.[350] However, in a case relating to a decree from a court in England, it was held by the Karnataka High Court that production of non-satisfaction certificate from High Court of Justice, Chancery Division, is not a condition precedent to initiate execution proceedings. It is procedural aspect and does not pertain to jurisdiction. It was also held in the above case that where damages for breach of contract is awarded according to the terms and conditions of agreement by applying English, it cannot be said that decree of execution is being enforced to recover penalty as stated in Explanation 2 to section 44A.[351] But once the certified copy of the decree and the certificate are produced, execution can proceed even against an immovable property situated in this country inspite of the judgment-debtor

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343. *Janardhan Mohandas Rajan Pillai v Madhubhai Patel*, AIR 2003 Bom 490.
344. *Geglani v Beharilal Beniprasad Pvt Ltd*, AIR 1978 Bom 255.
345. *Vitol SA v Deepak Fertilizers and Petrochemicals Corpn Ltd. Pune*, AIR 2012 Bom 57 : 2012 (5) All MR 164.
346. *Sheik Ali v Sheik Mohamed*, AIR 1967 Mad 45 : (1966) 2 Mad 551.
347. *Lakhpat Rai Sharma v Atma Singh*, AIR 1971 P&H 476 : 73 Punj LR 224.
348. *Jharkhand Mines and Industries Ltd v Nand Kishore*, AIR 1969 Pat 228.
349. *Morteys Biham Ltd v Roshanlal*, AIR 1961 Bom 156.
350. *Uthamram v Abdul Kassim & Co*, (1963) 2 Mad LJ 412.
351. *India Builders Corp v Masood Asif*, 2010 (1) : AIR Kar R 151.

having been adjudicated an insolvent by the court of the reciprocating territory as that court has no jurisdiction to vest such a property in the official assignee.[352]

[s 44A.6] Sub-Section (3): Conditions for Execution of Decree by Another Court

Section 44A(3) of the CPC reads that by virtue of sub-section (3), the court shall refuse execution if it is shown to the satisfaction of the court that the decree falls within any of the exceptions in clauses (a) to (f) of section 13. Thus, under sub-clause (b), if the decree has not been given on the merit of the case, then the following judgment is not conclusive between the parties and the same cannot be executed in India. Under section 13(b), even an *ex parte* judgment in favour of the plaintiff may be deemed to be a judgment given on merits if some evidence is adduced on behalf of the plaintiffs and the judgment, however, brief, is based on a consideration, of that evidence. Where however, no evidence is adduced on the plaintiff side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a former manner, the judgment may not be one based on the merits of the case.[353]

When an application is made for transmission of the decree, the judgment-debtor is entitled to raise all objections available under clauses (a)–(f) of section 13.[354]

[s 44A.7] Competency of Executing Court

Once decree of foreign superior court is sought to be executed under section 44A of the CPC as if it is the decree of the Indian court executing the same, no further question would survive regarding competence of such executing court. If the ship in question which is arrested at Visakhapatnam had sailed out of the territorial waters of Andhra Pradesh, then the Andhra Pradesh High Court would have lost its jurisdiction to entertain such a suit or the execution proceedings for executing the decree of foreign court. But once it was within its territorial waters, the ship could have been validly subjected to such a suit not only against itself but against its owner.[355]

[s 44A.8] Concept of Residence of Judgment-debtor Immaterial

The application for execution of decree of reciprocating court would lie in any district court, therefore, concept of residence of judgment-debtor need not be considered while filing such application under section 44-A.[356]

[s 44A.9] Foreign Award

The only difference as found is that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, a party holding foreign award can apply for enforcement of it but the court, before taking further effective steps for the execution of the award, has to proceed in accordance with sections 47–49. In one proceeding there may be different stages. In the first stage, the court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once

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352. *Indian Overseas Bank v SMM Musthaba*, AIR 1977 Mad 199 : (1977) 2 Mad 1.
353. *International Woolen Mills v Standard Wool (UK) Ltd*, (2001) 2 LRI 765.
354. *Indian General Investment Trust Ltd v Raja of Khalikote*, AIR 1952 Cal 508.
355. *MVAL Quamar v Tasavliris Salvage (International) Ltd*, (2000) 3 LRI 886.
356. *Janardhan Mohandas Rajan Pillai v Madhubhai Patel*, AIR 2003 Bom 490.

the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from the objectives contained in para 4 of the Statement of Objects and Reasons, sections 47 to 49 and the scheme of the Act, that every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution petition could not be permitted to convert as an application under section 47 is technical and is of no consequence. For enforcement of a foreign award, there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the court or decree and the other to take up execution thereafter. In one proceeding, the court enforcing a foreign award can deal with the entire matter.[357]

The holder of a foreign award need not take out two proceedings, i.e., one for deciding the enforceability of the award and the other for its execution. Therefore, such an award can be directly put in execution and the executing court would be entitled to execute it upon considering whether the award complies with the provisions of Part II, Chapter I in relation to the New York Convention Awards and Chapter II in relation to Geneva Convention Awards as may be applicable. It may be noted that when foreign decrees are put in execution under section 44A of the CPC also, the procedure does not contemplate two separate proceedings, one for deciding the enforceability of the foreign decree and the other for its execution.[358] When the law of a *forum country* is silent in regard to the limitation prescribed for execution of a foreign decree then the law of limitation of the *cause country* would prevail. Thus, the limitation period as prescribed in foreign court (from reciprocating country) for execution of a decree would apply.[359] The period of limitation would begin from the date when the decree was passed in the foreign court. However, if the decree holder first takes steps-in-aid to execute the decree in the cause country, and the decree is not fully satisfied, and the decree-holder prefers a petition for execution in India, it should be done within a period of three years as per Article 137 of the Limitation Act, 1963 from the finalisation of the execution proceedings in the *cause country*.[360]

The Delhi High Court has held that Part II of Arbitration and Conciliation Act, 1996 is a complete Code in itself for enforcement of foreign award except where suit is filed for the enforcement of such award. The exception is contained in Explanation 2 to section 44-A(2) of the Code which excludes from within its ambit an arbitration award.[361]

[s 44A.10] Foreign Judgment Not on Merit — Cannot be Executed

Undoubtedly, the burden of proving that the decree is not on merits would be on the party alleging it. However, courts never expect impossible proofs. It would never be possible for a party to lead evidence about the state of mind of the judge who passed the decree. Of course, amongst other things, the party must show that the decree does not show that it is on merits, if

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357. *Fuerst Lawson Ltd v Jindal Exports Ltd,* AIR 2001 SC 2293 : (2001) CLC 746 (SL).
358. *Enro-Asia Chartering Coprn Pvt Ltd v FI Ltd,* AIR 2002 Bom 447.
359. *Bank of Baroda v Kotak Mahindra Bank Ltd,* AIR 2020 SC 1474 : (2020) 4 Mad LJ 171 : (2020) 2 CTC 877.
360. *Bank of Baroda v Kotak Mahindra Bank Ltd,* AIR 2020 SC 1474 : (2020) 4 Mad LJ 171 : (2020) 2 CTC 877.
361. *Marina World Shipping Copr Ltd v Jindal Exports Pvt Ltd,* 2007 CLC 1606.

necessary, the rules of that court, the existence or lack of existence of material before the court when the decree was passed and the manner in which the decree is passed.

It cannot be said that the expression "judgment on the merits" implies that it must have been passed after contest and after evidence had been let in by both sides. An *ex parte* judgment in favour of the plaintiff may be deemed to be a judgment given on merits if some evidence is adduced on behalf of the plaintiffs and the judgment, however brief, is based on a consideration of that evidence. Where however no evidence is adduced on the plaintiff's side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case.

It is clear that if the decree cannot be said to be a decree on merits, such a decree cannot be enforced in India.[362]

In *Alcon Electronics Pvt Ltd v Celem SA of FOS 34320 Roujan,*[363] it was urged by the appellant before the Supreme Court that the order passed by the court in England imposing costs being an interlocutory order did not have the shades of a "judgment" to be executed before an Indian court and hence, the order was not a "decree" which may be executable. The Supreme Court held that as far as the explanation with regard to reciprocal territory is concerned, there is no dispute that England is a reciprocating territory for the purpose of section 44A. Section 44A indicates an independent right conferred on a foreign decree holder for enforcement of a Decree/Order in India. Section 44A gives effect to the policy contained in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is a part of the arrangement under which, on one part, decrees of Indian courts are made executable in the United Kingdom, and on the other part, decrees of courts in the United Kingdom and other notified parts of Her Majesty's dominions are made executable in India. As the United Kingdom is a reciprocating territory, and the High Court of Justice, Chancery Division, England being a recognised superior court in England, therefore, the order passed by that court was found executable in India under section 44A by the Supreme Court. The Supreme Court further held that section 44A deals with "execution of decrees passed by courts in reciprocating territory". Picking definition of "decree" from section 2(2), of "foreign judgment" from section 2(6), "judgment" from section 2(9), "order" from section 2(14) and Explanation 2 to section 44A(3), it was held that on conjoint reading of "decree", "judgment" and "order" from any angle, the order passed by the English Court fell within the definition of "Order" and therefore, it was a judgment and thus became a "decree" as per Explanation to section 44A(3). In the instant case, the court in England, after following the principles of natural justice, by recording reasons and very importantly basing on the application of the appellant itself, had conclusively decided the issue with regard to jurisdiction and passed the order coupled with costs. Hence, it was held that the order passed by the foreign court is conclusive in that respect and on the merits and hence, executable as a decree.

It was also held that Explanation II to section 44A does not refer to the costs as contemplated under section 35. The costs having been quantified have assumed the character of a money decree for costs and cannot be equated, either with a fine or penalty which is imposed on a party by the court or taxes claimed and are taxes payable to a local authority, Government, or other charges of a like nature.[364]

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362. *International Woollen Mills v Standard Wool (UK) Ltd,* AIR 2001 SC 2134 : (2001) 5 SCC 265.
363. *Alcon Electronics Pvt Ltd v Celem SA of FOS 34320 Roujan*, AIR 2017 SC 1 : (2017) 2 SCC 253 : (2016) 12 Scale 645.
364. *Alcon Electronics Pvt Ltd v Celem SA of FOS 34320 Roujan,* AIR 2017 SC 1 : (2017) 2 SCC 253 : (2016) 12 Scale 645.

[s 44A.11] Legal Fiction — Execution of Foreign Decree by Debt Recovery Tribunal

In interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction, it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. And a legal fiction in terms enacted for purposes of this Act is normally restricted to that Act and cannot be extended to cover another Act. Legal fictions may not be created only by the legislature and delegated legislation may also create such fictions. But it must be remembered that what can be deemed to exist under a legal fiction are facts and not legal consequences which do not flow from the law as it stands.[365]

The court has to ascertain the purpose for which the fiction is created and after ascertaining the purpose, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. This being the position, as far as the provision under section 44A(1) of the CPC is concerned, the fiction is to treat the judgment and decree of the superior court as equivalent to those of district courts for the purposes of execution in India. There is no unjustified extension of this fiction in the application made by the respondent bank that in view of the constitution of the Debts Recovery Tribunal, the jurisdiction gets transferred to the Debts Recovery Tribunal. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is a special Act to provide a complete mechanism for adjudication and recovery of certain debts of nationalised banks, and section 34 gives it an overriding effect. Under section 17(1) read with section 2(g) and section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the tribunal has the exclusive jurisdiction to recover these debts and, therefore, legal fiction will have to be deemed to have been extended to authorise the execution of a foreign decree by the tribunal.[366]

In view of the provisions of section 44A(1), CPC which requires that a foreign decree may be executed in India as if it has been passed by the district court, it would not be necessary to consider the difference between the execution of the domestic decree and foreign decree by the transferee court in India. A domestic decree must necessarily be executed in accordance with the law in relation to execution of such decree in India. A foreign decree by virtue of section 44A(1) must also be so executed in accordance with the law in India. Thus, for the purpose of ascertaining whether a foreign decree is liable to be executed only under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 the difference between the two kinds of decree would be of no significance. The execution of a decree, whether domestic or foreign, is in the nature of an application for recovery of a debt and must be entertained and decided by the Debt Recovery Tribunal alone and its recovery officer only under the scheme of the Act.[367]

Section 44A of the CPC makes it clear that the foreign decree may be executed in India as if it has been passed by the district court. Thus, the original character of a foreign decree is not of any consequence and the amount payable under the decree or order of any "civil court" may

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365. *Commentary on Principles of Statutory Interpretation*, 8th Edn, 2001, chapter 5, as quoted in *Harshadrai O Mody v Bank of India*, AIR 2003 Bom 125 (DB).
366. *Commentary on Principles of Statutory Interpretation*, 8th Edn, 2001, chapter 5, as quoted in *Harshadrai O Mody v Bank of India*, AIR 2003 Bom 125 (DB).
367. *Bank of India v Harshadrai Odhoiji*, AIR 2002 Bom 449.

be treated as (debt) payable within the meaning of section 2(g) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Thus, the amount claimed by the decree-holder-bank under the decree by foreign court is a debt within the meaning of the section.[368]

[369][**[S 45] Execution of decrees outside India.**—So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any State to send a decree for execution to any Court established [370][***] by the authority of the Central Government [371][outside India] to which the State Government has, by notification in the Official Gazette, declared this section to apply.]

SYNOPSIS

[s 45.1]	State Amendment	721	[s 45.4]	State Amendment in Pondicherry — Pondicherry (Union Territory)	722
[s 45.2]	Alterations in the Section	721			
[s 45.3]	Execution of Indian Decrees in Foreign Territory	721			

[s 45.1] State Amendment

Pondicherry.—*After Section 45 the following was inserted as section 45A by The Pondicherry (Extension of Laws) Act, 26 of 1968 (w.e.f. 5-9-1968):*—

45A. Execution of decrees, etc passed or made before the commencement of the Code in Pondicherry.—Any judgment, decree or order passed or made before the commencement of this Code by any Civil Court in the Union Territory of Pondicherry shall, for the purpose of execution, be deemed to have been passed or made under this Code:

Provided that nothing contained in this section shall be construed as extending the period of limitation to which any proceeding in respect of such judgment, decree or order may be subject.

[s 45.2] Alterations in the Section

The words "or continued" were omitted from this section and the words "in any Indian State" were substituted for the words "or of the Crown Representative in the territories of any foreign Prince or State" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order 1948, and, again by the Adaptation of Laws Order 1950, the words "outside India" were substituted for the words "in any Indian State".

[s 45.3] Execution of Indian Decrees in Foreign Territory

This is the only section which refers to the execution in foreign territory of decrees of courts in India. Such decrees can only be executed in foreign territory by courts established there by the Central Government and empowered by notification under this section. It is only when the court in foreign territory is a court established by the Central Government in the extra-territorial jurisdiction that there is power to provide for the transfer to it of decrees of Indian

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368. *Bank of India v Harshadrai Odhaiji*, AIR 2002 Bom 449.
369. Substituted by the AO 1937, for section 45.
370. The words "or continued" omitted by AO 1948.
371. Substituted by AO 1950 for "in any Indian State" which had been substituted for "or of the Crown representative in the territories of any foreign prince or State" by IAO 1948.

courts for execution, for, in foreign territory execution would be pursuant to the legislative authority or sovereign power to such state or territory.[372]

The three previous sections dealt with the converse case of the execution by the Indian courts of decrees of:

(a) Indian courts to which the provisions of the CPC do not extend (section 43).

(b) Courts outside India which are established or continued by the Central Government (section 43).

(c) Revenue courts situated in India (section 44).

(d) Superior courts of the United Kingdom or of any reciprocating territory (section 44A).

All other decrees of foreign courts, i.e., courts outside India not notified under section 44 must be enforced by suit.

[s 45.4] State Amendment in Pondicherry — Pondicherry (Union Territory)

In its application to the Union Territory of Pondicherry, after section 45, insert the following:

Section 45A. Execution of decrees, etc., passed or made before the commencement of the Code in Pondicherry—Any judgment, decree or order passed or made before the commencement of this Code by any civil court in the Union Territory of Pondicherry shall, for the purpose of execution, be deemed to have been passed or made under this Code:

Provided that nothing contained in this section shall be construed as extending the period of limitation to which any proceeding in respect of such judgment, decree or order may be subject.[373]

[S 46] Precepts.—(1) Upon the application of the decree-holder the Court, which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree holder has applied for an order for the sale of such property.

SYNOPSIS

[s 46.1] Attachment under Precept 722
[s 46.2] Appeal 724

[s 46.1] Attachment under Precept

It was, at one time, proposed to do away with the system of execution by transfer of decree under sections 36 to 42, and to substitute another system whereby the court which passed the

372. *Pierce Leslie v Perumal*, (1917) 40 Mad 1069.
373. See Act 26 of 1968, section 3(i) and Schedule, Pt II, w.e.f 5-9-1968.

decree, retained complete control and issued precepts to one or more other courts to carry on execution under its direction. This proposal was abandoned and the system of execution by transfer of decree retained. But the proposal led to the insertion of the present section by which the court which passed the decree can issue a precept of attachment to ensure for two months or pending transfer of decree and application for execution. The object of a precept is to enable a decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. No such attachment, however, can continue for more than two months except in the two cases mentioned in the section. The effect of the proviso is to render re-attachment unnecessary. When money is attached under a precept and the period of the operation of the precept is over, the money can be paid over to another decree-holder, who subsequently attaches it.[374] In an Andhra case, the facts were as under:

(i) Property in town *A* was attached;

(ii) Execution proceedings were going on in town *B;*

(iii) Application had been made to hold the auction in town *A*, where the sale would fetch a higher price as a large number of bidders were expected to bid.

It was held that the jurisdiction of court at *B* to give direction to court at *A* to conduct the auction was not affected by the mere expiry of the period of attachment.[375] When the attachment of a debt out of jurisdiction is made directly and not through a precept, the attachment is illegal.[376]

As a general rule, territorial jurisdiction is a condition precedent to a court executing a decree and neither the court which passes the decree, nor the court to which it is sent for execution, can execute it in respect of property lying outside its territorial jurisdiction. The object of section 46 (precepts), is simply to enable the attachment of the property of the judgment-debtor situated within the jurisdiction of another court, in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the judgment-debtor till proper proceedings are taken.[377]

As per the Chit Funds Act, 1982, the Registrar has no power to execute the award and the award with a certificate is transferred to a civil court as per section 71 of the Chit Funds Act, 1982. Since the Registrar has no power to execute the award as a court of first instance, the court which received such order or award would be deemed to be a court which passed a decree as per section 37 of CPC. A court has stated that section 46 cannot be strictly construed to contend that since a civil court has not passed a decree, it has no jurisdiction to issue precepts. The court noted that precepts is issued to the other court in order to prevent any encumbrance over the property though property does not lie in the jurisdiction of the court issuing precepts.[378]

The court to which a precept is issued, derives its authority from that precept and has no power to do anything not authorised thereby, but it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connection with proceedings for attachment. It cannot, therefore be said that the court to which a precept is issued has no

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374. *Gurdiyal Singh v Kharzan Chand*, AIR 1936 Lah 486.
375. *Karri Venkata Reddi v Central Bank of India*, AIR 1990 Pat 81.
376. *Sheerazee v Reddy*, AIR 1940 Rang 34 : (1939) ILR Rang 624.
377. *Manganese Ore (India) Ltd v Mangilal Rungta*, AIR 1981 Del 114.
378. *Shriram Chits Tamil Nadu Pvt Ltd v P Ravikumar*, (2019) 4 CTC 695 : (2019) 3 LW 860 : LNINDORD 2019 MAD 5993.

jurisdiction to stay execution if the judgment-debtor deposits the decretal amount in court or gives security for payment of the amount.[379] An order of precept is not an order transferring a decree for execution to the court to which it is issued.[380] This section deals with execution of decrees and does not affect the jurisdiction of the court under O XXXVIII, rule 5 to attach before judgment, properties lying outside the jurisdiction of the court.[381] See also the under mentioned decision on the proviso to the section.[382]

[s 46.2] Appeal

It has been held by the High Courts of Bombay, Calcutta and Madras that an order under this section is not an order in execution, that it only tends to facilitate execution but is not in itself a step in execution and it is therefore not appealable.[383] A different view however has been taken in *Kapoorchand v Revati Prasad.*[384] Even if it is treated as a step in execution it would not be appealable in view of the amendment of the definition of decree in section 2(2).

Questions to be determined by Court executing decree

[S 47] Questions to be determined by the Court executing decree.— (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[385][*Explanation I.*—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

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379. *Puran Mal v Dina Nath*, AIR 1926 Lah 433 : (1926) 8 Lah LJ 164.
380. *Champalal v Mohanlal*, AIR 1959 MP 397.
381. *Chiman Das v Mahadevappa*, AIR 1961 AP 417.
382. *Hindustan Bicycle Manufacturer and Industries Corp Ltd v Nath Bank Ltd*, AIR 1957 Pat 209.
383. *Pallonji Shapoor v Edward Vaughan Traders* ILR 12 Bom 400; *Kasiwar Dey v Asvini Kumar* ILR. (1920) Cal 241; *Roy Kishenji v Sri Kishen*, AIR 1940 Cal 26 : (1939) 2 Cal 370; *Ramchandrudu v Bakraj Gulabchad*, AIR 1952 Mad 826 : ILR 1952 Mad 489.
384. *Kapoorchand v Revati Prasad*, AIR 1956 MB 208.
385. Substituted by Act 104 of 1976, section 20, for *Explanation* (w.e.f. 1-2-1977). Earlier *Explanation* was inserted by Act 66 of 1956, section 5 (w.e.f. 1-1-1957).

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[s 47.1] State Amendment

Uttar Pradesh.—*The following amendments were made by Uttar Pradesh Act No. 57 of 1976, section 3 (w.e.f. 1-1-1977).*

In its application to the State of Uttar Pradesh, Explanation II as inserted by Uttar Pradesh Act 24 of 1954 shall be omitted—Uttar Pradesh Act 57 of 1976, section 3 (w.e.f. 1-1-1977).

[s 47.2] Changes in the Section

This section corresponds with section 244 of the Code of Civil Procedure, 1882 (now replaced by Civil Procedure Code, 1908) except in the following particulars:

(i) Sub-clauses (a) and (b) of section 244, which provided for the determination of questions regarding the amount of *mesne* profits and interest in execution proceedings have been omitted, as it was deemed expedient that such questions should be determined by the decree and not in execution.[386]

(ii) The words "or to the stay of execution thereof" which occurred in section 244 after the words, "execution, discharge or satisfaction of the decree" have been omitted in the present section.[387]

(iii) Sub-section (2) was introduced in 1908. It gave legislative sanction to the practice followed by the courts under the Code of Civil Procedure, 1882.[388]

(iv) Under the old section 244, the court executing the decree had the option when a question arose as to who was the representative of a party, itself to determine the question or to stay execution until it was determined by a separate suit. Sub-section (3) of the present section renders it obligatory on the executing court itself to determine the question, as it was considered inexpedient that separate suits should be instituted for the decision of such a question.[389]

(v) The explanation, as it stood until the Amendment Act, 1976 was introduced in 1908 to resolve the conflict of decisions noted in the commentary under the heading "Explanations I and II: deemed parties".

(vi) The Amendment Act, 1976 omits sub-section (2). That sub-section was as follows:

> (2) The court, may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

The omission of this sub-section was made in consequence of the change made in the definition of the word "decree" in section 2(2), the result to which was that a determination of any question within this section would no longer be regarded as a decree. It would be incongruous after that change to permit the court to convert an application into a suit and order payment of court-fees and yet say that a determination therein is not a decree.

(vii) The Amendment Act, 1976 substitutes:

Explanations I and II for the explanation as it stood till then. The explanation prior to 1976 read as follows:

> *Explanation*—For the purposes of this section, a plaintiff whose suit has been dismissed, and a purchaser at a sale in execution of the decree are parties to the suit.

The amendment resolves controversies as regards the position of a purchaser and as regards the question of recovery by him of the property purchased by him in execution sale. The controversies on both the points are noted below under the head: "Explanation I and II, deemed parties to the suit", etc.

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386. See CPC, O XX, rule 12.
387. As to the effect of the omission, see notes, "Stay of execution".
388. See notes below under the head "sub-section (2)—its omission".
389. See notes below under the head "sub-section (3): Inquiry as to who is the representative of a party".

[s 47.3] General Impression About Execution of Decree

It is a general impression prevailing amongst the litigant public that the difficulties of a litigant are by no means over on his getting a decree for immovable property in his favour. Indeed, his difficulties in real and practical sense, arise after getting the decree. Presumably, to tackle such a situation and to allay the apprehension in the minds of litigant public that it takes years and years for the decree holder to enjoy fruits of the decree, the legislature made drastic amendments in provisions in the aforementioned rules, particularly, the provision in rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. On a fair reading of the rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree holder or any other person in possession of the immovable property under execution and has vested the power in the executing court to deal with all questions arising in the matter irrespective of whether the court otherwise has jurisdiction to entertain a dispute of the nature.[390]

[s 47.4] Power of Court

Under section 47 of the CPC, all questions arising between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge or satisfaction of decree have to be determined by the court executing the decree and not by a separate suit. The powers of the court under section 47 are quite different and much narrower than its powers of appeal, revision or review. A first appellate court is not only entitled but obliged under law to go into the questions of facts as well as like trial court apart from questions of law. Powers of second appellate court under different statutes like section 100 of the CPC, as it stood before its amendment by Central Act 104 of 1976 with effect from 1-2-1977, could be exercised only on questions of law. Powers under statutes which are akin to section 100 of the CPC, as amended and substituted by the aforesaid Central Act, have been further narrowed down as now in such an appeal only substantial question of law can be considered. The powers of Supreme Court under Article 136 of the Constitution of India, should not be exercised simply because a substantial question of law arises in a case, but there is further requirement that such question must be of general public importance and it requires the decision of the Supreme Court. Powers of revision under section 115 of the CPC cannot be exercised merely because the order suffers from legal infirmity or substantial question of law arises, but such an error must suffer with the vice of error of jurisdiction. Of course, the revisional powers exercisable under the Code of Criminal Procedure, 1973, and likewise in similar statutes stand on entirely different footing and is much wider as there, the court can go into correctness, legality or propriety of the order and regularity of proceedings of the inferior court. It does not mean that in each and every case the revisional court is obliged to consider question of facts as well like a first appellate court, but the court has the discretion to consider the same in appropriate cases whenever it is found expedient, and not in each and every case. Discretion, undoubtedly, means judicial discretion and not whim, caprice or fancy of a judge. Powers

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390. *NSS Narayana Sarma v Goldstone Exports Pvt Ltd*, AIR 2002 SC 251.

of review cannot be invoked unless it is shown that there is error apparent on the face of the record in the order sought to be reviewed.

Where a decree is passed in respect of the same property which is mentioned in the schedule of the plaint, objection of the judgment debtor for correction of the decree is untenable, more so when application for correction of decree has been rejected up to the stage of appeal.[391] The issue as to whether the decree has been discharged or satisfied has to be determined by the executing court under section 47 of the CPC and the executive court must execute the decree as it stands without adding anything to it.[392]

The exercise of powers under section 47 of the CPC is microscopic and lies in a very narrow inspection hole. Thus, it is plain that the executing court can allow objection under section 47 of the CPC to the executability of the decree if it is found that the same is *void ab initio* and null, apart from the ground that decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing.[393]

In an execution proceeding, an objection was raised that land measuring 2.792 acres appurtenant to the bungalow was resumed in terms of the notice dated 23 September 1970 and taken over by Union of India. The said notice was not assailed by the grantees before any court or authority. The possession of the resumed land appurtenant to the bungalow was taken over and was also not assailed. The said land appurtenant to the bungalow had been utilised by the Union of India for the construction of barracks. The entire extent of 2.792 acres of land including the one under the barracks could, therefore, be taken over pursuant to the resumption order which was never assailed and had thereby attained finality. On these facts, it was held that possession of the above extent of land could not be taken away from the Union of India for delivery to the decree-holders since after resumption of the property and the taking over of the possession by Union of India in exercise of its rights as the paramount title-holder, it was no longer holding the same as a tenant so as to be answerable to the petitioners as its landlords. The Union of India was on the contrary holding the resumed property in its own right and in a capacity that was different from the one in which it had suffered the decree for eviction. It was accordingly held that this was a significant change in the circumstances in which the decree was passed rendering it inexecutable.[394]

[s 47.5] Inconsistency Between Judgment and Decree

It is the settled proposition of law that while there is some inconsistency between the judgment and the decree, the real intendment of the result of the suit should be gathered by re-conciliation between the judgment and the decree. Neither the decree nor the judgment should be read in isolation, but in combination. The executing court is duty bound to give effect to the decree in its substance and should not pass any order rendering the judgment a futile attempt.

Where the executing court failed to take into consideration the "interest" imposed by the trial court in passing the preliminary decree followed by final decree, decree holder was

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391. *Bandi Prasad Rao v P. Hari Kesavulu*, AIR 2007 AP 125 : (2007) 1 Andh LT 629.
392. *Kohinoor Transporters v State of Uttar Pradesh*, AIR Online 2018 SC 135 : (2018) 6 Andh LD 77 : (2018) 10 Scale 50.
393. *Dhurandhar Prasad Singh v Jai Prakash University*, AIR 2001 SC 2552.
394. *Arun Lal v UOI*, (2010) 14 SCC 384.

directed to submit a draft calculation sheet to assist the executing court and writ execution was to be issued after proper calculation.[395]

In Land Acquisition proceedings, if the award of a reference court or that of an appellate court does not specifically refer to the question of interest on solatium or in cases where a claim had not been made and rejected either expressly or impliedly by the reference court or the appellate court, and merely interest on compensation is awarded, then it would be open to the execution court to say that the compensation awarded includes solatium and in such an event interest on the amount could be directed to be deposited in execution.[396]

In *Land Acquisition Collector, Mohali v Surinder Kaur,*[397] the respondent, after about two years from the date of reference judgment, filed an execution petition seeking direction to the appellant to pay the compensation. The appellant filed objection under section 47 pleading that the determination made by the reference court was erroneous. The objection was rejected by the execution court as well as by the high court. The Supreme Court dismissed the appeal filed by the appellant and held that while deciding the objections under section 47, the Additional District Judge (ADJ) did not have the jurisdiction to go into the legality or correctness of the judgment by which compensation was awarded to the respondent. If the appellants felt aggrieved by the judgment, then they should have filed an appeal under section 54 of the Act. Having failed to do that, the appellants cannot seek modification of the judgment in an execution petition.

[s 47.6] Bar of Suit

The bar for suit under section 47 of the CPC could be applicable only in cases where the question can be determined by the court executing the decree. Once it is clear that the civil court is not the court executing the decree for partition of the estate which is subject to the assessment for payment of revenue to the government, the bar provided under section 47 of the CPC for an independent suit by the parties to the decree cannot come in the way of the party approaching the court with such suit regarding the grievance. Undoubtedly, the scope of such suit will be subject to the other laws which may bar the jurisdiction of the civil court to entertain the suit. For example, in cases of the questions to be determined under the said Act, certainly the civil courts will have no jurisdiction to entertain any suit in that regard. It will be exclusively for the competent authority under the said Act to decide those issues in view of the provisions of sections 36A and 36B of the said Act read with the decision of the Supreme Court in *Shevantabai Maruti Kalhatkar's* case.[398]

[s 47.7] Execution Petition — Signing of

It is not necessary that the decree-holder sign execution petition, but the court should be satisfied that the person signing the execution petition was acquainted with the facts of the case.[399] The signing of the execution petition is a ministerial act and that can be done by any person who is acquainted with the facts of the case.[400] It is very clear that the execution petition

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395. *State Bank of India v Maa Sarada Oil Mills*, AIR 2003 Gau 22.
396. *Chhanga Singh v UOI*, (2012) 5 SCC 763 [*Gurpreet Singh v UOI*, (2006) 8 SCC 457 followed; *Sunder v UOI*, AIR 2001 SC 3516: (2001) 7 SCC 211 referred to]
397. *Land Acquisition Collector, Mohali v Surinder Kaur*, (2013) 10 SCC 623 : (2013) 10 Scale 406.
398. *Prakash Nathyaba Bhosale v Laxman Ganabe Bhosale*, AIR 2003 Bom 41; *Shevantabai Maruti Kalhatkar v Ramu Rakhamaji Kalhatkar*, AIR 1999 SC 2623.
399. *Kopargaon Sahakari Society v Deorao*, AIR 1976 Bom 333.
400. *Lilavati v Municipal Corp Bombay* 66 Bom LR 868.

presented by the secretary of the trust is properly and legally presented before the court. It is not necessary that all the trustees and decree-holders should sign the execution petition.[401]

[s 47.8] Executing Court Cannot go Behind Decree

The executing court has no jurisdiction to go behind decree.[402] The executing court has no right to vary terms of the decree, however erroneous it may be in execution proceedings. Any order passed by the executing court by travelling beyond decree/order under execution would render such orders as without jurisdiction.[403] Thus, where the trial court passed decree for payment of principal amount with simple interest only, the executing court cannot grant compound interest, thereby varying terms of decree. If, however, the order is passed by the executing court construing simple interest as compound interest, the revision against such order is maintainable.[404]

In the execution of a decree for payment of money, the decree was silent with respect to a payment of interest. It was held that the executing court cannot go beyond the decree and award interest.[405]

In the execution proceeding relating to a decree for regularisation of services of teacher and for payment of arrears of salary, a direction by the executing court to pay arrears of salary "as per Government Scale" was held by Supreme Court to be not justified on the ground that the executing court is required to execute the decree as made and it has no jurisdiction to widen its scope or add to it unless a specific question is raised relating to discharge or satisfaction of the decree as envisaged in section 47 of the CPC.[406] Altamas Kabir, J, (as he then was) speaking for the Division Bench in the above case, observed as follows:

> When there were conflicting claims regarding the salary payable to Respondent 1, the said respondent ought to have taken steps to amend the prayers in the plaint so that proper relief could be provided to her. The same not having been done, the executing court had no jurisdiction to go beyond the decree as passed, despite the fact that the trial Judge had noticed the dispute and had even decided the same.[407]

In a money decree, the court granting decree had prescribed the mode of recovery. It was held by the Supreme Court that the order of the executing court altering the manner of recovery of the decretal amount was erroneous and not sustainable.[408]

[s 47.9] Execution Petition by Trust — Filing of

No doubt, section 47 of the Indian Trusts Act, 1882 prohibits the trustees from delegating the powers, but the explanation to section 47 of the Indian Trusts Act, 1882 reads as follows:

> The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

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401. *Monalisa Rohinton Irani v Naval H Tata*, AIR 2001 Bom 495.
402. *SP Mishra v Mohd Laiquddin Khan*, (2019) 10 SCC 329.
403. *S Bhaskaran v Sebastian*, (2019) 9 SCC 161.
404. *State of Bihar v Mijaj International*, AIR 2004 Jhar 29.
405. *O Sreenivasulu v P. Santhi*, AIR 2007 AP 115 : (2007) 2 Andh LD 175 : (2007) 2 Andh LT 673.
406. *Vedic Girls Senior Secondary School, Arya Samaj Mandir, Jhajjar v Rajwanti*, AIR 2007 SC 1779 : (2007) 5 SCC 97.
407. *Vedic Girls Senior Secondary School, Arya Samaj Mandir, Jhajjar v Rajwanti*, AIR 2007 SC 1779, at p 1782 : (2007) 5 SCC 97.
408. *Radhey Shyam Gupta v Punjab National Bank*, AIR 2009 SC 930 : (2009) 1 SCC 376.

It means that ministerial acts can be performed by a person who is authorised by the trustees to do the needful. Learned counsel for the petitioners has argued that no such authorisation is filed by the secretary before the court to show that he can sign the execution petition on behalf of the trust. However, when the court was satisfied that the secretary was acquainted with the facts of the case and could file proceedings, there does not seem to be any substance in this contention. Actual authorisation signed by all the trustees may not be there on record, but if the trust-deed provided such delegation of powers, then the secretary can definitely file execution petition before the court.[409]

On reading the provisions of section 47 of the Indian Trusts Act, 1882 and the provisions of O XXI, rule 11(2) of the CPC together, it is very clear that the court before which execution petition is filed has to satisfy itself with the authority of the person who has filed the execution petition. That has happened in this case and, therefore, no objection can be raised on this point.[410]

It is very clear that the execution petition presented by the secretary of the trust is properly and legally presented before the court. It is not necessary that all the trustees and decree-holders should sign the execution petition.[411]

[s 47.10] Decree in Nullity

In an application under section 47, the question that a decree is not executable being a nullity can be raised, and the executing court can decide the question. In such cases, the question of acquiescence will not be relevant. A decree which is a nullity in the eye of law is no decree, and hence even by consent of the parties, such a decree cannot be executed by the court. Even if the judgment-debtor did not raise the question, but for this reason it cannot be denied the remedy available to it under section 47 of the CPC. If the court finds that the decree is a nullity, as contended by the judgment-debtor, the court cannot proceed to execute it, and it is the duty of the court to hold that the decree is not executable.[412]

Any objection that a decree was incorrect in law cannot be taken in an execution proceeding. A decree, even if erroneous, is still binding between parties. However, when a decree is a nullity i.e., where the same has been made by a court which had no inherent jurisdiction to make it, its nullity can be set up in an execution proceeding, as lack of jurisdiction goes to the root of the competence of the court. Refusal of the executing court to execute such a decree will not amount to going behind the decree.[413]

A final decree drawn against a dead man is a nullity and cannot be executed against his legal representatives. However, in the case at hand, the plea was not taken by the legal representatives in their first petitioner and raised the plea of the death of the defendant before final decree. In the circumstances, the plea was held to be not tenable.[414]

[s 47.11] To What Decrees the Section Applies

This section presupposes the existence of a decree which is capable of execution. It does not apply to cases where the decree sought to be executed is either a nullity or declaratory in

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409. *Monalisa Rohinton Irani v Naval H Tata*, AIR 2001 Bom 495.
410. *Monalisa Rohinton Irani v Naval H Tata*, AIR 2001 Bom 495.
411. *Monalisa Rohinton Irani v Naval H Tata*, AIR 2001 Bom 495.
412. *Saraswat Trading Agency v UOI*, AIR 2004 Cal 267.
413. *RS Bajwa & Co v State of Chhattisgarh*, AIR 2008 CHG 75 : (2008) 4 MPHT 105.
414. *Nilamani Pradhan v Narottam Pradhan*, AIR 2008 Ori 185 : (2008) Supp OLR 877.

character. A decree is a nullity when it has been passed by a court having no jurisdiction or against a dead person. A decree passed by a court without jurisdiction is no decree, and therefore falls outside the scope of this section.[415] Inherent lack of jurisdiction is to be distinguished from lack of territorial or pecuniary jurisdiction. In the former case, the court entirely lacks jurisdiction either because the subject matter is foreign to its jurisdiction or the defendant was dead, when the decree was passed or some such ground by reason of which the court could not have seizing of the case.[416] If the defendant dies before the suit is concluded, and yet a decree is passed without bringing his legal representatives on record, the decree is a nullity and incapable of execution. If, in such a case, an application to execute the decree against a legal representative is made, its validity can be challenged in execution proceedings.[417] If a property is taken in execution, such a legal representative can sue to recover it.[418] At one time, the view taken by several high courts was that the question relating to the validity of a decree is not one pertaining to its execution, discharge or satisfaction. Hence, such a question was outside the scope of this section and should be tried in a suit and not in execution proceedings.[419] However, the Supreme Court in *Kiran Singh v Chaman Paswan*,[420] held that though a court executing a decree cannot go into the question of correctness or legality of a decree, it can entertain the objection that it is a nullity on the ground that the court which passed it had no jurisdiction to pass it.[421] This is not going behind the decree, since, the decree being null and void, there is no decree at all.[422] The next question is whether a suit which raises the question of nullity of a decree is barred under this section. There is authority for the view that it is.[423] The High Court of Patna has held that where property was sold in execution of a decree but at the time of the sale, the title thereto was not in the judgment-debtor but in another, the sale was a nullity. Accordingly, the successor-in-title could challenge such a state by an application under this section and not by a suit.[424] If the court which passes the decree lacks inherent jurisdiction, the decree would obviously be a nullity and can be challenged at the stage of execution. In such a case, the execution court does not go behind the decree, since there is no decree at all. Once the question of want of jurisdiction is raised but overruled, it cannot be raised again and would be treated inter parties that the court had inherent jurisdiction.[425] Question of validity of decree is

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415. *Ram Narain v Suraj Narain*, AIR 1934 Oudh 75 (FB) : (1934) 9 Luck 435, *Hans Raj v Niranjan Lal*, AIR 1952 Punj 159; *Nandagopal v Baidyanath*, AIR 1957 Pat 87.
416. *V Appannammanayuralu v B Sreeramulu*, AIR 1978 AP 160.
417. *Radha Prasad v Lal Saheb*, (1891) 13 All 53 : 17 IA 150; *Janardhan v Ramachandra*, (1903) 26 Bom 317; *Sripat v Tribeni*, (1918) 40 All 423; *Imdad Ali v Jagan Lal*, (1895) 17 All 478; *Narendra v Gopal*, (1912) 17 Cal LJ 634; *Subramania v Vaidyanatha*, (1915) 38 Mad 602; *Jangli Lal v Laddu Ram*, (1919) 4 Pat LJ 240 (FB). Where the defendant died after the hearing was concluded but before judgment was pronounced, the decree was held to be valid on the *nunc pro tunc*, doctrine—*Chetan v Balbhadra*, (1891) 21 All 314; see also *Munna Koer v Durga Prasad*, (1917) 2 Pat LJ 192.
418. *Beni Prasad v Mukteswar*, (1899) 21 All 316; *Mahabir v Narain*, AIR 1931 All 490 (FB), (1932) 54 All 25; *Cantonment Board v Kishen Lal*, AIR 1934 All 609 (FB) : ILR 57 All 1.
419. *Chintaman v Chintaman*, (1898) 22 Bom 475; *Gomathan v Komandur*, (1904) 27 Mad 318; *Rangasami v Tirupati*, (1905) 28 Mad 26; *Kumareetta v Sabapathy*, (1907) 30 Mad 26; *Khetrapal v Shyama*, (1904) 32 Cal 265; *Liladhar v Chathurbuj*, (1899) 21 All 277; *Hira Lal v Parmeshwar*, (1899) 21 All 356; *Ragha v Gopal*, AIR 1930 Bom 132 : (1930) 54 Bom 162; *Ajoy Kumar v Pushpabala*, AIR 1952 Assam 54 : 1951 ILR Assam 522.
420. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 : (1955) 1 SCR 117 : (1954) SCJ 514.
421. See notes to section 38 under the heading "Power of execution court".
422. *Sundar Dass v Ram Prakash*, AIR 1977 SC 1201 : (1977) 2 SCC 602 : (1977) 3 SCR 60.
423. *Shivaji v Vital*, AIR 1927 Bom 53 : 28 Bom LR 1367; *Dadu v Tukaram*, AIR 1959 Bom 221; *Ballkrishna v Shantilal*, AIR 1961 Bom 56 : (1960) Bom 554 : 62 Bom LR 410; *Ballabhadas v Parmal*, AIR 1961 MP 36.
424. *Central Bank of India v Vaibi Das*, AIR 1968 Pat 32.
425. *Prahalad Dora v State*, AIR 1969 Ori 21 : 34 Cut LT 1175.

not one relating to its discharge or satisfaction, and cannot be gone into by executing court.[426] If a court grants a decree even when the suit is barred by time, the court would be committing an illegality and the remedy of the aggrieved party is to get it set aside by preferring an appeal against it. So long as the court is having jurisdiction, the decree cannot be ignored even if it is erroneous and the only way of correcting it is by preferring an appeal or revision. It is not open to a party to contend in another suit or in collateral proceedings that a decree passed against him is void, merely on the ground of illegality. The execution court cannot go beyond a decree.[427] Delivering property not covered by the decree is "action in excess of the decree". In such a case, judgment-debtor should apply under section 47 and should not file a separate suit.[428] A question as to the identity of the property in respect of which the decree is sought to be executed, cannot be gone into by the executing court, under section 47, according to the Bombay High Court.[429] The ratio of these decisions is that a party to a decree has not merely the right to raise the objection of nullity of a decree in execution proceedings but is bound to do so. Consequently, an order for execution operates constructively, as *res judicata*. The bar to a separate suit arises not under this section but under section 11 on the ground that such a plea is one which a party not merely might but ought to have put forward in execution proceedings.

Declaratory decrees do not fall within this section for the reason that rights declared by such decrees can only be enforced by a suit.[430] But a decree passed in terms of an award, providing that on the happening of an event, the vendor shall be entitled to take back possession of the property does not make the award declaratory and therefore inexecutable.[431] A declaratory decree does not bar a subsequent suit for possession. Section 47 does not bar the suit, because a declaratory decree could not have been executed.[432] A decree for specific performance is not to be construed as declaratory merely because it does not provide when the purchase amount has to be paid and is executable.[433] Similarly, the fact that the decretal amount is not mentioned but which can be ascertained on the construction of the decree, does not make it incapable of execution.[434] Proceedings taken pursuant to a preliminary decree are proceedings in a pending suit and do not fall within this section. This is also so, where the decree is partly preliminary and partly final in so far as it relates to matters which are preliminary.[435] A decree passed on an award in a dispute relating to division of properties under Aliyasanthana law is in the nature of the preliminary decree. Hence, an application to carry it out is a proceeding in a suit.[436] A partition decree entitling the parties to be put in possession of allotted properties on payment of necessary court fees will not be hit by this section.[437] A final decree was passed in a suit for partition. Subsequently, there was interference with plaintiff's possession over the allotted portion. It was held that suit filed by the plaintiff for injunction to restrain the defendant from interference with possession was not barred. Subsequent acts of the defendants give rise to fresh cause of action.[438] The judgment of the trial court, and the preliminary decree based on it, mentioned the exclusion of certain properties from partition. In appeal, the high court did not

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426. *Ganapathi v Balasubramania Gounder,* AIR 1987 Mad 124.
427. *V Chinna Lakshmaiah v Samurla Ramaiah,* AIR 1991 AP 177.
428. *Gopal Krishna Kamath v R Bhaskar Rao,* AIR 1989 Ker 251.
429. *MT Gore v VR Kolhatkar,* AIR 1980 Bom 277.
430. *Ramaswami v Mudhiah,* AIR 1925 Mad 279 : (1925) 48 Mad 482.
431. *Prakash Chand v Harnam Singh,* AIR 1973 SC 2065 : (1973) 2 SCC 481.
432. *Rajendra Narain v Bajrang,* AIR 1983 All 364.
433. *Ramakrishna v Mukund Shankar,* AIR 1963 All 49.
434. *Bapurao v Hanumanthrao,* AIR 1950 Hyd 48.
435. *Dharam Dutt v Ram Lal,* AIR 1957 P&H 161.
436. *M Hegde v Meenakshi,* AIR 1960 Mys 193.
437. *Noha Haja v Veeram,* AIR 1942 Mad 364.
438. *Ram Lakhan Tewari v Ram Samujh Tewari,* AIR 1981 All 211.

set aside that particular direction. It was held that the question of exclusion of that property could not be raised at a subsequent stage before the executing court.[439] But a decree directing the defendant to pay maintenance and charging it on the property is a composite decree and is executable.[440] Question whether suit premises falls within "slum area" is a mixed question of law and fact. It cannot be raised for the first time, in execution proceedings.[441] Proceedings under section 21 of the Delhi Rent Control Act, 1958, are in the nature of execution, provisions of the CPC are applicable.[442] The question whether a decree is executable or not is to be decided by the executing court.[443] The objectors to the execution of the decree of the subordinate judge (as passed in appeal against dismissal of the title suit) raised the plea that the interest of one minor plaintiff who attained majority during pendency of suit could not be represented by the holder of power of attorney on behalf of all the plaintiffs. This point (though raised by the party concerned) was not considered by the subordinate judge. However, the high court, in second appeal, did not enter into the question on the ground that that was a question of fact. The objector's grievance on this score did not appear to be unfounded. But nothing could be done in this regard in the execution proceeding, since that would definitely amount to interfering with the decree as passed by the subordinate judge and as confirmed by high court. The objectors might seek their relief in this regard in some other proceeding, if permissible by law.[444] Decree for eviction, on ground of default in payment of rent, was based on evidence. There was absence of findings regarding the ground of eviction in the judgment and decree. It was held that this did not make the decree void or inexecutable.

In the case of a declaratory decree, the successful party cannot be allowed to suffer when the decision of the civil court, which has attained finality is not honoured by the judgment-debtor. Thus, where employees of a private college recognised and aided by Government of West Bengal were granted a decree declaring them class-III employees entitled to benefits and privileges attached to those posts, they were within their rights to move the high court under Article 226 of the Constitution. It was held by the Supreme Court that the high court, while granting the reliefs prayed for in the writ petition was not acting as an executing court.[445]

A party cannot suffer on account of the lapse of the court and a party cannot be wronged for an act or omission of the court. If a party proves its case, it is the duty of the court to grant relief. The court cannot afford to be unmindful to the ground of eviction, duly proved in evidence. An absence of judicial finding in spite of evidence to substantiate the ground of eviction, cannot render a decree void.[446] Judgment-debtor, in an Allahabad case, objected to the execution of a money decree on the ground that he was a "professional" decree-holder. But as no evidence was produced to support the objection, it was not entertained.[447] There are certain well-recognised exceptions to the ordinary rule that the executing court is not entitled to go behind the decree. When the decree is a nullity or the decree-holder has lost the right to execute the decree on account of a subsequent change in the law or some subsequent development, then the executing court can take note of the change in the situation and can refuse to execute the decree on that basis. The decree, under execution was not only a nullity on

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439. *Babusaheb Singh v Parsid Narain Singh,* AIR 1991 SC 1731.
440. *Govindamal v Chidambara,* AIR 1963 Mad 215.
441. *Bhaurao v Savitribai,* AIR 1991 Bom 55.
442. *Pokhraj Jain v Padma Kashyap,* AIR 1990 Del 159.
443. *Chandmul v Vishnu Sarma,* AIR 1953 Ajm 43.
444. *Lichubala Biswas v Jindar Mondal,* AIR 1990 Cal 151.
445. *State of West Bengal v Kamala Prasad,* AIR 2010 SC 1456 : (2010) 4 SCC 568.
446. *Satpal Tandon v Jyotsna Ghosh,* AIR 1991 Cal 228.
447. *Madan Lal v District Judge Pauri Garhwal,* AIR 1988 All 40.

the date it was passed, but had also been rendered inexecutable on account of the subsequent order passed by the authority by accepting the claim of the judgment-debtors to remain in possession of the land. Thus, the decree-holder had lost his right to recover possession of the land from the judgment-debtors. Therefore, the rejection of an application filed under section 47, challenging the validity and executability of the decree was illegal.[448] Where the executing court held that the arbitrator had jurisdiction to pass the award and that the due notices were given to the parties and reasonable opportunity was afforded, the omission of the reasons from the award could not render it *non est* and a nullity. A decree which can be said to be *non est* and a nullity is the one which a court having no jurisdiction to pass it, passed it, or it was a decree against a dead person or against a person who, at no stage was legally present before the court which passed the decree.[449] The executing court can very well decline to execute a decree, if it is satisfied that it is a nullity. When it does so, it is not to be regarded as going behind the decree, for the simple reason, that there is no decree at all to go behind.[450]

The question whether a particular decree is executable, falls within section 47. It is a question relating to execution, discharge or satisfaction of the decree.[451] The question of in-executability of the decree is included within "execution discharge or satisfaction" of the decree. Hence a dispute about second instalments not being paid is covered.[452] Eviction decree was passed. Appeal was dismissed. Plea was taken that decree in revision was not executable, as it was passed against a tenant who died. It was held that decree was executable and was not a nullity. In the revision petition filed by *S*, the high court was not satisfied that there existed any ground warranting interference with the judgment and decree passed by the appellate court below. The death of section did not, in any way, make the judgment invalid, in as much as it was passed in a revision under section 115 of the CPC, in which the high court could even *suo motu* call for the records and dispose of it after examining them and satisfying itself that the order of the subordinate court did not suffer from any infirmity specified in section 115 of the CPC. The death of *S* did not affect the revisional power of the high court and therefore, the validity of the judgment passed in revision could not be challenged before the executing court.[453] Under State Financial Corporations Act, 1951, section 32, the district judge had no jurisdiction to allow future interest while making the order. It is well-settled law that the executing court can go into the question whether or not the decree, or order under execution, is without jurisdiction and to refuse to execute the decree or order under execution is without jurisdiction and to refuse to execute the decree or order in case it is found to be without jurisdiction. This is because a decree or order passed by a court without jurisdiction, is a nullity and its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon. Under the circumstances, the court below erred in rejecting the petitioner's contention about want of jurisdiction to avoid future interest.[454] Execution application did not mention date of decree, nor did it specify movable or immovable property sought to be attached. Judgment-debtor did not raise objection as to existence of fatal defects in the application for execution of decree before executing court or appellate court. It was held that such objection would not be allowed to be raised in revision.[455] A decree for specific performance of an agreement to sale

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448. *Radha Dei v Lalit Bihari Mohanty,* AIR 1991 Ori 36.
449. *Hoshiarpur Central Co-op Bank Ltd v Urmar Harmonium Reed Workshop CIS Ltd.* AIR 1989 P&H 245 (DB).
450. *VS Alwar Ayyannagar v Gurusamy Thevar,* AIR 1981 Mad 354.
451. *State of Uttar Pradesh v Matendra Tripathi,* AIR 1984 All 59.
452. *UOI v SB Singh,* AIR 1988 All 225.
453. *Rahima Khatun v On the death of Samser Ali his LRs Amrun Nahar,* AIR 1985 Gau 40.
454. *Laxmi Furniture and Saw Mills v HPFC,* AIR 1985 HP 108.
455. *Ghulam Nabi Khan v Abdul Gani Khan,* AIR 1981 J&K 103.

land, directed division of the plot into two portions and then sell, subject to permission of the local authority. Judgment-debtor's application for such permission was refused. It was held that the judgment-debtor could seek a declaration that the decree had become inexecutable in the circumstances. He need not wait till the decree-holder applied for execution.[456] When the execution court allowed the execution petition of the mortgager for delivery of possession and set the heirs of the mortgagee *ex parte*, the court could not, on basis of the office note, that final decree is not passed, *suo motu* review and set aside its earlier order for delivery of possession and dismiss the execution petition.[457] The appellant was the owner of the suit property. His title suit against his tenant for ejectment and *mesne* profit was decreed, subject to payment of compensation for the structure raised by the tenant. The appellant filed a second titled suit not only against the original title suit but also against the respondent, who is alleged to be a sub-tenant. The respondent pleaded that he was a sub-tenant of the original tenant, that he had acquired title to the site and structures either by purchase from the tenant or by adverse position and that the decree in the earlier suit had become barred by limitation. The question before the Supreme Court was, whether the decree in the earlier suit bars the subsequent suit. The Hon'ble Supreme Court observed that in view of provisions of rules 35 and 36 of O XXI, of the CPC and Article 136 of the Schedule of the Limitation Act, 1963, no independent suit for recovery of possession of the property, which is the subject matter of the decree, would lie. All questions arising between the parties or their representatives, relating to execution or satisfaction of that decree, should also be determined by the executing court and not by a separate suit. However, the condition precedent for applicability of the said provision is that a person in possession should have derivative title of tenancy rights of the demised property, that is, the subject matter in execution through the judgment-debtor in the suit.[458]

By reasons of his own plea of ownership by purchase or adverse possession, it was not open to him to claim any right as a tenant under the appellant's tenant or as a sub-tenant of the appellant. His tenancy right with the appellant's tenant, having been merged into his ownership right, he denied himself of the right under section 47 read with O XXI, rule 36 of the CPC.

Where objection in an execution proceeding was raised under section 47 of the CPC that the execution proceeding was premature and hence vitiated on account of not being maintainable, it was held by Supreme Court that the principles applicable to suits filed prematurely would apply to such a premature execution proceeding.[459]

A decree for possession was passed *ex parte*. The execution was struck off, in full satisfaction, on 26 July 1965. Thereafter, the *ex parte* decree was set aside. The suit land was again found to be in possession of the defendant. After contest, another decree was passed. When that decree was sought to be executed, it was contended on behalf of the judgment-debtor that the decree was not executable because the possession had been already delivered under the first decree. It was held that the objection could not be sustained. What was now being executed was not the same decree. Once an *ex parte* decree has been set aside, it becomes *non est* and it is only the subsequent decree, passed after contest, which is to be treated as (the) decree in the suit and it is that decree alone which can be executed.[460] Decree-holder purchased certain properties in court auction. Application was made by him for possession. Plea by judgment-debtor

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456. *Narinder Kumar v HC Mehta*, AIR 1987 Del 275.
457. *Krishnan v Muthu Gounder*, AIR 1997 Mad 57.
458. *Indian Iron and Steel Co Ltd v Chagan Lal Marwari*, (1994) Supp 3 SCC 719.
459. *Pushpa Sahakari Avas Samiti Ltd v Gangotri Sahakari Avas Samiti Ltd*, (2012) 4 SCC 751.
460. *Salim Sultan v Third Addl District Judge*, AIR 1983 All 32.

was, that, he, being one of the co-owners, the decree-holder was entitled only to symbolic possession and not to *khas* possession. It was held that the judgment-debtor's entire right in the property having been sold in auction, he could not resist delivery of possession to the decree-holder, auction purchaser. The judgment-debtor could, but for section 47, have instituted a suit for declaration of the right, and also for consequential relief. Such rights of the judgment-debtor can be agitated only in a proceeding initiated under section 47, and not otherwise. The judgment-debtor's rights in properties in their entirety had been sold in public auction. The decree-holder purchaser, thus, stepped into the shoes of the judgment-debtor. Persons who can raise any objection in regard to the delivery of *khas* possession can, at best, be the persons who could claim to be the co-owners along with the decree-holder purchaser.[461] The plaintiffs sued for their title to the disputed land and for restraining the principal defendants from disturbing possession therein. The suit was dismissed by the trial court but allowed by the subordinate judge. Defendants' appeal from this judgment and decree was dismissed by the high court. Plaintiffs put the decree of subordinate judge to execution for recovery of possession of suit lands after evicting the defendants therefrom, and for recovery of costs, etc. It was held that this execution petition must be taken to be an application for execution of the high court's decree. There was no necessity for amending the execution petition.[462] Where there is obstruction to the delivery of possession of premises and application is made by the landlord for removal of the obstruction, the executing court can adjudicate the matter, even if the obstruction is by a person who is independently in possession of the premises. The Amendment Act of 1976 has inserted (in O XXI), new rules 98 to 104, in conformity with the legislative policy of entrusting the determination of all questions including question as to the title of the concerned party, to the executing court. The scope of the proceeding has been widened so as to include all questions arising between the parties and relevant to the adjudication of the application.[463] A sale held without drawing up a proclamation under O XXI, rule 66, is void. Judgment-debtor's application to challenge the sale cannot be dismissed merely because it is filed under O XXI, rule 90 instead of under section 47.[464] Decree was passed for eviction and arrears of rent. Decree was executed against the property of intervener in that eviction suit. Intervener filed a separate suit for declaration of title, confirmation of possession and permanent injunction against decree-holder. It was held that though no prayer for conversion of the suit into proceeding under section 47 had been made, such an order could be made under clause 18.[465]

[s 47.12] Section to be Construed Liberally

It is well-settled that no suit will lie on an executable judgment. The only remedy on such a judgment is by way of execution.[466] The section prohibits any relief being granted in a separate suit which will interfere with the conduct of proceedings by the court executing the decree.[467] The section lays down the principle that matters relating to the execution, discharge or satisfaction of a decree and arising between the parties including the purchaser of a sale in execution should be determined in execution proceedings and not by a separate suit. It

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461. *Joseph alias Kunjachan v Sethyappa*, AIR 1991 Ker 120.
462. *Lichubala Biswas v Jindar Mondal*, AIR 1990 Cal 151.
463. *N Palaniappan v G Pandwangan*, AIR 1990 Mad 327.
464. *Jagannathan v Angamuthu Pillai*, AIR 1990 Mad 226.
465. *Jugal Kishore Singh v Lakshmi Kumari*, AIR 1981 Ori 121.
466. *Ramanand v Jai Ram*, AIR 1921 All 369 : (1921) 43 All 170; *Ramaswami v Muthiah*, AIR 1925 Mad 279 : (1925) 48 Mad 482.
467. *Azizan v Matuklal*, (1896) 21 Cal 437; *Lal Das v Kishore Das*, (1896) 22 Bom 463.

matters not whether such a question arises before or after the decree has been executed.[468] The object of the section is to provide a cheap and expeditious procedure for the trial of such questions without recourse to a separate suit and to check needless litigation. This was what was expressed by the Privy Council in regard to the Codes of 1861 and 1882.[469] In conformity with these pronouncements a liberal construction has been consistently placed upon the section.[470] Accordingly, the court could convert till recently a suit which would be hit by this section into a proceeding under it and vice versa.[471]

On the other hand, the conditions which bar a separate suit must not be lost sight of. This conditions refers:

(a) to the questions; and

(b) to the parties.

The questions must relate to the execution, discharge, or satisfaction of the decree. The parties must be the parties to the suit or their representatives. If both these conditions are fulfilled, the question must be determined in execution proceedings and a separate suit will be barred.

Altering the terms of the decree must be clearly understood in contrast of construing a decree or interpreting a decree or giving clarity to its terms and conditions. In the garb of the latter, the court cannot create a new decree which is neither intended nor passed by the court of competent jurisdiction. Executing court can provide clarity, interpret or construe the decree, while keeping the decree as passed by the court of competent jurisdiction, intact and undisturbed. While exercising its jurisdiction, if the executing court in the guise of these ingredients materially alters the terms and conditions of the decree to the prejudice of any of the parties to the decree, which ought to have, if at all, falls in the domain of courts of competent jurisdiction, i.e. appellate or the court that passed the decree, certainly the executing court would outgress its jurisdiction as an executing court.

Permitting an executing court to alter the terms of the decree, would be opposed to all settled canons of civil jurisprudence. A decree which has been passed and has not be assailed in the regular appeals, which were available to the parties against whom the decree was passed, such party cannot be permitted to abuse the process of law before the executing court to alter the decree which has attained finality in all respects.[472]

A decree was held to be inexecutable on the grounds of being without jurisdiction in view of interpretation of the then prevailing law. The legislature, subsequently clarifying its intention, conferred jurisdiction on such courts with retrospective effect. Such a decree does not become extinct but remains only dormant which would be revived as a result of amendment and would become executable.[473] It is a settled principal of law that it is not incumbent upon the executing court that it must put to trial every objections which are filed in any execution

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468. *Imdad Ali v Jagan Lal,* (1895) 17 All 478; *Collector of Jaunpur v Bithal Das,* (1902) 24 All 291; *Gopi Rai v Rambhanjan,* AIR 1922 Pat 166 : (1922) 1 Pat 336.
469. *Chaudry Wahed v Jumabe,* (1873) 11 Beng LR 149, 155; *Prosunno Kumar v Kali Das,* (1895) 19 Cal 683 : 19 IA 166; *Amir Chand v Bakshi,* (1916) 30 Mad LJ 238 : 32 IC 354 (PC).
470. *Set Umedmal v Srinath,* (1900) 27 Cal 810; *Goberdan v Bishan,* (1901) 23 All 116, 118; *Jamini Nath v Dharma Das,* (1906) 33 Cal 857; *Amar Chandra v Sebak Chand,* (1907) 34 Cal 642; *Ram Chand v Shamas Din,* AIR 1938 Lah 690; *Durga Devi v Shanti Prakash,* AIR 1961 P&H 229 : (1960) 1 Punj 731; *Chhtradharilal v Shyamabai,* AIR 1966 MP 67 : 1965 MPLJ 627.
471. *Charu Chandra v Birendra Nath,* AIR 1970 Cal 34 : (1969) 2 Cal 656: 73 Cal WN 645.
472. *Gurde v Singh v Punjab National Bank,* AIR 1998 P&H 106.
473. *Dularey Lodh v Third Addl District Judge, Kanpur,* (1984) 3 SCC 99.

proceedings, even if *prima facie* they appear to be frivolous, vexatious and are only intended to delay the execution and frustrate the procedure of law or where it amounts to an abuse of the process of the court.[474] Unnecessary prolongation of litigation sometimes results even in frustrating the decree itself. Such an attempt on the part of the objector to frustrate a decree is a mischief which has to be prevented by due process of law and expeditious decision of such ill-founded and frivolous objections would also be in the interest of justice and within the permissible field of jurisdiction of the execution.[475] In cases where all sorts of mischievous and dishonest tactics are resorted to in order to delay or defraud the execution, the executing courts must be absolutely firm and ruthless in stopping such unhealthy practices. This is absolutely essential because otherwise the rule of law would not only be set but it would virtually nullify and neutralise the orders of competent courts.[476] In *Amalendu Kumar Bera,*[477] the decree was passed in respect of declaration of title and permanent injunction restraining the State from interfering with the possession of the suit property of the appellant. When the State tried to interfere with possession, the decree-holder filed for execution of the decree with regard to interference with possession and the State filed a revision petition. The Supreme Court rejected the same by holding that the delay in filing the execution case cannot be a ground to condone the delay in filing the revision against the order refusing to entertain objection under section 47. The court held that merely because the respondent is a State, delay in filing the appeal or revision cannot and shall not be mechanically considered and in the absence of "sufficient cause", delay shall not be condoned.

Opportunity to object to executability of the decree could be taken only once and repeated applications are unwarranted.[478] It is a settled proposition that the execution court cannot permit execution of a decree different from the decree passed by the appropriate competent court. By amendment of the execution petition, the opposite party no. 3 inserted only that description which was given in the house rent claim petition and in respect of which the house rent controller passed the order of eviction. It appears that original execution petition did not contain any detailed description of the premises in question. The decree-holder opposite party no. 3 did not change or alter or substitute any description, but merely supplied the description to rectify an omission. If the decree-holder had sought to introduce a description different from the description given in the house rent controller petition, the judgment-debtor petitioner might have a legitimate grievance.[479] Law is well-settled that an executing court cannot go behind the decree except when the decree is a nullity or without its jurisdiction.[480] But if the executing court has gone or travelled beyond terms of the decree and has set up a new case, which is not the case of the party, then nothing could prevent the high court from exercising its revisional jurisdiction in either setting aside the said decree or correcting its jurisdictional errors.[481] Mere use of the words "struck off in full satisfaction" would not mean that the decree has been satisfied and no further execution can take place.[482] A question which

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474. *Rock Tyres, Chandigarh v Ajit Jain,* AIR 1998 P&H 202.
475. Also see "If frivolous objections of the present kind are permitted to unreasonably and unnecessarily prolong the delivery of possession to a decree-holder, in accordance with law, it would certainly amount to putting a premium on abuse of process of law". *B Gangadhar v BG Rajalingam,* AIR 1996 SC 780; *Jagdish Narain v Satish Chand Goswami,* AIR 1997 Raj 209.
476. *Vigneshwar v Ganga Bai Coam Narayan Bhat Prasad,* AIR 1997 Kant 149.
477. *Amalendu Kumar Bera v State of West Bengal,* (2013) 4 SCC 52 : (2013) 2 Pat LJR (SC) 397.
478. *RPA Valliammal v R Palanichami Nadar,* (1997) 10 SCC 209.
479. *Chloride India Ltd v District Judge, Puri,* AIR 1997 Ori 135 (DB).
480. *Arjun Sethi v LA Collector, Cuttak,* AIR 1998 Ori 34; *State Bank of India v Indexport Registered,* AIR 1992 SC 1740 : (1992) 3 SCC 159 (FB).
481. *Man Industrial Corp Ltd v RFC,* AIR 1997 Raj 108.
482. *Sarish Chandra v The 17th Addl District Judge, Lucknow,* AIR 1994 All 117.

could not have been raised as defence in the suit cannot be raised after the decree is passed. Decree, as defined in section 2(2) of the CPC, means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in the controversy in the suit.

Once it is so determined and expressed formally in decree, setting up a new case or right for investigation in execution thereof would amount to going behind the decree.[483]

An executing court has jurisdiction while executing the decree to examine the executability of the decree.[484] So long as on the face of the decree a partner of a firm is the decree-holder, the executing court cannot refuse to disburse the amount deposited by the judgment-debtor to the certified decree-holder on the allegation that decree was really in favour of the firm, hence all the partners are entitled to the decretal amount.[485] Non-impleadment of judgment-debtors who have no interest in the case will not invalidate the execution proceedings.[486] The questions to be determined by a court dealing with a preliminary decree, before passing a final decree, may not be the one under section 47 but still, the transfer of decree by assignment and writing is covered by O XXI, rule 16 of the CPC for the purpose of execution.[487] In case of a joint decree where the shares of the parties are distinct or separable, even though some of the decree-holders have transferred their shares to the judgment-debtor, the decree does not become inexecutable as a whole, but can be executed by one of the decree-holders under the provisions of O XXI, rule 15 of the CPC at least to the extent of the share of the decree-holder. Where, in the decree, the share of the plaintiffs have not been specified and it was a joint decree passed in favour of the decree-holders, such a decree could be executed as a whole by one of the joint decree-holders, especially when the other decree-holders who have allegedly transferred their shares in the property did not come to oppose the application or denied that the same were not for their benefit.[488]

[s 47.13] Transfer of Execution to Collector — Effect

In a suit for partition, once the court passes the decree declaring shares of the parties in an undivided estate assessed to the payment of revenue to the government and orders division and separate possession of such estate in accordance with the shares so declared, then the court is enjoined to direct such partition or separation be effected by the Collector or any Gazetted Officer subordinate to Collector deputed by him in that behalf. Further, in order to give meaningful effect to such declaration and directions issued in terms of section 54 read with O XX, rule 18(1) of the CPC, the court is further enjoined to send the relevant papers to the concerned Collector or Gazetted Officer. Once the papers are transmitted to the revenue officer, the court passing the decree for partition under O XX, rule 18(1) of CPC becomes *functus officio* in relation to the decree for partition passed by it and all further proceedings for the execution of such decree are to be carried out by the concerned revenue officer. The civil court is not the executing court for the purpose of execution of the decree for partition of the estate which is subject to the assessment for payment of revenue to the government. Being so, the question of approaching the civil court under section 47 of the CPC with the grievance

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483. *Basu Dev v The Fourth Addl District Judge, Jhansi,* AIR 1997 All 288.
484. *Kamta Prasad v The Second Addl Judge, Mainpuri,* AIR 1997 All 201; *Tokerimum Nisa v Sultana Khanan,* AIR 1993 Ori 34; *Potti Venkata Kasi v VV Vyas,* AIR 1983 AP 64.
485. *Baaji Govindan v Kerala State Housing Board, Thiruvananthapuram,* AIR 1999 Ker 31 (DB).
486. *Jaseentha Joseph v Louius Neeklauusc,* AIR 1997 Ker 40.
487. *Atava Akkulamma v Gajjela Papi Reddy,* AIR 1995 AP 166.
488. *Lalita Devi v Kamla Devi,* AIR 1995 All 21.

regarding non-compliance of such decree or acts in contravention thereof or in violation of law by the revenue officer in the course of execution of such decree does not arise at all. Certainly, the provisions of O XXI of the CPC would not be attracted in such cases as the execution of a decree is not by the civil court. Being so, neither the provisions of section 47 nor those of O XXI can be of any help in such cases. Further, the matters pertaining to the execution of such decrees cannot be dealt with under the exercise of inherent powers under section 151 of the CPC. Undoubtedly, therefore, it can be said that the grievance relating to refusal of the revenue officer to execute the decree and therefore, direction for the execution to be carried out in terms of the decree, i.e., as per the declaration of shares under O XX, rule 18 of the CPC can be entertained by the civil court in exercise of its inherent jurisdiction to pass order under section 151 of the CPC for compliance of the said declaration, i.e., for execution of the decree in accordance with the terms thereof. Therefore, in cases of contravention of provisions of law or transgression of law or non-enforceability of the decree for partition on account of events occurring subsequent to the passing of such decrees or in relation to the similar such grievances, the limited control which can be exercised by the civil courts can be only by way of an independent suit. The bar for suit under section 47 of the CPC could be applicable only in cases where the question can be determined by the court executing the decree. Once it is clear that the civil court is not the court executing the decree for partition of the estate which is subject to the assessment for payment of revenue to the government, the bar provided under section 47 of the CPC for an independent suit by the parties to the decree cannot come in the way of the party approaching the court with such suit regarding the grievance in relation the execution of the partition decree.[489]

[s 47.14] "And not by a suit" — Whether Objection to Execution can be Raised by way of Defence

The section provides that all questions arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. The words "and not by a separate suit" have given rise to the question whether, if a party to a suit fails to raise an objection to execution in execution proceedings, he may raise it by way of defence, in a suit brought against him. In *Bhiram Ali v Gopi Kanth*,[490] the High Court of Calcutta held that he is entitled to raise the objection by way of defence. The ground of the decision was that what is prohibited by the section is the determination of question relating to execution by a separate suit and not their determination in a separate suit. *Bhiram Ali*'s case and the Calcutta cases which followed it, have been overruled by a later full bench ruling of the same high court in *Lakshman Chandra v Ramdas Mandal.*[491] The grounds of the decision are:

(i) that the words "shall be determined by the court executing the decree" amount to a direction that the executing court alone shall determine questions relating to the execution, discharge or satisfaction of the decree, thus giving the court executing the decree exclusive jurisdiction to determine such questions; and

(ii) that the prohibition conveyed by the words "and not by a separate suit" is a provision in aid of the previous direction.

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489. *Prakash Nathyaba Bhosale v Laxman Ganaba Bhosale,* AIR 2003 Bom 41.
490. *Bhiram Ali v Gopi Kanth,* (1897) 24 Cal 355.
491. *Lakshman Chandra v Ramdas Mandal,* AIR 1929 Cal 374 : (1929) 57 Cal 403 : 33 Cal WN 795.

In the full bench case, the decree was satisfied by an adjustment, but the adjustment was not certified to the court as required by O XXI, rule 2. The decree-holder applied for execution and the judgment-debtor's property was put up for sale and purchased by the decree-holder himself. The decree-holder afterwards sued the judgment-debtor for possession. The judgment-debtor contended that the decree had been satisfied and that the sale was therefore fraudulent and void. It was held that the judgment-debtor was precluded by this section from raising this defence. The full bench held that it did not make any difference whether the objection was raised by the judgment-debtor by a suit of his own or by way of defence in a suit brought against him. O XXI, rule 2, is not limited to the particular judgment-debtor who makes the adjustment; and one judgment-debtor cannot plead in defence an uncertified adjustment or payment made by another judgment-debtor.[492] Similarly, if *A* obtains a decree against *B* as the legal representative of *C*, and in execution of that decree, property alleged to be belonging to the estate of *C* is sold and purchased by *P* and *P* sues for possession, *B* is barred from contending that the property belonged to him and did not form part of *C's* estate.[493]

Bhiram Ali's case has been followed by the Madras High Court in several decisions.[494] The Madras decisions require reconsideration in view of the Full Bench decision of the Calcutta High Court referred to above.

In an execution of a decree, where the Executing Court passed orders confirming auction sale, the Andhra Pradesh High Court held that to get the order of auction and confirmation of sale set aside, a separate suit is barred by section 47 and O XXI, rule 92 of the CPC.[495]

[s 47.15] Compromise

The parties have the option to contest legal disputes or compromise them prior to disposal of the suit during execution proceedings.

In the following sub-headings, such options of compromise between the parties and their implications are considered.

[s 47.15.1] Decree on Compromise of Suit

If a suit ends in a compromise decree, a subsequent suit to enforce a term in the decree, which related to a matter not raised by any of the issues in the suit but was a consideration for the matter in suit and constituted a necessary and integral part of the adjustment of claim in the suit is barred under this section.[496] But where the compromise decree comprises matters outside the scope of the suit and there is no operative clause therein relating to them, a suit with respect to them is not barred.[497]

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492. *Harihar v Bhubneshwar,* AIR 1936 Pat 270 : (1936) 15 Pat 422.
493. *Beni Madhab v Rai Charan,* AIR 1929 Cal 247 : (1929) 56 Cal 467; *U Tin v Maung Sein,* AIR 1931 Rang 117 (FB) : (1931) 9 Rang 305; *Sukhdeo v Donger,* AIR 1935 All 588 : (1935) All LJ 490.
494. *Venkataramanachariar v Meenatchisundararamaiyer,* (1909) 19 Mad LJ 1; *Thathu Naick v Kondu Reddi,* (1909) 32 Mad 242; *Munshi China Dandasi v Munishi Pedda Tatiah,* AIR 1921 Mad 279 : (1921) 41 Mad LJ 261.
495. *Y Prasad Rao v P Venkat Raju,* AIR 2007 AP 142 : (2007) 3 Andh LT 403.
496. *Rabindranath v Dhirendranath,* AIR 1940 Cal 82 : (1940) 43 Cal WN 1007; *Kalyandas v Ganga Bai,* AIR 1961 MP 67.
497. *Jagdish Chandra v Kameshwar,* AIR 1953 Pat 178 : ILR 31 Pat 851.

A suit to set aside a consent decree on the allegation that it was obtained by fraud or misrepresentation is not barred, as such allegations do not relate to execution of the decree but to the impeachment of the decree itself.[498]

The consent decree cannot be defeated on the ground that the third party has been illegally inducted by the judgement-debtor. The executing court will be fully justified in ignoring the said transfer as completely null and void.[499]

A Division Bench of the Delhi High Court has held that a settlement decree passed by a Court on the basis of a compromise must be executed and should not be interfered with, by modifying the decree or going behind the decree. Thus, where in a partition suit the parties settled the dispute on terms and conditions specifically recorded in a settlement and a compromise decree was passed on the said terms and conditions, stay of sale of the property on the ground that the appellant was prepared to pay the amount of Rs 10 lacs to the decree-holder to save the ancestral property cannot be allowed.[500]

[s 47.15.2] Compromise Prior to a Decree

The discussion, thus far, has been with reference to agreements relating to execution, discharge and satisfaction of a decree entered into after it has been passed. But where such an agreement is entered into before the decree is passed, the question has been discussed whether it could be set up in bar of execution. On that, judicial opinion is divided. One of the earliest decisions on the question is that of the Full Bench of the Bombay High Court in *Laldas v Kishendas*,[501] wherein it was held that it could be determined in execution. In *Binoda v Rajendra*,[502] it was held by a Full Bench of the Calcutta High Court that a court executing the decree could not go into an agreement entered into, prior thereto, whether it related to the enforcement of the whole decree or its satisfaction in part. This has been consistently followed in that court[503] and it has also been observed that the remedy of the party aggrieved by a breach of the agreement was to enforce his rights thereunder in a separate suit and move for an injunction restraining the decree-holder from executing the decree. This view has been adopted by the High Courts of Rangoon,[504] Lahore,[505] Nagpur[506] and Punjab.[507] In Madras, the question was considered by a Full Bench in *Chidambara v Krishna*,[508] wherein it was held by the majority following the long-standing practice of the court[509] that a pre-decree agreement could be pleaded in execution proceedings and that it fell outside O XXI, rule 2 as that was applicable only to agreements entered into subsequent to the passing of the

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498. *Addisons Paints and Chemicals v Sant Ram,* AIR 1976 Del 137.
499. *Prataprai Trambakalal Mehta v Jayant Nemchand Shah,* AIR 1996 Bom 296.
500. *Gyan Devi v Smt. Leela Devi,* AIR 2007 Del 240 (DB).
501. *Laldas v Kishendas*, (1898) 22 Bom 463; followed in *Burjorij v Madhavlal,* AIR 1934 Bom 370.
502. *Binoda v Rajendra,* (1902) 29 Cal 810 (FB).
503. *Choti Narain v Kameswar,* (1902) 6 Cal WN 796; *Hasan Ali Gauzi Ali,* (1904) 31 Cal 179; *Harendranath v Gopal Chandra,* AIR 1935 Cal 177.
504. *Mulla v Maung Po,* AIR 1928 Rang 140 : (1928) 4 Rang 118; *Moolla v The Chartered Bank of India,* AIR 1928 Rang 36 : (1927) 5 Rang 685.
505. *Dilsukh Rai v Lakshman Das,* AIR 1927 Lah 894 : (1927) 9 Lah LJ 7; *Robert Hercules v Skinner,* (1937) Lah 209, AIR 1937 Lah 537.
506. *Bhasker Dattareya v Nilkant,* AIR 1938 Ngp 265.
507. *Co-op Bank v Ram Sarup,* AIR 1953 P&H 267.
508. *Chidambara v Krishna*, AIR 1918 Mad 1174 (FB) : ILR 40 Mad 233 : 32 Mad LJ 13.
509. *Rama Iyer v Srinivasa Pathar,* ILR 19 Mad 230; *Rukmani v Krishnamacharya,* 9 Mad LT 464; *Krishnamachariar v Rukmani,* 15 Mad LJ 370; *Subramanya v Kumaravelu,* 39 Mad 541; *Velu v Krishnaswami,* AIR 1925 Mad 591 : 48 Mad LJ 277, and *Venkatasubba v Manickammal,* AIR 1926 Mad 582, wherein *Chidambara v Krishna, supra* was followed.

decree. The precise scope of this decision was the subject matter of consideration in latter cases.[510] The question was again considered by a later full bench of the same high court,[511] which held that a distinction should be made between an agreement which related to the mode of execution or satisfaction of a decree and one which had the effect of rendering the decree nugatory and inexecutable in whole or in part, and that while the former could be pleaded in execution, the latter could not be.[512] This Full Bench decision of Madras High Court[513] was followed by the Punjab and Haryana High Court[514] in the recent past and it was held that in execution proceedings initiated for the execution of decree pre-decretal decisions, compromise or any arrangement could not be pleaded to defeat the execution. Where an agreement made subsequent to the suit but before the decree was passed, constituted an understanding that the decree, when passed, should not be executed, the agreement can be pleaded in execution proceedings as it relates to execution.[515] But executability of compromise decree not incorporating stipulation of executability in event of non-compliance by parties does not strip the decree of its executability.[516] In Allahabad, the trend of the authorities was in favour of the view that pre-decree agreements could be pleaded in execution.[517] In *Krishna Raj Trading Corp v Ram Saran*,[518] that court has, however, held on a review of the authorities that such agreements could not be pleaded in execution. The High Court of Andhra Pradesh has held, following the decisions of the Madras High Court, that pre-decree agreements could be set up in execution.[519] In *Ramasubbu v Sankararam*,[520] the High Court of Kerala has held that such agreements could not be pleaded in execution but the question would appear to have been left open in a later decision.[521] The only remedy of a person who wishes to challenge a compromise decree on the ground of fraud is to file a suit for setting aside the said decree. Such an objection cannot be entertained during the course of execution proceedings.[522]

In a case relating to specific performance of contract, the parties entered into a compromise before decree, and a decree was passed in terms of the compromise. The decree, as per terms of agreement, was executable within a period of one month. After more than four years, the decree holder sought to execute the decree. The Jharkhand High Court held that the execution proceeding was not filed in the court which passed the decree, and as such the executing court was bound to confine itself within the scope of the decree itself and had no jurisdiction to grant any extension of time for performance of the contract under the decree.[523]

Company *A* sought execution against Company *B* of a compromise decree. Under that decree, Company *B* was to take over the entire share holding of Company *A* in a detergent company. But, before execution, the detergent company was ordered to be wound up. Section 536(2) of the Companies Act, 1956 prohibits transfer of shares of a company which is

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510. *Butchayya v Tayar Rao,* AIR 1931 Mad 399: (1930) 54 Mad 184 : 60 Mad LJ 721 where the authorities are discussed.
511. See also *Pappanna v Venkayya,* AIR 1935 Mad 860 : ILR 58 Mad 994 : 69 Mad LJ 451; *Perumalsami v Rajammal,* AIR 1955 Mad 339 : 68 LW 233.
512. *Sha Manmall Misrimall v K Radhakrishnan,* AIR 1972 Mad 108 : (1971) 2 Mad LJ 487.
513. *Adappa Papamma v Venkayya,* AIR 1935 Mad 860 (FB).
514. *Harnam Singh v Arbindu Nath,* AIR 2004 P & H 210.
515. *Rangaswamy Reddiar v CJ Ammal,* AIR 1974 Mad 6.
516. *Gopal Lal v Babu Lal,* AIR 2004 Raj 273.
517. *Gowri Singh v Gajadhar Das,* 6 All LJ 403; *Narain v Basudev,* AIR 1950 All 427.
518. *Krishna Raj Trading Corpn v Ram Saran,* AIR 1962 All 374 : (1962) 1 All LJ 423.
519. *Ratan Chand Firm v Subramanyam,* AIR 1960 AP 324.
520. *Ramasubbu v Sankararam,* AIR 1951 Tr & Coch 216.
521. *Usman v Mammooty,* AIR 1961 Ker 179.
522. *Mohammad Aleem v Maqsood Alam,* AIR 1989 Raj 43.
523. *Md. Hanif Khan v Naresh Prasad,* AIR 2010 Jhar 73 : 2010 AIR Jhar R 564.

to be wound up. It was held that Company *B* could not be freed to pay for and purchase the shares. *A*'s application was not maintainable.[524] In a suit filed by the plaintiff for a declaration that he was the owner of the property and not the tenant of the defendant, the compromise decree was passed setting the question of ownership of the property. It was agreed that the defendant was the owner of the property. Further, parties agreed that on payment of a certain sum by the plaintiff, a reconveyance deed would be executed by the defendant. The question of tenancy was also settled, and the plaintiffs were required to pay enhanced rent. It was held that, in essence, the compromise was relating to the subject matter of the suit. Simply because the reconveyance was to be executed, it cannot be said that it was a fresh contract capable of enforcement by way of a suit for specific performance. As the compromise had merged into a decree, there was no separate agreement in existence. The only thing existing was the decree, containing the compromise agreement. Since this compromise agreement had ceased to exist, it could not be enforced by way of a separate suit. The decree could be put to execution, if the defendant had failed to execute it within the time mentioned in the compromise.[525]

[s 47.15.3] Compromise of a Decree

The general power of deciding questions in relation to execution, discharge or satisfaction of decree under section 47 can thus be exercised subject to the restriction placed by O XXI, rule 2, including sub-rule (3), containing special provisions relating to payment of money due under a decree outside the court or in any other manner adjusting the decree. The general provision under section 47 has, therefore, to yield to that extent to the special provisions contained in O XXI, rule 2 which have been enacted to prevent a judgment-debtor from setting up false or fabricated pleas so as to prolong or delay the execution proceedings.[526]

The expression "or the decree of any kind is otherwise adjusted" are of wide amplitude. It is open to the parties namely, the decree-holder and the judgment-debtor to enter into a contract or compromise in regard to their rights and obligations under the decree. If such contract or compromise amounts to an adjustment of the decree, it has to be recorded by the court under rule 2 of O XXI. It may be pointed out that an agreement, contract or compromise which has the effect of extinguishing the decree in whole or in part on account of decree being satisfied to that extent will amount to an adjustment of the decree within the meaning of the rule and the court, if approached, will issue the certificate of adjustment. An uncertified payment of money or adjustment which is not recorded by the court under O XXI, rule 2 cannot be recognised by the executing court. In a situation like this, the only enquiry that the executing court can do is to find out whether the plea taken on its face value, amounts to adjustment or satisfaction of decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. If the executing court comes to the conclusion that the decree was adjusted wholly or in part but the compromise or adjustment or satisfaction was not recorded and/or certified by the court, the executing court would not recognise them and will proceed to execute the decree.[527]

The CPC does not restrict the liberty of the parties to enter into an agreement with reference to their rights and obligations under the decree. If the parties contract upon the terms which have reference to and affect the execution, discharge or satisfaction of the decree, questions relating to such terms would have to be determined by the executing court. An adjustment

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524. *Transport Corp of India Ltd v Haryana State Industrial Corp Ltd*, AIR 1991 P&H 225.
525. *Bishambar Nath Agarwal v Kishan Chand*, AIR 1990 All 65 (DB).
526. *Padma Ben Banushali v Yogendra Rathore*, AIR 2006 SC 2167 : (2006) 12 SCC 138.
527. *Padma Ben Banushali v Yogendra Rathore*, AIR 2006 SC 2167 : (2006) 12 SCC 138.

not recorded under O XXI, rule 2 would, no doubt, not be recognised by a court executing the decree.[528] But no suit will lie to enforce an adjustment failing within this section.[529] A compromise in execution proceedings providing for a mode of discharge of the decree, does not itself discharge a decree. Therefore, all questions arising on the agreement are matters to be determined in execution and not in a separate suit.[530] Thus, where an award provides payment by instalments and further provides that on payment of such instalments, the decree shall be taken as satisfied, the judgment-debtor can rely on the award before the executing court that the decree has been already satisfied.[531] Similarly, a compromise entered in an execution proceeding by which execution is postponed on an undertaking by the judgment-debtor to pay interest at a higher rate than the decretal rate is enforceable in execution proceedings. The jurisdiction of the executing court to enforce such a compromise is not taken away by O XXIII, rule 4.[532] In so executing the compromise, the executing court has the power to determine whether it contains a penal clause or a fresh contract and to grant relief on that basis.[533] Where a compromise contains a clause for penal forfeiture, equitable relief against such a clause can be granted when time is not the essence of the contract.[534] Where the parties have entered into an agreement against the execution of a decree, a question would arise whether such an agreement is a bar to the execution. Whether there is such a bar, depends upon the nature of the agreement and the intention of the parties. If the agreement supersedes the decree and the decree is abandoned, the contract could be the basis for a subsequent suit. If it is not so, it would be the executing court which would determine all questions relating to such an agreement.[535] For example, if after obtaining a decree for possession by eviction of the tenant from the demised premises, the decree-holder creates a fresh tenancy, the decree is not adjusted under O XXIII, rule 2 so as to require certification. The judgment-debtor can object under this section that the fresh tenancy created in his favour made the decree un-executable.[536]

Section 47 mandates determination by an executing court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of a court of law being sacrosanct in nature, the execution thereof cannot to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof.[537]

In order to enforce a term of a decree of compromise which ended in dismissal, it can be satisfied only by means of an independent suit, unless, of course, in the compromise, it is stated that the terms so stipulated in the compromise petition are enforceable by means of an execution, despite a decree of dismissal. In the instant case, the earlier suit, being a title suit, had ended in a decree by compromise. Hence, the plaintiff ought to have levied an execution order to satisfy the terms of decree, instead of maintaining an independent suit for specific

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528. *The Oudh Commercial Bank Ltd, Fyzabad v Bind Band Kuer,* AIR 1939 PC 80 : 66 IA 84, p 101 : (1939) 41 Bom LR 708; *Bhiki v Kundanlal,* AIR 1940 All 107 : (1939) All LJ 1051; *Chaube Mahendra Rao v Lala Bishambar Nath,* AIR 1940 All 270 (FB).
529. *Ganpat Rao v Sridhar,* AIR 1955 Bom 64 : ILR 1955 Bom 57 : 56 Bom LR 1005.
530. *Bharat Bank v Sehgal Bros,* AIR 1960 P&H 459; affirmed on appeal *Sehgal Bros v Bharat Bank,* AIR 1961 P&H 439.
531. *Haridas Mundra v Mahabir,* AIR 1975 Cal 357 : 79 Cal WN 810.
532. *Motilal v Md Hssan Khan,* AIR 1968 SC 1087 : (1968) 2 SCJ 824.
533. *Gandhi Gopaldas v Lalitabai,* AIR 1971 Guj 270 : 12 Guj LR 492.
534. *Deepchand v Ticamchand,* AIR 1974 Cal 222.
535. *Parmananda v Bhagabati Dei,* AIR 1969 Ori 32 : 34 Cut LJ 1121.
536. *Chitra Talkies v Durga Dass,* AIR 1973 All 40 : (1972) 2 All 90.
537. *Brakewel Automotive Components India Pvt Ltd v PR Selvam Alagappan,* LNIND 2017 SC 126.

performance of a contract.[538] In a compromise decree, one party included some other part of the property by giving up a part of the claim. It was held that the decree is not one relating to some extraneous matter and was executable.[539] A compromise providing for a new decree in place of a decree already under execution is not executable, but the same is not true of a compromise which regulates the mode of payment of the decree under execution. Any such compromise is executable, as such matter rests upon the intention of the parties as expressed in agreement, than on anything else.[540] Under the consent decree, *A* undertook to execute a sale deed in respect of the land in his possession and cultivation, in favour of *V*, within 15 days of the date of the decree. It was held that it was only when the judgment-debtor *A* expresses his readiness and willingness to execute the deed of conveyance, the decree-holder was under obligation to pay the consideration. As a matter of fact, the judgment-debtor had, hardly within five days of the passing of the consent decree, executed the conveyance deed in favour of *K*. In that state of affairs, *v* could not have tendered the amount. The executing court was clearly in error in expressing its inability to extend the time under O XX, rule 14. Even if the consent decree in question is taken as a decree for pre-emption in respect of a particular sale of the property, the decree did not specify any date on which the pre-emptor, i.e., the decree-holder, had to deposit the amount, failing which the suit stood dismissed. The court would not be justified in rejecting the execution of the decree on the ground that the decree-holder had failed to pay the amount of consideration.[541] The only remedy of a person who wishes to challenge a compromise decree on the ground of fraud is to file a suit for setting aside the said decree. Such an objection cannot be entertained during the course of execution proceedings.[542] Concession was given to the defendant by a compromise decree. Lesser amount was agreed to be received, but not in full acquittance of the suit claim. It was held that what was granted to the defendants under the decree, was only a concession and the plaintiff did not agree to the full quittance of the claim. Therefore, the default clause would not be a penalty and the defendants could not invoke the benefit of section 74 of the Contract Act, 1872.[543] A suit was filed by the plaintiff for a declaration that he was the owner of the property and not the tenant of the defendant. A compromise decree was passed, settling the question of ownership of the property, and it was agreed upon, that the defendant was the owner of the property and further they agreed, that on payment of certain sum by the plaintiff, a reconveyance deed would be executed by the defendant. The question of tenancy was also settled, and the plaintiffs were required to pay at the enhanced rate of rent. It was held that essentially, the compromise was relating to the subject matter of the suit. Simply because the reconveyance deed was to be executed, it cannot be said that it was a fresh contract and capable of enforcement by way of a suit for specific performance. As the compromise had merged into the decree, there was no separate agreement at all, in existence. Only because a period of two years was allowed to the plaintiff to pay the amount for reconveyance and the rent, that would not affect the executability of the decree. The decree could be put to execution, if the defendant had failed to execute it within the time mentioned in compromise.[544] Where the compromise decree between the parties provided that the defendant would be liable to be evicted from the suit land after expiry of 10 years "by appropriate action in court of law", the plaintiff's ejecting the defendants from the suit land in their possession by taking appropriate legal action by filing a

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538. *Nebubala Sardar v Abdul Aziz Baidya*, AIR 1991 Cal 402.
539. *Brijlal v Roshanlal*, AIR 1980 HP 13.
540. *Ghulam Nabi Khan v Abdul Gani Khan*, AIR 1981 J&K 103.
541. *Kanbi Vaju Vasta Botad v Kanbi Popat Vasta*, AIR 1985 Guj 184.
542. *Mohammad Aleem v Maqsood Alam*, AIR 1989 Raj 43.
543. *N Kullayyappa v N Dastagiri Saheb*, AIR 1982 AP 154.
544. *Bishambar Nath Agarwal v Kishan Chand*, AIR 1990 All 65 (DB).

suit for ejectment or in any other manner as may be permissible in law; but not by applying for execution of the compromise decree. The issue can only be adjudicated properly in an appropriate proceeding and not in an execution of a decree. Had the intention been to allow the defendant only permissive possession for a period of 10 years and ejectment thereafter in execution of the compromise decree, the decree would have so provided.[545]

[s 47.16] Agreement Modifying Terms of Decree

The question whether an agreement between the parties to a decree altering or modifying its terms could be enforced in execution, has been the subject of consideration in several cases. There was a large body of opinion in support of the view that it could not be the ground of the decisions, that a court executing the decree cannot go behind it and that it could only record an adjustment which would *pro tanto* discharge the decree or execute it according to its terms.[546] It was also further held that an agreement which is purely executory cannot be recognised as an adjustment.[547] Considering this question, the Privy Council observed in *Oudh Commercial Bank Ltd v Thakurain Bind Basini Keur*:[548]

> If it appears to the court acting under Section 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then, no doubt, the Court will not have occasion to enforce the agreement in execution proceedings but will leave the creditor to bring a separate suit. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under Section 47. In such a case, to say that the creditor may perhaps have to file a separate suit is to misread the Code which be requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of the executing court.

On the basis of the above observations, it was held, in a number of decisions,[549] that the executing court should record not merely an agreement which results in the satisfaction of the decree, but also an executory agreement providing for a mode of discharge and that it would make no difference whether the agreement modifies or alters the decree.

The question was once again considered by a Full Bench of the Allahabad High Court and it was held, by a majority, that the decision in *Oudh Commercial Bank's* case did not change the law as laid down in the decisions previously and that an agreement altering the terms of a decree cannot be pleaded in execution.[550] The question has also been considered by the Punjab High Court which has held, differing from the Allahabad decision and by a majority, that an agreement modifying the terms of the decree could be pleaded in execution even though it did not, in itself, result in satisfaction of the decree and that in view of the decision in the *Oudh Commercial Bank* case, the earlier decisions taking a different view could not be followed.[551]

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545. *Bibekannanda Bhowal v Satindra Mohan Deb*, AIR 1996 SC 1985.
546. *Gobardan Das v Dau Dayal*, AIR 1932 All 273 (FB) : ILR 54 All 573; *Venkatagiri v Satagopa*, 14 Mad LJ 359; *Lodd Govinddas v Ramdas*, AIR 1916 All 604; *Azizur Rahman v Aliraja*, AIR 1928 Cal 527.
547. *Fateh Muhammad v Gopal Das*, ILR : 7 All 424.
548. *Oudh Commercial Bank Ltd v Thakurain Bind Basini Keur*, AIR 1939 PC 80 : (1938-39) 66 IA 84.
549. *Mahendra v Lala Bishembar*, 1940 All 377 (FB); *Bhiki Mal v Kundan Lal*, AIR 1940 All 270; *Chatrapati v Hari Ram*, AIR 1940 All 423 : 1940 All 536; *Ram Sevak v Ram Sadhari*, AIR 1952 All 169; *Durga Prasad v Ganga Bai*, AIR 1958 All 387; *Meg Raj v Kesariman*, AIR 1948 Ngp 35 : 1947 ILR Nag 197.
550. *Mahmud Hassain v Motilal*, AIR 1961 All 1 (FB).
551. *Sehgal Bros v Bharat Bank*, ILR 1961 Punj 439; affirming *Bharat Bank v Sehgal Bros*, ILR 1960 Punj 459.

[s 47.17] Questions Relating to Execution, Discharge or Satisfaction

Questions relating to the execution, discharge or satisfaction of the decree arising between the parties to the suit or their representatives are within this section and must be decided in execution and not by separate suit. Under Explanation II (b), all questions relating to delivery of possession are deemed to be questions relating to execution and therefore have to be tried under this section. The following are examples of such questions:

[s 47.17.1] Mis-description of Property

When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in O VII, rule 3 and O XX, rule 3 of the CPC is capable of being cured. After all, a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to section 152 or section 47 of the CPC, depending on the facts and circumstances of each case which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under section 152 of the CPC by the court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the executing court as a question relating to execution, discharge or satisfaction of decree within the meaning of section 47 of the CPC. A decree of a competent court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission.[552]

In a suit for specific performance of agreement to sell immovable property, the map of suit property was not annexed to plaint, and the defendants did not object to such fact promptly, the trial court did not insist on such map and the map was filed for the first time in execution proceedings. However, the draft sale deed accompanied by a notice requiring objections to be made by judgment-debtor as provided by sub-rule(2) of rule 34 of O XXI of the CPC was not caused to be served by the executing court, and the judgment-debtors repeatedly insisted, on draft sale deed being delivered to them enabling objections being filed and there was no determination by the executing court that the immovable property as delineated and demonstrated in the map accompanying the draft sale deed was the property forming the subject-matter of agreement to sell and the decree. The Supreme Court, observing that it was section 47 which would be invoked in the instant case, gave directions to the executing court to ascertain an exact description of property.[553]

In an execution of eviction decree, the delivery warrant was issued, and revision was filed against it. The revisional court, directing the execution court to first consider objection as to identity of suit property before issuing delivery warrant, further directed restoration of possession to tenant-judgment-debtor, since objection already settled in eviction proceedings the order was wholly erroneous, since the court cannot be asked to go behind the decree. The courts should see through such diabolic plans of judgment-debtor which deny the fruits of the decree to a decree-holder; cantankerous litigation of tenant-judgment-debtor is a bogey to delay eviction by abuse of process of court.[554]

In an execution of decree pertaining to agricultural produce which was passed on a suit seeking direction to the agricultural produce market committee for renewal of licence and

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552. *Pratibha Singh v Shanti Devi Prasad*, AIR 2003 SC 643 : (2003) 2 SCC 330.
553. *Pratibha Singh v Shanti Devi Prasad*, AIR 2003 SC 643 : (2003) 2 SCC 330.
554. *Ravinder Kaur v Ashok Kumar*, AIR 2004 SC 904 : (2003) 8 SCC 289 : (2003) 1 SCW 7158.

allotment of vacant site. The decree was passed for allotment of vacant site in between sites 10/C and 11/2. The sketch map annexed to the report of advocate commissioner showed that there was drain of about two feet width between the two sites and there existed sufficient space and extent excluding the drainage portion for satisfying decree The high court, misread the report and misconstrued the physical features as disclosed by report and concluded the decree as not executable. The order of the high court was set aside by Supreme Court. The market committee was directed to allot space between site nos. 11/2 and 10/C which was vacant and preventive steps to be taken to avoid seepage of drain water, and non-creation of unhygienic conditions were directed to be incorporated in an undertaking along with the agreement.[555]

In the execution proceeding of a particular case, a decision on ground of uncertainty of decree was given. The commissioner's report described the suit land as bound on three sides by "*nullah*", whereas the decree mentioned that the three sides of suit land were bound by roads. "Road" included "*nullah* or drain" as per section 2 (xxiii) of Manipur Town and Country Planning Act, 1940. Therefore, there was no discrepancy in description of the boundaries of land and the objection was rejected.[556]

Where a decree for mandatory injunction was passed in favour of plaintiff directing defendants to hand over balcony occupied by them to plaintiff and no dimensions were initially mentioned in plaint and the judgment and the decree also did not refer to any dimensions nor did it incorporate any sketch from where dimensions could be gathered, it was held by the Supreme Court that at the stage of execution, the plaintiff cannot be permitted to file an amended site plan and seek amendment of decree.[557]

In an execution proceeding relating to an award by Arbitrator for possession of immovable property, the judgment–debtor filed objection on the ground that the property was not identifiable. It was found by the high court that a map was attached with the award in which all the required details were provided. It was also found that along with the revision petition copy of the Official Gazette has been annexed wherein clear-cut area and boundary of the property has been given. It was held that under these circumstances, the executing Court should have no difficulty in executing the award.[558]

[s 47.17.2] Property Wrongly Taken in Execution

If the decree-holder takes in execution land not included in the decree, or in excess of the decree, the judgment-debtor must apply under this section for the recovery of such land, and a separate suit for that purpose will not lie.[559] This is because the question whether a particular property is covered by a decree relates to execution, discharge or satisfaction of the decree. It is for the executing court to satisfy itself, as to the identity of the property which is the subject matter of the decree. Such a question of identity arises where the decree-holder takes

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555. *P Varadarajulu v Agricultural Produce Market Committee,* AIR 2004 SC 1989 : AIR 2004 SCW 2189 : (2004) 4 SCC 217.
556. *K Shetrimayum Ibohal Singh v State of Manipur,* AIR 2006 (NOC) 1367 (Gau) : (2006) 1 Gau LT 252.
557. *Ramesh v Harbans Nagpal,* (2015) 8 SCC 716 : 2015 (4) Scale 172.
558. *Ram Agarwal v Brijendra Kaur,* AIR 2008 Uttr.25 : 2008 (4) ALJ 176.
559. *Duljeet v Rewal,* (1878) 22 WR 435; *Biru Mahata v Shyama Churn,* (1895) 22 Cal 483; *Pratab Singh v Beni Ram,* (1880) 2 All 61; *Abdul Karim v Islamun Nissa Bibi,* (1916) 38 All 339; *Ganapatrao v Anandrao,* (1920) 44 Bom 97; *Sharfu v Mirkhan,* (1919) 1 Lah LJ 230; *Rajaratnam v Sheikh Hasambi,* AIR 1926 Mad 968 : (1926) 51 Mad LJ 255; *Radha Charan v Kailash,* AIR 1928 Cal 776; *Lakshminarayan v Laduram,* AIR 1932 Bom 96 : (1931) 33 Bom LR 1557; *Provita Sundari v Saroda Charan,* AIR 1935 Cal 15 : (1934) 38 Cal WN 996; *Ramanandam v Jaffer,* ILR 33 Pat 394.

in execution land not included in the decree or in excess of the decree.[560] But where, in the redemption decree passed against defendants, an objection by one defendant judgment-debtor that his land was not part of the suit land, was not tenable if the objecting defendant had filed written statement in suit and such objection was not raised at preliminary decree stage or even at time of final decree.[561] The question that a property sold was not saleable in execution is one relating to discharge of the decree.[562]

In a case where a husband obtained a decree for restitution of conjugal rights, the question whether the wife has done necessary acts in fulfilment of the decree is one for the executing court to decide.[563] In *Merla Ramanna v Nallaparaju*,[564] the Supreme Court observed:

> It is well settled that when a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof, that question could be agitated, when it arises between the parties to a decree, only by an application under section 47, Civil Procedure Code and not in a separate suit.

Where in execution of a decree in ejectment, the decree-holder obtained possession and satisfaction of the decree was recorded and thereafter the judgment-debtor applied for redelivery on the ground that the order for delivery was illegal, it was held by the Supreme Court that the question whether the decree was completely satisfied and the court became *functus officio* was a question which related to the execution, satisfaction and discharge of the decree and should be tried under section 47.[565] But where a decree has been passed with reference to a property in which the rights of the judgment-debtor have lapsed as a result of a special statute and new rights in place of the old rights have been substituted, an execution to attach the property with reference to the old rights therein cannot lie.[566] The plaintiff obtained a decree against only one of the two defendants, but took in execution money that had been paid by the surety of the other defendant. The Privy Council said that the question was between parties to the suit and related to the satisfaction of the decree and that whatever remedy the aggrieved defendant had, section 47 precluded a suit against the plaintiff.[567] Where an application for delivery in execution of a decree for pre-emption is resisted by the judgment-debtor on the ground that the property in question was not the subject matter of the suit, the dispute is one which falls under section 47.[568] The decision in *Kangali v Shyamsundar*,[569] that when property not comprised in a mortgage decree was sold in execution thereof, the judgment-debtor could enforce his rights thereto in a suit and that section 47 was not a bar to its maintainability as the sale was a nullity does not appear to be correct. Where a decree-holder entitled to joint possession was given exclusive possession in execution, the application of the judgment-debtor to be put back in joint possession falls within this section and the fact that the decree had been executed does not affect the position.[570] An application for refund of excess amount realised in

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560. *M Pillai v PKV Naidu*, AIR 1968 Mad 433 : (1968) 3 Mad 224 : (1968) 2 Mad LJ 472.
561. *Narinder Singh v Kishan Singh with Thakar Dwara Bhagwan Narainji Dham through Mahant Govind Dass v Sarabjit Singh*, AIR 2002 SC 2603 : (2002) 6 SCC 46.
562. *CSJ Hussain v Rameshwar*, AIR 1972 All 350 : (1972) All WR 174; *Shiv Prasad v Talideri*, AIR 1973 Raj 159.
563. *MP Shreevastava v Veena*, AIR, 1966 P&H 506 : 1965 Punj LR (supp) 135.
564. *Merla Ramanna v Nallaparaju*, AIR 1956 SC 87 : (1955) 2 SCR 938 : (1956) SCJ 101; *Benares Ice Factory v Sukhlal*, AIR 1961 Cal 422.
565. *Patankar v Sastri*, AIR 1961 SC 272 : (1961) 1 SCR 591 : (1961) 1 SCJ 221.
566. *Vidya Sagar v Sudesh Kumari*, AIR 1975 SC 2295 : (1976) 1 SCC 115 : (1976) 2 SCR 194.
567. *Marret v Mahomed*, AIR 1930 PC 86 : (1930) 34 Cal WN 425.
568. *Tharapada Mishra v Hare Kishen*, AIR 1957 Cal 335.
569. *Kangali v Shyamsundar*, AIR 1957 Ori 14 : (1956) Cut 631.
570. *Sansarchand Mela Ram v Shamlal Danpat Rai*, AIR 1957 P&H 307.

execution of a decree falls within this section and must be decided by the executing court even though satisfaction of the decree had been recorded.[571]

[s 47.17.3] Property Taken in Execution of Decree Subsequently Amended

If a mortgagee brings property to sale in execution of a decree for sale, and an error in the mortgage amount is subsequently discovered, the judgment-debtor claiming a refund of the excess,[572] or the decree-holder claiming to recover the deficit,[573] must apply under this section, and a separate suit will not lie. An objection by the judgment-debtor that the sale proclamation is not in accordance with the decree falls within this section.[574]

[s 47.17.4] Transfer of Property by Decree holder

Where decree holders were alleged to have transferred their right, title and interest in suit property in favour of third parties by registered deeds of conveyances, objection was taken under section 47 that properties stood vested in transferees and decree holders had no right to execute the decree. It was held that mere transfer of property is not transfer of decree and the executing court is bound to allow execution at instance of recorded decree holders, unless transferees approach under O XXI, rule 16.[575]

In an execution proceeding, where the right, title and interest of the decree-holder had been affirmed upto the second appellate stage, it was held by the Orissa High Court that a person who purchased the property during pendency of litigation is not entitled to challenge delivery of possession to the decree-holder. However, he can file a suit under section 144 CPC after the decree-holder recovers his possession. It is also open to the purchaser to file a suit for enforcing his right, if any, under the sale deed.[576]

[s 47.17.5] Property Taken in Execution of Ex parte Decree Set Aside

If property is realised in execution of an *ex parte* decree which is afterwards set aside, the judgment-debtor must apply for restitution under this section.[577] There is, however, a conflict of decisions as to whether this case falls under section 144.[578] Where a court sale in favour of the decree-holder purchaser was set aside under section 23 of the Madras Agriculturists Relief Act, 1938, a suit by the judgment-debtor to recover possession of the property was held to be not barred under this section as it did not relate to execution, discharge and satisfaction of the decree.[579]

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571. *Raja Babu v Sayed Mahomed,* AIR 1961 Raj 227.
572. *Harnam v Muhammad,* (1905) 27 All 485; *Dhan Kunwar v Mahtab Singh,* (1900) 22 All 79.
573. *Nilratan v Ram Rattan,* (1901) 5 Cal WN 627.
574. *Varkey v Bhaskaran,* AIR 1958 Ker 78; *Gayaprosad v Dhanrupmal,* AIR 1954 Cal 492.
575. *Sarwari Begum v Nazir Ahmed,* AIR 2003 Cal 230.
576. *Sanjukta Sahoo v Sailabala Mishra,* AIR 2009 Ori 62 : 2009 (107) Cut LT 32 : 2009(2) Civil Court Cases 795.
577. *Saran v Bhagwan,* (1903) 25 All 441; *Swamirao v Valentine,* (1920) 44 Bom 702; *Ratnasi Agariya v Jay Singh,* AIR 1955 Ngp 29 : ILR 1955 Nag 425.
578. See note under that section, "Where the decree is varied or reversed".
579. *C. Mukkayi v Pattavumma,* AIR 1955 Mad 173; *Ayisumma v Kunhammayan,* AIR 1958 Ker 84.

[s 47.17.6] Quantum

The court must determine the quantum which the debtor is bound to pay. But where the trial court has left that question open for being considered at the time of execution, the executing court ought to determine the quantum and dispose of the issue.[580]

[s 47.17.7] Injunction Granted by Decree

A suit to enforce a permanent injunction granted by a decree is barred by this section. The remedy is by execution.[581] But this is so only when the injunction granted is a mandatory injunction. A suit for appropriate relief with respect to breach of a perpetual injunction is not barred.[582]

[s 47.17.8] Objections to Attachment or Sale by Parties or their Representatives

See notes below under the same heading.

[s 47.17.9] Surety

The surety contracts: "Trust the borrower, I undertake to be responsible" or "if he does not pay I will". This is the basic postulate or essence of the contract of guarantee. A surety in the eyes of law is a favoured debtor. Under section 128 of the Indian Contract Act, 1872, save as otherwise provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety thus becomes liable to pay the entire amount. His liability is immediate and simultaneous. It is not deferred until the creditor exhausts his remedies against the principal debtor either personally or against the property mortgaged or hypothecated by him. The creditor gets the right to recover the amount straightway from the surety. The right of the creditor to proceed against the surety is not dependent or contingent upon his remedy being exhausted against the borrower. The creditor cannot be asked to pursue his remedies against the principal debtor either personally or against his mortgaged or hypothecated property in the first instance.[583]

Where the principal debtor, on payment of certain amount, offered to pay balance in monthly instalments of Rs 1,000, the executing court directed accordingly and closed proceedings. No objection was ever raised by decree-holder to the new set of rights and obligations that emerged thereby, to which the surety had never been party. In view thereof it could be said that surety has been relieved of his liability by principal debtor and no fresh execution proceeding can be filed against the surety alone.[584]

Once the decree-holder chose to proceed against any one of judgment-debtors and realised the decretal amount to certain extent, he could not proceed against other, unless he exhausted his remedies *vis-a-vis* the former.[585]

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580. *State Bank of Travancore v Devassia Joseph*, AIR 1990 Ker 195.
581. *Sachi Prasad v Amarnath*, (1919) 46 Cal 103; *Yosef v Moses*, AIR 1931 Bom 490 : (1931) 33 Bom LR 114.
582. *Ajab Rao v Atmaram*, AIR 1954 Nag 245 : (1954) Nag 332; *Joseph v Makkaru*, AIR 1960 Ker 127. For further discussion see notes under O XXI, rule 32(5).
583. *State Bank of India v Goutmi Devi Gupta*, AIR 2002 MP 81.
584. *C Laxmaiah v State Bank of Hyderabad, Madanapuram Branch*, AIR 2006 (NOC) 1409 (AP), (2005) 3 Andh LT 539.
585. *C Laxmaiah v State Bank of Hyderabad, Madanapuram Branch*, AIR 2006 (NOC) 1409 (AP), (2005) 3 Andh LT 539.

[s 47.17.10] Construction of Decree

Executing court has competence to construe a decree, though it cannot go behind it. However, to interpret the decree sought to be executed, it can refer to reliefs sought in the plaint and discussions in the judgment in order to ascertain the true import of the decree. The plaintiff in an Orissa case prayed for (a) declaration of title to the suit land, (b) confirmation of possession and (in the alternative) (c) for recovery of possession. The suit was tried and decreed *ex parte*. On the basis of evidence on record, the plaintiff was found to be in possession and, accordingly, a decree declaring that the plaintiff had got the right, title and possession over the land in suit was passed. It was held that the executing court was justified in interpreting the decree to mean, that the relief sought in the plaint were granted and since one of the reliefs sought was to direct delivery of possession, the execution application for delivery of possession was maintainable even in the absence of specific direction for delivery of possession in the decree.[586] Hence, where a money decree was passed against a company and its managing director making them jointly and severally liable, and the executing court, on a construction of the decree, disallowed execution against personal property of the managing director, it was held that the order was justified. Construction of a decree is not governed by a general rule and depends on the facts.[587] Mere acceptance of commissioner's report by the trial court does not give rise to a liability unless there be clear determination that for the entire *mesne* profits as decreed by the court, the liability is that of a particular defendant. Without getting the final decree amended by trial court fixing the liability of a particular defendant for that amount, in execution he cannot be proceeded against on the basis of liability arising out of constructing of decree on ground of ambiguity.[588] Where there is a decree for *mesne* profits and a commissioner is appointed, mere acceptance of his report by the commissions does not give rise to a liability of a particular defendant, unless there is a clear determination that for the entire period, the liability is that of a particular defendant. Such question is not dealt with in the decree, cannot be dealt with in execution by way of "construction" of decree. The decree has to be got amended.[589] It is true that the executing court is not an automaton and it can exercise its power to properly construe the decree, in order to find out the true import and effect of the same, so that it can proceed to execute the decree in its true and correct perspective, giving full effect to the same, and for that purpose, the court can look into the pleadings and judgment. But it cannot travel outside those materials. A decree has a sanctity of its own and there cannot be any "fishing" inquiry at the execution stage.[590] Although the executing court cannot go behind a decree, it can interpret a decree where the same is not clear in terms. While so interpreting the decree, the executing court is to presume that decree was passed keeping the correct legal position in mind. When there is ambiguity in the decree, the executing court can go behind the decree and look into the pleadings and the judgment, in order to have the ambiguity dispelled. But, where the decree is clear, unequivocal and is not ambiguous, the executing court cannot call for the assistance of pleadings, judgment and so on. It has to be spelled out from the decree itself, as to whether it is a declaratory decree *simpliciter* or whether there are accompaniments to the decree with consequential directions in case the right conferred is not given effect to. On the facts, the decree was held to be declaratory only and hence not executable.[591] The party, in compliance with the order of the

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586. *Biswanath v SD Uttara Bewa,* AIR 1988 Orissa 9 : (1986) 2 Ori LR 480 (DP Mohapatra, J).
587. *Hrushikesh Panda v Indramani Swami,* AIR 1987 Ori 79 (DB).
588. *Padmalaya v Shyam Sunder Sahu,* AIR 1980 Ori 1.
589. *Padmalaya v Shyam Sunder Sahu,* AIR 1980 Ori 1.
590. *Kitabian Bibi v Ramlal Durgadutta,* AIR 1984 Gau 44.
591. *Pathi Venkata Viswanatham v Vallabha Vyas,* AIR 1983 AP 64.

court for depositing certain amount in court, tendered a cheque for the prescribed amount on the last date for payment. The same was encashed in due course. The payment by cheque was held to be a valid payment, in the absence of anything in the order suggesting that the deposit was to be in cash. The objection that there was no money on the date of delivery of the cheque to support payment of it and that it was only subsequently (when arrangements were made) that the cheque was realised, would not be maintainable. The reason is that there was nothing to suggest that, under the arrangements made for payment of the cheque, even if it had been encashed on the date it was delivered, the cheque would not have been encashed and there was no finding by the court that on the date the cheque was tendered, the cheque would not have been realised.[592] It is not necessary in a suit for specific performance either to separately claim possession or for the court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by section 55 of the Transfer of Property Act, 1882.

In the execution of a decree in a suit relating to specific performance of contract, the Andhra Pradesh High Court held that omission to make specific prayer for the relief of possession is not fatal to the execution proceeding. It was observed that in the light of the statutory duties and obligations cost on the seller by virtue of section 55 of the Transfer of Property Act, 1882 and also in the light of the scope and ambit of section 22 of the Specific Relief Act, 1963, the mere fact that such specific prayer for delivery of possession was not made, the same cannot be taken advantage of, when there is no dispute or controversy that the judgment debtors-defendants are in possession. The decree for execution of sale deed would imply the decree of delivery of possession too, because these are obligations which flow from the relief of execution of sale deed.[593] The Allahabad High Court has held that where in a suit for specific performance, the subsequent purchaser was also made a defendant in the suit and the decree in the suit was also against him, the executing court could always grant the relief of possession once the court executed sale deed in favour of the decree-holder, as the relief of possession is incidental to the execution of sale deed.[594]

In a suit, preliminary decree for dissolution of firm was passed commission was appointed for settling the accounts of the firm. The Commission in its report valued only goodwill of the firm but did not give any valuation of trademark. It was held by a Division Bench of the Madhya Pradesh High Court that the report of the Commissioner is incomplete since it did not give any valuation of trademark. The decree which refers to assets and properties of the firm is inclusive of its trademark, which has separate entity and is not included in goodwill. It was held that direction to auction trademark is in consonance with intention behind the decree.[595]

When such a suit for specific performance is ended by a final decree transferring the title, that title relates back to the date of agreement on which the suit is based, and the court will not permit the decree to be rendered nugatory by intermediate conveyances. Once this established legal position is borne in mind, there shall not be any doubt about the competence of the

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592. *K Saraswaty v P.S.S. Somasundaram*, AIR 1989 SC 1553 : (1989) 4 SCC 527 : (1989) 22 SCR 819 : JT 1989 (2) SC 480.
593. *Smt. Suluguru Vijaya v Pulumati Manjula*, AIR 2007 AP 35 : (2007) 2 Andh LT 218.
594. *Jafar Mian v Qaiser Jahan Begum*, AIR 2007 All 5 : (2006) 6 All LJ 296.
595. *Kale Khan Mohd Hanif v Mohd Iqbal*, AIR 2009 MP 84 (DB).

executing court in granting possession even if the decree is silent as far as delivery of possession is concerned.[596]

[s 47.17.11] Bankers Lien

Section 171 of the Indian Contract Act, 1872 gives statutory recognition to the concept of "banker's general lien". It provides that the bankers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them. Money is a species of goods which may be the subject-matter of bailment and over which lien may be exercised. The general lien of bankers, as judicially recognised and dealt with in section 171 of the Indian Contract Act, 1872, attaches to all goods and securities deposited with them as bankers by a customer or by a third person on a customer's account, provided there is no contract, express or implied, inconsistent with such lien. The Supreme Court has laid down the law on "banker's lien". It has been held after a detailed survey of various authorities on English law on the subject that by the mercantile system the bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right of the banker judicially recognised and in the absence of an agreement to the contrary, a banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer by way of reduction of customer's debit balance. Such a lien is also applicable to negotiable instruments including FDRs which are remitted to the bank by the customer for the purpose of collection. There is no gain saying that such a lien extends to FDRs also which are deposited by the customer. When the words used in the letter accompanying the FDRs gave the authority to the bank to retain the deposits "so long as any amount on any account" is due from the judgment-debtor. The Supreme Court held that the recital in the letter shown that a general lien is created in favour of the bank in respect of those two FDRs. The bank was given the authority to retain the FDRs so long as any amount on any account was due from the judgment-debtor. Thus, the bank had a right to set off in respect of these FDRs if there was a liability of the judgment-debtor due to the bank.[597]

[s 47.17.12] Arbitration

Executing court, while deciding objections as to indivisibility of award, could not decide whether portion of award declaring assets in favour of one group was executable or not.[598] If a point of jurisdiction arises then the same can be agitated, not only in an application under section 30 of the Arbitration Act, 1940 (now replaced by Arbitration and Conciliation Act, 1996) but also in resistance to execution of decree passed upon the award.[599] No court can pass a decree directing a defendant to do an impossible or an illegal act. If a decree were to be passed simpliciter for a sum expressed in a foreign currency, it would be to direct the defendant to do an act, which would be in violation of the Foreign Exchange Regulation Act, 1973 (now repealed, Foreign Exchange Management Act (FEMA), 1999). Such a decree can, therefore, only be passed by making the payment in foreign currency, subject to the permission of the foreign exchange authorities being granted. If, however, the authorities do not grant

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596. *Prataprai Trambakalal Mehta v Jayant Nemchand Shah,* AIR 1996 Bom 296.
597. *Syndicate Bank v Vijay Kumar,* AIR 1992 SC 1066; *State Bank of India v Goutmi Devi Gupta,* AIR 2002 MP 81.
598. *Ramesh C Vaish v Banwari Lal Jaipuria,* AIR 1999 Cal 339 (DB).
599. *JD Singh v Calcutta Port Trust,* AIR 1994 Cal 148.

permission for payment of the judgment debt in foreign currency, it would not be possible for the defendant to make such payment, resulting in the decree becoming infructuous and the plaintiff getting nothing under it. The court must, therefore, provide for the eventuality of the foreign exchange authorities not granting the requisite permission or even if such permission is given, the defendant not paying the decretal debt, or not wanting to discharge the decree by making payment in foreign currency or in Indian rupees. This can only be done by the decree providing in the alternative for payment of a sum of money in Indian rupees, which will be equivalent to the sum decreed in foreign currency. It is but just, that a man, who is in law entitled to receive a sum of money in a foreign currency, should either receive it in such currency or should receive its equivalent in Indian rupees.[600]

Where parties have entered into an agreement, containing arbitration clause, but subsequently, on their own volition consented to abandon arbitration clause, and had entered into another agreement to refer their matter to High Power Committee as per mechanism evolved by Central Government, it is incumbent upon parties to abide by the said subsequent agreement in toto and take recourse to mechanism evolved by them. The mere use of word "Arbitration" or "Arbitrator" in a clause in agreement will not make it an arbitration agreement. The intention of parties should be gathered from the terms of the agreement.[601]

[s 47.17.13] Adjustment of Decree

The question whether a decree has been paid or adjusted out of court, is one for the court of execution to decide under this section. An executing court has jurisdiction to record an adjustment entered into between the decree-holder and the judgment-debtor and to ascertain its legal effect.[602] If the judgment-debtor applies to enter up satisfaction of a decree by a writing in the nature of a compromise and the decree-holder objects that the writing was obtained by fraud, the question is one relating to the discharge of the decree, and is to be decided by the court of execution under this section.[603] An application by a decree-holder to set aside an order recording satisfaction of a decree on the ground of fraud of his agent and the judgment-debtor, falls under this section.[604] If the adjustment has not been certified by the judgment-debtor within the time allowed by law, and the decree-holder proceeds to execute the decree, the dispute, no doubt, is one relating to the satisfaction of the decree, but it cannot be dealt with either under this or any other section relating to execution, for an uncertified adjustment cannot be recognised by any court executing the decree.[605] Where it was admitted that payment had been certified or recorded, the same, (even if actually made) could not be recognised by the court executing the decree.[606] By virtue of O XXI, rule 2(3), "a payment or adjustment, which has not been certified or recorded in accordance with the rule, shall not be recognised by any court executing the decree". Therefore, when a decree-holder takes out execution, the judgment-debtor will not be entitled to plead (if, by the date of his plea, a period of 30 days has expired from the date of payment or adjustment, as the case may be) that he has paid the

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600. *Forasol v ONGC,* (1984) Supp SCC 263.
601. *Paradeep Phosphates Ltd v Paradeep Port Trust,* AIR 2009 Ori 139 : 2009 (107) Cut LT 836 (DB).
602. *Chaube Mahendra Rao v Lala Bishamber Nath,* AIR 1940 All 270 (FB) : (1940) All LJ 301 : (1940) II R All 377.
603. *Muhammad Kasim v Rukia Begam,* (1919) 41 All 443.
604. *Monorath v Atmaram,* AIR 1943 Ngp 335; *Sheodahin Tiwari v Ramjanam Tiwari,* AIR 1934 Pat 202; *Gajraj Singh v Debi Singh,* AIR 1937 Oudh 298.
605. *Azizan v Matuk Lal,* (1894) 21 Cal 437; *Bamagulu v Bapanna,* (1892) 15 Mad 302; *Dino Bandhu v Hari,* (1904) 31 Cal 480; *Ram Labhaya v Mukundamal,* AIR 1922 Lah 428 : (1922) 3 Lah 319.
606. *Bhabani Dasya v Tulsi Ram Keot,* AIR 1990 Gau 90.

money due, or has otherwise adjusted the decree, outside the court. The expression "may" in O XXI, rule 2(3), has to be construed and understood as "shall". By placing this construction, no inconsistency arises between O XXI, rule 2 and section 47. It does not mean that the provisions in O XXI, rule 2 read with Article 125 of the Limitation Act, 1963, should be ignored.[607] The general and broader provisions of section 47 of the CPC, clothing the court with the jurisdiction to decide all questions pertaining to execution, discharge and satisfaction of a decree cannot be allowed to defeat the special provisions of O XXI, rule 2 of the CPC dealing with adjustments of the decree. When the satisfaction of the decree is based on an adjustment, provisions of section 47 cannot be pressed into service unless the adjustment is recorded in accordance with rule 2 of O XXI of the CPC.[608] It is no doubt open to the parties to adjust or compromise their rights under the decree, but if it amounts to adjustment of decree, it must be reported to the court whose duty it is to execute the decree so that that court may record or certify the same. If it is not done, the court, before which the execution proceedings are initiated, will proceed to execute the decree. It is not every time that the decree-holder and judgment-debtor enter into a compromise after the decree. The judgment-debtor may even set up a false case of compromise and creation of fresh tenancy after the decree. It is in order to prevent such judgment-debtors that O XXI, rule 2 has been enacted so that if such compromise or creation of fresh tenancy has not been recorded, the judgment-debtor be not encouraged to imitate another round of litigation under section 47 of the CPC.[609] In a Madras case, it was not in dispute that the entire amount due under the decree passed by the trial court had been discharged by payment and deposit, and therefore, there was no further amount due to the plaintiff under the decree as passed by the trial court. It was held that the plaintiff may be entitled to further amounts in the event of its success in the appeal filed by it against the decree. But that would not prevent the executing court from recording the payment made by the defendant towards the decree passed by the trial court. In fact, an unconditional deposit of the amount decreed in court will operate as a discharge of the decree. Just because an appeal against the decree is pending, at the instance of the plaintiff, it does not mean that the decree passed by the trial court could not be satisfied by the defendant by payment or adjustment otherwise. It is not in dispute in the instant case that the entire amount due under the decree passed by the trial court had been discharged by payment and deposit, and therefore, there is no further amount due to the plaintiff under the decree passed by the trial court. The plaintiff may be entitled to further amounts, in the event of its success in the appeal filed by it against the decree. But that will not prevent the executing court from regarding the payments made by the trial court. In fact, unconditional deposit of the amount decreed in court will operate as a discharge of the decree.[610]

[s 47.17.14] Adjustment of Fine Paid in Criminal Court

Where the payment or deposit made by respondent in the criminal case was the amount fined, a part of it was ordered to be paid to petitioner. So, out of Rs 22,000 imposed as fine, if Rs 11,280 has not been ordered to be paid to the petitioner in the criminal case, that amount would have gone to the state as fine amount and not that, the amount would have remained with the respondent. Further, the said payment of Rs 11,280 was made in that court

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607. *P Narasaiah v P Rajoo Reddy,* AIR 1989 AP 264.
608. *Badriprasad v Mallubhai,* AIR 1994 MP 37 (DB).
609. *Sultana Begum v Prem Chand Jain,* (1997) 1 SCC 337; *Pratapari Trambakal Mehta v Jyant Nemchand Shah,* AIR 1992 Bom 48.
610. *KR Shankar Rai v State Bank of India,* AIR 1989 Mad 255. Also see the CPC, O XXI, r 2(3).

as part of fine amount in pursuance of order of sentence passed in criminal proceedings for the offence committed by respondent and not towards the liability arising under civil law or sought to be enforced against him by petitioner in execution proceedings. In other words, payment or satisfaction of decree passed in suit would not have come to the aid of respondent for avoiding the consequence of default in the payment of entire or any part of fine amount ordered in criminal case. Similarly, payment of fine amount in the criminal case would not have discharged the respondent from his liability to pay the amount claimed in civil proceedings.[611]

[s 47.17.15] Award of Lok Adalat

The award of the *Lok Adalat* is fictionally deemed to be decree of court and therefore the courts have all the powers in relation thereto as it has in relation to a decree passed by itself. This includes the powers to extend time in appropriate cases. The award passed by the *Lok Adalat* is the decision of the court itself, though arrived at by the simpler method of conciliation instead of the process of arguments in court. The effect is the same.[612]

Where the suit for possession was decreed in favour of appellant decree holder and pending appeal the dispute referred to the *Lok Adalat*, the award was passed by the *Lok Adalat* on basis of compromise. The award provided for sale of scheduled property to appellant on payment of sum within two years. The plea of the respondent was that execution of sale deed could not take place due to default on part of appellant. Notice and telegram was issued, requiring respondent to execute sale deed as submitted in award. The respondent did not receive said notice and it was returned unserved. No obligation was held cast on appellant to examine the postman. The presumption under section 114 of the Indian Evidence Act, 1872 attracted the obligations on respondent to evince his willingness to execute sale deed within two years and not on appellant as assumed by the high court. The order of the high court dismissing petition for execution of award filed by appellant was found not proper.[613]

[s 47.17.16] Agreement to Give Time

A fair bargain for time in consideration of a reasonable rate of interest properly recorded, has its effect upon the rights of the parties under the decree and the executing court has jurisdiction under this section to ascertain its legal effect and to order accordingly.[614]

[s 47.17.17] Substituted Share

Where a decree gives a right to possession of a share in a *ijmali mahal*, which has prior to the date of the decree been partitioned under the Estates Partition Act, 1897, the court in proceedings for execution of the decree, has power under this section to put the decree-holder in possession of the specific land substituted for his share on partition.[615] Where, after the mortgagee had obtained a decree for the sale of the mortgaged properties, they were acquired

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611. *Gayathri v Clement Mary*, AIR 2003 Kant 134.
612. *PT Thomas v Thomas Job*, AIR 2005 SC 3575 : (2005) 6 SCC 478 : 2005 (10) JT SC 304.
613. *PT Thomas v Thomas Job*, AIR 2005 SC 3575 : (2005) 6 SCC 478 : 2005 (10) JT SC 304.
614. *Oudh Commercial Bank Ltd v Binda Bansi Kuer*, AIR 1939 PC 80 : 41 Bom LR 708 PC : ILR 14 Luck 192; *Bhiki v Kundanlal*, AIR 1940 All 107 : (1939) All LJ 1051. For cases of eviction see *J Bhimaraju v KK Subudhi*, ILR AIR 1972 Ori 81 : (1971) Cut 523; *Bhagat Ram v Lilawati*, AIR 1973 HP 57; *Doshi Kantilal v M Chandulal*, AIR 1973 Guj 80.
615. *Baijnath v Ravaneshwar*, AIR 1922 PC 54 : 49 IA 139 : ILR 1 Pat 378; *Nabhobai v Haiman Gaiv*, AIR 1954 MB 181 : 1954 MB 426.

under the Land Acquisition Act, 1894, the decree-holder was held entitled to proceed in execution against the compensation amount as substituted security.[616]

[s 47.17.18] Accretion to Mortgaged Property

The question, whether certain property is an accretion to the mortgaged property, is a question to be determined under this section in execution of a decree for redemption obtained by the mortgagor against the mortgagee.[617]

[s 47.17.19] Rateable Liability of different Mortgaged Properties

Question relating to rateable liability of different mortgaged properties is within the section.[618]

[s 47.17.20] Waste Committed by Judgment-Debtor after Decree for Possession

The question whether the judgment-debtor has committed waste, eg, cut down trees, after a decree against him for possession, is one to be dealt with under this section, and not by a separate suit;[619] also compensation for such waste;[620] so also waste committed by decree-holder in possession,[621] so also a claim for damages for damage done to the property of a co-sharer after a decree for partition.[622] It is observed in *Kunhikoya v Ahmed Kutty*[623] that a claim by a party to a decree based on allegations of waste is not within the scope of section 47. This observation is open to question. The real ground of the decision, however, is that a person against whom the claim was made, was not a representative of the judgment-debtor and therefore section 47 had no application.

[s 47.17.21] Decree for Possession

Where a decree is passed for possession in a suit for pre-emption, conditional on the plaintiff paying a specified sum of money within a time fixed by the court, and the money is paid, but possession is not delivered to the plaintiff, his only remedy is by an application under this section. A suit for possession is barred under this section.[624] The High Court of Kerala, however, has taken the view that where there is only delivery by symbolical possession in execution, the decree-holder can maintain a suit for possession on the basis of execution sale.[625]

Section 47 bars a separate suit only in respect of a question relating to execution, discharge or satisfaction of the decree. If there is a subsequent dispossession after the decree of possession is complied with, a suit to obtain possession is not barred simply because there was an earlier

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616. *Ramanathan v Abdul Hamid,* AIR 1963 Mad 73; *Nabbobai v Hasan Gani,* AIR 1954 MB 181 : (1954) MB 426; *Sudhir Kumar v Chandrakantha,* AIR 1955 Cal 560 : 52 Cal WN 446.
617. *Motilal v Bai Mani,* AIR 1925 PC 86 : ILR 49 Bom 233 : 52 IA 137.
618. *Pandurang Kashinath Patel v Subari Deorao Despande,* AIR 1949 Ngp 155 : (1948) ILR Nag 595.
619. *Hari v Sakharam,* AIR 1923 Bom 391 : (1923) 25 Bom LR 449; *Kumara Rama Panikkar v Variath Ouseph,* AIR 1953 TC 77; *Phool Kuer v Manoharmal,* AIR 1955 All 223 : (1954) All LJ 730; *Manishankar v Niranjan Sarup,* AIR 1955 All 686.
620. *Poomalai v Ramalingam,* AIR 1977 Mad 411 : (1977) 2 Mad 365.
621. *TS Ramanatha Ayyar v S Abdul Salam Sahib,* AIR 1945 Mad 179.
622. *Varadaraja v Parameswara,* AIR 1935 Mad 280 : (1935) 68 Mad LJ 27.
623. *Kunhikoya v Ahmed Kutty,* AIR 1952 Mad 59 : (1951) 2 Mad LJ 399.
624. *Raman v Jai Ram,* AIR 1921 All 369 : (1921) 43 All 170; *Sovani v Bhima,* AIR 1922 Pat 407 : (1922) 1 Pat 157; *Abdul Karim v Islam-un Nissa,* (1916) 38 All 339.
625. *Chathu v Janaki Amma,* AIR, 1969 Ker 121.

decree obtained by the plaintiff for possession which decree had been complied with. In fact, there will be no question of executing the earlier decree, when it has already been complied with.[626] Where a decree for possession in favour of the plaintiff provided for the defendants removing construction materials stored by him in the property, a suit by the latter for damages on the ground that the decree-holder prevented him from removing them, is barred under this section.[627] Where the landlord obtained a decree in ejectment and after recovering possession sued the judgment-debtor for compensation for certain sums paid by him, it was held that this was not a question relating to the execution, discharge and satisfaction of the decree and the executing court cannot go into it.[628] In a decree for possession, if the legal representatives of a judgment-debtor contend that they were in possession in their own right, that contention must be decided in execution proceedings.[629] In an execution of a decree for possession of immovable property, the judgment-debtor tenant delayed the execution of the decree for several years. The High Court of Uttarakhand directed the judgment debtor to pay rent/damages as were being paid earlier to the decree-holder till the date of delivery of possession.[630] Where a compromise decree providing for eviction is challenged by the tenant as a nullity on the ground that it was in violation of the relevant Rent Act, the executing court can go into the decree to ascertain whether the grounds for eviction permissible under the Act, were pleaded and admitted by the tenant when he agreed to the consent decree.[631] The question relating to delivery of possession to the auction purchaser or its representative is a matter relating to execution, discharge and satisfaction of the decree within the meaning of section 47 of the CPC. Sub-section (1) of section 47 prohibits determination of such questions by way of a separate suit and mandates that such questions shall be determined only by the court executing the decree and not by a separate suit.[632]

[s 47.17.22] Resistance or Obstruction to the Possession of Property

Provision is made in the CPC for delivery of possession of immovable property in execution of a decree and matters relating thereto. In O XXI, rule 35 provisions are made empowering the executing court to deliver possession of the property to the decree holder, if necessary, by removing any person bound by the decree who refuses to vacate the property. In rule 36, provision is made for delivery of formal or symbolical possession of the property in occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy. Rules 97–101 of O XXI contain the provisions enabling the executing court to deal with a situation when a decree holder entitled to possession of the property encounters obstruction from "any person". From the provisions in these rules which have been quoted earlier, the scheme is clear that the legislature has vested wide powers in the executing court to deal with "all issues relating to such matters". It is a general impression prevailing amongst the litigant public that difficulties of a litigant are by no means over on his getting a decree for immovable property in his favour. Indeed, his difficulties in real and practical sense, arise after getting the decree. Presumably, to tackle such a situation and to allay the apprehension in the minds of litigant public that it takes years and years for the decree

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626. *Uma Shanker v Sarbjeet,* AIR 1996 SC 1005 : (1996) 2 SCC 371.
627. *Murari Lal v Debi Saran,* AIR 1956 All 555.
628. *Mana Devi v Malki Ram,* AIR 1961 All 84.
629. *STR Pillai v Dhanlakshmi,* AIR 1972 Mad 190 : 85 Mad LW 19.
630. *Murli Singh (deceased by LRs.) v Ram Singh,* AIR 2007 Utr 80 : 2007 (3) UC 1509.
631. *Nai Bahu v Lala Ramnarayan,* AIR 1978 SC 22; *Nagindas v Dalpatram,* AIR 1974 SC 471.
632. *KN Krishnappa v TR Gopalkrishna Setty,* AIR 1997 Kant 152; *Gal Nagamma v Hardar Babubali,* AIR 1992 Kant 208.

holder to enjoy fruits of the decree, the legislature made drastic amendments in provisions in the aforementioned rules, particularly, the provision in rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under rules 97 or 99 or their representatives, and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suit. For this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. On a fair reading of the rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree holder or any other person in possession of the immovable property under execution and has vested the power in the executing court to deal with all questions arising in the matter, irrespective of whether the court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the courts seized of an execution proceeding. The court cannot shirk its responsibility by skirting the relevant issues arising in the case. The position is manifest that when any person claiming title to the property in his possession is obstructing the attempt by the decree-holder to dispossess him from the said property, the executing court is competent to consider all questions raised by the persons offering obstruction against execution of the decree and pass appropriate order, which under the provisions of O XXI, rule 103 is to be treated as a decree.[633]

[s 47.17.23] Validity of an Assignment of a Decree

Whether the assignment of a decree is valid or not is essentially a question arising between the parties and relates to execution of the decree and falls under this section. A suit for the declaration that the assignment is valid does not lie.[634] Where a debt on which a suit had been filed was assigned, the assignee could apply under section 146 and O XXII, rule 10, to bring himself on record and execute the decree which was passed on the debt and his application is one under section 47.[635]

[s 47.17.24] Mutual Obligations Under a Decree

Where a decree for specific performance directed that on the plaintiffs tendering or paying the amounts specified, the defendants were to execute in favour of the plaintiffs, proper deeds of transfer of certain properties, the question whether the defendant is able to perform his part of the decree and whether he transfers the very thing which the decree directs him to transfer must be determined in execution and not by a separate suit.[636] In the case of such a decree, even if it is silent about giving possession, the executing court under this section, can direct possession to be given to the decree-holder as possession is incidental in such a decree.[637]

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633. *NSS Narayana Sarma v Goldstone Exports Pvt Ltd,* AIR 2002 SC 251 : (2002) 1 SCC 662.
634. *Kundanmal Jasraj v Surajkuvarbai,* AIR 1943 Bom 455 : 45 Bom LR 859; *Balchand v Kachru,* AIR 1938 Nag 267.
635. *Jugal Kishore v Raw Cotton Co,* AIR 1955 SC 376 : (1955) 1 SCR 1369 : (1955) CJ 371 : (1955) SCA 440.
636. *Jai Narain v Kedarnath,* AIR 1956 SC 359 : (1956) SCR 62.
637. *Narayana Pillai v PC Subbalakshmi Ammal,* AIR, 1978 Ker 236; *Prataprai Trambakalal Mehta v Jayant Hemchand Shah,* AIR 1996 Bom 296.

[s 47.17.25] Scaling of Decrees

Where a mortgage decree was scaled, interest reduced and a new decree passed, the order scaling the decree is not an order relating to execution of the decree within section 47, but is a new decree and appealable as such.[638] But an order made for the enforcement of the order falls within section 47.[639]

[s 47.17.26] Suits Giving Relief to Tenants against Eviction

The question whether a tenant against whom a decree in ejectment has been passed is a "*Kudikidappakaran*", liable to be evicted only in accordance with the provisions of the Travancore Prevention of Eviction Act, 1948, or whether he is entitled to the protection under the provisions of the Stay of Execution Proceedings Act, 1950, are questions which should be determined by the executing court.[640] Where a decree for ejectment was made against a tenant in breach of the provisions of the Rent Control Order giving him protection, it was held that the execution court must refuse to enforce it.[641] Regarding the existence of any of the grounds mentioned in section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, the executing court will proceed to record the statements of each party and such other witnesses of both the parties, as it thinks necessary to reach any conclusion. It is none of the concern of the court to see what shall be the result of two interpretations of a particular provision of the law.[642] When section 2(2) was not amended, an order under section 47 by reason of a legal fiction was to be treated as a decree and, thus, an appeal against an order made under section 47 was maintainable in terms of section 96 of the CPC. After the amendment of section 2(2) of the CPC, no appeal lies under section 96 of the Act. If an objection filed under section 47 of the CPC is stated to be an appealable order coming within the purview of section 104 of the CPC, the purpose of the amendment would be frustrated. If decree is valid and has not been held to be a nullity by reason of lack of inherent jurisdiction by a court of law, the question as of the same being an order appealable in terms of clause 15 of Letters Patent does not arise.[643] This case is an example of as to how a small step in haste makes a person repent at leisure. The landlady, exasperated by law's delay, wanted to seize an opportunity to dislodge the tenant. In her enthusiasm to execute the decree, the landlady persuaded the executing court to bye-pass the process of law and obtained a warrant for possession and got it executed post-haste. This was despite a stay order passed against the execution of decree. The executing court did not care to inquire into and find out whether the conditions of the stay were fulfilled and the stay order had been automatically vacated. The first appellate court had not taken care to put a time limit for performance of the conditions imposed upon the tenant for staying the execution of the decree. It was not, therefore, simply a case where the conditions of the stay order not having been complied with within the time given by the appellate court. Some inquiry was absolutely necessary before the stay order could have been treated as automatically vacated for non-compliance of the conditions imposed by the stay orders.[644]

Against the decree for ejectment passed by a civil court, qua a commercial tenancy in the state of Delhi, before the declaration of law by the Supreme Court in *Gian Devi Anandcase*[645]

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638. *Rajindra v Balmukand,* AIR 1954 All 63.
639. *Ashalata v Jedunath,* AIR 1954 SC 409 : (1955) 1 SCR 150 : (1954) SCJ 690 : (1956) SCA 635.
640. *Varkey Chacko v Mathai Varkey,* AIR 1953 TC 427.
641. *K Punnan v P Kurup,* AIR 1986 TC 1 (FB).
642. *Kishan Lal v Shyam Lal represented by, Kedar,* AIR 1990 Raj 46 (DB).
643. *Ramesh C Vaish v Banwarilal Jaipuria,* AIR 1999 Cal 339 (DB).
644. *Kaushalya Bai v Fifteenth Addl Judge to the Court of District Judge, Indore,* AIR 1994 MP 55 (DB).
645. *Gian Devi Anand v Jeevan Kumar,* AIR 1985 SC 796 : (1985) 2 SCC 683.

that such a tenancy is heritable, the judgment-debtors can successfully raise objection to its execution on the ground that the same was passed by a court lacking inherent jurisdiction and therefore inexecutable.

Because of the operation of section 14 of the Delhi Rent Control Act, 1958, the only authority to pass a decree for ejectment of the tenanted premises is the Rent Controller appointed under the Act and section 50 of the Act specifically bars the jurisdiction of the civil court to entertain any suit or proceeding in so far as it relates to the eviction of any tenant from the premises which were covered by the Delhi Rent Control Act, 1958. The eviction decree was passed by the civil court, on the basis of the view taken by the high court, that commercial tenancies are not heritable, and that the statutory tenancy of the original tenant came to an end on his death. In *Gian Devi Anand's* case,[646] the interpretation given by the Delhi High Court that commercial tenancies were not heritable was overruled, as being erroneous. The Supreme Court, in *Gian Devi Anand's* case[647] did not lay down any new law but only interpreted the existing law which was in force. The interpretation of a provision relates back to the date of the law itself and cannot be prospective of the judgment. When the court decides that the interpretation given to a particular provision earlier was not legal, it declares the law as it stood right from the beginning as per its decision. The interpretation given by Supreme Court declaring that the commercial tenancies are heritable would be the law as it stood from the beginning as per the interpretation put by Supreme Court. It would be deemed that the law was never otherwise. Jurisdiction of the civil court has not been taken away by the interpretation given by Supreme Court. Supreme Court declared that the civil court had no jurisdiction to pass such a decree. A decree passed by a court having no jurisdiction over the subject-matter would be a nullity and the judgment-debtor can object to the execution of such a decree being a nullity and *non est*. Its invalidity can be set up whenever it is sought to be enforced, including the stage of execution of the decree or any other collateral proceedings. The view of high court, while rejecting the objection raised to executability of decree that the decision of Supreme Court in *Gian Devi Anand's* case[648] would operate prospectively, was found improper.[649]

The tenant's right to remain in occupation of the non-residential premises governed by the Maharashtra Rent Control Act, 1999 is a property, such property is saleable, and the tenant has disposing power over the interest of tenancy for this benefit and in view thereof, it can be said that the interest of the tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies is attachable and saleable in execution of the decree against the tenant.[650]

[s 47.17.27] Sub-tenant

The history of the litigation reveals that the tenant surrendered the lease with effect from 31-8-1953 by a notice, but failed to vacate it on the due date. Landlord was therefore required to file a suit against the tenant on the basis of the notice for surrender of tenancy.

During pendency of the suit, the tenant entered into a compromise and in terms thereof vacated the leased premises. As against the sub-tenants, which the tenant had inducted during

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646. *Gian Devi Anand v Jeevan Kumar,* AIR 1985 SC 796 : (1985) 2 SCC 683.
647. *Gian Devi Anand v Jeevan Kumar,* AIR 1985 SC 796 : (1985) 2 SCC 683.
648. *Gian Devi Anand v Jeevan Kumar,* AIR 1985 SC 796 : (1985) 2 SCC 683.
649. *Sarwan Kumar v Madan Lal Aggarwal,* AIR 2003 SC 1475 : (2003) 4 SCC 147 : (2003) 1 SCR 918 : JT 2003 (1) SC 607.
650. *TES Pvt Ltd v Indian Chemicals,* AIR 2004 Bom 198 (FB).

subsistence of tenancy, one of the terms of the compromise decree reserved liberty to the landlord to take necessary legal steps for their eviction. The landlord thereafter instituted an independent suit for eviction of the sub-tenant. In that suit, the court held that the remedy of the landlord is to execute the compromise decree. The firm, as sub-tenant, had filed a counter suit seeking declaration of its status as direct tenant under Act of 1950 and protection thereunder. In the counter suit of the sub-tenant, the court took the same view that the remedies of the parties lay in execution proceedings. The judgment rendered in the counter suit of the sub-tenant, i.e., the firm, was challenged in Supreme Court in special leave petition but it was withdrawn. The judgment rendered in the counter suit, as also the other rendered in the suit filed by the landlord against the sub-tenant, had attained finality. It is only after the landlord failed in obtaining eviction decree in the suit filed by it that it moved an application for execution of the compromise decree. One of the terms of the compromise decree which reserved the right to the landlord to take necessary legal steps to evict the sub-tenants, makes the decree executable to that extent. It could not, therefore, be urged by the firm that the compromise decree on its terms is not executable.[651]

Where a suit for recovery of possession was filed against lessee of land only without including the building thereon which was constructed and sublet by lessee with the permission of lessor, the decree passed upon admission of lessee to surrender the land would be inexecutable against the sub-lessees, particularly when no leave was obtained under O II, rule 2 in respect of the building. Therefore, the decree as it stood was final and could be executed only against the land and against the lessee. It could not have been executed in respect of the building constructed thereon, nor it could be executed against persons who were not sub-lessee/tenant of the land; which was the subject matter of the suit but were sub-lessees/tenants in respect of the building, which comprised of the land and the building. Moreover, though a decree for eviction against the lessee/tenant is binding on the sub-lessee/tenant, there are some exceptions to it. One such exception is that the sub-tenant/lessee has a right independent of the lessee/tenant. In case the sub-lessee/tenant is able to prove collusion, then the sub-lessee/tenant is said to have a right independent of the lessee/tenant, and in this instant case, collusion between landlord and lessee was prima facie apparent because the decree was passed on admission of lessee to surrender the suit land though he was receiving substantial amount of rent from sub-lessees and also because he did not file any objection to application for amendment so as to include building.[652]

[s 47.17.28] Alteration in Circumstances

As to the power of the executing court to take note of altered circumstances existing at the date of execution, see the cases noted below.[653]

[s 47.18] Questions not Relating to Execution, Discharge or Satisfaction

If the question that arises between the parties or their representatives does not relate to the execution, discharge, or satisfaction of the decree, the section does not apply, and a separate suit will lie. The following are leading cases on the subject:

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651. *Arm Group Enterprises Ltd v Waldorf Restaurant*, AIR 2003 SC 4106 : 2003 AIR SCW 2088 : (2003) 6 SCC 423 : 2003 (3) JT SC 450.
652. *Mehta Suraja v United Investment Corp*, AIR 2002 Cal 108.
653. *Ramabhadra v Ramanna*, AIR 1952 Mad 125; *Nabbaobai v Hasan Gani*, AIR 1954 MB 181 : 1954 MB 426.

[s 47.18.1] Questions as to the Validity of the Decree

The principle generally is that the court executing the decree cannot go behind the decree and question its validity. The section assumes that a valid decree exists.[654] It cannot hold an investigation to determine that the court which passed the decree, lacked jurisdiction to do so.[655] A decree passed by a court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a *coram non judice* (not before a judge). A decree passed by such a court is a nullity and is *non est.* Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party.[656] A decree passed by a court having no jurisdiction over the subject-matter would be a nullity and the judgment-debtor can object to the execution of such a decree being a nullity and *non est.* Its invalidity can be set up whenever it is sought to be enforced including the stage of execution of the decree or any other collateral proceedings.[657] In the eyes of law, a procedural irregularity in itself would not amount to branding the decree as "without jurisdiction" or "a nullity".[658] In this case, an argument was advanced that a decree is a nullity, can be raised even in execution proceedings and a separate suit for a declaration that the decree is a nullity is not maintainable under section 47. The Karnataka High Court did not consider this question as this ground was not urged before the lower court and in the memorandum of appeal. It is respectfully submitted that the defects of jurisdiction cannot be cured hence it is a wrong judgment. In view of *Sushil Kumar Mehta v Gobind Ram Bohra*,[659] it will not be open to a party to challenge a judgment when it is sought to be enforced on the ground that the judgment is based on wrong conclusions or on erroneous findings or on wrong application of law. As the remedy of the aggrieved party in such cases is to challenge the same in appeal or revision, as the case may be and not to challenge it when it is sought to be enforced, the respondents challenge in this case against the judgment cannot be sustained. Since the plea of lack of jurisdiction was pleaded by the respondents and that has been considered and found against them, they cannot raise the very same point in the executing court.[660] Nor can it set aside a sale on the ground that it was illegal in the absence of leave by the insolvency court which has appointed the receiver.[661] When respondents could not be said to be "necessary party" to the suit, non-joinder of respondents, would not make a decree passed by the Court of Small Causes, Bombay, nullity or inexecutable. If the decree is not null and void, as per settled law, appropriate proceedings will have to be taken by the persons aggrieved by such decree.[662] Where an arbitrator under the Punjab Co-operative Societies Act, 1961 has jurisdiction to make an award and makes such award after due notice to the parties, the executing court cannot declare the award *non est* and refuse to execute the award. A decree (or award) is *non*

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654. *Fazal Ilahi v RB Sabel & Co,* AIR 1935 Lah 549.
655. *Ahmed Khan v Mohd Khasim,* AIR 1976 Kant 13.
656. *Sushil Kumar Mehta v Gobind Ram Bohra,* (1990) 1 SCC 193.
657. *Sarwan Kumar v Madan Lal Aggarwal,* AIR 2003 SC 1475 : (2003) 4 SCC 147 : (2003) 1 SCR 918 : JT 2003 (1) SC 607.
658. *Rafique Bibi v Sayed Waliuddin,* AIR 2003 SC 3789 : (2004) 1 SCC 287.
659. *Sushil Kumar Mehta v Gobind Ram Bohra*, (1990) 1 SCC 193; *Laxmi Narayan Rao v Janardan Shettigara,* AIR 1994 Kant 105.
660. *KP Antony, "Santhosh", Edakkad Amsom, Puthiyangadi, Calicut v Thandiyode Plantations Pvt Ltd, Thandiyode, South Wynad,* AIR 1996 Ker 37.
661. *Manulal v Natwarlal,* AIR, 1976 Pat 321.
662. *Balavant N Viswamitra v Yadav Sadashiv Mule,* AIR 2004 SC 4377 : (2004) 8 SCC 706.

est, only if it is against a dead person or against a person not represented or is otherwise made without jurisdiction.

The award cannot be regarded as *non est* merely because no reasons were recorded.[663]

See note—Powers of executing court under section 38, and the note under the heading "To what decree the section applies" under section 47 above. But a suit to set aside a decree as invalid is not barred by section 47, for, the section refers to cases where the satisfaction of the decree as distinguished from its validity is in issue.[664] But section 8 of the Societies Registration Act, 1860, which imposes a bar for imposing liability on the members of the society and the decree passed against the members of the society in their individual capacity is a nullity. The decree passed against the office bearers of the society cannot be upheld as the decree against them in their personal capacity. The personal decree passed against the office bearer of society is a nullity and unenforceable under the law. When once the decree becomes a nullity, it cannot be executed through the execution proceedings against the personal property of the bearer of society.[665] That would also be the case where the challenge is that the decree was obtained by fraud. Such an objection cannot be tried by the executing court.[666] But, in a decision, the Supreme Court has stated that when the decree is passed by a court which lacks the inherent jurisdiction to pass it, objection as to the validity of the decree can be raised in an execution proceeding if the objection appears on the face of the record. But if it does not so appear and requires examination of the questions raised and decided at a trial, or which could have, but have not been raised, the executing court will have no jurisdiction to entertain such an objection. Thus, where a decree for eviction of a tenant has been made by a small cause court without any objection as to its jurisdiction having been raised and the question depends on the interpretation of the terms of the lease and the use to which the land was put at the date of the lease, it was held that these questions cannot be allowed to be raised in the execution proceedings.[667] The principle that an executing court can go into question of lack of jurisdiction apparent on the record is well-settled.[668] This can be done even where execution has been struck off in full satisfaction[669] or where delivery of disputed property has been taken in execution.[670] But where a decree has been passed in a suit filed without notice under section 164 of the Maharashtra Co-operative Societies Act, such a suit lacks maintainability but is not one without inherent jurisdiction. If the question of maintainability has not been raised, the decree is binding on the parties and that point cannot be agitated in the executing court.[671]

Similarly, a decree passed on an unregistered award is not a nullity. An objection against such a decree would not be entertained in execution.[672] The question that the decree is barred by limitation, can be gone into in execution proceedings but not the question that on account of certain statutory provisions the judgment-debtor was entitled to certain relief, for, such a

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663. *Hoshiarpur Central Co-op Bank v Urmar Harmonium Reed Workshop CIS Ltd*, AIR 1989 P&H 245 (DB).
664. *Ram Charan v Salik Ram*, AIR 1930 All 628 : (1930) 52 All 217; *Raja Ram v Chhaddammi*, AIR 1926 All 475 : (1926) 48 All 574.
665. *Someswara Swamy Vari Devasthanam v Dasam Suryavaryane*, AIR 2004 AP 223.
666. *Sudindra v Budan*, (1886) 9 Mad 80; *Dhanii Ram v Luchmeswar*, (1896) 23 Cal 639; *Karam Ali v Mt Sagi*, AIR 1962 Pat 432.
667. *VD Modi v RA Rehman*, (1970) 2 Mad LJ 85; *ND Co-op Trans Society v Suraj Mani*, AIR 1977 HP 35.
668. *MS Adekar v AV Umathe*, AIR 1965 Bom 129.
669. *Raja Ram v Bhagwan Das*, AIR 1973 All 82 : (1972) ILR All 783.
670. *Sitaram Srigopal v Union Carbide*, AIR, 1973 Cal 322 : 77 Cal WN 525.
671. *ETGUS Society v Sunil Waste Corpn*, AIR 1971 Bom 91 : 72 Bom LR 620.
672. *Bansilal v Nandlal*, AIR 1975 MP 25.

question does not directly relate to execution,[673] nor can the executing court say that a part of the decree contravenes the terms of section 23 of the Moneylenders Act, 1946 and therefore is inexecutable,[674] nor the decree passed against the governing body of the college which was defendant without seeking leave of the court to continue the suit against the university upon whom the interest of the original defendant devolved and impleading would make the decree *void ab initio* so as to invoke application of section 47 of the CPC and entail dismissal of execution.[675] Under the unamended section, the view taken was that the question of delivery of possession of a property purchased by a decree-holder in execution, was not a question relating to execution, discharge or satisfaction of the decree[676] since, such a question was something consequential upon his purchasing the property and therefore the purchaser's right was either to apply under O XXI, rule 97 or file a separate suit.[677] This is no longer correct in view of the new Explanation II. But it may still be held that a dispute between the decree-holder who has purchased the property in auction sale and his assignee as to who is entitled to the money deposited by the judgment-debtor for having the sale set aside, does not relate to execution.[678] Such an assignee is not a deemed purchaser under clause (a) of Explanation II, nor does the question of deposit of delivery of possession of the auctioned property arise.

Though the general principle is that executing courts cannot go behind the decree and question its validity, courts have, sometimes, taken into account legislation affecting the decrees. In one case, the plaintiff obtained a decree for injunction restraining a district board from realising an illegal tax. After the decree was passed, the tax was validated by legislation and the court refused to execute the decree on the ground that the decree was no longer capable of execution.[679] The proprietor of an estate obtained a decree for possession of certain lands. Before the date of the decree, the title to the lands was extinguished by the MP Abolition of Proprietary Rights Act, 1951 but this fact had not been brought to the court's notice when the decree was passed. The judgment-debtor objected to the execution of the decree on the ground that it was in contravention of the provisions of the Act and was therefore a nullity. The Supreme Court upheld the objection and held that the objection could be taken before the executing court under this section.[680] A reversioner against whom a decree is being executed as legal representative of the deceased judgment-debtor, cannot object in execution that the debt for which the decree was passed was not binding on the estate of which he is the reversioner but may file a separate suit for a declaration to that effect.[681] If sons, who are not parties to the suit against their father on a mortgage and who had been found not to be represented in the suit by their father, desire to challenge the mortgage on the basis of which the suit was brought and decree obtained by the mortgagee, they cannot do so in execution.[682] Where a decree passed against a minor is sought to be executed, the questions whether the minor was

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673. *Narsimhrao v Venkateswarlu*, AIR : 1965 AP 346 : 1965 Andh WR 435.
674. *Yusufbhai Ismailbhai v Manilal Mohanlal*, AIR 1965 Guj 282.
675. *Dhurandhar Prasad Singh v Jai Prakash University*, AIR 2001 SC 2552.
676. *Dayashankar v Khubchand*, AIR 1973 Raj 304.
677. *KK Thakkar v LA Patil*, AIR 1968 Bom 98 : 69 Bom LR 502 : 1967 Mah LJ 861.
678. *Krishnan Nair v Kunchi Amma*, AIR 1967 Ker 86 : (1966) 2 Ker 234.
679. *Bukkan Singh v District Board*, AIR 1933 Lah 41 : (1933) 14 Lah 230.
680. *Haji SK Subhan v Madhorao*, AIR 1962 SC 1230 : (1962) 2 SCJ 575.
681. *Hamidgani v Ammasahib*, AIR 1941 Mad 898; *Tallapragada v Boorugapally*, (1907) 30 Mad 402; *Ala Singh v Wavawa*, (1931) PR 14.
682. *Thiruvendipuram Dorairajam v Venaswami Rama Naidu*, AIR 1950 Mad 47; *Hamidgani v Ammasahib*, AIR 1941 Mad 898; *Lakshamadu v Ramudu*, AIR 1939 Mad 867 : (1940) ILR Mad 123; *Ram Gopal v Ajodhya Pradad*, AIR 1953 All 281; *Devana Philipose v Venkita Subba*, AIR 1954 TC 118 : (1953) TC 275 : 1952 Ker LT 289.

properly represented and whether he has suffered any prejudice, cannot be investigated in execution proceedings.[683] When the minor has not been properly represented in a suit, he is not a party to the suit in the proper sense of the term. A suit by him to set aside the decree in the suit and the sale in execution of the decree is not barred by this section.[684] But where a suit was decreed, as against a number of defendants some of whom were minors, a suit by the major defendants disputing the validity of the decree on the ground that the minors were not properly represented in the previous suit was held to be barred by this section.[685] An executing court cannot investigate into facts to determine whether relationship of landlord and tenant existed between the parties when the rent court passed the order of eviction in order to determine whether that court had jurisdiction to do so.[686] If a decree strikes at the jurisdiction of the court or the court lacks jurisdiction, it strikes at the very root of the authority to pass the order or the decree. Such a decree will be a nullity. Nullity has to be understood in the sense that it is ultra vires the power of the court passing the decree and not merely avoidable decree.[687] A declaratory decree merely declares the right of the decree-holder *vis-a-vis* the judgment-debtor and does, in terms, direct the judgment-debtor to do or refrain from doing any particular act or thing. If a decree does not direct reinstatement or payment of arrears of salary, the executing court could not issue any process for the purpose as that would be going outside or beyond the decree.[688]

[s 47.18.2] Mal-administration of Judgment-debtor's Estate

A decree-holder failing to realise his decree by execution against the judgment-debtor's executor, may file a suit against the executor for the administration of the estate and for an account on the footing of misadministration. This is his only remedy for the conduct of the executor and is not a matter for the court of execution.[689]

[s 47.18.3] Second Suit for Redemption

When a mortgagor is, in effect, bringing a suit to execute a previous mortgage-decree for redemption, the suit is barred under this section.[690] But if the right to redeem was reserved to him by the decree in the previous suit, a fresh suit for redemption will lie.[691] The better opinion is that if the former mortgage-decree does not extinguish the right of redemption, a fresh suit for redemption will not be barred.[692] Such a suit is not an execution of the former decree, but a fresh exercise of the same right.

[s 47.18.4] Payment Before Decree

Inexecution of a decree, it is not open to the judgment-debtor to contend that he should get credit for the amount paid before the decree.[693]

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683. *Umar v Mahahabirlal,* AIR 1940 Pat 59.
684. *Dwarka v Sitta,* (1940) ILR All 344.
685. *Ballabhdas v Parmal Singh,* AIR 1961 MP 36.
686. *Narayana Gowda v Krishna Madyastha,* AIR 1976 Kant 56.
687. *Urban Improvement Trust, Jodhpur v Gokul Narain,* AIR 1996 SC 1819 : (1996) 4 SCC 178.
688. *State of Madhya Pradesh v Mangilal Sharma,* (1998) 2 SCC 510.
689. *Saratmani v Bata,* (1908) 35 Cal 1100.
690. *Hari v Shappurji,* (1887) 10 Bom 461.
691. *Tani v Hari,* (1887) 16 Bom 659 (FB); *Abdul v Vaman,* AIR 1921 Bom 284 : (1921) 45 Bom 1355; *Ambu v Kelu,* AIR 1930 Mad 305 : (1930) 53 Mad 805.
692. See note, "Finality of Decree in Redemption Suits".
693. *Bhaskar v Nilkanth,* AIR 1938 Ngp 265; *Seth Samrat Das v Seth Narain Das,* AIR 1955 Bhopal 3

[s 47.18.5] Construction of Decree

Executing court can interpret the decree sought to be executed. For doing so, it can refer to reliefs sought in the plaint and discussions in the judgment in order to ascertain the true import of the decree. The plaintiff in an Odisha's case, prayed for:

(i) declaration of title to the suit land;

(ii) confirmation of possession and (in the alternative); and

(iii) for recovery of possession.

The suit was tried and decreed *ex parte*. On the basis of the evidence on record, the plaintiff was found to be in possession and, accordingly, a decree declaring that the plaintiff had got the right, title and possession over the land in suit was passed. It was held that the executing court was justified in interpreting the decree to mean that the reliefs sought in the plaint were granted and since one of the reliefs sought was to direct delivery of possession, the execution application for delivery of possession was maintainable even in the absence of a specific direction for delivery of possession in the decree.[694] It is well-settled that a decree which merely declares the right of the party and has not directed any act to be done, is incapable of being executed and only a separate suit, and not an application under section 47 of the CPC, will lie to impose the right so declared. It is equally well-settled that the question whether the decree is capable or incapable of execution is pre-eminently one coming under the provisions of section 47 of the CPC. The question, as to executability of the decree, can be decided by executing court only and not by the court passing the decree. At the same time, the executing court has to execute the decree as it is and it cannot go behind the decree.[695] A plea by the managing director and the director of a private company that they are not personally liable, is a mixed question of fact and law and could not be raised before an executing court, irrespective of the fact that a joint decree is passed against the private limited company and its managing directors and its directors.[696]

In a case, decree for permanent injunction was passed restraining the judgment-debtor from planting any tree on the land in question. The decree did not speak of removal of any tree which had already been planted. The Supreme Court held that interpreting the said decree by the executing court and holding that there should not be any tree within two *karams* on either side of common boundary of parties was not in consonance with the tenor of the decree. It was further held that "as the decree did not clothe the decree holder to pray for execution of the decree by way of removal of the trees, the same could not have been directed by the learned Executing Court in the name of construing the spirit of the decree under execution".[697]

[s 47.19] Parties to the Suit

If the question is one relating to the execution, discharge, or satisfaction of the decree, but does not arise between the parties to the suit, the section does not apply, and a suit is not barred. "Parties" ordinarily means parties who are opposed to each other in the suit, though not necessarily as plaintiff and defendant;[698] for, in a partition suit, co-defendants may be

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694. *Biswanath v SD Uttara Bewa,* AIR 1988 Ori 9.
695. *Radha Rajak v Balmiki Devi,* AIR 1998 Pat 75.
696. *Indian Overseas Bank v AB Senam,* AIR 1999 Ker 364.
697. *Gurde v Singh v Narain Singh,* AIR 2008 SC 630 : (2007) 14 SCC 173.
698. *Bathai Bayyalakshmi Amal v Thoppai Bapu Aiyar,* AIR 1946 Mad 90 : (1946) ILR Mad 640; *Mangaya v Sriramula,* (1913) 24 Mad LJ 477; *Sundar Das v Bishan Das,* AIR 1936 Lah 116.

opposed to each other. Thus, where a decree was passed against *J* and *R* on a joint debt and it was scaled as against *J*, a subsequent application by *J* to adjust towards the decree as scaled, payments made by *R* is not within this section, as it is not one between the parties to the order scaling the debt nor could they be adjusted as they were prior to the scaling.[699] Where a party not taking part in the execution proceedings to be intimated about the date fixed for hearing[700] questions arising between parties who are not opposed to each other, or between a party and a stranger, do not fall under section 47. The following are illustrations:

[s 47.19.1] Questions Between Decree-Holders *Inter se*

Disputes between rival decree-holders seeking to attach the same property,[701] or claiming against each other in the distribution of assets,[702] or between joint decree-holders *inter se*,[703] are not within the section, unless they affect the judgment-debtor.[704] Where one of the two legal representatives of a decree-holder transferred his rights in the decree to a third person a suit by the latter against the other legal representative for his share of the realisations is not barred by this section.[705]

In a case, where there was a dispute between decree-holders that warrant of possession should not be issued only in favour of one but should be issued in favour of all the decree-holders jointly and an application under section 47 was filed, it was held that such a dispute between co-decree holders/co-plaintiffs is not covered by this section.[706] The Madhya Pradesh High Court relied on the decision of the Apex Court in *Jagdish Dutt's* case[707] wherein it has been laid down that a joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree-holders are defined or those shares can be predicted or the share is not in dispute.

[s 47.19.2] Questions Between Judgment-debtors *Inter se*

The Allahabad High Court has held that questions between judgment-debtors inter se are not within the section.[708] But the Madras High Court has held that they are[709] and this has been followed by Rangoon.[710] Where there is money decree against the principal debtor and the guarantors, their liability is joint and several. Decree-holder need not exhaust his remedies against the mortgaged/hypothecated property as well as the principal debtor before proceeding against the guarantors.

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699. *Janki Bai v Bikaji,* 59 Bom LR 610.
700. *Dataram Jaganath Firm HUF v MS Jagi,* AIR 1990 Ori 160.
701. *Ram Chunder v Hamiran,* (1906) 11 Cal WN 433; *Ramanathan v Karuppaya,* (1926) 51 Mad LJ 436; *M Salamatulla v Murlidhar,* AIR 1936 Oudh 277.
702. *Sanjivii v Ramasami,* (1885) 8 Mad 494; *Viswanathan v Yawabanda,* AIR 1936 Mad 136 : (1936) II R 59 Mad 399.
703. *Munshi Rai v Rup Narain,* AIR 1927 Pat 288 : (1927) 6 Pat 386. But see *Abdul Satar v Chi Doe Rhi,* AIR 1927 Rang 45 : (1926) 4 Rang 418.
704. *Hari Kishen v Gopeswar,* AIR 1937 Cal 177.
705. *Siva Parvathamma v Krushna Chandra,* AIR 1956 Ori 53 : (1955) Cut 454.
706. *Shiv Autar v Hariom,* AIR 2007 MP 130 : 2007 (3) Civil Court Cases 35 (Gwalior Bench).
707. *Jagdish Dutt v Dharma Pal,* AIR 1999 SC 1694 : (1999) 3 SCC 644.
708. *Raynor v Mussoorie Bank,* (1885) 7 All 681; *Abdul Aziz v Abdul Rahim,* AIR 1929 All 291 : (1929) 27 All LJ 757.
709. *Vedaviasa v Madura,* AIR 1924 Mad 365 : (1924) 45 Mad LJ 478.
710. *Abdul Satar v Chi Doe Rhi,* AIR 1927 Rang 45 : (1927) 4 Rang 418.

The proposition that the decree-holder must exhaust remedies against the principal debtor suffers from the vice of total vagueness. The stage when such remedies would be deemed to have been exhausted, will have to be necessarily spelt out. If not, such a proposition would create almost insurmountable difficulties in the way of the decree-holder. The law should not be interpreted so as to deny to the decree-holder, the fruits of his decree.[711] From the scheme of O XXI, rule 49, it would be clear that in execution of a decree obtained against a partner in his personal capacity, the property of the partners cannot be attached, although an order charging the interest of such partner in the partnership property etc contemplated by O XXI, rule 49 can be passed.[712]

[s 47.19.3] Questions Between a Party and his own Representatives.[713]

A question arising between the representatives of one of the parties is also not a question between the parties and their representatives.[714]

[s 47.19.4] Question Between Decree Holder and Successor-in-interest of Judgment Debtor

If the decree was passed against the governing body of the college which was the defendant without seeking leave of the court to continue the suit against the university upon whom the interest of the original defendant devolved and impleading it, such an omission would not make the decree *void ab initio* so as to invoke application of section 47 and entail dismissal of execution. The validity or otherwise of the decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that original defendant absented himself from the proceeding of the suit after appearance, as it had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.[715]

[s 47.19.5] Party Added at the Execution Stage

Party added at the execution stage is not within the section, such as a receiver.[716]

[s 47.19.6] Questions Between a Party and a Stranger

A dispute between a party to the suit or his representatives on the one hand and a stranger (not a purchaser at the execution sale) on the other, is outside the scope of this section. Under the new Explanation II, a purchaser or property at a sale in execution of a decree, though a stranger to the suit, is deemed to be a party to the suit in which the decree has been passed. Before the recent amendment, the view taken was that a suit by the purchaser in court auction of the interest of a co-sharer against the other co-sharers for partition and separate possession

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711. *State Bank of India v Balak Raj Abrol,* AIR 1989 HP 41.
712. *KP Sobhana Ltd v Catholic Syrian Bank Ltd,* AIR 1989 Ker 246.
713. *Annamalai Mudali v Ramaswami Mudali,* AIR 1941 Mad 161 : (1941) Mad 438; *Maganlal v Doshi,* (1901) 25 Bom 631; *Raynor v Mussoorie Bank,* (1885) 7 All 681, 686; *Bhagwati v Banwari Lal,* (1909) 31 All 82 (FB); *Kedar Nath v Arun Chandra,* AIR 1937 All 742 (FB) : (1937) All 921.
714. *Mundyappu Hengsu v Sampa Alvathi,* AIR 1965 Mys 268.
715. *Dhurandhar Prasad Singh v Jai Prakash University,* AIR 2001 SC 2552 : (2001) 6 SCC 534 : 2001 (4) Scale 495.
716. *Satyanarayan Bannerjee v Kalyani Prasad Singh Deo,* (1945) 49 Cal WN 558 : 80 Cal LJ 198.

of that interest does not fall under this section.[717] But, after the amendment, such a purchaser is a deemed party to the suit wherein the decree was passed and the question of delivery of possession of the co-sharer's share in the property would be deemed to be a question relating to execution. Hence the view held in those cases may not henceforth be held to be correct. Where, pending a second appeal, the decree-holder died and his widows were brought on record as his legal representatives, an application by a third person claiming to be the representative of the deceased decree-holder to enforce the decree is not within this section.[718] Proceedings against the garnishee in execution are outside section 47,[719] and so is an order directing execution on the application of a commissioner for recovery of costs directed to be paid by a party.[720] The members of joint Hindu family do not become entitled to file objections under section 47, CPC. Section 47 is a special provision regarding objections in the execution by the parties to the suit. It cannot be extended to the persons, who are not parties to the suit on the basis that they are also members of joint Hindu family. This provision cannot be availed by them and the only option for them is to file a separate suit.[721]

When a party is suing or being sued in a representative capacity (section 11, Explanation VI and O I, rule 8) all persons whom such party represents, are parties. Thus, if a decree is passed against a *karnavan* of a *tarwad* in his representative capacity, all members of the *tarwad* are parties to the suit,[722] in their capacity as members of the *tarwad*.[723] A minor[724] or a lunatic[725] not represented by a proper guardian *adlitem* is deemed not to be a party to the suit. So also, when a decree is passed against a manager of a joint Hindu family, the junior members will be constructively parties to the suit only with reference to disputes relating to joint family properties but not those relating to their individual properties.[726] An objection, however, on this ground cannot be taken in execution proceedings against the minor or lunatic, for an executing court cannot go behind the decree, but the judgment may be attacked in revision or by appeal or by a regular suit.[727] A judgment-debtor, who objected to a sale of property on the ground that he had acquired a fresh title to it, subsequent to the decree, was held not to be a party to the suit in respect of that objection.[728] A *benamidar* is neither a party nor a representative of a party within this section.[729] A dispute between a decree-holder and his assignee is not a dispute between parties to the suit and a separate suit relating to the validity of the assignment is competent.[730] Where in a suit for possession there was no privity of contract between plaintiff-landlord and respondents, it was the case of the plaintiff-landlord that property was let out to respondents. Respondents were also not claiming through the plaintiff-landlord but through the tenant of plaintiff, and at most could be treated to be sub-tenants. The respondents/sub-tenant cannot, in the instant case, be said to be necessary party to suit proceedings and were not required to be joined as defendants in suit. Non-joinder of

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717. *Avidayamma v Paramartha,* AIR 1954 Tr & Coch 299; *Suryanjaneyulu v Venkateswarlu,* AIR 1955 Pat 203.
718. *Kalabathi v Chandra Narain,* AIR 1962 Pat 55; *Manturni v Munni Lal,* AIR 1963 Pat 127.
719. *Bharat Pictures Ltd v UP Chougani,* AIR 1954 Bho 30.
720. *Ramkeshwar Prasad v Babu Girija,* AIR 1957 Pat 501.
721. *Shyam Sunder v Firm Narain Das Bal Krishna,* AIR 2001 All 222.
722. *Marivittil v Pathram,* (1907) 30 Mad 215; *Kamal Kutti v Ibrayi,* (1901) 24 Mad 658.
723. *Narayanan v Theva Amma,* AIR 1927 Mad 1043 : (1927) 51 Mad 46.
724. *Rashid-un-nissa v Muhammad,* (1909) 31 All 572 : 36 IA 198.
725. *Kalipada v Hari,* (1917) 44 Cal 627 : 35 IC 856.
726. *Junnoo Singh v Ram Narain,* AIR 1956 All 580.
727. *Kalipada v Hari,* (1917) 44 Cal 627 : 35 IC 856.
728. *Sham Lal v Amar Prasad,* (1917) 2 Pat LJ 219.
729. *Venkamma v Parthasarathi,* AIR 1926 Mad 1081 : (1926) 51 Mad LJ 381.
730. *Sarab Sukh v Prem Dutt,* AIR 1937 Lah 465 : (1937) Lah 162.

respondent sub-tenant to the suit, will not make decree passed in suit nullity or inexecutable qua sub-tenant.[731]

Where a person, who has been joined as a party to a suit being a co-sharer, claims that the property sold at a court auction in execution of the decree in the suit is in excess of what could be sold and he is resisted not only by the auction-purchaser but also by the decree-holder, an issue relating to execution of the decree arises between such person and the decree-holder, both of whom were parties to the suit. The fact that he was merely joined as proforma defendant will make no difference.[732] By reason of the new Explanation II(a), the auction-purchaser is also a deemed party to the suit.

Summary suit for recovery of money advanced by plaintiff to respondent no 2, a proprietary concern was decreed. The decree was put in execution. A receiver was appointed in respect of properties of respondent no 2. Respondent no 1, a public limited company filed objection to appointment of receiver. The stand of respondent no 1 was that the company has taken over the business of the proprietary concern of respondent no 2. The company is a tenant under the mother of respondent no 2. Since the receiver was appointed without notice to the company, the substantial rights and interest over the properties as tenants were being affected. The revisional court set aside the order of appointment of receiver on ground that on the basis of affidavits it was not possible to say that transfer if any made by respondent no 2 to the company is a fraudulent transfer and the matter has assumed the proportion of a full-blown suit. The revisional court directed the execution court to decide the question of title.

It was held that the order of revisional court was clearly unsustainable on more grounds than one. Respondent no 1 claimed its tenancy from mother of respondent no 2. Her application to be impleaded as a party in the present proceedings was rejected. At no point of time had she pressed a claim of being the owner of the property. In any event, the question of tenancy cannot be decided by the execution court. The executing court cannot go beyond the decree. It is the settled position in law which flows from section 38 of the CPC, except where the decree is a nullity or is without jurisdiction. The crucial expression in section 47 is "all questions arising between the parties to the suit","or their representatives". Order XXI, rule 54 deals with attachment of immovable property, while rule 58 deals with adjudication of claims to, or objections to attachment of property. The case of respondent no 1 was thus not covered by section 47 or O XXI, rule 54 or rule 58.[733]

[s 47.20] Explanations I and II: Deemed Parties to the Suit and Deemed Questions Relating to Execution, Discharge or Satisfaction

Under section 244 of the Code of Civil Procedure, 1882, the High Courts of Allahabad[734] and Calcutta[735] took the view that a plaintiff whose suit has been dismissed and a defendant against whom a suit had been dismissed, ceased to be parties to the suit. On the other hand, the High Courts of Madras,[736] Bombay[737] and later on, Calcutta,[738] held that such persons continued to be parties to the suit for purposes of this section. To resolve this conflict, the

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731. *Balavant N Viswamitra v Yadav Sadashiv Mule,* AIR 2004 SC 4377 : (2004) 8 SCC 706.
732. *Shiv Ram Kehar Singh,* AIR 1934 Lah 105.
733. *TCI Finance Ltd v Calcutta Medical Centre Ltd,* AIR 2005 SC 3654 : (2005) 8 SCC 41.
734. *Kalka v Basant,* (1901) 23 All 346; *Sheo Parshad v Nawab Singh,* (1910) 32 All 321.
735. *Rahimuddi v Loll Meah,* (1902) 29 Cal 696; *Ram Pershad v Jagannath,* (1903) 30 Cal 134.
736. *Ramaswami v Kameshwaramma,* (1990) 23 Mad 361 (FB).
737. *Gawri v Vigneswar,* (1863) 17 Bom 49.
738. *Nirode Kali Roy v Harendra Nath,* AIR 1938 Cal 113 : (1938) 1 Cal 280.

legislature introduced an explanation by which it gave effect to the latter view. However, the further question still remained unresolved, *viz*, whether a claim for possession by a purchaser in court auction held in pursuance of execution of a decree is not one relating to execution of the decree. The recent amendment omits the explanation and brings, in its place, two explanations. The first explanation is a reproduction of the first part of the deleted explanation and the second explanation enacts that such a purchaser is not only to be deemed a party but the question relating to delivery of possession to him is to be deemed to be one relating to execution, discharge or satisfaction of the decree. All objections, therefore, to attachment or sale by the judgment-debtor fall under this section and not O XXI, rule 58.[739] But if an objection is raised by two persons, one of whom is a party, but the other is not, and such an objection is dismissed, the latter could file a suit under O XXI, rule 63.[740] But that is no longer possible as that rule has been omitted by 1976 Amendment Act. The procedure laid down for the execution of the decrees is elaborately dealt with in O XXI of the CPC. Various safeguards were fixed to ensure that if any issue arises during the execution, the same can be dealt with in execution petition proceedings instead of driving the parties to file separate suit for appropriate relief. As can be seen from section 47 of the CPC, all the questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or a satisfaction of the decree are required to be considered by the executing court. Therefore, the requirement of section 47 is that the question should arise between the parties to the suit and the question should relate to the execution, discharge or satisfaction of the decree, subject to the explanation. Therefore, when once the decree is executed or decretal amount is discharged, or the satisfaction is recorded by the court, no further question would arise for determination of the court. That is the reason why deeming clauses were introduced. In Explanation II, the purchaser of the property, at a sale in execution of the decree, was also deemed to be a party to the suit and all questions relating to the decree of the possession of such property was deemed to be a question relating to execution, discharge or satisfaction of the decree.[741]

As the words of sub-section 1 indicate, the words "parties to the suit" need not be given a limited meaning as connoting only parties opposed to each other in the suit. A judgment-creditor and his representative as also a judgment-debtor and his representative are parties opposed to each other.[742] Where, on an application for execution of a money decree obtained against the insolvents and their sons, the joint family property of the judgment-debtors attached before judgment was sought to be proceeded against, the official receiver, who was a party to the decree, prayed for an order to deliver the attached property for administration by him on the insolvency side. The issue between him and the attaching decree-holder, was whether the property was the self-acquired property of the insolvents or was the joint family property of the father and the sons. It was held that the issue was between parties to the suit and related to the execution of the decree and consequently had to be decided by the executing court.[743] On the other hand, the question still remains whether a person against whom the suit is dismissed on the ground of misjoinder, is a party within the meaning of this section. Such a person was improperly impleaded and therefore, was never treated by the court as a party to whom the decree would be binding. In this case, the high court, while deciding the appeal

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739. *Jamini v Kali Prasad*, AIR 1921 Cal 242 : (1921) 34 Cal LJ 477; *Sheikh Kaloo v Bholanath*, (1925) 6 Pat LJ 725; *Mst Madho v Hazari Mal*, AIR 1929 Pat 141 : (1929) 8 Pat 717; *Chettyar Firm v Teo Ee Sanh*, AIR 1927 Rang 273 : (1927) 5 Rang 393.
740. *Thandaran v Unnalachan*, AIR 1934 Mad 435 : (1934) 57 Mad 822.
741. *Chivukula Ranjith Kumar v Santhilal Nemichand*, AIR 2000 AP 113.
742. *Mohd Akhtar Ali v Badrudin*, AIR 1973 Pat 187.
743. *Venkata Suryanarayana v Official Receiver*, AIR 1965 AP 451 : (1965) 2 Andh WR 321.

of the judgment-debtor, had observed that so far as compensation is concerned "it would be opened to the D-1 to seek compensation for the properties in an appropriate proceedings in accordance with law". The Supreme Court, in appeal, did not consider necessary to get into the scope of section 47 of the CPC to decide the controversy. It was observed by the Hon'ble Supreme Court that the words "in an appropriate proceedings" cannot certainly mean execution proceedings of the very same decree, which is but the same proceedings. The said words meant a separate independent proceedings.[744]

In *Krishnappa v Periaswamy*,[745] the Madras High Court held that a defendant, against whom the suit was dismissed on account of misjoinder is not a party. In *Sunamma v Radhobhayi*,[746] the same high court held that a defendant who had been properly impleaded, but as against whom the suit was dismissed because the plaintiff had abandoned his case, as against him is a defendant against whom a suit has been dismissed under section 47. But when a party whose joinder is not proper is exonerated, he ceases to be a party and the claim preferred by him to the property attached in execution does not fall within this section.[747] So also, where sons who were impleaded in a suit for the recovery of a debt of the father, pleaded exemption from liability and were exonerated, it was held that they ceased to be parties to the suit and that section 47 did not apply.[748] In a later case, however, it has been held that whether a party to a suit who has been exonerated continues to be a party within this section when he is struck off on the ground on which he is exonerated and when he is struck off on the ground that his joinder was improper, he ceases to be a party.[749] When a suit is dismissed against the defendant on the ground that he is not concerned with it, he is no longer a party for the purpose of section 47.[750] Where, in a suit on a mortgage, the minor son of the mortgagor who disputed its validity, was directed to be removed, it was held that he still continued to be party and that the binding character of the mortgage could be decided in execution.[751] A person, who is not a party to a promissory note, cannot be properly impleaded as a party in a suit thereon and when on his objection, the suit is withdrawn and dismissed as against him, he is not a party within section 47.[752] In *Abdul v Sundara*,[753] a Full Bench of the Madras High Court held that a person who is not a proper party to the suit, is not a party under section 47 for the purposes of execution, and that it matters not that the court, instead of striking out his name under O I, rule 10(2), has dismissed the suit as against him. A person whose name is struck off the record, is a person whom the court does not regard as a person to be bound by the decree and is, therefore, not a party under section 47.[754] The Allahabad High Court has held that an order exempting a defendant from the suit is equivalent to an order dismissing the suit as against

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744. *MPEB v Central Indian Electric Supply Co Ltd*, (1995) 1 SCC 364.
745. *Krishnappa v Periaswamy*, (1917) 40 Mad 964; followed in *U Kala v Ma Hnin*, AIR 1927 Rang 137 : (1927) 5 Rang 110.
746. *Sunamma v Radhobhayi*, (1918) 41 Mad 418.
747. *Mahalakshmamma v Hanumayya*, AIR 1953 Mad 916 : (1953) 1 Mad LJ 808; *Ramayya v Venkanraju*, AIR 1954 Mad 916; *Ramayya v Venkanraju*, AIR 1954 Mad 864 (FB) : (1954) 2 Mad LJ 176; *Mulkraj v Ramdas*, AIR 1962 J&K 43.
748. *Ramayya v Venkanraju*, AIR 1954 Mad 864 (FB) : (1954) 2 Mad LJ 176(suit against the son on a promissory note executed by the father to which he was not a party).
749. *Kailasa Reddiar v Ponnammal*, (1961) 2 Mad LJ 119.
750. *Suresh Mohan v Shamal Mall*, AIR 1957 Pat 437 : ILR 36 Pat 424.
751. *Mohalinga v Santhangopalakrishna*, AIR 1958 Mad 80 : (1958) 2 Mad LJ 580.
752. *Suryaprakasa Rao v Abdullah Saheb*, AIR 1959 AP 106 : (1958) ILR AP 759.
753. *Abdul v Sundara*, AIR 1930 Mad 817 (FB) : (1913) 54 Mad 81; approving *Krishnappa v Periaswamy*, (1917) 40 Mad 964, and overruling *Sethu v Ramaswamy*, AIR 1926 Mad 484 : (1926) 49 Mad 494, and *Linga v Lakshumanan*, AIR 1926 Mad 687 : (1926) 50 Mad LJ 387; *Kusmi v Sadasi*, AIR 1942 Pat 432 : (1942) 21 Pat 601; *Radha Nath v Ramchandra*, AIR 1954 Cal 367.
754. *Nallaperumal v Sakul*, AIR 1928 Mad 276 : (1928) 54 Mad LJ 721.

him and that if his name is not struck off the record, he is a party to the suit for purposes of the execution.[755] The executing court can decide the question about the non-executability of the decree, or it being a nullity and that this aspect of controversy is covered by the expression "execution, discharge or satisfaction of the decree" used in section 47 of the CPC.[756]

[s 47.21] Representatives

The "representative" in this section includes not only "legal representatives" in the sense of heirs, executors or administrators, but also "representative in interest", that is, any transferee of the decree-holder's interest, or any transferee of the judgment-debtor's interest, who so far as such interest is concerned is bound by the decree.[757] The word "representative" as used in this section means a person in whom the interest of a party to the suit has vested either by an act of the party (i.e., a transferee from the party) or by operation of law, which ordinarily means and includes cases of testamentary and intestate succession upon the death of the party to the suit or upon his insolvency or cases of forfeiture.[758] Even a transferee *pendente lite* is a representative of his transferor within the meaning of sub-section (3) of section 47. One who claims to be a transferee by operation of law, would as well be a representative of the decree-holders interests in the decree and the decree-holder disputes it, the execution court has to resolve the dispute for proceedings with the execution of decree. The word "representative" used in section 47 is obviously much wider than the words "legal representative" as used in section 50 of the CPC.[759] In the case of a pre-emption decree, the right to execute it after the death of the pre-emptor decree-holder, will vest in his legal representative by operation of law. But that would not be the position where the pre-emptor decree-holder assigns his rights in the decree, in favour of a third party since the decree-holder has no right to transfer a pre-emption decree.[760] A surety for the performance of a decree is not a representative of a party within the meaning of this section.[761] It was at one time supposed that a transferee, by judicial sale, could not be a representative,[762] but this view is no longer tenable. He is now a deemed party to the suit to which the decree has been passed. Hence an auction-purchaser is a necessary party in a revision petition filed against an order refusing to stay confirmation of court sale.[763] It was also said that a "representative" is a person who succeeds to the rights of any of the parties after decree;[764] but this is incorrect for a transferee may be bound by the decree on the doctrine of *lis pendens.*[765]

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755. *Seed Ahmed v Raza Hussain,* AIR 1933 All 57 : (1932) 54 All 1031; *Sachitanand v Radhapat,* AIR 1928 All 234 : (1928) 26 All LJ 524
756. *Sunder Theaters v Allahabad Bank,* AIR 1999 All 14.
757. *Ishan Chunder v Beni Madhub,* (1897) 24 Cal 62; *Gulzari Lal v Madho Ram,* (1904) 26 All 447; *Tara Prasanna v Nilmoni,* (1914) 41 Cal 418; *Azhar Hussain v Mohammad Shibli,* AIR 1939 Nag 183 : (1939) Nag 548; *Gauri Dutt v Dawring,* AIR 1934 Pat 413 : (1934) 13 Pat 735; *Bankery Behari Lal v Brij Rani,* AIR 1944 Oudh 314; *Annamalai Mudali v Ramaswami Mudali,* (1941) Mad 1003 : (1954) 1 Mad LJ 501.
758. *Hanmantagouda v Shivappa,* (1940) 42 Bom LR 1123; *Ajodheya Lal v Mahanath Brijkishore,* AIR 1940 Pat 615.
759. *Gangabai Gopal Dass Mohta v Ful Chand,* AIR 1997 SC 1812 : (1997) 10 SCC 387.
760. *Hazari v Zila Singh,* AIR 1970 P&H 215 : (1970) ILR 1 Punj 326 : 71 Punj LR 927.
761. *Raghuber Singh v Jai Indra Bahadur Singh,* 46 IA 228 : 236; *Abdul Ali v Rupchand,* AIR 1953 Hyd 111. See section 145 below.
762. *Gour Sundar v Hem Chunder,* (1889) 16 Cal 335; *Sabhaji v Sri Gopal,* (1895) 17 All 222.
763. *Kariman Bai vs Laxman Lal Ram Pratap,* AIR 1978 Raj 120.
764. *Bankey Behanlal v Brij Rani,* AIR 1944 Oudh 314; *Kameshar Prasad v Ran Bahadur,* (1896) 12 Cal 458.
765. *Sheo Narain v Chunilal,* (1900) 22 All 243; *Gopinath v Sajani,* (1905) 10 Cal WN 240; *Gur Prasad v Ram Lal,* (1899) 21 All 20.

Thus, when at the time of the purchase, the property purchased was under attachment in execution of a decree, the purchaser was regarded as a representative of the judgment-debtor.[766]

ILLUSTRATIONS

(i) *A*, in execution of his decree, obtained on 14 March, an order for the attachment of the property of *B*. The attachment was actually effected on 17 March. But, before this, *B* had obtained an interim order from the court of appeal for stay, a copy of which was received by the court of execution on 16 March. The stay order was vacated on 15 April. *C*, believing that the attachment after the stay order was invalid, purchased the property from *B* on 27 May. *A*, however, continued to prosecute his execution proceeding against *B* and three years later the high court restored the attachment. Held that, as *C* purchased during the pendency of the execution proceedings, he was bound by the order of the high court on the principle of *lis pendens* and must be regarded as a representative of *B*. The question of the validity of the attachment is one that falls to be decided by the court of execution, and it mattered not that the court was called upon to decide the question formally after the judgment-debtor had sold the property.[767]

(ii) *A* filed a suit against *B* and obtained an attachment of the properties before judgment. Then, in execution of an award passed by the Deputy Registrar of Co-operative Societies, the properties were brought to sale and purchased by *C*. Then *A* obtained a decree and proceeded to sell the same property. *C* preferred a claim under O XXI, rule 58 and that having been dismissed, filed a suit under O XXI, rule 63. It was held that he was a representative of the judgment-debtor, and that the petition under O XXI, rule 58 was misconceived, that the suit under O XXI, rule 63 was not maintainable but that it could be converted into a proceeding under section 47.[768] This cannot now be done in view of the omission of sub-section (2) of section 2;rule 63 of O XXI having also been omitted, no such suit is possible and therefore the remedy of *C* is only under this section.

The High Court of Bombay once took the view that a purchaser *pendente lite* was not the representative of his vendor.[769] But this view was dissented from by the High Court of Madras[770] and was contrary to the view taken by the Privy Council[771] and the High Court of Calcutta.[772] At a later date, the High Court of Bombay changed its view and held, in a suit for possession of immovable property, that a transferee of a defendant *pendente lite* was a representative of the defendant.[773] That was also the view of the High Court of Nagpur.[774] According to a Calcutta decision, two tests are to be employed in order to determine whether a particular person is a representative: first, whether any portion of the interest of the decree-holder or of the judgment-debtor which was originally vested in one of the parties, has by the act of the parties or by operation of law vested in the person sought to be treated as a representative, and secondly, if there has been devolution of interest in the person in whose favour it has taken place.[775] A devisee,[776] a legatee,[777] a lessee,[778] and a person taking joint

766. *Sheo Narain v Chunilal*, (1900) 22 All 243; *Gopinath v Sajani*, (1905) 10 Cal WN 240; *Gur Prasad v Ram Lal*, (1899) 21 All 20.
767. *Venkatachalapathi v Venkatappayya*, AIR 1932 Mad 86 : (1931) 55 Mad 495 : 136 IC 306.
768. *Veerayya v Veeraraghaviah*, AIR 1961 AP 298.
769. *Basappa v Bhimangowda*, AIR 1928 Bom 65 : (1928) 52 Bom 208.
770. *Lakshminarayana v Hanumayuya*, AIR 1937 Mad 508.
771. *Parmeshri Din v Ram Charan*, AIR 1937 PC 260 : (1937) 39 Bom LR 1019 : 41 Cal WN 1130.
772. *Nishi Kanta v Kumar Promotha Nath*, (1934) 37 Cal WN 1015 : AIR 1934 Cal 145.
773. *Gopal v Dnyanu*, ILR AIR 1938 Bom 367 : (1938) Bom 649.
774. *Narayan Rao v Chunilal*, AIR 1953 Nag 263 : (1952) ILR Nag 150.
775. *Ajodhya Rao v Hardwar Ray*, (1907) 9 Cal LJ 485; *Naranappa v Khurana*, AIR 1953 Mys 153; *J.L. Arora v ME Periera*, AIR 1977 Del 12.
776. *Bhawani Shanker v Naranshaker*, (1899) 23 Bom 536.
777. *Chettiar Firm v Teo Ee San*, AIR 1927 Rang 273 : (1927) 5 Rang 393.
778. *Nishi Kanta v Kumar Promatha Nath*, AIR 1934 Cal 145; *Murari Lal v Debi Saran*, AIR 1956 All 555.

property under the rule of survivorship[779] are representatives. A sub-lessee is a representative of the lessee and would be bound by a decree for possession passed against the lessee provided the eviction is based on a ground which determines the sub-lease.[780]

In a suit for specific performance of contract, an objection was raised by the judgment-debtor in the execution proceeding that property under the draft sale deed was joint family property and not his exclusive property and that property has been sold to two outsiders. It was held by the Orissa High Court that the objection raised by the judgment-debtor for the first time is not tenable in view of the provisions of section 52 of the Transfer of Property Act, 1882.[781] The principle of law has been explained in the following words:

> Lis Pendens is a doctrine common to the Courts of both law and equity and rests on the foundation that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The law maxim "ut lite pendente nihil innovetur", i.e. during litigation nothing new should be introduced, aims at prevention of multiplicity of suits. Even otherwise, where a decree is for execution of a document, the executing Court has only to determine whether the draft document is in conformity with the terms of the decree. The executing Court having no power to go beyond the decree is not only to act in consonance with the terms of the decree but ensure that the draft document does not go beyond the terms. Thus where a decree does not deal with or has given no direction regarding possession of any third party and/or alienation pendente lite, the executing Court will have no jurisdiction to delve into such aspects.[782]

The legatee of a part of an estate is not a legal representative.[783]

The following are illustrations of persons held to be representatives under this section:

[s 47.21.1] Effect of Death of Decree Holder on Execution

It is true that in the light of the provisions of rule 12 of O XXII, CPC, the provisions of O XXII do not apply to the execution proceedings and the execution cannot abate on the death of the decree holder, but the question is as to whether from this provision, it can be concluded that execution can proceed after the death of the decree holder without substitution of his heirs. The reply will certainly be in the negative. There must be somebody to prosecute the proceedings and the execution proceedings cannot be proceeded till the heirs of the decree holder are substituted. The decree holder, who moved application for execution, died in the year 1982. Her heirs have still not been substituted. The natural question is as to who will prosecute the execution proceedings.

This principle will equally apply to the decree holder. Therefore, the execution cannot proceed till the heirs of the decree holder are brought on record in her place.[784]

[s 47.21.2] Questions Between Legal Representatives of Deceased Decree-holder

In one case, two persons, namely the wife and sister of deceased decree-holder claimed the right to represent him. The proceedings were instituted by the petitioner who claimed to be the heir of the decree-holder alleging herself to be the sister of the decree-holder. The issue, therefore, which has arisen is between two persons claiming a right to represent the

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779. *Peari Lal v Chandi Charan*, (1906) 11 Cal WN 163.
780. *Guru Shiddhaswami v Dakshina Maharashtra Digambar Jain Sabha*, AIR 1953 SC 514 : (1953) SCJ 730.
781. *Doki Surya Prakash Rao v Gopal Krishna Dolai*, AIR 2007 Ori 168.
782. *Doki Surya Prakash Rao v Gopal Krishna Dolai*, AIR 2007 Ori 168, p 170.
783. *Deshpande v Srinivasan*, (1954) Mad 1003 : (1954) 1 Mad LJ 501; *Narsu v Mamda*, (1950) 1 Mad LJ 476.
784. *Makkhan Lal Jaiswal v Executive Engineer, Land Planning Division*, AIR 2002 All 75.

deceased decree holder. Neither the petitioner nor the respondent no 2 is a party to the suit. In such a situation, the dispute about the right of representation is not really between the parties or with even one of the parties to the suit, but between two sets of persons claiming to represent one of the parties, namely, the plaintiff decree holder. It is a dispute about who is the legal representative. In such a situation, the provisions of section 47 are not applicable as that provision applies only to a dispute between parties to the suit. Sub-section (3) of section 47 provides that "where a question arises as to whether any person is or is not the representative of a party such question shall for the purposes of this section be determined by the court". The words of this sub-section make it clear that the determination is to be for the purposes of section 47. The purpose of section 47 is the decision of questions arising between parties to the suit or their representatives and relating to execution discharge or satisfaction of the decree. Now, the question whether a person is a representative of a party when raised by the other party to the suit would be covered under sub-section (1) of section 47 as it would be a decision between the representative of one party on the one hand and the other party on the other hand. But where the dispute between two persons claiming to be the legal representative of one party arises on the death of that party, the dispute is not one between two parties to the suit or between a representative of one party on the one hand and the other party to the suit on the other hand and hence would not be a dispute covered under the scope of section 47(1) or of section 47(3), CPC. Thus, where a judgment-debtor challenges the right of a person claiming to be the representative of the decree-holder, he is challenging the right of such person to execute the decree and a question relating to execution therefore arises between the parties to the suit but a dispute between two persons claiming to be the legal representative of the decree-holder in which the judgment-debtor is not interested would not be a dispute between the parties to the suit or with any party to the suit at all and hence would not be covered under section 47.[785]

[s 47.21.3] Transferee of a Decree

A transferee of a decree, or of the interest of any decree-holder in a joint-decree within the meaning of O XXI, rule 16, is a "representative" of the decree-holder.[786] A transferee from such transferee is also a 'representative' of the decree-holder.[787]

A judgment-creditor who attaches a decree held by the judgment-debtor against another is a "representative" of the judgment-debtor. *A* holds a decree against *B*. *C* obtains a decree against *A*, and, in execution, attaches the decree held by *A* against *B*. *C* is a "representative" of *A* in proceedings in execution of *A*'s decree against *B*.[788]

[s 47.21.4] Transferee of Property from a Judgment-debtor under Money Decree

A obtains a decree against *B* for Rs 5,000. *B* then sells certain property belonging to him to *C*. *C* is not a "representative" of *B*, for the decree is a simple money decree, and does not relate to the specific property sold to *C*.[789]

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785. *Nand Rani v Civil Judge, Junior Division, Pilibhit,* AIR 2004 All 307.
786. *Dwar Buksh v Fatik,* (1899) 26 Cal 250; *Badri Narain v Jai Kishen,* (1894) 16 All 483; *Sheo Prasad v Lall,* AIR 1925 Pat 449 : (1925) 4 Pat 120.
787. *Ganga Das v Yakub Ali,* (1900) 27 Cal 670.
788. *Sah Man Mull v Kanagasabapathi,* (1893) 16 Mad 20; *Krishnan v Venkatapathi,* (1906) 29 Mad 318; *Peary Mohun v Romesh,* (1888) 15 Cal 371. See also O XXI, rule 53(3).
789. *Madho Das v Ramji,* (1894) 16 All 286; *Shivram v Jivu,* (1889) 13 Bom 34; *Rashbehary v Surnomoyee,* (1881) 7 Cal 403; *Mst Bhampul v Harbuksh Singh,* (1912) PR No 64, p 242 (gift by judgment-debtor of his entire property).

[s 47.21.5] Pre-emption Decree

A obtains a decree for pre-emption and deposits the requisite amount and then transfers the lands to *B*. A suit by the transferee for recovery of possession of lands is not barred as the decree for pre-emption is personal to the decree-holder and the transferee is not his representative.[790]

[s 47.21.6] Decree for Specific Performance

An application for possession of properties in execution of a decree for specific performance of an agreement to sell, obtained against the transferee of the vendor, falls within this section as the transferee is the representative of the vendor with respect to the liability of the latter to deliver possession.[791]

[s 47.21.7] Transferee from Judgment-debtor of Property Under Attachment

A purchaser, lessee, or mortgagee, from a judgment-debtor, of property belonging to the judgment-debtor and attached in execution of a decree against him, is the "representative" of the judgment-debtor, within the meaning of this section, for the property being under attachment at the date of the purchase, lease or mortgage, the purchaser, lessee or mortgagee is bound by the decree so far as the interest transferred to him is concerned.[792] But where the judgment-debtor enters into a contract to sell property before it is attached, the transferee from him pursuant to the contract is not his representative.[793] Where in execution of a money decree, the judgment-debtor was arrested, and he was released on his executing a bond securing immovable properties, an application by the decree-holder to enforce the bond as against a person who had obtained a subsequent mortgage from the judgment-debtor fails within this section as he is a representative of the latter.[794]

[s 47.21.8] Purchaser of Judgment-debtor's Equity of Redemption Under a Private Sale

A obtains a decree against *B* for sale of certain property, mortgaged to him by *B*. After the date of the decree, *B* sells his equity of redemption in the mortgaged property to *C*. *C* is a "representative" of *B*, the judgment-debtor, for the property having been purchased after it was affected by *A*'s mortgage-decree, *C* is, to the extent, bound by *A*'s decree. Hence, any question relating to the execution of *A's* decree, and arising between *A* and *C*, must be determined by the court executing *A*'s decree, and not by a separate suit,[795] and even so if the execution is of the personal decree passed under O 34, rule 6.[796] The same procedure would apply even if B had transferred his interest in the property to *C* during the pendency of the mortgage suit and before the passing of the decree.[797]

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790. *Ramsingh v Gaindaram*, AIR 1953 P&H 163 : (1954) ILR Punj 15.
791. *Subhodh Kumar v Hiramoni*, AIR 1955 Cal 267.
792. *Gur Prasad v Ram Lal*, (1899) 21 All 20 (sale); *Matheuson v Gobardhan*, (1901) 28 Cal 492 (lease); *Paramananda v Mahabeer*, (1897) 20 Mad 378 (mortgage); *Kuppana v Kumara*, (1911) 34 Mad 450 (sale); *Narayenaswami v Seshappier*, (1907) 17 Mad LJ 321 (mortgage); *Lalji Mal v Nand Kishore*, (1897) 19 All 332; *Ishar Das v Parma Nand*, (1925) 6 Lah 544 : AIR 1926 Lah 134 (mortgage); *Manicka Chettiar v Rajammal*, 1955 (2) Mad LJ 357 : 1955 Mad WN 664. See section 64.
793. *Varughese v Ouseph Lonan*, AIR 1952 TC 467 : (1952) TC 201.
794. *Subramanya v Esakki Madan*, AIR 1953 TC 364.
795. *Madho Das v Ramji*, (1894) 16 All 286.
796. *Samhut Rai v Sambaran Rai*, AIR 1944 Pat 105 : (1943) 22 Pat 678.
797. *Sheo Narain v Chunilal*, (1900) 22 All 243.

[s 47.21.9] Purchaser of Judgment-debtor's Equity of Redemption at a Judicial Sale

A obtains a decree against *B* for the sale of certain property mortgaged to him by *B*. Before the property could be sold in execution of *A*'s decree, *X*, who holds a money decree against *B*, brings *B*'s equity of redemption in the mortgaged property to sale in execution of his decree, and it is purchased by *C*. *C* is a "representative" of *B*, and judgment-debtor, for the property having been purchased after it was affected by *A*'s mortgage-decree, *C* is, to that extent, bound by *A*'s decree. Hence, any question relating to the execution of *A's* decree, and arising between *A* and *C*, must be determined by the court executing *A*'s decree and not by a separate suit.[798] *A* obtained a decree for maintenance and it was charged on property *X*. In a sale in execution of the decree, *B* became the purchaser. *X* was again sold, in execution for recovery of subsequent maintenance, and purchased by *A*. *A*, having been obstructed in taking possession, filed a suit against *B* in ejectment. It was held that it was barred, as *B* was a representative of the judgment-debtor and the dispute fell within section 47.[799] But where the properties were sold in court auction prior to the suit on a mortgage and purchased by the defendants, a suit by the purchaser in execution of the mortgage decree to eject him is not barred by section 47.[800]

[s 47.21.10] A Purchaser of Property from a Party to a Suit in Which an Injunction has Been Granted Affecting Such Property is not a "Representative" within the Meaning of this Section

A obtains a decree against *B*, restraining B by an injunction from obstructing him in the exercise of his right of way to his land over *B*'s land. *A* then sells his land to *C*. If *B* obstructs *C* in the enjoyment of the right of way, *C*'s proper remedy is by way of suit against *B* and not in execution under this section. The reason is that an injunction does not run with the land, and *C* cannot, therefore, claim the benefit of the decree against *B*.[801] Note that *C* is not a transferee of the decree, but of the property only.[802]

[s 47.21.11] Official Assignee

The Official Assignee claiming property on behalf of the creditors of an insolvent judgment-debtor, is not a "representative" of the judgment-debtor within the meaning of this section.[803] Nor is a receiver appointed under O XL, rule 1 the representative of the judgment-debtor or decree-holder, as the case may be, as the title of none of parties to the suit is transferred to him, there being only change of possession.[804] In such a case, he is really a third party making a claim though for some purposes he would be entitled as representing the judgment-debtor to litigate matters under section 47.[805] An application by an official receiver on the insolvency of the

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798. *Gulzari Lal v Madho Ram*, (1904) 26 All 447; *Ishan Chunder v Beni Madhub*, (1897) 24 Cal 62; *Radha Kishun v Hem Chandra*, (1907) 11 Cal WN 495; *Mahimuddin v Pamu Sahani*, AIR 1952 Ori 64.
799. *Tirugnana Sambanda Mudaliar v Meenakshi Ammal*, AIR 1963 Mad 144.
800. *Kedarnath v Sheo Narain*, AIR 1957 Pat 408.
801. *Jamsetji v Hari Dayal*, (1908) 32 Bom 181.
802. See notes to section 50, "Decree for injunction".
803. *Kasi Prasad v Miller*, (1885) 7 All 752; *Grey v Hazari Lal*, (1908) 30 All 486; *Sardarmal v Aranvayal*, (1896) 21 Bom 205; *Frederick Peacock v Madan Gopal*, (1902) 29 Cal 428; *Official Assignee of Madras v Aiyu*, AIR 1925 Mad 688 : (1925) 48 Mad LJ 530; *Re Frank Morton Fisk*, AIR 1956 Cal 656 : 60 Cal WN 61.
804. *Satyanarayan Bannerjee v Kalyani Prasad Singh Deo Bahadur*, AIR 1945 Cal 387 : (1945) 49 Cal WN 558 : 80 Cal LJ 198.
805. *Mohitosh v Satish*, AIR 1932 Cal 203 : (1931) 35 Cal WN 971; *Official Receiver v Imperial Bank of India*, AIR 1935 Mad 151 : (1935) 58 Mad 403.

judgment-debtor to have a sale in execution of a decree set aside is made by him as a representative of the judgment-debtor.[806] Whether such a receiver is a representative of the judgment-debtor or not, is a question to be determined on the facts of each case.[807] A receiver appointed under O XL, is not a representative of any party to the suit in which he has been appointed receiver.[808] The Custodian of Evacuee Properties is a representative of the evacuees and is entitled to apply under section 47 to set aside a, sale of his interest in execution of a decree on the ground that it is prohibited by the Administration of the Evacuee Property Act, 1950 and is void.[809]

[s 47.21.12] Purchaser from a Judgment-debtor under O XXI, Rule 83

The High Court of Allahabad has held that a purchaser from a judgment-debtor under O XXI, rule 83, is a "representative" of the judgment-debtor within the meaning of this section.[810] *A* obtains a decree against *B*. In execution of the decree certain property belonging to *B* is attached and an order is made for the sale thereof. *B* then obtains a certificate from the court under O XXI, rule 83, to sell the property by private sale, and the property is sold to *C* in pursuance of the certificate. *C* is a "representative" of *B* within the meaning of this section.

[s 47.21.13] Purchaser from a Judgment-debtor of an Occupancy Holding

A purchaser from the judgment-debtor of an occupancy holding not transferable by custom is a "representative" of the judgment-debtor. If the holding is sold in execution of the decree against the judgment-debtor, and he is dispossessed by the auction-purchaser, he may apply for possession under this section, and not under O XXI, rule 100.[811] In *Tulsiram v Lakshmichand*,[812] the occupancy right of a tenant *A* was sold in execution of a decree and purchased by *X*. Then the landlord *B* pre-empted and the sale was set aside on his depositing the sale amount. Subsequently, *B* attached and withdrew the amount deposited by *X* into court in execution of a rent decree obtained against *A*. *X* is entitled to recover the amount from *B* in a separate suit as he had ceased to be representative of *A* when *B* attached the amount.

[s 47.21.14] Purchaser from a Judgment-debtor of a Portion of a Holding

A purchaser from a judgment-debtor of a portion of a holding, is, so far as his interest is concerned, bound by the decree for rent obtained against the judgment-debtor under section 148A of the Bengal Tenancy Act, 1885 and by the sale in execution of that decree. He is, therefore, a "representative" of the judgment-debtor, and if he is dispossessed by the auction-purchaser, he may apply for possession under this section, but not under O XXI, rule 100.[813]

[s 47.21.15] Stranger Purchaser at a Court Sale and a Purchaser at a Revenue Sale

A purchaser at a court sale in execution of a decree of a civil court, who is a stranger, was held to be not a representative either of the judgment-debtor or the decree-holder.[814] So also, a

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806. *Dineshchandra v Munshi Jahanali*, AIR 1935 Cal 503 : (1935) ILR 62 Cal 457; *Narasimhacharyudu v Sambayya*, AIR 1960 AP 131.
807. *Official Receiver, Guntur v Amara Seshayya*, AIR 1941 Mad 262.
808. *Surendra Nath Chatterjee v Surendra Nath Basu*, AIR 1951 Pat 451.
809. *Durga Prasad v Custodian of Evacuee Property*, AIR 1960 P&H 341 (FB) : (1960) 2 Punj 159.
810. *Gobardhan v Bishan*, (1901) 23 All 116.
811. *Panchratan v Ram Sahay*, (1918) 3 Pat LJ 579.
812. *Tulsiram v Lakshmichand*, AIR 1953 Ngp 334 : (1952) ILR Nag 89.
813. *Bhikhia v Biri Bihari*, (1917) 2 Pat LJ 478; *Surendra Narain v Gopi*, (1905) 32 Cal 1031; *Krishna Chandra v Dina Nath*, AIR 1928 Cal 94 : (1928) 54 Cal 1064.
814. See *Maruti v Krishna*, AIR 1967 Bom 34 : (1966) ILR Bom 154 : 67 Bom LR 534.

purchaser at a sale, held by a revenue court.[815] Now under Explanation II, such a purchaser is deemed to be a party to the suit and all questions relating to delivery of possession of him are questions relating to execution to be determined under this section.

[s 47.22] Objections to Attachment or Sale by Parties or their Representatives

Objections to attachment made by a judgment-debtor or his representative must be distinguished from those raised by either of them on behalf of a third person. In the former case, the objection falls under this section and a separate suit has been held to be barred.[816] The objection could be taken before the sale is confirmed[817] but not after it is confirmed.[818] In the latter case, the objection is in effect by a third person and falls under O XXI, rule 58. Until recently, the position was that such an objector could proceed either by an application under O XXI, rule 58 or by a suit. But with the deletion of rule 63 of O XXI by the Amendment Act, 1976, such a suit is no longer possible and therefore he has to file an application under O XXI, rule 58 and such an application would be disposed of according to the provisions of that rule as amended by the Amendment Act, 1976.

If the judgment-debtor objects that the property is not liable to attachment or sale[819] or that the decree-holder, in connivance with a court peon, has misappropriated part of the property attached,[820] the objection is by the judgment-debtor on his own behalf, and it must be decided by the executing court under this section. Similarly, if property is attached as property of a deceased judgment-debtor in the hands of his legal representative, and the latter objects that it is not the property of the deceased, but his own property, the case falls under this section for the legal representative is not setting up *a jus tertii*.[821] A person against whom a suit is dismissed, is still a party to the suit under Explanation I and an objection to attachment by

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815. *Hanmantagauda v Shivappa*, (1940) 42 Bom LR 1123.
816. *Rahim Buksh v Kishen Lal*, AIR 1939 All 368; *Pannalal v Mst Naraini*, AIR 1952 SC 170 : (1952) SCR 544 : (1952) SCJ 211 : (1953) SCA 871; *Karimunnissa v Alfuddin*, AIR 1960 MP 76; *Prafulla Chandra v Calcutta Credit Corp*, AIR 1965 Assam 21.
817. *Baleshwar v Ram Ranvijaya Prasad Singh*, AIR 1947 Pat 46 : (1947) 26 Pat 201; *Ram Chander v Sarupa*, AIR 1939 Lah 113 : (1939) ILR Lah 103; *Pokhar Singh v Tular Ram*, AIR 1935 All 1016; *Adit Prasad v Sheo Mangal*, AIR 1967 All 258.
818. *Baleshwar v Ram Ranvijaya Prasad Singh, supra*; *Firm Wasti Ram Gurditta Mal v Mst Ganeshi*, AIR 1939 Lah 405 : (1939) ILR Lah 116; but see *Ram Chand v Shamas Din*, AIR 1938 Lah 690.
819. *Jaga Tarini Dasi v Sarajranjan Pal*, AIR 1941 Cal 357 : (1941) 1 Cal 336 : (1940) 45 Cal WN 323 : 74 Cal LJ 169; *Trimbak v Govinda*, (1895) 19 Bom 328; *Majed v Raghubar*, (1900) 27 Cal 187; *Gohar v Kasi*, (1900) 27 Cal 415; *Ajodhia v Mahadeo*, AIR 1927 All 574; *Brown v Hanson*, AIR 1933 Bom 185 : (1933) 35 Bom LR 360; *Lakku v Radha Bai*, AIR 1952 Bom 438; *Bajnath Mukherjee v Chota Nagpur Banking Assn*, ILR 27 Pat 399; *Jagunandan Prasad v Bhagwat Mahton*, AIR 1955 Pat 350 : ILR 34 Pat 366; *Pappayamma v Rama Raju*, AIR 1962 Ori 69.
820. *Gajadhar v Babu Arjun*, (1916) 1 Pat LJ 558.
821. *Sant Ram v Atma Singh*, AIR 1948 P&H 8; *Amiya Prabha Das v Jyoti Bhusan Ghosh*, AIR 1947 Cal 364 : (1946) 50 Cal WN 548 : 82 Cal LJ 131; *Sethchand v Durga*, (1890) 12 All 313; *Panchanun v Rabia Bibi*, (1890) 17 Cal 711 (FB); *Kali Charan v Jewat*, (1906) 28 All 51; *Vengapayyan v Karimpanakal*, (1903) 26 Mad 501; *Madhusudan v Gobinda*, (1900) 27 Cal 34; *Murigeya v Hayat Saheb*, (1899) 23 Bom 237; *Gokulsing v Kissensing*, (1910) 34 Bom 546; *Umeshananda v Mohendra*, (1911) 14 Cal LJ 337; *Ajo Koer v Gorak Nath*, (1914) 19 Cal WN 517; *Dull v Shit Lal*, (1917) 39 All 47; *Bhagwant Ram v Nizam Din*, AIR 1921 Lah 173 : (1921) 3 Lah LJ 406; *Arunachellam v Maung San Ngwe*, AIR 1924 Rang 323 : (1924) 2 Rang 168; *Ishar Das v Parma Nand*, (1925) 6 Lah 544 : AIR 1926 Lah 134; *Mashwe v Maung Ba*, AIR 1928 Rang 29 : (1927) 5 Rang 659; *Naida v Rajendra*, (1928) 48 Cal LJ 551; *Maria v Pana*, AIR 1928 Bom 534 : (1928) 30 Bom LR 1447; *Charusilla Dasi v Sukhdev*, AIR 1935 Cal 14 : (1935) 60 Cal LJ 251; *Dinbai v Bamansha*, AIR 1934 Bom 296 : (1934) 58 Bom 513; *Swaminathan v Somasundaran*, AIR 1938 Mad 731 : (1938) ILR Mad 1080; *Ajo Koer v Gorak Nath*, 481; *Fakir v Giribala*, 22 Cal LJ 305; *Pappayamma v Rama Raju*, AIR 1962 Ori 69.

him will fall under this section.[822] So also, when on a debt due by a father, a decree is passed against the sons as his legal representatives, an objection by them in execution that the decree was not binding on them because the debt was illegal or immoral is one to be decided in execution.[823] But if the objection is made by the judgment-debtor or his representative, not on his own behalf, but on account of a third party as trustee,[824] or as *shebait* of an idol,[825] or on the ground that the property is *wakf*,[826] the objection is under O XXI, rule 58, and not under this section. Where a decree for sale of mortgage property is passed against a mortgagor and on his death, his legal representative is brought on record, an objection that the mortgagor had no title to the property, does not fall under this section, as the objection relates to the validity of the decree.[827] A suit on a mortgage was filed after the death of the mortgagor, against persons alleged to be his legal representatives and they pleaded that the properties belonged to them in their own right. The plea was overruled, and a decree passed. A subsequent suit by them challenging the validity of the decree was held not to be barred as the question did not relate to execution, discharge or satisfaction of the decree.[828] In cases where the mortgagee decree-holder or his assignee had acquired the equity of redemption in an item of the mortgaged properties after the decree, there is a conflict of opinion as to whether the mortgage decree is *pro tanto* satisfied. The preponderance of authority is that it is not, and the equities between him and the judgment-debtors can only be determined in a separate suit.[829] So also an objection that the debt in respect of which decree was obtained against the father (who had died subsequent to the passing of the decree) did not exist, as a fact, did not, in the special facts of that case, fall under this section.[830]

In a money suit for realization of bank loan, a decree was passed in favour of the bank. In the execution proceeding filed by the bank, the properties of the judgment-debtors were put to auction. In course of the execution proceeding, the judgment-debtors filed objection that the delay on the part of the decree-holder in selling the property has fetched lesser price causing loss to the judgment-debtors. However, the judgment-debtors offered other properties which, if sold, would satisfy the decree. It was held by the Orissa High Court that the dwelling-house of judgment-debtors will not be sold, and steps be taken to consider other properties offered for sale.[831]

When a judgment-debtor seeks the setting aside of a sale by invoking O XXI, rule 90 of the CPC, he is accepting the factum of the sale or the reality of the sale and is only questioning it on the basis of the material irregularities referred to in O XXI, rule 90. In a case where the judgment-debtor is proceeding under section 47 of the CPC, he attacks the sale either on the

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822. *Anant v Brijmohan,* AIR 1956 Ngp 93 : (1955) ILR Nag 72.
823. *Sethuram v Jaychand,* AIR 1962 Raj 136.
824. *Chokkalingam Chettiar v Raman Chettiar,* AIR 1946 Mad 209 : (1946) ILR Mad 707; *Mangeya v Hayat Saheb,* (1899) 23 Bom 237; *Bhudrudin v Abdul Rahim,* (1908) 31 Mad 125; *Indomati v Jogashar,* (1906) 28 All 644; *Roop Lal v Bekani,* (1890) 15 Cal 437.
825. *Kartick Chandra v Ashutosh,* (1912) 39 Cal 298; *Upendranath v Kusum,* (1915) 42 Cal 440; *contra Shah Naim v Girdhari,* AIR 1927 Oudh 120 : (1927) 2 Luck 145.
826. *Sheikh Nazir v Muhammad,* AIR 1922 Pat 196 : (1922) 1 Pat 637.
827. *Jatru Pahan v Ambikajit Prasad,* AIR 1946 Pat 214 : (1954) 24 Pat 741; *Hamidgam v Amma Sahib,* AIR 1941 Mad 898; *Ramaswami v U Tun Tha,* AIR 1940 Rang 161; *Venkate Gowda v Basava Gowda,* AIR 1952 Mys 3 : (1952) ILR Mys 147; *Daud Beg v Mahammudi Begum,* AIR 1952 All 881; *Devasia Philipose v Harihara Iyer,* AIR 1954 TC 118 : (1952) TC 275.
828. *Ramgopal v Ajodhia Prasad,* AIR 1953 All 281 : (1951) ILR 1 All 545.
829. *Shrinivasacharyulu v Venkatavaradacharyulu,* AIR 1946 Mad 155 : (1946) ILR Mad 120; *Sheo Narain Sah v M Deolodhan Kuer,* AIR 1948 Pat 208 : (1946) 26 Pat 97.
830. *Lakshamadu v Ramudu,* AIR 1939 Mad 867 : (1940) ILR Mad 123.
831. *Hari Mohan Behera v State Bank of India,* AIR 2007 Orissa 96 : 2007 (1) Ori LR 337.

ground that it is void, or that it is voidable on grounds of illegality, not covered by O XXI, rule 90 of the CPC. Where O XXI, rule 90 applies, section 47 is not available.[832]

If a decree is passed against the *Karnavan* as the manager of a *Malabar Tarwad*, the executing court has jurisdiction to determine the decree-holder's right to execute the decree against the other members of the *Tarwad*.[833]

[s 47.23] Objections to Attachment by Sale by Third Parties

If the objection was made by a third party, the position, until the Amendment Act, 1976 was passed was that he could proceed either under O XXI, rule 58 or by a suit[834] but the claim could not be dealt with under this section.[835] Now a suit is not possible and the claim by such a third party would be under O XXI, rule 58 as amended.[836]

[s 47.24] Execution Purchaser

There has been a large body of case law relating to questions arising after the sale of the judgment-debtor's property in which the auction purchaser was concerned. These questions fell into two classes:

(a) where questions arose between the decree-holder on the one hand and the judgment-debtor on the other hand, the auction-purchaser being only interested in the result; and

(b) where questions arose between the auction-purchaser on the one hand and a party to the suit or his representative on the other hand.

As regards (a), there was no difficulty since these were questions between the parties to the suit and therefore they fell under this section.[837] It was well-settled that as between the judgment-debtor and the decree-holder, an objection to the sale in execution could only be taken in execution and the old section 244, corresponding to this section, was held to prohibit a suit by a party or his representative against an auction-purchaser.[838] The leading case on the subject was *Prosunno Kumarv Kali Das.*[839] A judgment-debtor, therefore, can seek to set aside an execution sale:

(i) on deposit under O XXI, rule 89;

(ii) for material irregularity under O XXI, rule 90;

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832. *G Rajarethna Naikan v PN Parameswara Kurup*, AIR 1997 Ker 361; *Mangal Prasad v Krishan Kumar Maheshwari*, AIR 1992 SC 1857.
833. *Pandayappa v Chennappa*, AIR 1940 Mad 165.
834. *Kanhaya Lal v National Bank of India*, (1913) 40 Cal 598 : 40 IA 56; *Sundar Singh v Ghasi*, (1896) 18 All 410; *Raghunath v Sarosh*, (1899) 23 Bom 266.
835. *Siveshwar Prasad v Lal Harnarain*, AIR 1945 Pat 116 : (1944) 23 Pat 760; *Ramanathan v Levvai*, (1900) 23 Mad 195; *Peari Lal v Allahabad Bank*, AIR 1926 All 244 : (1926) 24 All LJ 334.
836. See notes above, "Objections by parties or their representatives".
837. *Bhagwat Narain v Mahadeo Prasad*, AIR 1942 Pat 244 : (1941) 21 Pat 233; *Basti Ram v Fattu*, (1886) 8 All 146 (FB); *Dhani Ram v Chaturbhuj*, (1899) 22 All 108.
838. *Bhagwat Narain v Mahadeo Prasad*, AIR 1942 Pat 244 : (1941) 21 Pat 233; *Nadarmuni v Veerabhadra*, (1911) 34 Mad 417; *Gokul Singh v Kissen Singh*, (1910) 34 Bom 546; *Mohan Singh v Punchanan*, AIR 1927 Cal 106 : (1927) 53 Cal 837.
839. *Prosunno Kumar v Kali Das*, (1892) 19 Cal 683 : 19 IA 166; *Sadho v Abhenandan*, (1904) 26 All 101; *Gaya Prasad v Randhir Singh*, (1906) 28 All 681; *Mathura Das v Lachman*, (1902) 24 All 239; *Haribar Kanta v Rama Pandu*, (1909) 33 Bom 698; *Bhagwat Narain v Mahadeo Prasad*, supra; *Murlidhar Bhattar v Mahendra Nath Das*, AIR 1949 Ori 73 : (1949) 1 Cutt 269; *Mst Shabbir Bandi v Mohammad Hashim*, AIR 1944 Oudh 43.

(iii) for fraud under O XXI, rule 90; and

(iv) for other reasons, e.g., that the sale is illegal or a nullity for want of notice under O XXI, rule 22,[840]

or under O XXI, rule 66;[841]

(v) or that the judgment-debtor has been adjudged insolvent and the decree gives no charge upon land,[842]

(vi) that the property is not liable to attachment and sale;[843]

(vii) that the sale is in contravention of O XXXIV, rule 14;[844] that the sale was not warranted by the terms of the decree;[845] as for example where the properties themselves were sold, though the decree directed only the sale of mortgage, rights over them;[846]

(viii) that the property sold did not belong to the judgment-debtor;[847] that the decree-holder had purchased without leave of the court;[848]

(ix) that the decree had been adjusted;[849]

(x) that the sale is invalid having been held after a stay order;[850]

(xi) that the property sold was that of the decree-holder instead of the judgment-debtor;[851]

(xii) that the receiver had purchased the property in court sale without the sanction of the court.[852]

An order setting aside an auction sale for non-payment of deposit as provided by O XXI, rule 85, is one under this section whether the auction-purchaser is the decree-holder or a stranger.[853] Where the auction-purchaser deposited the balance amount under O XXI, rule 85, but failed to lodge the receipt therefore, and the court ordered resale, an application for review

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840. *Bhau Kumar v Lachmi Kant,* AIR 1941 Pat 566; *Imam-un-nissa v Liakat Hussain,* (1881) 3 All 424; *Sahdeo v Ghasiram,* (1894) 21 Cal 19; *Rajagopala v Ramanujachariar,* AIR 1924 Mad 431 : (1924) 47 Mad 288.
841. *Dada v Jayachand,* AIR 1958 Bom 278 : (1958) ILR Bom 633.
842. *Anatharama v Vettah,* (1916) 30 Mad LJ 611.
843. *Mst. Shabbir Bandi v Mohammad Hashim,* AIR 1944 Oudh 43; *Ram Gopal v Khiali Ram,* (1844) 6 All 448; *Basti Ram v Fattu,* (1886) 8 All 146; *Durga Charan v Kali Prasanna,* (1899) 26 Cal 727.
844. *Ashuttosh v Behari Lal,* (1908) 35 Cal 61; *Izhuvan v Izhuvan,* (1907) 30 Mad 313; *Bhaichand v Ranchhodas,* AIR 1921 Bom 285 : (1921) 45 Bom 174.
845. *Ganga Devi v Ram Prasad,* AIR 1925 All 551 : (1925) 23 All LJ 558.
846. *Merla Ramanna v Nallapa Raju,* AIR 1956 SC 87 : (1955) 2 SCR 938; *Marrat v Shivaji & Sons,* AIR 1930 PC 86; *Venkatachalam v Perumal,* (1912) Mad WN 44.
847. *Shabbir Bandi v Mohammad Hashim, supra*; *Gokulsing v Kissensing,* (1910) 34 Bom 546.
848. *Genu v Sakharam,* (1898) 22 Bom 271; *Durga v Balwant,* (1901) 23 All 478; *Vinayaghava v Venkata,* (1893) 16 Mad 287; *Bank of Upper India v Fitzholmes,* AIR 1928 Lah 666.
849. *Dhani Ram v Chaturbhuj,* (1900) 22 All 86.
850. *Mohanlal v Shibdhari,* AIR 1922 Pat 146; *Sarat Chandra Gayan v Port Canning and Land Development Co Ltd,* AIR 1946 Cal 45 : 80 Cal LJ 35; *Superior Bank v Budh Singh,* AIR 1924 All 698 : (1924) 22 All LJ 413.
851. *Hafez Uzir v Nasimannessa,* AIR 1928 Cal 865.
852. *Govindarajulu v Sivarama,* AIR 1953 Mad 822 : 1952 (2) Mad LJ 294; *Aravindaksha v Lakshminarayana,* (1956) TC 1113.
853. *Nandlal v Siddiquan,* AIR 1957 All 558; *Siribhan v Jit Singh,* AIR 1956 Pepsu 77.

of such order is within this section.[854] In general, a party can attack an execution sale only in execution proceedings and not in a separate suit. A person against whom the suit is dismissed is a party and a suit by him to set aside an execution sale is barred.[855]

The section is very wide, and in a sense, all questions relating to execution, discharge or satisfaction of the decree that arise between the decree-holder and the judgment-debtor fall under this section. The section, however, must be so construed as not to render, redundant, the other provisions of the CPC, e.g. rules 89, 90, and 91 of O XXI.[856] It has been held that an application by the decree-holder for confirmation of the sale on the judgment-debtor's failure to carry out the terms of the arrived at in a proceeding under O XXI, rule 90 is an application under this section.[857] But an order allowing an application by the decree-holder under O XXI, rule 66 for reduction of upset price in a sale does not.[858] An application by the judgment-debtor to set aside a sale on the ground of failure to affix the sale proclamation in any part of the property, proclaimed for sale, falls under this section and not under O XXI, rule 9.[859] Broadly stated, when a sale in execution of a decree whose validity is not questioned, is attacked on the ground that it is not merely irregular but illegal and void, that must be done by a proceeding under this section and not in an independent suit.[860] As regards (b), i.e., questions between the auction-purchaser on the one hand and a party to the suit or his representative on the other hand cases fell into two classes:

(i) cases where the decree-holder himself was the purchaser and the judgment-debtor claimed to set aside the sale; and

(ii) cases arising between the auction-purchaser and the judgment-debtor and where the former sought to recover possession of the property purchased by him.

In such cases, the property may have been purchased by the decree-holder with the leave of the court under O XXI, rule 72 or by a stranger. Even where the decree-holder himself was the purchaser, two questions used to arise, *viz*, whether for the purpose of recovering possession of the property the decree-holder purchaser was a "party"' to the suit within the meaning of this section or whether he had ceased to be a party to the suit by reason of his purchase and whether the question as to delivery of possession to him was one relating to "execution, discharge or satisfaction". In such a class of cases, it was held that so far as the judgment-debtor was concerned, he had to proceed by an application under this section.[861] But as regards the judgment-creditor purchaser there was a conflict of opinion on both the

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854. *Veerayya v Tirichirapalli District Board,* AIR 1961 Mad 409.
855. *Ramanna v Nallaparaju,* supra, *Kuttikrishnan Nair v Madhavan Nair,* AIR 1957 Ker 382; *Shiva Pujan v Baban Lal,* AIR 1959 Pat 13.
856. *Harindra Nath v Bhola Nath,* AIR 1937 All 407.
857. *Ram Kalpa Kundu v Kasi Nath Dutta,* AIR 1950 Cal 582 : (1949) 54 Cal WN 690; *G Raja Rethna Naikkan v PN Parmeshwara Kurup,* AIR 1997 Ker 361.
858. *Raghunath Raju v Kasim Khan,* AIR 1966 AP 152.
859. *Iyer v Kunhamuthammad,* AIR 1965 Ker 99; *Narayanappa v Akkulappa,* AIR 1965 AP 215.
860. *Marla Ramanna v Nallaparaju,* AIR 1956 SC 87 : (1952) SCR 938; *Rajagopala Iyer v Ramanujachariar,* AIR 1924 Mad 431 (FB); *Lakhu v Radhabai,* AIR 1952 Bom 438 : (1952) ILR Bom 1056; *Ramlal v Rannia,* AIR 1947 Pat 454 (FB); *Bansi Sao v Debi Prasad,* AIR 1961 Pat 508; *Cheria Chacko v Kumaran Kesavan,* AIR 1963 Ker 258, explaining the observations in *Nanibai v Geeta Bai,* AIR 1958 SC 706 : (1958) SCJ 925. As to the application of this section, when the sale is attacked as void on the ground that the decree itself is void, see notes "To what decree the section applies" above.
861. *Ganapathy v Krishnamachariyar,* (1918) 45 IA 54 : 60; *Ramabhadra v Kadiryarwami,* AIR 1922 PC 252 : 48 IA 155.

points. The High Courts of Madras,[862] Calcutta[863] and Nagpur[864] held that the decree-holder retained his character as a 'party' to the suit though he was also the purchaser and the question as to delivery of possession to him was one which related to execution of the decree. The High Court of Madhya Pradesh also took the view that dispute as to possession between the decree-holder auction-purchaser and the judgment-debtor was one falling within this section[865] and so also such a question between the decree-holder auction purchaser and a transferee from the judgment-debtor subsequent to attachment.[866]

According to the other view, which was held by the Allahabad,[867] Patna,[868] Bombay,[869] Lahore,[870] and Rangoon[871] High Courts, a decree-holder-purchaser stood on the same footing as a stranger purchaser so that he could proceed either under O XXI, rule 95 or by a suit for possession. The reasoning was that either the question of possession to such a purchaser was not one relating to execution[872] or that the decree-holder-purchaser on his purchase, ceased to be a party to the suit. The cases in which it was held that the decree-holder-purchaser ceased, on his purchase, to be a party were not correctly decided in view of the Privy Council's ruling that such a purchaser continued to be a party even after purchase by him.[873] If the decree-holder-purchaser is obstructed in obtaining possession by a stranger claiming *bona fide* to be in possession on his own account, the question would not be within the purview of this section but within the purview of O XXI, rule 97 and rule 101, as recently amended and not by a suit as held earlier.[874]

Similarly, if the decree-holder purchaser were to be obstructed in obtaining possession by the judgment-debtor and a stranger to the suit, the case would not fall under this section.

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862. *Kasinatha v Uthumansa,* (1902) 25 Mad 529; *Kattayat v Raman,* (1903) 26 Mad 740; *Sandhu v Hussain,* (1905) 28 Mad 87; *Veyindramuthu v Maya Nadan,* (1920) 43 Mad 107 (FB).
863. *Kailash v Gopal,* AIR 1926 Cal 798 : (1926) 53 Cal 781 : 30 Cal WN 1059; *Jiteswari v Sudhakrishna,* AIR 1932 Cal 672 : (1932) 59 Cal 956; *Galstaun v Syed Mahammad,* AIR 1932 Cal 627 : (1932) 36 Cal WN 242; *Kalipada v Basanta Kumar,* AIR 1932 Cal 126 : (1932) 59 Cal 117; *Kedar Nath v Kshiroda,* (1933) 37 Cal WN 671; *Sariatoola v Rajkumar,* (1900) 27 Cal 709; *Ramnarain v Bandi Pershad,* (1904) 11 IC 737; *Hari Charan v Mon Mohan,* (1914) 18 Cal WN 27; *Debi Prasad v Satish Chandra,* AIR 1944 Cal 32.
864. *Semabai v Ganpatrao,* AIR 1938 Ngp 212 : (1938) ILR Nag 583; *Narayan Rao Amrita Rao v Chunilal Sitaram,* AIR 1953 Ngp 236 : (1952) ILR Nag 150.
865. *Ram Ratan v Chauwamal,* AIR 1959 MP 348.
866. *Gita Bai v Daulatrao,* AIR 1962 MP 62; *Bhikumal v Ram Chander Babulal,* AIR 1946 Lah 134 : (1946) ILR Lah 672; *Manicka Chettiar v Rajambal,* (1955) 2 Mad LJ 357 : 1955 Mad WN 664.
867. *Bhagwati v Banwari Lal,* (1909) 31 All 82 (FB); *Buddhu Misir v Bhagirathi,* (1918) 40 All 216; *Mohsin v Haider,* AIR 1928 All 368 : (1928) 50 All 670; *Kedar Mal v Arun Chandra,* AIR 1937 All 742 (FB) : (1937) All 921; *Mst Suraj Dei v Mst Gulab Dei,* AIR 1955 All 49 : (1955) 1 All 687, overruling *Baburan v Pyarilal,* AIR 1919 All 390.
868. *Haji Abdul Gani v Raja Ram,* (1916) 1 Pat LJ 232; *Dahminder Das v Bakshi,* (1918) 3 Pat LJ 571; *Sridhar v Jageshwar,* (1919) 4 Pat LJ 716; *Jadab v Rameshwar,* AIR 1930 Pat 308 : (1930) 9 Pat 332; *Ram Kumar v Ramcharan,* (1930) 9 Pat 775 : AIR 1930 Pat 311, dissenting from *Askaran v Raghunath,* AIR 1925 Pat 478 : (1925) 4 Pat 726; *Tribeni Prasad v Ramasray,* AIR 1931 Pat 241 (FB) : (1931) 10 Pat 670 : 133 PC 337.
869. *Hargovind v Bhudar,* AIR 1924 Bom 429 : (1924) 48 Bom 550, overruling *Sadashiv v Narayan,* (1911) 35 Bom 452; *Lakshman v Govind,* AIR 1924 Bom 527 : (1924) 26 Bom LR 843; *Hiralal v Ramchandra,* AIR 1930 Bom 375 : (1930) 54 Bom 479.
870. *Chotha Ram v Karmon Bai,* (1918) PR No 8, p 34; *Nusrat Ali v Sakina Begam,* (1919) PR No 121, p 312; *Sardar Mal v Kartar Singh,* AIR 1939 Lah 211 : (1939) ILR Lah 295; *Qazi Abdul Ghani v Lala Lal Chand,* AIR 1940 Lah 230; *Bali Lal v Durga,* (1920) 1 Lah 134; *Ram Singh Gopal Singh v Abdulla Habibulla,* 1945 Lah 252 : AIR 1944 Lah 402 (FB).
871. *Martin v Häshim,* AIR 1930 Rang 61 : (1930) 8 Rang 162.
872. *Gaya Baksh v Kuar Rajendra,* AIR 1928 Oudh 199 (FB) : (1928) 3 Luck 182.
873. *Ganapathy v Krishnamachariyar,* (1918) 45 IA 54, 60.
874. *Dwipalchandra v Jeeban,* AIR 1931 Cal 574 : (1931) 58 Cal 808.

But the remedy would not be by a suit as held in earlier decisions[875] but by an application under O XXI, rules 97 and 101 as amended by the Amendment Act, 1976. Some of the Allahabad cases where questions were raised as to whether the decree-holder-purchaser was or was not the representative of the decree-holder, are no longer relevant as the remedy of a decree-holder where possession by him is resisted is by way of an application to the executing court under O XXI, rule 97 and not by a suit.

Under the section, as it stood before its amendment by Act 66 of 1956, where a stranger auction-purchaser sought to recover possession from the judgment-debtor, the questions raised were:

(i) whether such a purchaser was the representative of either party to the suit; and

(ii) whether, the question of possession by him was a question relating to execution, discharge or satisfaction of the decree.

The conflict of opinion as regards question (2), has been already referred to. On the question whether a stranger purchaser is a representative or not and if so, whose representative, there was conflict. The High Courts of Bombay[876] and Patna[877] held that he was not a representative of either party to the suit. On the other hand, the Calcutta[878] and Allahabad[879] High Courts held that he was not the representative of the decree-holder but that he was the representative of the judgment-debtor. In Madras, there was conflict within the high court itself, until such conflict was sought, though not successfully, to be resolved by a full bench in *Veyindramuthu v Maya Nadan.*[880] The Lahore view was that a stranger purchaser was not the representative of the judgment-debtor.[881] For the view of Oudh Court.[882] The Nagpur High Court held that a dispute between a stranger auction-purchaser and the judgment-debtor regarding delivery of possession is one relating to execution and further that such an auction-purchaser is the representative of the decree-holder and therefore such a question would fall under the purview of this section.[883]

All the high courts[884] seemed to hold that where an auction-purchaser, who is a stranger, was resisted in obtaining possession by the judgment-debtor of the property purchased by him in

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875. *Goba v Sakharam,* (1920) 44 Bom 977.
876. *Maganlal v Doshi Mulji,* (1901) 25 Bom 631; *Gokulsing v Kissensing,* (1910) 34 Bom 546; *Bai Mani v Ranchodlal,* AIR 1923 Bom 214 : (1923) 25 Bom LR 147; *Narsinbhat v Bandu Krishna,* (1918) 42 Bom 411 : 20 Bom LR 495; *Hanmantagouda v Shivappa,* (1940) 42 Bom LR 1123.
877. *Bhagwat Narain v Mahadeo Prasad,* AIR 1942 Pat 244 : (1941) 21 Pat 233.
878. *Ishan Chunder v Beni Madhub,* (1896) 24 Cal 62 (FB).
879. *Gulzari Lal v Madho Ram,* (1904) 26 All 447 (FB); *Ananti Kunwari v Ajudhia Nath,* (1908) 30 All 379.
880. But see the following cases: (1920) 43 Mad 107; *Krishna v Saraswatula,* (1908) 31 Mad 177; *Nadamuni v Veerabhadra,* (1910) 34 Mad 417; *Subbamma v Chennayya,* (1918) 41 Mad 467; *Veyindramuthu v Maya Nadan,* (1920) 43 Mad 107; *Sornam v Tiruvazhiperumal,* AIR 1926 Mad 857 : (1926) 51 Mad LJ 126; *Sandhu v Hussain,* (1905) 28 Mad 87; *Manickka v Rajagopala,* (1907) 30 Mad 507; *Nilkantharao v Mst Satyabhama Bai,* AIR 1944 Ngp 25 : (1944) Nag 230; *Paramananda v Mahabeer,* (1897) 20 Mad 378; *Sivarama v Somasundara,* (1905) 28 Mad 119; *Kuppana v Kumara,* (1911) 34 Mad 450; *Veyindramuthu v Maya Nandan,* (1920) 43 Mad 107; *Nadamuni v Veerabhadra,* (1910) 34 Mad 417 : 421; *Arasayee v Sokkalinga,* (1916) 1 MWN 287; *Jainulabdin v Krishna,* AIR 1921 Mad 420 : (1921) 41 Mad LJ 120; *Sorimuthu v Muthu Krishna,* AIR 1933 Mad 598 : (1933) 65 Mad LJ 253; *Thondam Annamalai v Tiruttani Ramasami,* AIR 1941 Mad 161 (FB).
881. *Hukum Chand v Ganga Ram,* (1919) Punj Rec No 12, p 25.
882. See *Narotam v Sukraj,* AIR 1928 Oudh 442 : (1928) 3 Luck 717.
883. *Ramavatar Lakshman Prasad v Mst. Jugram Bai,* AIR 1956 Ngp 81 : (1956) Nag 371.
884. *Bai Mani v Ranchodlal,* AIR 1923 Bom 214 : (1923) 25 Bom LR 147; *Kishori Mohun Roy v Chunder Nath,* (1887) 14 Cal 644; *Bhagwati v Banwari Lal,* (1909) 31 All 82 (FB). See also cases cited under the head, "First where the decree-holder is himself the purchaser"; *Hari Kishan v Radha Kishan,* AIR 1957 All 251; *Devi Singh v Tara Chand,* AIR 1962 HP 8.

execution, he could apply for delivery of possession under O XXI, rule 95 and that this section would not apply either because he was not the "representative" of the decree-holder or because the question as to delivery of possession to him was not one relating to execution, discharge or satisfaction. The Bombay view was that an auction-purchaser, even if he were the *benamidar* for the decree-holder was a stranger.[885] In Madras, the Full Bench decision in *Veyindramuthu*'s case[886] was treated as an authority for the proposition that an auction-purchaser, though he be a stranger, must proceed by an application under this section and not by a suit. But this view was changed in a later Full Bench case[887] where it was held that when the judgment-debtor or any one at his instigation resists or obstructs the stranger auction-purchaser, the latter must proceed under O XXI, rule 97 and not under this section.

Apart from cases under O XXI, rule 95, questions relating to execution may arise in different ways. The High Court of Allahabad held that where property not included in the mortgage deed or in the mortgage decree was sold and delivered to a stranger purchaser in execution, the judgment-debtor could not apply under this section and that his remedy was by a suit.[888] The Madras High Court following *Veyindramuthu*'s case, held that it was this section which applied.[889] A Full Bench of the Allahabad High Court has held that an auction-purchaser under a decree which has been, after confirmation of the sale, set aside as a result of a separate suit, could apply under this section for recovery of the purchase money from the decree-holder.[890] But a Full Bench of the Madras High Court has held that where the sale was set aside in execution by an application under O XXI, rules 89, 90 or 91, the auction-purchaser could obtain refund under O XXI, rule 93, but where the sale turned out to be futile as the result of a finding that the judgment-debtor had no saleable interest in the property, in a suit by a third party after confirmation of the sale, the remedy was by way of a suit.[891] In the face of such a medley of conflicting views, it was time for the legislature to intervene and resolve the conflicts. This was done, though partially, by Act 66 of 1956 which amended the explanation to the section by providing that for purposes of this section, a purchaser at a sale in execution of the decree is a party to the suit. Consequently, a purchaser at an execution sale, whether he is the decree-holder or not, is a party to the suit and the question raised earlier whether he was a representative or not and if so, whether, of the decree-holder or of the judgment-debtor ceased. The result of the amendment was that all questions arising between the auction-purchaser and the judgment-debtor had to be decided by the executing court and not by a separate suit.[892] In spite of the amended explanation, it was still necessary in order to bring the dispute under this section, that it must relate to execution, discharge or satisfaction of the decree. Thus, with the changed explanation, the earlier decisions dealing with the question whether an auction-purchaser is, or is not, a party to the suit and the distinction between a decree-holder purchaser and a stranger purchaser have lost their relevance.[893] But if a right to file a suit was available to a stranger auction-purchaser under the law as it stood before the amendment, that right would

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885. *Ramchandra v Gajanan*, (1920) 44 Bom 352.
886. *Veyindramuthu*'s case, (1920) 43 Mad 107.
887. *Thondam Annamalai v Tiruttani Ramasami*, AIR 1941 Mad 161 (FB).
888. *Muna Lal v Collector of Shahjahanpur*, AIR 1923 All 470 : (1923) 45 All 96; see also *Imtiaz-un-nissa v Chuttan Lal*, AIR 1925 All 236 : (1925) 47 All 304; *Nagabhatta v Nagappa*, AIR 1923 Bom 62 : (1923) 46 Bom 914 (judgment-debtor estopped as he had not objected to the sale).
889. *Jainulabdin v Krishna*, AIR 1921 Mad 420 : (1921) 41 Mad LJ 120.
890. *Bindeshri Prasad v Badal Singh*, AIR 1923 All 394 : (1923) 45 All 369.
891. *Macha Koundan v Kottora Koundan*, AIR 1936 Mad 50 : (1936) 58 Mad 202.
892. *Harnandrai v Debidutt*, AIR 1973 SC 2423 : (1973) 3 SCC 467; *SPL Pillai v Subbarami*, AIR 1972 Ker 162 : (1971) 2 Ker 472.
893. *Sham Mohan Lal v Jai Gopal*, AIR 1968 Del 104; *Janak Raj v Gurdial Singh*, AIR 1966 P&H 315 : (1966) 2 Punj 593.

still survive since the amended explanation, did not expressly or by necessary implication take away such a right.[894] The partial lacuna left by Act 66 of 1956, regarding the question as to when a question is to be regarded as one relating to execution, has now been filled in by the Amendment Act, 1976 which by the new Explanation II has enacted that not only an auction-purchaser is to be deemed to be a party to the suit wherein the decree has been passed but also that all questions relating to delivery of possession of such property shall be deemed to be questions relating to execution, discharge or satisfaction. Henceforth, all questions relating to delivery of possession between an auction-purchaser, whether he is a decree-holder or a stranger and the judgment-debtor and his representatives are to be determined under this section. Under section 47, Explanation II(a), the auction-purchaser is deemed to be a party. Under Explanation II(b), questions relating to possession are deemed to be questions relating to execution etc. Hence, such questions when raised by or against an auction purchaser, have to be determined by the court executing a decree, and not by separate suit.[895]

[s 47.25] Application by an Auction-purchaser for Costs on Improvements — When Sale Set Side

If the order confirming a sale is set aside and the auction purchaser applies for compensation as regards improvements made by him, the application does not fall under this section. It does not relate to the execution, satisfaction or discharge of the decree. But the court can act under section 151.[896]

[s 47.26] Sub-section (3): Inquiries as to Who is Representative of a Party

The question whether a person is a legal representative of a party so that execution should proceed against him is one to be decided by the court in execution.[897] An application by a person who claims that the decree-holder on record is a *benamidar* and that he is the heir of the true decree-holder is not within this section.[898] The court, no longer, has the option of staying the execution proceeding until the matter is settled by suit. This sub-section is ancillary to sub-section (1) and is limited to questions relating to the execution, discharge and satisfaction of a decree, and does not apply to the determination of a question between rival representatives of one party.[899] The same rule applies when the question arises in execution proceedings as to whether a certain person is a transferee of a decree, for a transferee of a decree is, as stated above, a "representative" of a party within the meaning of this section. Until the amendment of the definition of "decree" by the deletion of the words 'section 47' in section 2(2) by the

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894. *VSM Iyer v Azharkhan,* AIR 1972 Ker 135 : (1972) 1 Ker 248 : (1972) Ker LR 70; but see *Sadhucharan v Sudershan,* AIR 1965 Ori 2.
895. *Ganpat Singh v Kailash Shankar,* (1987) 3 SCC 146.
896. *AR Dawar v Ganesh Datta,* AIR 1940 Lah 59.
897. *Ganga Singh v Badri Singh,* AIR 1945 Oudh 314 : (1945) 20 Luck 471; *Muna Koer v Durga Prasad,* (1917) 2 Pat LJ 192; *Babu Lal v Janak,* AIR 1926 All 681 : (1926) 48 All 429; *Shaligram v Mst Dhurpati,* AIR 1939 Ngp 147 : (1930) ILR Nag 165; *Damodarlalji v Sone Basantlal,* AIR 1952 Pat 333 : ILR 27 Pat 848; *Rangappa v Rindava,* AIR 1954 Bom 139.
898. *Parasnmal v Jeth Singh,* AIR 1957 Raj 253 : (1956) ILR Raj 217.
899. *Venubai v Damodar,* AIR 1933 Bom 396 : (1933) 57 Bom 641; *Maganlal v Doshi Mulji,* (1901) 25 Bom 631; *Charan Singh v Sardar Khan,* AIR 1935 Lah 384; *Md Abdul Matin v Mst Bibi Hamidan,* AIR 1932 Pat 329. But see *Nathamai v Kasilya,* AIR 1934 Mad 181 : (1934) 57 Mad 457; *Ananta Parkash v Dharmanand,* AIR 1957 Punj 64.

Amendment Act, 1976, an order determining whether a person is a representative of a party was a decree and therefore appealable.[900] This is no longer the position.

If the transferee of a decree dies pending execution, the executing court has power, under this section, to inquire whether the transferee was merely a *benamidar* for another and to allow the real owner to execute the decree.[901]

[s 47.27] Stay of Execution

The words "or to the stay of execution thereof" which occurred in section 244 after the words "execution, discharge or satisfaction of the decree" were omitted in 1908. As a result of the deletion, two possible views were entertained. One was that the words were omitted because they were thought superfluous, as a plea that the execution may be stayed was equivalent to the plea that the decree should not be executed and it was thus a question relating to the execution of the decree.[902] The other view was that they were deliberately omitted and therefore questions relating to stay of execution were no longer within the section.[903] The Lahore High Court, after considering all the authorities, took the former view[904] and held that an order staying execution was one relating to the execution of the decree in the same way that an order dismissing an application for execution as time-barred would so relate and that the only difference between the two was that in one there was temporary suspension, while in the other there was prohibition. It has been held that a person who has stood as surety for costs and against whom a decree for costs has been consequently passed is a judgment-debtor within the meaning of section 2 (10) and can therefore apply for stay of execution of the decree pending an appeal therefrom.[905] The High Court of Rajasthan, in *Sohanmal v Rajmal*,[906] held that the question whether an order staying execution is appealable or not, depended on whether it finally decided any question as to the rights and liabilities of parties is no longer correct law in view of the amendment of the definition of a decree in section 2(2).

An order made at the instance of an interim receiver under section 52 of the Provincial Insolvency Act, 1920 stopping a sale, does not fall under this section.[907] The courts are normally slow in staying the execution of a decree unless some cogent reasons are placed before the court.[908]

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900. *Badri Narain v Jai Kishen*, (1894) 16 All 483; *Krishnama v Appasami*, (1902) 25 Mad 545; *Ganga Das v Yakub Ali*, (1900) 27 Cal 670; *Khem Singh v Raghubir*, AIR 1925 All 578 : (1925) 47 All 365; *Narasimha v Venkatachalapathi*, AIR 1934 Mad 181 : (1934) 57 Mad 457; *Jnanendra Nath v Girish Chandra*, (1935) 39 Cal WN 313; *Ram Autar v Bate Krishna*, AIR 1936 All 479 : (1936) All LJ 541.
901. *Krishan v Janakiramayya*, AIR 1927 Mad 903 : (1928) 51 Mad 219.
902. *Subramania v Kumaravelu*, (1916) 39 Mad 541 : 542; *Chidambaram v Krishna*, (1917) 40 Mad 233; *Srinivas Prosad v Kesho Prosad*, (1911) 14 Cal LJ 489; *Bolanath v Satya Charan*, (1951) 2 Cal 70; *Audh Behari v Sailendranath*, AIR 1954 Cal 339.
903. *Janardhan v Martand*, AIR 1921 Bom 208 : (1921) 45 Bom 241; *Ramchandra v Balmukand*, (1905) 29 Bom 71; *Rajendra Kishore v Mathura Mohan*, (1919) 25 Cal WN 555 (order refusing to stay execution); *Hussain Bhai v Beltie Shah*, AIR 1924 All 808 : (1924) 46 All 733, (order staying execution for a definite period); *U San v U Chit*, AIR 1931 Rang 221 : (1931) 9 Rang 354 (order refusing to stay execution); *Chidambaran v Samasundaram*, AIR 1938 Rang 317 : (1938) Rang 580.
904. *Durga Devi v Hans Raj*, AIR 1930 Lah 187 : (1930) 11 Lah 402, dissenting from *Janardhan v Martand*, (1921) 45 Bom 241 and *Husain Bhai v Beltie Shah*, (1924) 46 All 733 and *Rajendra Kishore v Mathura Mohan*, (1919) 25 Cal WN 555.
905. *Shivbasappa v Marigowda*, AIR 1934 Bom 252 : (1934) 58 Bom 485.
906. *Sohanmal v Rajmal*, AIR 1963 Raj 4.
907. *Ethirajulu v Official Receiver*, AIR 1933 Mad 152 : (1933) 56 Mad 453.
908. *Rohit Kumar v Bodh Pal Singh*, AIR 1997 Raj 159.

[s 47.28] The term "execution has not been stayed"

The term "execution has not been stayed" (Under Section 9 (2); Presidency Towns Insolvency Act (3 of 1909)) could only mean an execution which is possible in a civil court under CPC. The order as such not being capable of execution in a civil court under CPC, it must be taken as being not capable of execution as it stands today.[909]

[s 47.29] Sub-section (2)— Its Omission

Sub-section 2 was introduced in this section, in order to give legislative sanction to the practice followed by the courts under the earlier CPC. It enabled the court to treat an application under this section, as a suit or a suit as an application. If an application was brought, the court could treat it as a suit but then it had to be disposed of by itself and the parties were not to be referred to a separate suit.[910] Conversely, if a suit was brought for determination of a question which fell under this section, the court had a discretion, either to dismiss it or treat the plaint as an application under this section and dispose it of accordingly, provided of course, that the court in which the suit was brought, had jurisdiction to execute the decree[911] and the execution was not time-barred.[912] An application for execution could be treated as a suit, only when the court in which it was made, had jurisdiction to try it.[913] Accordingly, a small cause court could not convert an application by a sub-tenant claiming relief under the Rent Act into a suit for declaration of title.[914] The power was discretionary[915] and therefore no appeal lay against an order under the sub-section though the definition of "decree", as it then stood, brought such an order within it.[916] The discretion being judicially exercisable, its exercise had to be in accordance with law.[917] The power was also exercisable by an appellate court which could treat a plaint filed in the lower court as an application and the decree brought before it in appeal as an order under this section. But the appellate court also would not exercise its discretion unless the court which passed the decree had jurisdiction to execute the original decree[918] and the suit was filed within the period of limitation prescribed for applications under this section.[919] In a case where a party, instead of applying under this section, filed a suit which he prosecuted up to the stage of a second appeal, the High Court of Allahabad refused to exercise its discretion to treat the plaint as an application.[920] A minor, objected in execution proceedings that he had

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909. *TTV Dhinkaran v Dy Director, Enforcement Directorate,* AIR 2003 Mad 59.
910. *Seetharaman v Chidambaram,* AIR 1933 Mad 166 : (1933) 56 Mad 447.
911. *Jhamman Lal v Kewal Ram,* (1900) 22 All 121; *Sadho v Abhenandan,* (1904) 26 All 101, 103; *Sheodihal v Bhawani,* (1907) 29 All 348; *Venkata Krishnama v Krishna Rao,* (1909) 32 Mad 425; *Ramanna v Nalaparaju,* AIR 1956 SC 87 : (1952) SCR 938; *Basantlal v Beharilal,* (1953) ILR Punj 609 : AIR 1953 Punj 118; *Raman Nair v Lakshmi Amma,* AIR 1952 TC 96.
912. *Sadashiv v Narayan,* (1911) 35 Bom 452 : 461; *Bhaichand v Ranchhoddas,* AIR 1921 Bom 285 : (1921) 45 Bom 174 : 176; *Protiva Sundari Debi v Sarada Charan,* AIR 1934 Cal 15 : (1934) Cal WN 996; *Nirode Kali Roy v Rai Herendra Nath,* (1938) 1 Cal 280 : AIR 1938 Cal 113.
913. *Suryanarayana v Venkata,* AIR 1954 Mad 239 : (1954) Mad 338 : (1953) 2 Mad LJ 495.
914. *Khetra Mohan v Parbati,* AIR 1955 Cal 295.
915. *Sachi Prasad v Amarnath,* (1919) 46 Cal 103; *Meghraj Sah v Raj Bhansi Lal,* AIR 1958 Pat 546.
916. *Ramanuja v Soliappa,* AIR 1931 Mad 270 : (1931) 60 Mad LJ 471.
917. *Manishankar v Niranjan Swarup,* AIR 1955 All 686.
918. *Azizuddin v Ramanugra,* (1887) 14 Cal 605; *Biru Mahata v Shyama Churn,* (1895) 22 Cal 483; *Pasupathy v Kothanda,* (1905) 28 Mad 64; *Jotindar v Mahomed,* (1905) 32 Cal 332; *Debendra Nath v Prasanna Kumar,* (1907) 5 LJ 328; *Mohan Singh v Punchanan,* AIR 1927 Cal 106 : (1927) 53 Cal 837.
919. *Lalman Das v Jagan Nath,* (1900) 22 All 376; *Sarjan Bibi v Ashanulla,* AIR 1927 Cal 411 : (1927) 54 Cal 524.
920. *Puran Chandra v Bawan Das,* (1900) AWN 196.

not been represented by any guardian *ad litem* in the suit but the executing court refused to entertain the objection as one affecting the validity of the decree.

On appeal from that order, the Allahabad High Court treated the application as a suit and made a declaration that the decree was not binding on the minor.[921] Conversely, when a minor filed a suit to set aside a sale on the ground that he was not properly represented in the execution proceedings, it was held that the sale was not binding on him, but that that question should be agitated in execution proceedings and accordingly the plaint was treated as an execution application.[922]

These powers have now been withdrawn by the legislature omitting sub-section 2 from the section. The omission is in pursuance of the legislative policy that all questions between the parties to the suit in which the decree was passed and their representatives should be disposed of under this section and not by a suit and further that an order made in such applications is not a decree from which an appeal would lie. The omission had to be logically effected since the power of the court to convert an application into a suit and vice versa ceased to be relevant, or in consonance with the amendments carried out in this section as also section 2(2).

[s 47.30] Where a Sale is Sought to be Set aside on the Ground of Fraud

It has been stated above, that the procedure for setting aside a sale on the ground of fraud in publishing or conducting the sale is by an application under O XXI, rule 90 and not by a separate suit. But an execution sale may also be challenged on the ground that the decree on which it is founded, is itself tainted with fraud, and in this case, the remedy is by a regular suit. The following are the leading cases on the subject:

(i) A suit will lie to set aside a decree and the sale held in execution of the decree where both the decree and sale are impeached on the ground of fraud.[923] The reason is that the question of the validity of a decree can only be determined by a regular suit.[924]

(ii) *A* obtains an *ex parte* decree against *B*. In execution of the decree, a certain property belonging to *B* is sold and purchased by *C*. The decree is then set aside under O 9, rule 13. *B*, thereafter, sues *A* and *C* to set aside the sale challenging not only the sale, but also the decree, on the ground of fraud. The suit is not barred under this section; *B* is entitled to show that the decree was obtained by fraud, and this can only be done in a regular suit.[925]

[s 47.31] Setting aside Sale —Instances

A bare reading of section 47 of the CPC shows that its scope is very wide and comprehensive enough to include all questions relating to the execution, discharge, or satisfaction of the decree. The question about saleability of the judgment-debtors interest in a property attached in the execution proceedings is held to be a question which falls within section 47.

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921. *Daulat Singh v Maharaj Raja Ramji*, AIR 1926 All 387 : (1926) 48 All 362; *Chhubbo v Lala*, AIR 1931 Oudh 45 : (1931) 6 Luck 452.
922. *Venkata v Perumal*, AIR 1952 TC 136 : (1951) TC 728.
923. *Abdul v Mahomed*, (1894) 21 Cal 605; *Pran Nath v Mohesh Chandra*, (1897) 24 Cal 546; *Moti Lal v Russick Chandra*, (1899) 26 Cal 326.
924. See notes above, "Questions not relating to execution, discharge or satisfaction".
925. *Ram Narain v Shew Bhunjan*, (1900) 27 Cal 197; *Debendra Nath v Prasanna Kumar*, (1907) 5 Cal LJ 328.

Following are the illustrations of sales which are held to be liable to be set aside under section 47 of the CPC.

(i) A sale in contravention of section 99 of the Transfer of Property Act, 1882 is void, notwithstanding that a third party is the purchaser and only a portion of the property sold was under mortgage. Such a sale may be set aside under the present section.[926]

(ii) Where the decree-holder is himself the auction purchaser and the *ex parte* decree, in execution of which he purchased, has been subsequently set aside under O IX, rule 13, the sale cannot stand, even though it had been confirmed. An application to set aside the sale under such circumstances comes under this section.[927]

(iii) A court, in execution of decree, has no jurisdiction to sell property over which it had no territorial jurisdiction at the time it passed the order of a sale; such a sale may be set aside under this section.[928]

(iv) Where, through inadvertence or otherwise, the court orders sale of any property in execution of the decree, notwithstanding such previous discharge of it, the sale under such order would be null and void as *ultra vires*. Such a sale may be set aside under this section.[929]

(v) The question arising between a judgement-debtor and the auction purchaser as to whether certain property was liable to attachment and sale, is one to be determined under this section.[930]

(vi) Where a judgment impeaches the validity of execution proceedings which proceeded and led up to the sale of his property, and thus seeks to have sale set aside, his remedy lies by application under this section.[931]

(vii) An application to set aside an execution sale on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale, but the payment was not certified and the sale was held, comes within the scope of this section.[932]

(viii) An application by the judgment-debtor asking the court to set aside the sale and to restore him to possession of the property not covered by the decree is an application relating to the execution, discharge or satisfaction of the decree under this section.[933]

(ix) An application to set aside an execution sale on the ground of absence of notice of the settlement of sale proclamation, as required by O XXI, rule 66 can only be considered under this section.[934]

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926. *Mayan v Pakuran,* (1899) ILR 22 Mad 347.
927. *Umedmal v Srinath,* (1904) ILR 27 Cal 810.
928. *Prem Chand v Mokhoda Devi,* (1890) ILR Cal 699.
929. *Chunni v Lala Ram,* (1883) ILR 5 All 5.
930. *Basti Ram v Fathu,* (1896) ILR 8 All 146.
931. *Mohdi Begam v Rasul Beg,* 48 IC 39.
932. *Alkokeshi v Mohini,* 10 IC 625.
933. *Raja Ram v Itraj,* (1914) 17 OC 94.
934. *Thakedath v Subramania,* 53 IC 809; *V Subbamma v Koniki Chengama Naidu,* AIR 1999 AP 55.

[s 47.32] Appeal

Before the Amendment Act, 1976, the determination of a question under this section was under section 2(2) as it, then was, a decree and as such, unless it was an order under O XLIII, rule 1 subject to an appeal and a second appeal. The omission of the words "Section 47" from the definition of decree in section 2(2) has now drastically changed the position. An application under this section is not a suit. The order determining it is no longer a decree and is appealable only if it falls under section 104(1)(i). Sub-section (2) of section 104 provides that no appeal shall lie from any order passed in appeal under this section. Orders passed under this section are not appealable, unless they are orders falling under O XLIII, rule 1. A determination under O XXI, rules 34, 73, 92 or 106 (1) is appealable under O XLIII, rule 1 read with section 104(1)(i). Such a determination, when it is between the parties to the suit or their representatives, would fall under this section but would nevertheless be subject to one appeal, if it is also an order falling under O XLIII, rule 1. As regards appeal, therefore, orders under this section would be:

(i) orders also falling under O XLIII, rule 1; and

(ii) orders not falling under O XLIII, rule 1 and therefore not appealable.

An order of the executing court refusing to restore an application by the judgment-debtor dismissed earlier for default, amounts to confirmation of sale but since it is not a reference to set aside the sale, it is not appealable under O XLIII, rule 1.[935] Disputing from *Parshva Properties v AK Bose*,[936] the Punjab and Haryana High Court has held that an order under section 47 is (after 1976) not a decree and not appealable as a decree.[937]

Appeals already filed and pending on the date when the Amendment Act, 1976 was brought into force i.e., 1 February 1977, are expressly saved by section 97(2) of the Amendment Act.[938]

[s 47.33] Dismissal of Appeal— Effect on Pending Execution

When the Supreme Court had stayed the execution proceedings pending disposal of the civil appeal, after the disposal of the appeal, there was no impediment or bar to continue the execution proceedings on the application moved by the appellants to proceed with the execution. It was held that the high court committed a manifest error in taking a view that a fresh execution petition should be filed after the dismissal of the appeal by the Supreme Court as the decree passed by the high court had merged with the decree of Supreme Court and the execution petition filed earlier which was pending, was not maintainable. The Supreme Court had only confirmed the decree passed by the high court without any alteration or modification. Even otherwise, in a pending execution case, amendment could be sought if it was needed after dismissal of the appeal, under O XXI, rule 11(2)(d) of the CPC, in the execution application, the particular as to whether any appeal has been preferred from the decree is to be mentioned. If an appeal has been preferred from a decree and after disposal of the appeal necessary information can be given by filing an application, if need be, by seeking an amendment. It is one thing to say that the earlier decree passed gets merged in the decree passed by the appellate court, yet it is a different thing to say that an execution petition filed earlier is not maintainable and that there is a need to file a fresh application for execution after

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935. *Gopilal v Sitaram*, AIR, 1968 MP 196 : (1968) MPLJ 365.
936. *Parshva Properties v AK Bose*, AIR 1979 Pat 308.
937. *Jagat Ram v Jagjit Singh*, AIR 1984 P&H 281.
938. *Mohan Das v Kamla Devi*, AIR 1978 Raj 127; *Nanda Kishore v Mahabir Prasad*, AIR 1978 Ori 129.

a decree is passed by the appellate court, particularly when the appellate court had stayed the execution proceedings filed earlier, it was obvious that the execution proceedings could be continued after dismissal of the appeal by appellate court without any alteration.[939]

[s 47.34] Revision

The exercise of power under section 115 of the CPC is broadly subject to the conditions that the decision, i.e., the impugned order, must have been given by a court subordinate to the high court, and no appeal lies either to the high court or to any lower appellate court against the said decision and in deciding the case, the subordinate court must have appeared to have exercised the jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it by law or acted in the exercise of its jurisdiction illegally or with material irregularity. The purpose behind section 115 of the CPC is to provide means to an aggrieved party to obtain ratification of a non-appealable order. Therefore, for the maintainability of a revision petition there must be an error relating to the jurisdiction committed by the court below either by way of assumption of jurisdiction which it does not have or failure to exercise jurisdiction which it has or by exercising its jurisdiction illegally or with material irregularity. In this case, the impugned order is a composite order saddling a special cost of Rs 25,000 against the judgment-debtor's petition besides a direction to the *seristedar* to calculate the amount due under the decree taking into account the compound interest at the rate of 15 per cent per annum, capitalising the said interest in the principal sum. The operative part of the decree has been quoted above wherein simple interest at the rate of 15%pa had been awarded on the principal sum of Rs 2,58,222 w.e.f. 5-10-985, till its realisation. There is no decree in this case for payment of compound interest at the rate of 15%pa with annual rest capitalising the sum with the principal amount. It is the settled principle of law that an executing court has no jurisdiction to go behind a decree. The learned court below has construed the interest at the rate of 15%pa as compound interest which is not in the decree. The executing court has no right to vary the terms of the decree, however, erroneous it may be in the execution proceeding. Therefore, it is a clear case in which the executing court has committed a manifest error relating to its jurisdiction which it does not have, and the exercise of its jurisdiction is definitely illegal and it equally suffers with material irregularity which has cost irreparable injustice to the judgment-debtors petitioner in this case and in this view of the matter, failure of justice was occasioned in this case. Viewed thus, the revision filed by the judgment-debtors petition is maintainable.[940]

The expression "other proceedings" in section 115 of the CPC includes proceedings under section 47. As such, revision petition against an order rejecting objection under section 47 of the CPC would be maintainable.[941]

[s 47.35] Appeal Remanded for Disposal — Effect on Execution

Where no order for execution of decree was passed at any stage of proceedings and a remand order was passed by the Supreme Court in a Special Leave Petition, for hearing appeal by appellate court *de novo*, still the decree of trial court would be executable as the Supreme Court judgment was passed neither in affirmation of the decree of the trial court in expressed terms;

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939. *Krishna Gopal Chawla v State of Uttar Pradesh,* AIR 2001 SC 3832 : (2001) 9 SCC 694.
940. *State of Bihar v Mijaj International,* AIR 2004 Jhar 29.
941. *Ram Agarwal v Smt. Brijendra Kaur,* AIR 2008 UP 25 : (2008) 4 All LJ 176.

nor any stay of operation of the decree of the trial court has been granted. Logically, the appeal has been restored in the same position as if it were before.[942]

In this case to apply principle of merger there must be a decree of the Supreme Court and the aforesaid order cannot partake of the character of the decree. The order of remand does not decide anything else, rather it is sent for the decision to the subordinate court. It is needless to mention that there is a distinction between decree and order.[943]

It cannot also be said in such a case that the decree of trial court is not in existence in view of the order of remand. Unless there is a decree, question of deciding the appeal does not and cannot arise. It is absurd to suggest that for the purpose of hearing of the appeal the decree would be operative, whereas for execution purpose it is kept in abeyance in view of the order of remand. The law cannot be applied discriminatingly in the same context. It cannot further be said that because of the order of remand of the Supreme Court, stay of operation of the decree had become automatic, as it will defeat the mandatory provision of the other portion of the law as O XLI, rule 5 provides for granting stay of operation of the decree by the appellate court.[944]

[s 47.36] Orders Passed under Special Statutes

A dispute between the parties arising out of an order passed under a special statute is within this section if it relates to execution, discharge or satisfaction thereof.[945] Thus, orders passed under section 15 of the Bombay Agricultural Debtors Relief Act, 1974;[946] under section 20 of the Madras Agriculturists Relief Act, 1938;[947] under section 16 of the Bengal Premises Rent Control (Temporary Provisions) Act, 1950;[948] under section 18 of the Madras Buildings (Lease and Rent Control) Act, 1946[949] have been held to be appealable under this section. In view, however, of the change in section 2(2) this observation is no longer applicable and though such orders would fall under this section, an appeal against them can only lie if they fall under section 104(1)(i).

[s 47.37] Limitation Procedure and Evidence

An application under this section to set aside a sale inexecution of a decree must be made within 30 days from the date of the sale.[950] But if the sale is void, as where no notice is given as required by O XXI, rule 22, it is not necessary to apply to the court to set aside the sale. Hence the Article applicable in such a case is the residuary Article 137 which provides a period of three years from the date when the right to apply accrues, and not Article 127.[951] An application under this section by a representative of a judgment-debtor to set aside a sale on the ground that the property sold, belongs to him and not to the deceased judgment-debtor, is governed by Article 127 and must be made within 30 days from the date of sale.[952] In the

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942. *Kanchan Udyog Ltd v Mc Dowell & Co Ltd,* AIR 2003 Cal 207.
943. *Kanchan Udyog Ltd v Mc Dowell & Co Ltd,* AIR 2003 Cal 207.
944. *Kanchan Udyog Ltd v Mc Dowell & Co Ltd,* AIR 2003 Cal 207.
945. *Kunjan Nair Krishan Menon v Ouseph Devasia,* AIR 1955 TC 183.
946. *Guru Basappa v Neelkantappa,* AIR 1951 Bom 136 : (1955) ILR Bom 393 : 53 Bom LR 371.
947. *Desikachaiar v Ramachndra,* AIR 1951 Mad 393 : 1951 (1) Mad LJ 23, overruling *Nagappa Chettiar v Annapoorni Achi,* AIR 1941 Mad 235 : (1941) ILR Mad 261.
948. *Dalhousie Traders Ltd v Md. Sadique,* AIR 1954 Cal 220 : 57 Cal WN 945.
949. *Seshadri v Narayana,* AIR 1951 Mad 640 : (1951) 1 Mad LJ 55, LW 121 : 1951 Mad WN 44.
950. Limitation Act 1963, Sch 1, Art 127.
951. *Rajagopala v Ramanujachariar,* AIR 1924 Mad 431 (FB) : (1924) 47 Mad 288; *Manmatha Nath v Lakmi,* AIR 1928 Cal 60 : (1928) 55 Cal 96; *Marla Ramanna v Nallapa Raju,* AIR 1956 SC 87 : (1952) SCR 938
952. *Satish Chandra v Nishichandra,* (1919) ILR 46 Cal 975.

case of execution against government, limitation does not commence until after compliance of section 82 since the decree until then is not executable.[953] The objections under section 47 should not be disposed of summarily. It is true that the executing courts are not enjoined by the statute to frame issue and dispose of the same in the same manner as a suit. Nevertheless, it is under an obligation to decide the dispute in a judicial manner. If the judgment-debtor wants to lead evidence, the judge ought to allow an opportunity to prove the assertion made in the objection petition. The executing court cannot dismiss the objection petition without going into the merits of the case.[954] A suit was filed for the recovery of profits alleged to have been misappropriated by the receiver. It was decreed *ex parte*. Both the parties to the decree died. The successor-in-interest of the decree-holder applied for execution. It was held that succession certificate was not needed. The amount in question was not a debt.[955] Symbolical delivery of possession of the sold properties supported the case of the intervener to be in possession. The sale being void, the intervener is entitled to continue in possession and the decree-holder is not entitled to interfere with it.[956] The upset price has some relation to the price which the property intended to be sold in the auction is expected to fetch. When the court gives the price, it cannot do so merely on the *ipse dixit* of either of judgment-debtor or the decree-holder. What should be the amount to be fixed as the upset price must, therefore, be determined after an objective consideration of all the relevant facts to which the court must apply its mind, so as to safeguard the interests of the judgment-debtor. The court must, therefore, have before it, the necessary material with regard to the nature of the property whether the property is agricultural property, the use to which the property was being put, whether the cultivation is dry cultivation or wet and such other factors which ultimately go to determine the value of the property.[957] If the decree is not fully satisfied the decree-holder is entitled to bring the other properties of the judgment-debtors to sale. The auction-purchaser similarly has a right to seek permission to deposit the entire sale price. The court sales are not an empty formality. The objections, if any, regarding confirmation of sale, must be raised before the executing court. Judgment-debtor must not be granted interim stay.[958] Property was sold in execution of a decree suit. A suit to set aside the sale was decreed, declaring the decree (which was the subject matter of execution) as not binding on the plaintiff. Direction for restitution of suit property was also contained in the decree. Decree was not merely declaratory. Considering the long pendency of litigation, the Supreme Court directed payment of market value of the suit property by the defendant, instead of restitution. On the facts and in the circumstances, and in consideration of the fact that the litigation was pending for a long period, the Supreme Court directed that justice and equity would be met after assessing the prevailing market value of the disputed house and the site as on date and directed the appellant to pay the value thereof within a time to be fixed by the district court of Kotah.[959] Executing court cannot take additional evidence. It can, however, appoint a commissioner to ascertain identity of the property in terms of the decree. A compromise decree finally allotted specific properties to the parties. It was held that it was executable by itself. Final decree need not be drawn up.[960]

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953. *UOI v K Khandelwal,* AIR 1970 Ori 137.
954. *Woolways, shop-cum-office, Chandigarh v Central Bank of India, Chandigarh,* AIR 1990 P&H 92.
955. *Snehakana Sur v Abani Bhusan,* AIR 1982 Cal 378 (DB).
956. *Jugal Kishore Singh v Lakshmi Kumari,* AIR 1981 Ori 121.
957. *Elumalai Naicker v Kishtambal Ammal,* AIR 1988 Mad 106.
958. *Venkateshwara Oil Mills v Syndicate Bank,* AIR 1989 Kant 225.
959. *Bhanwarlal v Premlata,* AIR 1990 SC 623 : (1990) 1 SCC 353.
960. *Lalmuni Devi v Shiv Shankar Tiwary,* AIR 1980 Pat 184.

If, the appellate court has dismissed the appeal filed by judgment-debtor against decree of trial court, the decree of trial court merges with the decree passed by the appellate court and the execution petition filed within 12 years from the date of order of the appellate court is not barred by limitation.[961] The period of limitation for filing execution petition begins to run when the decree or order becomes enforceable. Appeal preferred against a decree is a continuation of suit. It is the decree of the appellate court only which is enforceable and capable of execution and not the decree passed by the trial court.[962] However, were filing of appeal against decree cannot make the decree in executable. The decree remains executable, but its execution can be suspended by order of the appellate court as per O XLI, rule 5 (1) or by the executing court as per O XLI, rule 5(2).[963]

In the undernoted case,[964] the Supreme Court held that section 4(b)(i) of the Pondicherry Limitation (Repeal of Local Laws) Act, 1994 would not save the execution petition from the bar of limitation, where the execution petition is filed after the period of limitation. In that case, the execution petition to execute the decree passed on 22 April 1983 was filed on 10 November 1995. Earlier execution petition filed by the decree-holder was dismissed for default and the petition filed for its restoration was dismissed as not pressed. The Supreme Court observed that no execution petition was pending on the date of commencement of the 1994 Act and as such the savings clause will not be applicable.

Limitation period for execution is governed by Article 136 of the Limitation Act, 1963 read with Article 134. Section 47 is not concerned with limitation.[965] The Supreme Court in *Ramanna v Mallaparaju*,[966] laid down that an application by a party to the suit to recover possession of the properties which had been taken delivery of under a void execution sale would be in time under Article 181 of the Limitation Act, 1908, if it was filed within three years of its dispossession. Article 128 of the Limitation Act, 1963 of which the corresponding article is Article 165 of the Limitation Act, 1908, lays down that the period of limitation is 30 days from the date of dispossession, for filing a petition for possession, by one dispossessed of immoveable property and disputing the right of the decree-holder or purchaser at a sale in execution of the decree. It has been made clear in *Rammanna's* case that this Article applies only to applications for being restored to possession by persons other than the judgment-debtors as under O XXI, rule 100 of the CPC and applications by judgment-debtors claiming relief on the ground that their properties which had been erroneously taken is execution of decree, are not governed by it.[967] The plea of lack of jurisdiction can be raised at any time even in second appeal, so also on the execution sides.[968] The Madras High Court, relying upon *Bhanwarlal v Satyanarain*,[969] held that each occasion of section gives a cause of action for filing an application to remove the obstructions.[970] The provision under Limitation Act, 1908 are applicable to proceedings of execution by virtue of O XXI, rule 105 (4).[971]

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961. *Hari Singh v Harbhajan Singh*, AIR 2001 P&H 108.
962. *Arakhita Naik v Narasingh Naik*, AIR 2007 Orissa 175 : 2007 Supp Ori LR 337.
963. *Suresh Kumar v Virendra Kumar*, AIR 2007 Raj 117 : 2007 (3) Civil Court Cases 272 : 2007 (2) Raj LW 1574.
964. *Kanagavaliammal v R Balsubramanian*, AIR 2008 SC 1991 : (2008) 5 SCC 212.
965. *Ganpat Singh v Kailash Shankar*, AIR 1987 SC 1443 : (1987) 3 SCC 146.
966. *Ramanna v Mallaparaju*, AIR 1956 SC 87 : (1955) 2 SCR 938.
967. *Achamma Cyrisc v Kerala Financial Corp*, AIR 1997 Ker 75.
968. *Bhavrvad Chotta Bhaga v Bhavrvad Jaga Dahya*, AIR 1999 Guj 17.
969. *Bhanwarlal v Satyanarain*, AIR 1995 SC 358 : (1995) 1 SCC 6.
970. *Adimoolam Mudaliar v PL Unnamalai Achi*, AIR 1998 Mad 17 (DB).
971. *R Parsuraman v K Jayalaxmi*, AIR 1995 Mad 242.

[s 47.38] *Res Judicata*

Principles of *res judicata* as also of constructive *res judicata* apply to decisions in execution proceedings as between the parties.[972] Therefore, if a judgment-debtor, who might and ought to have raised a defence at an appropriate stage, has failed to do so, he would be precluded from urging it at any subsequent stage of the proceedings.[973] Accordingly, where the court is competent to decide a question as to jurisdiction arising from the interpretation or the applicability of a statute, even an erroneous decision is binding on the parties.[974] Where the widow of the judgment-debtor failed to appear in spite of notice under O XXI, rule 22 and raise the objection as to the saleability of the property before an order of attachment was made, it was not open to her, to subsequently file an application, under this section for release of the property even though the property proceeded against was her personal property and not belonging to her husband.[975] But the dismissal of an application resisting the execution for default of the judgment-debtor is not a decision after hearing the parties and therefore does not operate as *res judicata*.[976] The decree-holder, after fighting the legal battle for more than a decade, succeeded in getting a decree for the restoration of possession of the land in dispute. Only symbolic possession was delivered to her, as the land was under crops. There was no evidence to hold that the decree-holder consented to symbolic possession in lieu of actual physical possession. It was held that the executing court was wrong in drawing an inference that the decree-holder was satisfied with mere symbolic possession, merely, because the first execution application was allowed to be dismissed in default. Refusal to entertain a second execution application on that ground was illegal. Non-appearance of the decree-holder on the date fixed by the executing court cannot lead to a conclusion that she was satisfied with symbolic possession in lieu of actual physical possession. Such a consent, if any, has to be given in the executing court, and even if such consent was given, it could not amount to the satisfaction of the decree which was for actual physical possession. Hence, there was no bar to the maintainability of the second execution application.[977]

See also notes under section 11.

[s 47.39] Estoppel

In the case of acquisition of land, the reference court amended its earlier order granting compensation. The order in question has attained finality by reason whereof the original decree stood amended. The executing court in view of the decision, in itself, could not have gone behind the decree. The executing court thus proceeded to pass the impugned judgment on a wrong premise. The executing court keeping in view its limited jurisdiction could not have gone into the question as to whether the reference court was correct in passing the order amending the decree or not. The executing court did not have any jurisdiction to go into the said question. A decree passed by a competent court of law can be suitably amended. A decree, so amended on an application filed by the claimant for review thereof becomes final. If the

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972. *Ravti Devi v Khiali Ram,* AIR 1967 Del 119; *Narayan Chandra v Nath Bank Ltd,* AIR 1967 Pat 124 : ILR 44 Pat 87; *Nairanjan Das v Liquidator Puri Bank,* AIR 1968 Ori 183; *Girdharan Parasad v State,* AIR 1968 Pat 77; *Bijali Bala v Charu Bala,* AIR 1969 Pat 21; *Sarjug Singh v Bassisut Singh,* AIR 1970 Pat 237 : ILR 47 Pat 173; *Perraju v Venkamma,* AIR 1971 AP 74; *Shanker v Sukhai,* AIR 1976 All 229.
973. *Pushpa v Ganpat Singh,* AIR 1977 Raj 216.
974. *Piarelal v Bhagwat Prasad,* AIR 1969 MP 35.
975. *Chandra Choor v Krishnavati,* AIR 1969 Pat 251.
976. *Shivshankar v Baikunth,* AIR 1969 SC 971 : (1969) 1 SCC 718.
977. *Ajit Kaur v Mandir Jhok Haridhar,* AIR 1989 P&H 194.

state was aggrieved by and dissatisfied therewith it could have taken the matter by filing an appropriate application before the high court. But keeping in view of the fact that the said order was allowed to attain finality, the court could not have permitted the state to reagitate the said question before the executing court by filing an application under section 47 of the CPC or otherwise. In a case of this nature the principle of estoppel by records shall come into play.[978]

[s 47.40] Satisfaction of Decree

Decree sought to be executed was a decree for permanent injunction regarding user of flour mill.

As soon as the possession of the *attachakki* itself was entrusted back to the decree-holder, there could be no further occasion for violating the decree for permanent injunction which restrained the respondent/judgment-debtor from using the *chakhi* or from using the power connection for the *chakki*. Therefore, the entire decree stood satisfied on the delivery of the *chakki* back to the decree-holder.[979]

In law, where a person having two alternative courses of action which are mutually exclusive, chooses to adopt one and reject the other expressly or impliedly, then he is said to have elected to choose one. He is subsequently precluded from adopting the course which he intended to reject. It is known as the doctrine of election. Like estoppel, it is also a child of equity. It is founded on the principle that one should not be permitted to approbate and reprobate, that is, blow hot and cold at the same time. It has been extended and applied as an aspect of estoppel to prevent a person from falling a victim to what would have otherwise resulted in injustice to him and unfair advantage to the doctrine of approbation and reprobation, which is akin to the law of election and estoppel, applies to those cases where a person has elected to take a benefit otherwise than on merits of the claim. Another criterion for the applicability of the doctrine is that the person receiving the benefit must have a choice between two rights, and after the exercise of the choice, restitution is impossible or inequitable.[980]

For the purposes of the common law doctrine of election, where a person has an unrestricted choice between two mutually inconsistent courses of action which affect his rights, knowledge of the right to elect is a precondition to the making of an effective election, and there can be no knowledge of the right to elect unless the person knows his legal right as well as facts giving rise to those rights.[981]

In a case, where the decree-holder bank had filed an execution proceedings under the CPC and had simultaneously initiated revenue recovery proceedings under section 69 (2) of the Kerala Revenue Recovery Act, 1968 for recovery of Bank debt, it was held by the Kerala High Court Division Bench that proceedings under section 47 of the CPC and under section 69 (2) of the Act are independent of each other in scope and purport and can be simultaneously employed to attain ultimate goal of recovery of the amount. It was not necessary to stop one of the processes to continue with the other.[982]

The Supreme Court on several earlier occasions had considered the applicability of the doctrine of election in legal proceedings. In *Bhau Ram's* case,[983] a five-judge bench of the Supreme

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978. *Jaya Chandra Mohapatra v Land Acquisition Officer, Rayagada*, AIR 2005 SC 4165 : (2005) 9 SCC 123.
979. *Shiv Charan Din Dayal Jain v Mohan Lal*, AIR 2004 Del 139.
980. Woodroffe & Amir Ali, *Law of Evidence*, 17th Edn, vol 4, p 5075.
981. *Peyman v Lonjani*, (1984) 3 All ER 703 : (1985) Ch D 457
982. *Syndicate Bank v SS Sheriff*, AIR 2007 Ker 189 (DB).
983. *Bhau Ram v B Baijnath Singh*, AIR 1961 SC 1352 : (1962) 1 SCR 358.

Court was hearing an appeal against a pre-emption decree. The defendant had withdrawn the pre-emption amount deposited in court. A preliminary objection was raised whether the defendant, having taken the benefit from the decree, can challenge the same decree. Mudholkar, J, speaking for the majority view, held that the principle that a person who takes benefit under an order cannot repudiate that part of the order, which is detrimental to him, on the ground that he cannot be allowed to approbate and reprobate, is applicable only to cases where the benefit conferred by the order is something apart from the merits of the claim involved.

In another case,[984] a three-judge bench of the Supreme Court, in a suit for redemption, held that where the mortgage enjoys benefits under a deed, he must also accept the obligations thereunder.

This doctrine came to be noticed by the Supreme Court again in a case under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("NPA Act") and the Debt Recovery Tribunal Act, 1993 (DRT Act). It was held that NPA Act is additional remedy to DRT Act and together they constitute one remedy. Thus, the doctrine of election does not apply.[985] SH Kapadia J (as he then was), speaking for the Bench, observed as follows:

> In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2nd. Vol. 25, page 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity (Thirty-first Edition, page 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants, at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.[986]

Limit of time for execution

[S 48] Execution barred in certain cases.—[*Rep. by the Limitation Act, 1963 (36 of 1963), sec. 28 (w.e.f. 1-1-1964).*]

The section, prior to its deletion, was as follows:

> 48. (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—
>
> (a) the date of the decree sought to be executed; or
>
> (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.
>
> (2) Nothing in this section shall be deemed—
>
> (a) to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-

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984. *C Beepathumma v VS Kadambolithaya,* AIR 1965 SC 241 : (1964) 5 SCR 836.
985. *Transcore v UOI,* AIR 2007 SC 712 : (2008) 1 SCC 125.
986. *Transcore v UOI,* AIR 2007 SC 712, p 733 : (2008) 1 SCC 125.

debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of Art. 183 of the First Schedule to the Indian Limitation Act, 1908.

This section has been repealed by section 28 of the Limitation Act, 1963. In its place, a new provision, Article 136, has been introduced which prescribes "for the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court" a period of 12 years:

> [987][When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurrent periods, when default in making the payment or delivery in respect of which execution is sought, takes place:
>
> Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

The period of 12 years prescribed by section 48 is retained under Article 136 and is now the only period of limitation. It is therefore no longer necessary to keep the execution alive by successive applications within three years for complying with the original Article 182.

Those interested in pending proceedings under section 48 as it stood before its deletion are requested to refer to the commentary under that section contained in the earlier edition. The following case decided after the amendment may to such readers be of interest.[988]

Transferees and legal representatives

[S 49] Transferee.—Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

[s 49.1] Equity of Judgment-debtor

This is the same principle as that enacted in section 132 of the Transfer of Property Act, 1882. A right of set-off is an equity, and if the judgment-debtor has the right to set off a cross decree under O XXI, rule 18, he has this right also against the transferee of the decree-holder.[989] But the question of set-off will arise when the decree will be actually put under execution. The court to which an application for transfer of a decree is made cannot go into the question of equities under this section.[990] The section applies to all decrees including mortgage-decrees.[991] The judgment-debtor is entitled to claim under this section, only those equities which he had against the original decree-holder and not against his transferee, and accordingly, a payment made by him to a transferee from the decree-holder whose transfer was invalid cannot be set up

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987. Substituted by Act 52 of 1964, section 3 and the Second Schedule, for "Where" (w.e.f. 28-12-1964.)
988. *K Ramayya v VK Nageshwarrao*, AIR 1969 AP 250; *Sita Devi v Anna Rao*, AIR 1970 AP 43; *Rameswar Sarma v Madan Lal Agarwalla*, AIR 1965 Assam 96; *LR Goud v Raju Bai*, AIR 1971 AP 336; *Lalji Raja & Sons v Hanraj Nathuram*, AIR 1971 SC 974; *K Muniswamappa v P Chennakrishnappa*, AIR 1971 Mys 266 : 1 Mys LJ 48; *Mitthan Lal v Parwati*, AIR 1977 All 236.
989. *Kaim Ali v Lakhikant*, (1868) 1 Beng LR 23 (FB); *Kristo Ramani v Kedarnath*, (1889) 16 Cal 619; *Sinnu v Santhoji*, (1903) 26 Mad 428; *Brij Mohan v Manmohan*, AIR 1937 All 351 : (1937) All 553.
990. *Dutta v Tarubala*, AIR 1937 Cal 570.
991. *Sheo Prasad v Lall*, AIR 1925 Pat 449 : (1924) 4 Pat 120.

against a transferee who has obtained a valid transfer.[992] A company borrowed a loan from the bank, but failed to repay. Consequent upon this, the bank tried to exercise the right of set off in terms of the contractual obligations assumed by the petitioners (company), by transferring the amounts deposited by petitioners in the current account to the loan account. The question arose whether the respondent bank had the right to claim set-off, of the amounts deposited in the current accounts by transferring them to the loan account, in order to realise the loans advanced to the petitioners, which they had failed to discharge. It was held that the matter fell within the domain of the law of contract, and the right of set off claimed by the bank could not be denied on the pretext that the transfer of the amounts in the current account would result in the negation of the activities of the petitioners in publishing the newspapers, weeklies, etc. The enforcement of the doctrine of set off for the amounts to be realised by the bank, cannot be said to be arbitrary or *mala fide*.[993]

ILLUSTRATIONS

(i) *A* holds a decree against *B* for Rs 5,000. *B* holds a decree against *A* for Rs 3,000. *A* transfers his decree to *C*. *C* cannot execute the decree against *B* for more than Rs 2,000.[994]

(ii) *A* obtains a decree against *B* for Rs 5,000. *B* then sues *A* to recover Rs 2,000. Pending *B*'s suit, C obtains a transfer of *A*'s decree with notice of *B*'s suit. A decree is then passed for *B* in his suit against *A*. *C* applies for execution against *B* of the whole decree for Rs 5,000. He is not entitled to execute the decree for more than Rs 3,000 as the transfer was taken with notice of *B*'s suit.[995]

The second illustration is the case of *Kristo Ramani v Kedarnath*,[996] in which it was assumed that the assignee must have notice of the equity. However, it is submitted, that it matters not that the assignee was, unaware of the equity provided it was existing at the time of the assignment;section 132 of the Transfer of Property Act, 1882, illustration (i) and the case of *Mon Mohan Karmakar v Dwarka Nath Karmakar*.[997] In the latter case, the court said:

> Under section 49 of the Code the assignee (of a decree) stands in no better position than the assignor and takes it subject to all the equities and defences, subsisting at the time of the assignment, which the judgment-debtor could have asserted against it in the hands of the judgment-creditor, notwithstanding that the assignee may have had no notice thereof.

If the equity is not existing at the time of the assignment there is no right to set-off.[998] The right of a judgment-debtor to ask for a stay of execution under O XXI, rule 29 is an equity which binds the assignee of a decree.[999] An application for stay of execution is maintainable under O XXI, rule 29 even though the decree-holder has assigned his decree in favour of a stranger pending the suit of the judgment-debtor and the assignee is not a party therein. The assignee takes his assignment subject only to the equity in favour of the judgment-debtor under O XXI, rule 29 and it is immaterial that the assignee had no notice of the suit.[1000] It has however, been held by the High Court of Rajasthan that the mere pendency of a suit

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992. *Harjang Singh v Gowardhandas*, AIR 1952 P&H 183 : (1951) ILR Punj 475.
993. *Canara Bank v Taraka Prabhu Publishers Pvt Ltd*, AIR 1991 AP 258 (FB).
994. *Kaim Ali v Lakhikant*, (1868) 1 Beng LR 23 (FB).
995. *Kristo Ramani v Kedarnath*, (1889) 16 Cal 619.
996. *Kristo Ramani v Kedarnath*, (1889) 16 Cal 619.
997. *Mon Mohan Karmakar v Dwarka Nath Karmakar*, (1910) 12 Cal LJ 312; *Daw Aye v U Aye Maung*, AIR 1937 Rang 316; *Palladugula Suyanarayana v Samayamanthula Nageswara Rao*, AIR 1945 Mad 381 : (1946) ILR Mad 30.
998. *Nagendra Nath v Haran Chandra*, AIR 1933 Cal 865 : (1933) 37 Cal WN 758.
999. *Gurushantappa v Nagappa*, AIR 1938 Bom 253 : (1938) Bom 263.
1000. *Kottayam Orient Bank Ltd v Moosa Rawther*, AIR 1959 Ker 402 : 1958 Ker LT 1012 : (1958) Ker LJ 1255.

by the judgment-debtor against the decree-holder is not an equity within this section and that consequently, the assignee of a decree does not take it, subject to any decree that may subsequently be passed in the suit of the judgment-debtor.[1001]

Court-fee is essentially a matter between the State and the person, who comes to the court, as a pauper or otherwise. The person, who raises the question of court-fee, cannot take upon itself the role of the state. It has been held by a Division Bench of the Gauhati High Court that the fact that the decree has been obtained by a person without paying any court-fee or without paying appropriate court-fee, the decree, if validly granted, cannot be held to be in executable or a nullity, particularly, when the *bona fide* of the person who obtains the decree, is not challenged or is in dispute.[1002]

[S 50] Legal representative.—(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

SYNOPSIS

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[s 50.1] Changes in the Law

The present section differs from the corresponding section 234 of the Code of Civil Procedure 1882, in one respect, *viz*, that the words "fully satisfied" have been substituted for the words "fully executed".[1003]

[s 50.2] Judgment-debtor Dies

This refers to natural death and not to civil death. If the judgment-debtor becomes a *sanyasi*. his son is not his legal representative.[1004]

1001. *Anupchand v Hira Chand*, AIR 1962 Raj 223.
1002. *Maya Ram Ghosh v State of Tripura*, AIR 2007 Gau 76 (DB) : 2007 AIHC 2169 (Agartala Bench).
1003. See notes below under the head: "Before the Decree has Been Fully Satisfied".
1004. *Madho Rao v Gur Narain*, AIR 1931 All 306 : (1931) 53 All 529; *Sudhamoyee v Bhupendra*, AIR 1935 Cal 713.

[s 50.3] Judgment-debtor Applying for Insolvency

Where property of the judgment-debtor is sold by the decree-holder after the judgment-debtor has applied for insolvency, without notice to the official receiver, the sale is a nullity, as the adjudication of the insolvent relates back to the date of his petition and the properties of the judgment-debtor vests in the official receiver from that date.[1005]

[s 50.4] Extent of Liability of Legal Representative

It is well settled that legal representative of judgment-debtors are liable for the debts of the predecessor to the extent of estate acquired by the legal representative from their predecessors.[1006] This section enables a decree-holder to execute his decree against the legal representative of a deceased judgment-debtor. The property that can be attached is the property of the judgment-debtor found in the hands of the representative, and the property of the representative, from whatever source derived, to the extent of that, which he has wasted out of the assets come to his hands without satisfying the debts of the deceased.[1007]

The liability of a legal representative in execution proceedings is confined to the property of the deceased which has actually come to his hands. If the decree-holder seeks to make the legal representative answerable also for the property of the deceased, which, with due diligence on his part would have come to his hands, his proper remedy is by way of suit against the legal representative, and not by proceedings in execution under this section.[1008] Suit was filed for recovery of money and decreed against appellant's husband. Execution of decree was sought by attaching movable property of the wife after death of the husband-appellant took the plea that she did not inherit any property of her husband and that it was her personal property. Order for attachment and sale without considering the matter and in violation of sections 52–53, is illegal.[1009]

Sub-section (2) of section 50 of the CPC makes it very clear that the legal representative is liable only to the extent of the property of the deceased, which is inherited by him. Appointment of the legal representative on compassionate ground cannot be termed as property inherited from his father. Therefore, attachment of salary cannot be ordered against the said judgment-debtor.[1010]

The extent of the liability of the legal representative is decided by the court executing the decree and the court may call for an account of the property of the judgment-debtor that has come into the hands of the legal representative. The decree-holder must prove in the first instance that some assets have come to the legal representative, and the onus is then shifted to the latter, to show how the assets including rents and profits have been applied.[1011]

A decree-holder is entitled under this section to have the amount of the decree paid out of the assets of the deceased in the hands of the legal representative which have not yet been duly disposed of. Hence, the legal representative is bound to pay to the decree-holder, the full

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1005. *Henry Merien v Official Receiver, Madura,* AIR 1935 Mad 907.
1006. *Madhukar Sagun Karpe v Institute of Public Assistance,* AIR 1998 Bom 201.
1007. *Rajrup Singh v Ramgolam,* (1888) 16 Cal 1; *Chintamoney Dutt v Mohesh Chandra,* (1896) 23 Cal 454.
1008. *Khushrobhai v Hormazsha,* (1887) 11 Bom 727; *Saratmani Debi v Batta Krishna,* (1908) 35 Cal 1100; *Leong Ah Choy v TD Findlay & Sons, Ltd,* AIR 1937 Rang 274.
1009. *Anmina Poul Choudhary and Biswas v Bank of Baroda,* AIR 1991 Ori 115.
1010. *Bandaru Srinivassa Rao v Sreyobhilashi Chit Funds, Wyra,* AIR 2008 AP 97 : 2008 (1) Andh LD 392.
1011. *Raja of Kalahasti v Prayag,* (1916) 30 Mad LJ 391.*Mohammad Shariff v Mehraj Din,* AIR 1934 Lah 106; *Lal Behari Prasad v Bindesari Misra,* AIR 1934 All 249.

amount of the decree, though there may be other creditors of the deceased, and the assets may not be sufficient to pay them all in full.[1012] On the death of the judgment-debtor in a motor vehicle accident, the amount of compensation awarded by the Accidents Claims Tribunal is payable to his real heirs only. The said amount cannot be said to have been part of the estate of the deceased. It is, therefore, not liable to be attached in execution of the decree against the judgment-debtor, as the asset of the deceased is in the hands of his legal representatives. But when the decree was made personally against one of the legal representatives along with the deceased, the share of the legal representative in the compensation amount would be liable to be attached.[1013] In a case where the decree restrains a judgment-debtor from doing something in his own hand to the detriment of the decree-holder or in derogation of a right claimed by the judgment-debtor to enjoy his own property as an owner, the decree could not be understood as merely personal and not binding on the representatives or assignees of the judgment-debtor in relation to the property in respect of which it is obtained.[1014]

[s 50.5] Legal Representative

The effect of section 50 read with O XXI, rule 22 is that there are two requirements for all execution applications against legal representatives. The first is that the application must be made to the court which passed the decree and the second is that notice of execution must be served on the legal representative. An application for transfer of a decree under section 39 is not sufficient compliance of this section.[1015]"Legal representative" means a person, who, in law, represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased.[1016] Thus, where a judgment-debtor dies and a stranger takes possession of his property, the decree may be executed against the stranger, for he is a "legal representative" within the meaning of this section.[1017] A residuary legatee in possession of the judgment-debtor's estate is his legal representative although letters of administration have not yet been issued to him.[1018] A nominee under an insurance policy has been held to be a legal representative of the deceased policy-holder.[1019] The purchaser of the business of a firm against which a decree has been passed is not the "legal representative" of the firm within the meaning of this section. The decree against the firm cannot, therefore, be executed against the purchaser.[1020] The widow and the daughter of the judgment-debtor remain liable under section 50 of the CPC and the provisions of Hindu Succession Act, 1956 on the death of the judgment-debtor.[1021]

1012. *Venkatarangayan v Krishnasami,* (1899) 22 Mad 194.
1013. *Janaki v Prabhat Finance by Partner,* AIR 1986 Mad 273.
1014. *Chothy Theyyathan v John Thomas,* AIR 1997 Ker 249.
1015. *Presidency Industrial Bank v HL Industries,* AIR 1969 Bom 84 : 70 Bom LR 373 : 1969 Mah LJ 49.
1016. See section 2, clause (11).
1017. *Saratchandra Deb v Bichitranand Sahu,* AIR 1951 Ori 22 : (1950) Cut 413. The decision to the contrary in *Chatakelan v Govinda,* (1894) 17 Mad 186, is no longer law. See note "Legal representative" under section 2(11).
1018. *Porosanno Chundra v Kristor,* (1877) 4 Cal 342; *Chuni Lal v Osmond,* (1877) 4 Cal 342; *Chuni Lal v Osmond,* (1903) 30 Cal 1044.
1019. *Rajaram v Mata Prasad,* AIR 1972 All 167 (FB).
1020. *Harish Chandra Chandpore Co Ltd,* (1903) 30 Cal 961; *Arbuthnot's Industrials Ltd v Madhu Chetties,* (1908) 31 Mad 464.
1021. *Raghu Mandala Kasibabu v State Bank of India,* AIR 1999 Ori 160.

[s 50.6] Before the Decree has been Fully Satisfied

The corresponding section of the Code of Civil Procedure, 1882 (section 234) provided, in effect, that if a judgment-debtor died before the decree had been "fully executed", the holder of the decree might apply to the court which passed it to execute the same against the legal representative of the deceased. This gave rise to the question as to when a decree could be said to be "fully-executed"? It was held by the High Court of Madras that a decree could not be said to be "fully executed" until the property attached was sold, and that if the judgment-debtor died before sale, his legal representatives ought to be brought on the record; and if the property was sold without the legal representatives being brought on the record, the sale was absolutely void.[1022] On the other hand, it was held by the High Court of Allahabad that once the property was attached the decree was "fully executed" and that it was not necessary to bring the legal representatives on the record and a sale held in their absence was not void. The latter decisions were based on the ground that once a property was attached, it was in the hands of the law, and the attachment did not abate on the death of a judgment-debtor.[1023] At the same time, there were cases in which it was held that omission to being the legal representatives on the record, did not vitiate the sale, but was at most an irregularity within the meaning of section 311 of the Code of Civil Procedure, 1882 [now O XXI, rule 90].[1024] It was to remove this conflict of decisions that the words "satisfied" has been substituted in the present section for the word "executed". The effect of this alteration in the language is to supersede the Allahabad decisions in so far as they hold that after attachment, it was not necessary to bring the legal representatives on the record; for a decree cannot be said to be fully "satisfied" merely because the property was attached. The words of the enactment that the "holder of a decree may apply" have led to a further controversy as to whether a sale held without bringing on record the legal representatives of a deceased judgment-debtor was void or voidable. It was held by the Calcutta High Court that such a sale was merely irregular and liable to be set aside under O XXI, rule 90, on proof of substantial injury.[1025] A Full Bench of the Madras High Court has however held that in such a case, the sale is void.[1026] The Patna High Court has also followed this view in a case where this judgment-debtor died after the publication of the sale proclamation and no notice of the execution was, given to his legal representative.[1027] The Calcutta High Court has, in a later case,[1028] followed the Full Bench decision of the Madras High Court, observing that its earlier decision given in *Tharangini's* case cannot be considered to be right in view of the decision of the Privy Council in *Raghunath Das*'s case.[1029] The question has since been considered by a Full Bench of the Calcutta High Court[1030] which has held that the omission to bring the legal representatives on record rendered the sale a nullity. That is also the view taken

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1022. *Ramasami v Bagirathi,* (1883) 6 Mad 180; *Groves v Administrator-General,* (1899) 22 Mad 119.
1023. *Sheo Prasad v Hira Lal,* (1890) 12 All 440 (FB); *Abdur Rahman v Shankar,* (1895) 17 All 162; *Stowell v Ajudhia Nath,* (1884) 6 All 255.
1024. *Aba v Dhondu Bai,* (1895) 19 Bom 276; *Net Lall v Sheikh Kareem,* (1896) 23 Cal 686; *Bepin Behary v Sosi Bhusan,* (1913) 18 Cal WN 766.
1025. *Jagadish v Bama Sundari,* (1919) 23 Cal WN 608; *Tarangini v Raj Krishna,* (1927) 32 Cal WN 418.
1026. *Kanchamalai v Shahaji,* AIR 1936 Mad 205 (FB) : (1936) 59 Mad 461; *Faizuddi v Razia Begum,* AIR 1942 Cal 436 : (1942) 2 Cal 262 : (1942) 46 Cal WN 631 : 75 Cal LJ 368.
1027. *Ajab Lal Dubey v Hari Chaaran Tewari,* AIR 1945 Pat 1 (FB) : (1944) 23 Pat 528.
1028. *Faizuddin Talukdar v Razia Begum,* 75 Cal LJ 368.
1029. *Raghunath Das v Sundar Das Khetri,* (1915) 42 Cal 72.
1030. *Smt Shanti Devi v Khandu Bala Dasi,* AIR 1961 Cal 336 : 65 Cal WN 171; *Rajilakshmi v Bonomali,* AIR 1955 Cal 573.

by the High Courts of Kerala[1031] and Rajasthan,[1032] which have observed that the words "may apply" meant only that the decree-holder may elect to proceed against the legal representatives or not and that when he does elect to proceed against them, he must take proceedings against them under this section and that in that context the word "may" mean "shall". Thus, the law may be taken to be well settled that a sale held without bringing on record the legal representatives of a deceased judgment-debtor is a nullity. But where an order has been made bringing the legal representatives on record and the sale is held, that is not liable to be attacked as a nullity on the ground that the order as to representation is erroneous. And where there are several legal representatives and only some of them are brought on record, the sale will be binding on all of them.[1033]

[s 50.7] Before the Decree has been Passed

A decree against a person who has died pending the suit without his legal representatives being brought on the record is a nullity and cannot be executed against the legal representatives.[1034] But a decree passed by the Privy Council in ignorance of the death of a respondent was held not to be a nullity.[1035] In such a case, it has been held that the decree of the Privy Council may be executed under this section against the property of the judgment-debtor, in the hands of his legal representatives.[1036]

[s 50.8] May Apply to Execute the Decree Against the Legal Representatives

Where execution proceedings have been commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the judgment-debtor in the application for execution already on the files of the court. It is not necessary to file a fresh application for execution under O XXI, rule 11.[1037] At the same time notice should be given to the legal representative under O XXI, rule 22. If such notice has been served on the legal representative, the order substituting his name can be made *ex parte*.[1038] The Madras High Court has held that if execution is necessary against the legal representative of the deceased judgment-debtor, the decree-holder has no option but to proceed under this section or to present a fresh application for execution.[1039] It has been held that legatees who have taken possession of their legacies, are legal representatives against whom execution can be taken under this section.[1040]

1031. *Kolappa v Krishna,* AIR 1962 Ker 144 : (1961) Ker LJ 1231 : (1961) Ker LT 1013; *Chacko Piley v Iype Varghese,* AIR 1956 TC 147; *Fernandez v Madhavi,* AIR 1955 TC 92 : 1955 Ker LT 46.
1032. *Mubarak Begum v Sushil Kuar,* AIR 1957 Raj 154.
1033. *Sathruhan Prasad v Sudip Narain,* AIR 1955 Pat 408, following the Privy Council decision in *Mallikarjuna v Narahari,* 25 Bom 337 : 27 IA 216; *Mahadeo v Shantilal,* AIR 1957 Bom 170; *Hardaya Devi v Fideen,* AIR 1962 All 125; but See *Chacko Piley v Iype Varghese,* AIR 1956 TC147. See further section 65 notes under the heading "Sale when void and when voidable" and section 52 notes under the heading "Decree against wrong person as heir and legal representative".
1034. *Radha Prasad v Lal Saheb,* 17 IA 150; *Jungli Lall v Laddu Ram,* (1919) 4 Pat LJ 240; *Seshamma v Venkata,* AIR 1924 Mad 713 : (1924) 47 Mad LJ 235; *Elisa v A Dass,* AIR 1992 Mad 159.
1035. *Deonandan v Janki Singh,* (1920) 5 Pat LJ 314; *Sri Chandra Chur v Mst Shyam,* AIR 1932 Pat 261 : (1932) 11 Pat 445.
1036. *Chandra Chur v Shyam,* AIR 1932 Pat 261 : (1932) 11 Pat 445.
1037. *Purshottam v Rajbai,* (1910) 34 Bom 142; *Bhagwan Das v Jugal Kishore,* (1920) 42 All 570; *Shankar v Hiralal,* (1931) 33 Bom LR 585; *Premabai v Juvandas,* AIR 1936 Bom 546 : (1936) 38 Bom LR 977; *Komalavalli v Kunju Pillai,* AIR 1954 TC 26. See O XXII, rule 12.
1038. *Nachiamma v Subramanian,* AIR 1928 Rang 40 : (1928) 5 Rang 775.
1039. *Kanchamalai v Shahaji,* AIR 1936 Mad 205 (FB) : (1936) 59 Mad 461.
1040. *Natesa Sastri v Sundaram Chettiar,* AIR 1953 Mad 623.

[s 50.9] To which Court Application Should be Made

The application to execute the decree against a legal representative of the judgment-debtor should be made to the court which passed the decree.[1041] But this is only a question of procedure and if the court to which the decree is sent for execution, makes the order that is an irregularity which may be waived.[1042] The appellate court ought not to interfere where the merits of the case are not affected by the irregularity.[1043] Section 50 of the CPC deals with execution of decrees of all kinds including that of permanent injunction. Further, the court stated that section 50 of the CPC would also be attracted read with O XXI, rule 32 of the CPC.[1044]

[s 50.10] Death of Legal Representative

If the legal representative of a judgment-debtor against whom execution has been taken out under this section dies before the decree has been fully executed, the decree-holder may execute the decree against the legal representative, of that legal representative to the extent of the assets of the original judgment-debtor that may have come into his hands.[1045]

[s 50.11] Legal Representative bound by Previous Proceedings

The legal representative is bound by orders passed in execution against the deceased judgment-debtor. *A* obtains a decree against *B*. *A* then transfers the decree to *C*. *C* applies for execution against *B*, and an order is made for execution after notice to *A* and *B* as provided by *D* as, rule 16, [Code of Civil Procedure, 1882], section 232. *A* then dies, and his legal representative *D* is brought on the record under this section. The order for execution having been passed in *A*'s lifetime, *D* cannot object to execution on the ground that the transfer to *C* was fraudulent.[1046]

[s 50.12] Decree for Injunction

An injunction obtained against a defendant, restraining him from obstructing plaintiff's ancient rights, may, on the death of the defendant, be enforced under this section, against his son as his legal representative, by procedure under O XXI, rule 32.[1047] Similarly, a decree for an injunction against a manager and representative of a joint Hindu family can be enforced after his death against a son who represents the joint family.[1048] But such an injunction cannot be enforced under this section against a purchaser of the property from the defendant, for an

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1041. *Hirachand v Kasturchand,* (1894) 18 Bom 224; *Seth Shapurji v Shankur,* (1895) 17 All 431; *Swaminatha v Vaidyanath,* (1905) 28 Mad 466; *Sham Lal v Modhusudam,* (1895) 22 Cal 558; *Begam v Bulaqi Shah,* AIR 1926 Lah 34; *Manjulabai v Pandurang,* AIR 1933 Bom 215 : (1934) 36 Bom LR 443; *Official Trustee v Basdeo Bhagat,* AIR 1937 Pat 239; *Damodarlalji v Basant Lal,* AIR 1952 Pat 333 : (1948) 27 Pat 848; *Prasadi v Gulam,* AIR 1951 Pat 618.
1042. *Jang Bahadur v Bank of Upper India,* AIR 1928 PC 162 : 55 IA 227; *Sham Lal v Madhusudan,* (1895) 22 Cal 558; *Sri Chandra Chur v Shyam,* AIR 1932 Pat 261 : (1932) 11 Pat 445; *Mathu Karuppan v Shellani Achi,* AIR 1938 Rang 385 : (1938) Rang 335; *Punjab Co-op Bank v Bikramlal,* AIR 1959 Punj 71 : (1958) Punj 2430; *SB Mills v UOI,* AIR 1965 Pat 52 : (1964) BLJR 212.
1043. *Debendra Nath v GA Aratoon,* AIR 1941 Pat 139; *Srimathi Nilawwa v Virupaxappa,* AIR 1959 Mys 99.
1044. *Ramesh Kumar v Anuj Kumar,* C.R. No. 67/2019, decided on 7 September 2019 (High Court of Himachal Pradesh, Shimla).
1045. *Jafri Begam v Saira Bibi,* (1900) 22 All 367; *Raghu Mandala Kasibabu v SBI,* AIR 1999 Ori 160.
1046. *Mulchand v Chhagan,* (1886) 10 Bom 74; *Liladhar v Chaturbhuj,* (1899) 21 All 277.
1047. *Sakarlal v Parvatibai,* (1902) 26 Bom 283; *Amritlal v Kantilal,* AIR 1931 Bom 280 : (1931) 33 Bom LR 266. Code of Civil Procedure 1882, section 260.
1048. *Ganesh v Narayan,* AIR 1931 Bom 484 : (1931) 55 Bom 709.

injunction does not run with the land. The remedy of the decree-holder is to bring a fresh suit for an injunction against the purchaser,[1049] when the decree is one restraining the owner of the property from blasting rocks in his property on a finding that such blasting would injuriously affect the adjacent property of the decree-holder. When once a decree is passed, it is obvious that the defendant in the suit, judgment-debtor, would be precluded from carrying on blasting operation in his property. To say that when he is succeeded by the others, they would not be bound by the restrain relating to the enjoyment of the particular property is to derogate from the principle of the public policy that there shall be no second litigation in respect of the same right and the same property. It cannot be the policy of law that every time an assignment of the decree schedule property take place, the decree-holder should institute a fresh suit against the assignee, so as to prevent them from disobeying the decree obtained by the decree-holder against the original owner of the property.[1050] The Bombay High Court has held that an injunction can be enforced against a person who has purchased while execution proceedings are pending, by virtue of the doctrine of *lis pendens*.[1051]

In execution of a decree for perpetual injunction, the liability of the legal representatives of the judgment-debtors is limited to the extent of interference which was restrained through such decree. It is only such legal representatives who defy the decree that can be proceeded against.[1052]

In *Muthukaruppa Pillai v Ganesan,*[1053] a question arose with respect to executability of a decree for injunction where the plaintiff had filed a suit for restraining the defendant-appellant from interfering with her rights as *Hakdar* and *Pujari*. The Supreme Court laid down that the legal representatives of decree holder can execute decree for permanent injunction relating to the property or right which is heritable and partible. In such situations, it would be open to the decree holder to execute decree against the successor of interest of judgment-debtor also.

In a subsequent case, the question before the Supreme Court was executability of decree for permanent injunction against the legal representatives of judgment-debtor. Relying on *Muthukaruppa Pillai v Ganesan,*[1054] it was held that the executing court could execute the decree of perpetual injunction against the legal representatives of the judgment-debtor. The court held that the right in a property which is heritable and partible would enure not only to the benefit of the legal heir of decree-holders but also would bind the legal representatives of the judgment-debtor. It also held that when a judgment-debtor dies before the decree has been satisfied, it can be executed against legal representatives. Section 50 is not confined to a particular kind of decree. Decree for injunction can also be executed against legal representatives of the deceased judgment-debtor. The maxim "*actio personalis moritur cum persona*"(a personal right of action dies with the person)is limited to certain class of cases and when the right litigated upon is heritable, the decree would not normally abate and can be enforced by LRs of decree-holder and against the judgment-debtor or his legal representatives. It was further held that it would be against the public policy to ask the decree-holder to

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1049. *Dayashbai v Bapalal,* (1902) 26 Bom 140; *Vithal v Sakharam,* (1899) 1 Bom LR 854; *Jamsetji v Hari Dayal,* (1908) 32 Bom 181.
1050. *Chothy Theyyathan v John Thomas,* AIR 1997 Ker 249. See notes to section 47, "Representatives No (6)—Purchaser of Property".
1051. *Krishnabai v Savlaram,* AIR 1927 Bom 93 : (1927) 51 Bom 37.
1052. *Kalpuri Ellamma v Nellutla Venkata Lakshmi,* 2008 (72) All Ind Cas 669.
1053. *Muthukaruppa Pillai v Ganesan,* (1995) Supp 3 SCC 69.
1054. *Muthukaruppa Pillai v Ganesan,* (1995) Supp 3 SCC 69.

litigate again against the legal representatives of the judgment-debtor when the cause and injunction survives.[1055]

[s 50.13] Application of this Section to Orders

This section is applicable to orders which are executable as decrees.[1056]

Procedure in execution

[S 51] Powers of Court to enforce execution.—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by the sale without attachment of any property;

(c) by arrest and detention in prison; [1057][for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section];

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require:

[1058][Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]

1055. *Prabhakara Adiga v Gowri*, AIR 2017 SC 1061 : (2017) 4 SCC 97 : 2017 (3) Scale 32.
1056. *Abdul Fatha v Mohd Jabbar,* (1956) 2 Mad LJ 475.
1057. Inserted by Act 104 of 1976, section 21 (w.e.f. 1-2-1977).
1058. Inserted by Act 21 of 1936, section 2.

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[s 51.1] State Amendment

Uttar Pradesh Amendment.—After clause (*b*) the following clause (*bb*) was added by Uttar Pradesh Act 24 of 1954:—

"(*bb*) by transfer other than sale, by attachment or without attachment of any property".

[s 51.2] High Court Amendment

Calcutta.—In clause (*b*) omit the words "or by sale without attachment" between the words "sale" and "of any".

In the proviso omit the words "for reasons recorded in writing" after the words "the Court" and before the words "is satisfied".

Add the proviso—

"*Provided also* that the Court of Small Causes of Calcutta shall have no power to order execution of a decree by attachment and sale of immovable property or by appointing a receiver in respect of such property." *vide* Cal. Gaz., Pt. I, dated 20 April 1967.

[s 51.3] Choice of Appropriate Mode of Execution

The various modes mentioned in this section are not open to the executing court in every case. The court ought to be guided by the procedure laid down in the CPC and must resort to the method appropriate to each case.[1059] It is for the decree-holder to choose in which of the several modes mentioned in the section, will he execute the decree, but his option is subject to the provisions of the CPC and to the discretion of the court.[1060] If the mode of procedure provided by the law at the time when execution is sought is different from that prevalent when the decree was passed, by reason of an alteration effected in the law in the meantime, the altered law must be followed. The decree-holder's right to execute the decree under section 51

1059. *Anandi Lal v Ram Sarup*, AIR 1936 All 495 (FB) : (1936) All LJ 605; *Munni Lal v Nawal Kishore*, AIR 1961 P&H 547; *Ram Lochan v Mahadeo Prasad*, AIR 1970 All 544 : (1970) All LJ 687.
1060. *Umakant v Renwick & Co Ltd*, AIR 1953 Cal 717 : 58 Cal WN 683.

is subject to the rules for the time being in force. Section 51 itself provides that it is subject to the prescribed conditions and limitations.[1061]

The Andhra Pradesh High Court has held that the decree, be it of any court, including the Apex Court, can be subjected to execution and enforced by different modes, may be under the provisions of O XXI, rule 35 or section 144 or section 151 of the CPC depending upon the facts and circumstances of each case, and the imperative need to give quietus to the litigation expeditiously and forever.[1062]

Section 51 of the CPC makes it explicit that arrest and detention of the judgment-debtor is one of the modes of execution of the decree. Once the decree-holder satisfies the court that the judgment-debtor has sufficient means but has neglected to discharge the debt, the court cannot dismiss the execution petition on the ground that the decree-holder has alternative remedy of getting properties of the judgment-debtor attached. The decree-holder can choose any of the modes available to him under section 51 of the CPC.[1063]

Under O XXI, rule 64 makes provision for sale of attached property, while rule 66 takes in cases covered by rule 64 and also decrees where attachment is not necessary. Therefore, the specific mention of attachment of property in rule 64 would not take away the application of rule 66 to decrees for execution of which no attachment is necessary.[1064]

[s 51.4] Constitutionality

Imprisonment of a judgment-debtor in execution cannot be ordered unless the conditions given in section 51 are satisfied. Hence, the section does not violate Article 21 of the Constitution of India.[1065]

[s 51.5] Enforcing Decree and its Satisfaction: Distinction

A distinction has to be drawn between the mode of enforcing decree on one hand and actual satisfaction thereof; sending a person to prison is a "mode of enforcement". It is not a mode of satisfaction of the decree. The whole purpose of detaining a person in civil prison is to compel a person liable to obey the mandate of a decree who refused to comply with the terms of the decree without satisfactory cause. The satisfaction is to be recorded as per the requirement of section 51 CPC. Merely because it appeared to the court that there is no possibility to satisfy the decree, is not equivalent to the "satisfaction" statutorily required under section 51 read with O XXI rule 37 of the CPC to be recorded by the court before proceeding to resort to arrest and detention of the judgment debtor.[1066] The purpose of sentencing him to prison is not to wipe out his liability of comply with the decree. A sentence of prison or detention of a person in civil prison, is not a substitute for compliance of the decree. It is not a mode of discharging or satisfying a decree. The compliance of the decree can only be sought by resorting to these penal actions. The liability or obligation flowing from the decree cannot be taken to have been discharged by detaining a person liable to comply with the decree, in prison. At the cost of

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1061. *Mahadev Prasad v Ram Lochan*, AIR 1981 SC 416 : (1980) 4 SCC 354.
1062. *Pentakota Krishna Bhagwan v Alla*, AIR 2007 AP 2008 : 2007 (3) Andh LT 103.
1063. *Gudiwada Munemma v Jawardhal*, 2007 (1) Civil Court Cases 332 : 2006 (6)Andh LT 587.
1064. *PK Kuruvilla v The Corp Bank*, 2008 (1) Ker LT 604 (DB).
1065. *Jolly George Varghese v Bank of Cochin*, AIR 1980 SC 470 : (1980) 2 SCC 360 : (1980) 2 SCJ 358; *Subhash Chand Jain v Central Bank of India*, AIR 1999 MP 195.
1066. *Mohinder Singh v Amrit Singh Zora Singh Merchants & Commission Agents*, (2019) 196 Punj LR 689.

repetition, it may be stated that it is only a mode or method of implementation of a decree and/or mandate flowing therefrom. No other view is possible.[1067]

[s 51.6] Execution of Decree —Writ not Proper Remedy

Petition seeking writ directing respondent to give all assistance to petitioner in taking over management of institutions in pursuance of the decree of a civil court is not maintainable. A decree passed by the civil court must be passed in terms of the provisions contained in the CPC. The writ petition is not the appropriate remedy therefor.[1068]

[s 51.7] Simultaneous Execution

Simultaneous execution, both against the property and person of the judgment-debtor, is allowed under O XXI, rule 30.[1069] Under the CPC, there is no statutory provision against a number of execution proceedings continuing concurrently. Section 51 of the CPC gives an option to the creditor of enforcing the decree either against the person, or the property of the debtor; and nowhere has this been laid down that the prosecution against the person of the debtor shall not be allowed unless and until the decree-holder has exhausted his remedy against the property.[1070] For conditions and limitations as to arrest and detention, section 58, clause (c) of the operative part of this section has been amended so as to bring it in harmony with the limitations and conditions laid down now in section 58. But the court has discretion under O XXI, rule 21, to refuse simultaneous execution and to allow the decree-holder to avail himself of only one mode of execution at a time.[1071] The privy council has said that "the difficulties of a litigant in India begin when he has obtained a decree",[1072] and the court is not justified in refusing execution against the person on the ground that the decree-holder should first proceed against the property.[1073] But the Calcutta High Court has said that there may be circumstances which would justify such a refusal. Execution should be refused against the person when the decree-holder has a mortgage on the property of the judgment-debtor which would yield a large surplus. If realised in execution, but which prevents the judgment-debtor from raising money on the property.[1074] The court has power under this section, to order delivery of movable property and also to direct conditional attachment of other properties.[1075]

In *Subrata Roy Sahara v UOI,*[1076] the Apex Court dealt with the scope of sections 51, 55 and 58 that permit arrest and detention of a person to enforce compliance with court order imposing financial liability. The court stated:

> A perusal of Section 51 CPC leaves no room for any doubt that for the execution of a decree for payment of money an executing court may order the arrest and detention of the judgment-debtor. Section 55 CPC lays down the manner and modalities to be followed while executing an order of arrest or detention. A perusal of Section 58 CPC postulates the detention of a judgment-debtor for up to six weeks for the recovery of a meagre amount

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1067. *Yashodabai Ganesh Naik Gaunekar v Gopi Mukund Naik,* AIR 2003 Bom 77.
1068. *Swamy Atmananda v Swami Bodhananda,* AIR 2005 SC 2227 : (2005) 3 SCC 734 : 2005 (4) Scale 116 : 2005 (11) JT SC 379.
1069. *Venkappa v Lakshmikant,* AIR 1956 Hyd 7 : (1955) ILR Hyd 797.
1070. *Shyam Singh v Collector, District Hamirpur,* (1993) Supp 1 SCC 693.
1071. *AK Subramania v A Ponnuswami Chettiar,* AIR 1957 Mad 777 : (1957) 1 Mad LJ 208.
1072. *Court of Wards v Maharajah Coomar Ramaput,* (1872) 14 Moo Ind App 605, p 612 : 17 WR 159 PC.
1073. *Hargobind v Hakim Singh,* AIR 1926 Lah 110 : (1926) 6 Lah 548.
1074. *Mono Mohan v Upendra Mohan,* AIR 1935 Cal 127 : (1935) 38 Cal WN 1085.
1075. *Umakant v Renwick & Co,* AIR 1953 Cal 717 : 58 Cal WN 683.
1076. *Subrata Roy Sahara v UOI,* AIR 2014 SC 3241 : (2014) 8 SCC 470 : 2014 (6) Scale 257.

of less than Rs 5000. Where the amount is in excess of Rs 5000, the provision postulates detention for up to three months. Interestingly, the first proviso to Section 58(1) CPC clearly brings out the purpose of the person's detention. It provides for the concerned person's release on the satisfaction of the money decree even before the duration for which he had been ordered to be detained. But the second proviso to Section 58(1) CPC provides that such an order of detention would not be revoked "without the order of the Court". Another interesting aspect pertaining to the detention of an individual for the execution of a money decree is contained in Section 58(2) CPC, which provides that a person who has been ordered to be arrested and detained (in the course of execution of a money decree) and has been released from jail, would not be treated as having been discharged from his debt. In other words, the detention of a judgment-debtor in prison (for the execution of a money decree), would not liberate/free him from the financial liability which he owes to the decree-holder. It is therefore apparent, from the provisions of CPC, that a court can order for the arrest and detention of a person, even for the enforcement of a paltry amount of Rs 2000 (and also for recovery of amounts in excess thereof).

[s 51.8] Section 51, Clause (B)

The principle underlying clause (b) of the section is that if the property sought to be attached is within the limits of the court's jurisdiction, the court can attach and sell the property. The fact that the place of business of the judgment-debtor company is outside its jurisdiction or that the dividend on its shares is payable only in a place outside its jurisdiction is not material.[1077] The words "attachment and sale" in the clause are to be read disjunctively.[1078] Therefore, attachment of the property is neither necessary nor an essential step in the process of realisation of the decretal amount by sale of the property.[1079] Accordingly, where property is sold without attachment or under an invalid attachment, it is only a case of irregularity, and the sale is not void.[1080]

[s 51.9] Clause (C)—Arrest and Detention

Section 51, CPC, provides that one of the modes of the execution of a decree is "arrest and detention" of the judgment-debtor in civil prison. The proviso to this section restricts the power of the executing court to direct the arrest and detention of the judgment debtor in execution of the decree for payment of money. The object of the proviso is to afford protection to indigent and honest debtors. Therefore, mere non-payment of the amount of the decree is not enough to send the judgment-debtor to prison. But if the conduct of the judgment-debtor is dishonest or contumacious, he is liable to be arrested and detained. The judgment-debtor is not protected if there is element of bad faith in his conduct. If he has the means to pay and if he still refuses or neglects to honour his obligation under the decree, he becomes liable to imprisonment under section 51, CPC. In short, honest judgment-debtors must be protected and dishonest ones should be punished.[1081]

On a combined reading of sections 51(c) and 58 of the CPC, it has been held, that in the execution of a decree of prohibitory injunction under O XXI, rule 32, the judgment-debtor cannot be detained in a civil prison for more than three months and he cannot be detained more than once. Even otherwise, the matter is left to the discretion of the court, and it would

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1077. *MAA Raoof v KG Lakshmipathi,* AIR 1969 Mad 268 : (1968) 2 Mad LJ 34.
1078. *Amulya Chandra Roy v Kumar Pasupati Nath Malia,* AIR 1951 Cal 48 : 55 Cal WN 385 (FB); *Narasingh Dutt v Ram Pratap,* AIR 1961 All 436.
1079. *Karnataka Bank v K. Shamanna,* AIR 1972 Mys 321; *Krishnamukhatal v Bhagwan,* AIR 1974 Guj 1.
1080. *Rahim Bux v Samlulla & Sons,* AIR 1963 All 320.
1081. *Prakash Bhagwani v Sammati Food Products Pvt Ltd Sagar,* AIR 2002 MP 127.

be a sound exercise of discretion to treat the judgment-debtor on par with the other judgment-debtors and the detention cannot exceed the period of three months. In the instant case, the judgment-debtor had already been detained for a period of three months. The order of the court for his detention, till he obeyed the decree, was held to be contrary to the provisions of sections 51 and 58 of the CPC, read with O XXI, rule 32, besides being arbitrary.[1082] Before detention in prison can be ordered, the court must be satisfied that the judgment-debtor has or had, since the decree, the means to pay. Otherwise, the order may be vitiated by non-application of mind.[1083]

Mere inability to pay debt and satisfy the degree is no ground to detain the judgment-debtor in civil prison. Where there is attempt by the judgment-debtor to evade rigours of the decree by fraudulently seeking to transfer property to third party, issuance of warrant of arrest is proper.[1084] If proper procedure has followed as contemplated under the act before the passing of the arrest order, then the arrest order does not require any interference.[1085]

In a case of execution of recovery certificate under the Maharashtra Co-operative Societies Act, 1961, where the respondents having means to pay, refused, and neglected to pay the decretal amount and did not even bother to reply to the notice of show-cause, the notice was made absolute and warrant of arrest directed to be issued against them.[1086]

Where an employee under suspension is paid subsistence allowance and accepts the same, it cannot be said that he was a man without means to pay the decretal amount. Therefore, having accepted to discharge his liability, if he has failed and neglected to do so knowingly and deliberately, the petition for his arrest is not liable to be dismissed.[1087]

When the judgment-debtor categorically disclosed in his counter-affidavit in the Execution Petition, about his salary particulars and expressed in unequivocal terms, his willingness to have his salary attached. This conduct cannot either be called as "*mala fide*" or "deliberate refusal" or "negligence" on the part of the judgment-debtor.

If from the counter-affidavit filed by the judgment-debtor, it could be seen that he has been drawing substantial amount towards his salary, the same can be attached for the realisation of the decretal amount, instead of resorting to an extreme step of ordering the arrest of the judgment-debtor.[1088]

[s 51.10] Arrest of Guarantor

Where the petitioner, as a guarantor, accepted the terms and conditions of loan granted to the principal borrower and suffered a composite decree, he could not contend that the judgment-debtor/principal borrower should be directed to sell mortgaged property first and for recovery of balance amount, if any, to proceed against principal borrower and guarantor. the evidence showed that despite having means the petitioner/guarantor evaded payment of

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1082. *Dodha Narayana v Velli Reddemma,* AIR 1990 AP 147.
1083. *Pundlik v Maharastra State Finance Corp,* AIR 1992 Bom 48.
1084. *Jagdish Prasad Sharma v Standard Brands Ltd,* (2006) 135 DLT 608 : 2007 (50) All Ind Cas 771.
1085. *G-Tech Stone Ltd v BFIL Finance Ltd,* 2020 (4) CTC 770 : (2020) 3 Mad LJ 845 : LNIND 2019 MAD 8954; see also, *Rupesh v Sardar,* M.P. No. 460/2020, decided on 18 February 2020. (Madhya Pradesh High Court (Indore Bench)).
1086. *Greater Bombay Co-op Bank v Satguru Construction,* 2007 (6) AIR Bom R 447 : 2007 (3) Bom CR 707.
1087. *Velraj v Muthiah,* AIR 2008 Mad 239 : (2008) 5 Mad LJ 1307 (Madurai Bench).
1088. *K Vijayakumar v N Gururaja Rao,* AIR 2004 AP 435.

decretal amount, so the order directing arrest of petitioner or guarantor cannot be said to be without jurisdiction.[1089]

[s 51.11] Clause (D)

Refusal or neglect envisages capacity to pay but deliberate non-payment, merely because judgment-debtor possesses immovable property, order of detention in civil prison cannot be made for his failure to pay.

It is open to the decree-holder to file a petition for attachment and sale of the immovable property. The decree-holder, in this case, has not taken recourse to those provisions. It is obvious that he is utilising the provisions of O XXI, rule 38, of the CPC merely as a lever to force payment without taking recourse to the proceedings for attachment and sale of the immovable property. The petition appears to be wholly *mala fide*.[1090]

[s 51.12] Receiver in Execution Proceedings

The appointment of a receiver in execution proceedings is a form of equitable relief which is granted on the ground that there is no effective remedy by execution at law.[1091] Such a receiver has all the powers under O XL, rule 1. The effect of the appointment of a receiver is to prevent the judgment-debtor from collecting amounts due from the garnishee. Payment made by the garnishee to the judgment-debtor would not operate as a discharge and he would still continue to be liable to pay to the receiver. Where the decree-holder is appointed as the receiver he collects the debts not as his own money, but as the officer of the court. Therefore, he cannot appropriate that money towards money due to him by the judgment-debtor;[1092] but this should not be resorted to, in order to circumvent a specific legal bar. So, an order appointing a receiver in respect of the provident fund of a railway employee was discharged.[1093] The Supreme Court has now held that the provident fund standing to the credit of a retired government servant cannot be attached in view of section 2(a) of the Provident Fund Act, 1925, nor a receiver appointed for the same.[1094] and likewise, it has been held that when there is a legal bar to the attachment of a property, as for example, the salary of a private employee before it becomes payable, it cannot be got over by the appointment of a receiver.[1095] No proceedings, by way of attachment or appointment of a receiver, can be taken against properties which vest in the Custodian of Evacuee Property as the same is prohibited by section 17 of the Evacuee Properties Act, 1950.[1096] The appointment of a receiver in execution is, therefore, not a matter of right, and a proper case must be made out, to justify the exercise by the court, of its discretion to make the appointment.[1097] The

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1089. *Ch Sankara Reddy v Andhra Bank*, AIR 2006 AP 319.
1090. *Ganesa Nadra v K Chellathai Ammal*, AIR 1989 Mad LJ 8.
1091. *Pursattamdas v Baijnath*, AIR 1941 Cal 240; *Re Shephard, Atkins v Shephard*, (1889) 43 Ch D 131; *Saileshwar Lakhaiyar v Kanti Kumar Sinha*, AIR 1965 Pat 238; *Dhirendra Nath Sen v Smt Santasila Debi*, AIR, 1969 Cal 406.
1092. *Arumugha Thevar v Palaniammal*, AIR 1973 Mad 426 : (1973) 1 Mad LJ 111.
1093. *Dominion of India v Ashutosh Das*, AIR 1950 Cal 212.
1094. *The UOI v Hira Devi*, AIR 1952 SC 227 : (1952) SCR 765 : 1952 SCJ 326.
1095. *Vasant Shamrao Khot v Jagannath Ganesh Jambotkar*, AIR 1955 Bom 450 : (1955) ILR Bom 589 : 57 Bom LR 416.
1096. *Custodian of Evacuee Property v Simla Banking and Industries Co*, AIR 1951 P&H 434 : (1951) ILR Punj 306; *Abdul Kaliq Khan v Custodian of Evacuee Property*, AIR 1954 Hyd 674.
1097. *Pramatha Nath Malia v HV Low And Co*, AIR 1930 Cal 502 : (1930) 57 Cal 964; *Hemendra Nath Roy Chowdhury v Prokash Chandra Ghosh*, AIR 1932 Cal 189 : (1932) 59 Cal 205.

discretion is regulated by the provisions of O XL, rule 1, and clause (a) of that rule has been altered to allow the court to appoint a receiver after decree.[1098] The court must be satisfied that the appointment of a receiver is likely to benefit both—the decree-holder and the judgment-debtor—rather than a sale of the attached property, and for this reason, a receiver has been appointed to realise an attached decree;[1099] to realise a debt attached in execution of a decree;[1100] to collect the rents of an attached property;[1101] and to realise a decree for maintenance charged upon immovable property.[1102] The court can, on the application of the decree-holder of a decree on a simple mortgage, appoint a receiver for collecting the rents and profits from the hypothecation for the benefit of the decree-holder.[1103] Again, the court must be satisfied that the decree is likely to be realised within a reasonable time from the attached properties so that the judgment-debtor may not be burdened with property while he is deprived of the enjoyment of it.[1104]

Execution of decree by appointing a court receiver is a mode of execution provided in section 51. A receiver cannot be appointed just for the asking. It is within the discretion of the court and this discretion has to be judiciously exercised in a fit case. No decree-holder can transfer his responsibility to have the decree executed upon the shoulders of a court officer for no reason whatsoever.[1105]

In *Ma Mya v Ma Mi Kye*,[1106] a third share of certain promissory notes had to be realised in execution and the Privy Council said that the right method of working out the decree was by the appointment of a receiver. Again, in *Nawab Bahadur v Kernanai Bank*,[1107] the Privy Council upheld the appointment of a receiver to collect the rents and profits of properties which had been settled upon the *Nawab* of Murshedabad and his lineal descendants by the Murshedabad Act 15 of 1891, although the receiver was liable to be superseded by the Secretary of State in exercise of a power reserved under the Act to apply the rents and profits for the maintenance of the position and dignity of the *Nawab*. It has been held that even if property is not liable to be attached and sold by reason of a section in a statute, a receiver can be appointed to liquidate a decree from the profits of the property.[1108]

The appointment of a receiver to take charge of the, judgment-debtor's property is an exceptional remedy and when there is admittedly ample property of the judgment-debtor available for satisfaction of the decree, there is no good reason to appoint a receiver. Besides, when execution proceedings are to be transferred to the collector, a receiver cannot be appointed.[1109]

1098. *Shambhu Nath v Balmukund Dikshit*, AIR 1931 Oudh LJ 307 : (1932) 7 Luck 203; *Hemendra Nath Roy Chowdhury v Prokash Chandra Ghosh*, AIR 1932 Cal 189 : (1932) 59 Cal 205.
1099. *Pratap Singh v Delhi and London Bank*, (1908) 30 All 393.
1100. *Toolsa Goolal v John Antone* (1887) ILR 11 Bom 448.
1101. *Maung Thein v SA Firm*, AIR 1925 Rang 318 : (1925) 3 Rang 235.
1102. *Hemanginee Dassee v Kumode Chander Dass*, (1899) 26 Cal 441.
1103. *Onkarlal Radha Kishan v VS Rampal*, AIR 1961 Raj 179 : (1961) 1 Raj 9.
1104. *Hemendra Nath v Prokash Chandra*, AIR 1932 Cal 189 : (1932) 59 Cal 205.
1105. *Ge Countrywide Consumer v Ganesh Jagannath Thanekar*, AIR 2008 Bom 4 : 2007 (3) All MR 526.
1106. *Ma Mya v Ma Mi Kye*, AIR 1929 PC 246 : (1929) 7 Rang 388.
1107. *Nawab Bahadur v Kernanai Bank*, AIR 1931 PC 160 : 58 IA 215.
1108. *Manohar Singh v Hakim Riazuddin*, AIR 1934 Nag 605; *Mohammad Sharif v Bougleon*, AIR 1938 Lah 458.
1109. *Firm Narain Dass, Gulab Singh v Patiala Durbar*, AIR 1940 Lah 345.

[s 51.13] Receiver of Properties Outside the Local Jurisdiction

The court may appoint a receiver of property outside the local limits of its territorial jurisdiction. The principle by which the action of a court in effecting sales in execution is confined to property situate within its territorial jurisdiction is *prima facie* not applicable to a sale by a receiver which need not necessarily be a sale by public auction as distinct from private treaty.[1110] If, according to the law of an Indian state, it was not shown that the son could not be made liable for the debts of his father, in respect of property in his hands, liable under Hindu law for the debts of the father, a receiver can be appointed of the property in the state. Though the court cannot, in such a case, empower the receiver to take possession of the property, it can direct the son in possession of the property, to hand over the property to the receiver.[1111]

[s 51.14] Receiver of Future Maintenance

The Privy Council has held that though a right to future maintenance cannot be attached [section 60(1) (n)], the court may, in a proper case, eg, where provision is made for the maintenance of the judgment-debtor out of the income of villages, appoint a receiver for realising the rents, and paying there out to the judgment-debtor a sum sufficient for his maintenance and the balance to the decree-holder.[1112] The Bombay High Court doubts whether the property in the Privy Council decision was really covered by the expression "a right of future maintenance" and holds that property which is, at law, unattachable cannot be realised by equitable execution.[1113]

The Madras High Court has followed the Privy Council decision and appointed a receiver of future maintenance;[1114] but in an earlier decision, it had held that a receiver could not be appointed, as a right of future maintenance cannot be attached.[1115] The Lahore High Court had, by way of equitable execution, appointed a receiver of a house in which the judgment-debtor had a right of residence, though he had no power to transfer the same.[1116]

[s 51.15] Appeal

A obtains a decree against *B*. By consent of parties, *C* is appointed receiver to take charge of certain properties for the execution of the decree. *A* then applies to the court for the discharge of *C* as receiver, but the application is refused. The order was one relating to "execution" within the meaning of section 47, and was therefore, then appealable.[1117] An order appointing a receiver in execution is one falling in substance within O XL, rule 1, and is as such appealable under O XLIII, rule 1(s).[1118]

[s 51.16] Clause (E)

This is a residuary clause and comes into play only when the decree cannot be executed in the modes provided in clauses (a)–(d).[1119] But when the property is attachable, the court,

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1110. *Pramatha Nath Malia v HV Low and Co,* AIR 1931 Cal 174.
1111. *Sunder Singh v Lala Ganga Ram,* AIR 1938 Lah 93 : (1938) Lah 305.
1112. *Rajindra Narain v Sundara Bibi,* AIR 1925 PC 176 : 52 IA 262 : ILR 47 All 384.
1113. *Secretary of State for India v Bai Somi,* AIR 1933 Bom 350 : (1933) 57 Bom 507.
1114. *Secretary of State v Venka,* AIR 1926 Mad 565 : (1926) 49 Mad 567.
1115. *Palikandy Mammad v Krishnan Nair,* (1917) 40 Mad 302.
1116. *Tikka Sant Singh v Sain Das Chawla,* AIR 1937 Lah 433 (the house had been let to a tenant).
1117. *Maharaja Sir Rameshwar Singh v Babu Hitendra Singh,* (1918) 3 Pat LJ 513.
1118. *Moideen Batcha v Sulaiman Sahib,* AIR 1956 Mad 163.
1119. *Murarilal v Nawal Kishore,* AIR 1961 P&H 547.

under this clause, in the absence of any specific provision or form, can evolve a prohibitory order suitable to the nature of the clause.[1120] However, the clause does not authorise a court to read into the decree, a supplementary or alternative relief which is not in it, nor does it enable the court to give a mandatory direction to remove something which was not in existence at the time of the decree.[1121] Thus, where a decree in a suit for redemption directs the defendant-mortgagee to deliver to the plaintiff mortgagor the documents of title relating to the mortgaged property, but does not provide for an alternative relief, the court has no power under this clause to award damages in execution.[1122] This conclusion might have been arrived at on the simple ground that a court executing a decree has no power to add to the terms of a decree.

[s 51.17] Decree for the Payment of Money

A decree for the payment of arrears of alimony is a decree for the payment of money within the meaning of this section.[1123]

[s 51.18] Lease of the Judgment-debtor's Land

The Allahabad High Court recently held that an executing court is bound by methods laid down in section 51, and that as the power to lease is not included in the power to sell property, lease can only be granted under conditions prescribed in section 72 and section 68 read with Schedule III of the CPC.[1124] The view of the Lahore High Court was to the contrary.[1125]

[s 51.19] Proviso

The proviso, together with the explanation added by section 2 of the Code of Civil Procedure (Amendment) Act, 1936 restricts the power of the court to direct the arrest of a judgment-debtor in execution of a decree for the payment of money.

Its provisions are mandatory and must be strictly complied with. No order for arrest should be made unless the court is satisfied for reasons to be recorded in writing that the judgment-debtor should be committed to prison for one of the reasons set out therein.[1126] According to the Madras High Court, the inhibition contained in section 51, proviso, applies only to an order for detention in prison and not to order for arrest of the judgment-debtor. Therefore, where, in the proceedings for execution of a money decree, on the day the matter was called, the judgment-debtor was absent and the court acting on the affidavit filed by the decree-holder, found that the judgment-debtor had sufficient income, the order of the court directing arrest of the judgment-debtor would be valid.[1127]

1120. *Champarun Sugar Co Ltd v Haridas Mundhra*, AIR 1966 Cal 134 : 69 Cal WN 815.
1121. *Evuru Venkata Subbayya v Srishti Veerayya*, AIR 1969 AP 96.
1122. *Marath Sivaraman Nair v Seshu Pattar*, AIR 1922 Mad 299 : (1922) 42 Mad LJ 356 : (1922) 42 Mad LJ 365.
1123. *Jessie Grant Khambatta v Mancherji CKhambatta*, AIR 1941 Bom 17 : (1940) 42 Bom LR 945.
1124. *Bhagwati Singh v L Kashi Narain*, AIR 1938 All 290 (FB).
1125. *Punjab National Bank Ltd v Shamsher Singh*, AIR 1936 Lah 696; *Datar Kaur v Ram Rattan*, AIR 1920 Lah 456 (FB) : (1920) 1 Lah 192.
1126. *Parmanandaswami v Shunmugam Pillai*, AIR 1949 Mad 822 : 1949 Mad WN 194; *SK Kuttalalingam Pillai v SVN Chinnakannu Pillai*, AIR 1952 Mad 18 : (1951) 2 Mad LJ 588; *Bansidhar v Pribhu Dayal*, AIR 1954 Raj 1; *Madhavan Nair, and Muthu Pathar v Mani Rao*, AIR 1956 Mad 580; *T Kunhiraman v Pootheri Illath Madhavan Nair*, AIR 1957 Mad 761 : (1957) 2 Mad LJ 28; *Paramananda v Maheshwar Panda*, (1960) ILR Cut 33.
1127. *KN Gangappa v AM Subramanya Mudaliar*, AIR 1988 Mad 182.

In execution of a decree for prohibitory injunction, the judgment-debtor cannot be detained for more than three months and for more than one time. Section 58 applies to all decrees. This is evident from section 51 which uses the expression "execution of a decree". There is absolutely no reason to prescribe an unlimited period in the case of a decree for prohibitory injunction.[1128]

Under the provisions of O XXI, rule 30; O XXI, rule 32 and O XXXIX, rule 2A, for the breach of a decree for prohibitory injunction, the judgment-debtor cannot be detained for more than three months and for more than one time, according to the Andhra Pradesh High Court.[1129] The Andhra Pradesh High Court in the above case dissented from the Gujarat decision to the contrary. The Gujarat High Court had taken the view that in the case of decree for prohibitory injunction, no time limit is prescribed. According to the Andhra Pradesh High Court, however, section 51(c) read with section 58 lays down a limit of three months in the case of all decrees, subject to the further limits laid down in the section regarding money decree.[1130] The restrictions mentioned in section 51 of the CPC as to arrest and detention, apply also where the decree is against the husband for maintenance. In particular, the wife, decree-holder, has to satisfy the court that the husband has means to pay. The executing court can also act on the presumption that the husband has the means, but the husband should be given an opportunity to rebut the presumption.[1131]

In execution of a decree by arresting the judgment-debtor, the burden is on the decree-holder to show that the judgment-debtor was resorting to unfair means for avoiding payment. In a case, where the judgment-debtor of a money decree was once arrested and thereafter released after recording his undertaking about repayments, it was held that this fact itself was no ground for his re-arrest. It was also held that the fact that he was pursuing the profession of a doctor or that he was proprietor of a hospital, by itself does not ipso facto lead to an inference that he has sufficient means to pay decree-debt.[1132]

The Explanation to section 51 of the Code will show that in calculation of the means of the judgment-debtor for the purpose of clause (b) of the Proviso, any property which is exempted from attachment in execution of the decree either by law or by custom having the force of law shall be left out. Thus where execution of a money decree is sought by arrest and detention and salary is shown as the means of the judgment-debtor, an enquiry is necessary as to what is the attachable portion of the salary in terms of section 60 of the Code.[1133]

The enquiry prescribed under O XXI, rule 40(1) of the Code is not an empty formality. Mandatory duty is cast upon the decree-holder to establish as to incapacity of the judgment-debtor to pay the decretal amount and to establish intentional evasion to satisfy the decree. Acceptance of affidavit of the decree-holder in preference to objection of judgment-debtor for issuance of warrant of arrest is erroneous.[1134]

The object of detaining a judgment-debtor in a civil prison is not to punish him for any crime but for enabling the decree-holder to realise the money decreed in his favour, and for the purpose of achieving this alone, the conditions in the proviso have been formulated. It is some contumacious conduct on the part of the judgment-debtor and not mere inability to pay,

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1128. *Dodla Narayana v Velti Reddemma,* AIR 1990 AP 147.
1129. *Dodla Narayana v Velti Reddemma,* AIR 1990 AP 147, p 151, para 7.
1130. *Prabhat Bai v Aravind Kumar,* AIR 1987 Guj 160.
1131. *Pankaj Mahakud v Tara Mahakud,* AIR 1992 Ori 199.
1132. *Tamil Nadu Mereantile Bank v N Poulose,* (2007) 1 Ker LJ 238.
1133. *S Balamurli v K Vikramanunni,* AIR 2007 Ker 280 : (2007) 3 Ker LJ 112.
1134. *BS Ashok v Investment Trust of India Ltd,* 2010 (2) AIR Kar R 396.

which renders him liable to be arrested. Though at a particular point of time the conditions of the proviso might have been satisfied, yet if the order passed by the court has not been taken advantage of or not given effect to within a reasonable time, the position of the judgment-debtor might so change that the conditions set out in the proviso would be considered as no longer satisfied.[1135] The conditions in the proviso are a mandate to the court and are intended to protect debtors who cannot pay for reasons beyond their control. Whether the judgment-debtor appears or not, the court must satisfy itself whether materials on record bring the case within any of the clauses of the proviso;[1136] but it has also been held that the conditions as to the existence of the grounds specified in the proviso and the court, recording its reasons, apply not to an order for arrest but to an order for detention in prison which represents a later and a different stage in the proceedings.[1137] Under the new proviso, an arrest cannot be ordered unless there has been some contumacious conduct on the part of the judgment-debtor. Mere inability to pay does not justify an arrest.[1138] Where the judgment-debtor having other claims to meet, utilised the money for satisfying them, he cannot be held to have neglected to pay the same to the decree-holder.[1139]

According to the Madras High Court, before making an order for the arrest and detention of judgment-debtor, the court should, in suitable cases first order payment by instalments.[1140] After hearing the judgment-debtor, the court must be satisfied that the judgment-debtor was acting dishonestly or with bad faith. Clause (b) of the proviso to section 51 deals with a situation where a judgment-debtor, having the means to pay the amount of the decree or some substantial part thereof, refuses or neglects to pay the same. By means of explanation to the proviso, property which cannot legally be attached in execution of a decree, is directed to be counted out, for the purpose of ascertaining the means or capacity of the judgment-debtor, to pay the amount of the decree. Section 51 does not authorise the execution of money decree by arrest of the judgment-debtor, except where the judgment-debtor acts in bad faith. There can be no legal or constitutional objection for execution of a decree by arrest and detention of an individual judgment-debtor, who deliberately refuses or neglects to pay a decretal amount while possessing the capacity to pay.[1141] An order for arrest cannot be passed, merely on the allegation that the income of the judgment-debtor was rupees seventy thousand, when there is no supporting proof on the record, of such income. Where the judgment-debtor is in a position to pay the amount in instalments, such a course should be adopted by the court before making an order of committal to prison on the first application. The mere fact that the judgment-debtor pays by instalments, does not mean that he has the means to pay the entire amount immediately. Similarly, the mere fact that he possesses immovable property, does not justify an order of detention in civil prison on his refusal to pay.[1142] Judgment-debtor was

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1135. *Gopichand v Brahmo Devi*, AIR 1968 Del 101 : (1967) 69 Punj LR 328; but see also *Ulahannan Job v The Prudential Trust, Vaikom*, AIR 1964 Ker 16 : (1964) 2 Ker 200.
1136. *Jogendra Missir v Ramnandan Singh*, AIR 1968 Pat 218 : 46 ILR Pat 1142.
1137. *Pattaramaiah v Haji Ibrahim Essack & Sons*, AIR 1959 Mys 94; dissenting from *T Kunhiraman v Poothen Illath Madhavan Nair*, AIR 1957 Mad 761 : (1957) 2 Mad LJ 28; *Madhusudan Prabhakar Chitale v Trimbak Vyankatesh Joshi*, AIR 1961 Bom 23 : (1960) ILR Bom 523 : 62 Bom LR 599; *N Ramachandra Iyer v Thomas Mathai*, AIR 1966 Ker 65; *WM Singh v A Debota*, AIR 1973 Gau 84 : (1973) Assam LR 104; *N Mudalidar v PJAM & Co*, AIR 1972 Mad 292; *PG Ranganatha Padayachi v The Mayavaram Financial*, AIR 1974 Mad 1.
1138. *Prabhu Dayal v Bhondu Mal*, AIR 1938 Lah 692.
1139. *Ch Harpal Singh v Lala Hira Lal*, AIR 1955 All 402.
1140. *VP Madhavan Nambiar v Chaldean Syrian Bank Ltd*, AIR 1955 Mad 409; approved in *V Ganesa Nadar v K Chellathai Ammal*, AIR 1989 Mad 8.
1141. *JJ Shankar v WM Ismail*, AIR 1981 AP 336.
1142. *V Ganesa Nadar v K Chellathi Ammal*, AIR 1989 Mad 8.

working in a bank and was having land in which he was raising tobacco crop. He purchased cloth on credit. There was failure to pay the amount of credit. Decree against him can be enforced by directing arrest and detention in civil prison of judgment-debtor, if he neglects or refuses to pay the decretal amount without any reasonable explanation. Every judgment-debtor is not immune from arrest. There can be no legal or constitutional objection for execution of a decree by arrest and detention of an individual judgment-debtor who deliberately refuses or neglects to pay a decretal amount while possessing the capacity to pay.[1143] Simple default by the judgment-debtor, in payment of the decretal amount to the decree-holder, is not enough for the executing court to order his arrest. The decree-holder must prove that the judgment-debtor was having enough funds to pay the decretal amount.[1144] According to the Madras High Court, the court, before making an order for the arrest and detention of judgment-debtor, should in suitable cases, first order payment by instalments.[1145] Mere non-payment does not mean refusal or neglect to pay. "Refusal" implies that a request was made to the judgment-debtor at the time when he had the means to pay and the judgment-debtor declined to make any payment. "Neglect to pay" also connotes that when the judgment-debtor could have paid, he just omitted to pay, owing to his negligence or carelessness. It may be that the judgment-debtor may have had other claims to satisfy or more urgent necessities to meet. He cannot then be said to have neglected to pay.

Where the son and brother of the judgment-debtor filed a suit against him claiming certain property as their own and obtained an injunction staying its sale, it cannot be said that the judgment-debtor had obstructed the execution of the decree.[1146] The onus of proof is on the decree-holder to establish that the judgment-debtor has sufficient means to pay the debt.[1147] Where the judgment-debtor is in possession of a house which he owns, the normal presumption is that he is able to pay by sale or mortgage of that house. But there must be evidence to show that apart from his owning the house, he is in possession of it and is in a position to realise substantial cash by its sale, mortgage or other encumbrance.[1148] "Refusal" or "neglect" envisages capacity to pay, coupled with deliberate non-payment. Merely because judgment-debtor possesses immovable property, an order of detention in civil prison cannot be made for his failure to pay.[1149] A director of a company occupies a fiduciary position; so he can be arrested in execution of a decree which the company had obtained against him for loss caused by his negligence.[1150] In a proceeding instituted for the arrest of the guarantor in civil prison, the guarantor is not entitled to raise the plea that he has no means to pay the decree debt. Being the guarantor, he is in a fiduciary capacity to pay the account to the decree-holder, which is the first requirement of clause (c) of proviso to section 51. Every judgment-debtor, whether he is

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1143. *JJ Shankar v WM Ismail*, AIR 1981 AP 336.
1144. *KAlRmRm Alagappan v Rajaguru & Co*, AIR 1985 Mad 353.
1145. *VP Madhavan Nambiar v Chaldean Syrian Bank Ltd*, AIR 1955 Mad 409; approved in *V Ganesa Nadar v K Chellathai Ammal*, AIR 1989 Mad 8.
1146. *BMatha Gowder v MS Kada Gowder*, AIR 1954 Mad 81; *Paramananda v Maheshwar Panda*, (1960) ILR Cut 33; *Prahlad Dalsukhrai v Maganlal Muljibhai Tewar*, AIR 1961 Bom 142.
1147. *Atta Karim v Mt Bibi Habibai Soghra*, AIR 1951 Pat 355; *Jugal Kishore v Pralhad Rai*, AIR 1939 Pat 22; *RM Jassawala v Amulya Chandra Dutta*, AIR 1940 All 494; *Ch Harpal Singh v Lala Hira Lal*, AIR 1955 All 402; *Paramananda v Maheshwar Panda*, (1960) ILR Cut 33; *VP Madhavan Nambiar v Chaldean Syrian Bank Ltd*, AIR 1955 Mad 409 : (1955) 2 Mad LJ 121, where it is observed that the question was not one of strict proof but of prima facie inference; but see *IK Merchants Ltd v Indira Prakash Karnani*, AIR 1973 Cal 306; *Kesava Pillai Karunakaran Pillai v Ouseph Joseph*, AIR 1977 Ker 27 : (1976) 2 Ker 92.
1148. *VKS Sivam v Thirupathiswami*, AIR 1972 Mad 9 : (1971) 2 Mad LJ 396.
1149. *V Ganesa Nadar v K Chellathai Ammal*, AIR 1989 Mad 8.
1150. *MA Malik v VS Thiruvengadaswami*, AIR 1950 Mad 208.

a principal debtor or a mere guarantor or a surety, has the said obligation to the decree-holder in accordance with the nature and circumstance in each case.[1151] Under section 51, proviso (c), where a decree is passed against a director of a company for loss caused by him as director (to the company), the director can be arrested, because he occupies a fiduciary position.[1152] A partner failing to pay money in his hands and received by him on account of partnership is not liable as a person acting in a fiduciary capacity. In *Prem Ballabh v Mathura Datt*,[1153] the respondent as the managing partner was liable to render accounts of the partnership assets in his hands. On taking of the accounts, it was found that he overdrew the partnership account, and a decree was passed against him. No fraud or clandestine dealing was alleged or proved. It was held that the decree was not for a sum which he was bound to account in a fiduciary capacity and therefore condition (c) of the proviso did not apply. Order for arrest without recording reasons, therefore, would be regarded as being without jurisdiction, even if made for the second time.[1154] It has been held that an order of committal to prison should not be made on the first application for execution and that the judgment-debtor should, in the first instance, be directed to pay the amount by instalments.[1155] For instances in which the judgment-debtor was held liable to be arrested on the ground that he was bound in a fiduciary capacity to pay the amount, see the cases noted below.[1156]

The words "fiduciary capacity" mentioned in proviso (c) to section 51, has not been defined in the Code or in the General Clauses Act or in Family Courts Act. The relationship between husband and wife can be described as fiduciary relationship. In execution of a money decree against husband, the husband stands in fiduciary capacity in relation to the wife, because the wife walks into the matrimonial home with cash, ornaments and articles belonging to her and entrusts the same to her husband.[1157] Relying on dictionaries, Law Lexicons and precedents to ascertain the precise scope of the expression "bound in a fiduciary capacity to account," the Division Bench of Kerala High Court observed as follows:

> 29. The above discussions lead us to the conclusion that husband and wife relationship can be held to be a fiduciary relationship. It also follows that in respect of cash, ornaments and articles brought by the wife to the matrimonial home and entrusted to the husband, he is bound in a fiduciary capacity to account to the wife whenever she makes a demand. Elements of trust are involved in such relationship and in the entrustment of cash/ ornaments/articles. We do not, in these circumstances, have any hesitation to agree that proviso (c) to s 51 of the CPC squarely applies and the pleas which may be available under cls (a) and (b) of s 51 of the CPC shall not be available to a judgment-debtor, if the case falls within cl (c).[1158]

When the decree for the payment of money is passed jointly and severally against two or more defendants, there is no question of one being a personal debtor and the other a surety. Both are equally liable for the entire amount and the decree-holder is entitled to realise the amount from any of them. If the decree-holder wants personal execution, and when his

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1151. *V Velayudhan v State Bank of India*, AIR 1989 Ker 38.
1152. *Tussidas Mundhra v Official Liquidator*, AIR 1983 Cal 403; *MA Malik v VS Thiruvengadaswami Mudaliar*, AIR 1950 Mad 208 : (1949) 2 Mad LJ 604 followed.
1153. *Prem Ballabh Khulbe v Mathura Datt Bhatt*, AIR 1967 SC 1342.
1154. *Kotha Venkatasubba Rao v Majeti Sreeramulu*, (1948) 2 Mad LJ 648; *Venkatasubba Rao v Sreeramulu*, AIR 1949 Mad 470.
1155. *VP Madhavan Nambiar v Chaldean Syrian Bank Ltd*, AIR 1955 Mad 409 : (1955) 2 Mad LJ 121; *Khemchandra v Budh Singh*, AIR 1961 Raj 243 : (1960) Raj 1355.
1156. *Ambadi v Balan*, AIR 1959 Ker 273 : (1958) Ker LT 801; *Prem Ballabh Khulbe v Mathura Datt Bhatt*, 1967 AIR 1342 : 1967 SCR (2) 298; *Mathura Dutt v Prem Ballabh*, AIR 1961 All 19.
1157. *Sunitha KK v AS Ramesh*, AIR 2010 Ker 184 : 2010 (3) Ker LT 501 (DB).
1158. *Sunitha KK v AS Ramesh*, AIR 2010 Ker 184 : 2010 (3) Ker LT 501 (DB), p 191.

allegations for that purpose are denied, it is for him to satisfy the court, that conditions for ordering personal execution are there. When the person carries on a business, it does not automatically follow that the business is profitable and that the person carrying on the business has the means to satisfy the decree.[1159]

When the decree is for payment of money jointly and severally against two or more defendants, there is no question of one being a personal debtor and the other a surety. Both are equally liable for the entire amount and the decree-holder is entitled to realise the amount from any of them. It cannot be said that in a money decree, personal execution could be ordered against a person without affording him an opportunity to show cause why he should not be committed to the civil prison and when he shows cause, without the requisite satisfaction, simply on the ground that he is a surety. The execution court is concerned only with the liability under the decree and is to see whether personal execution could be had against them. It is the decree-holder who wants personal execution; when his allegations for that purpose are denied, it is for him to satisfy the court that conditions for ordering personal execution are there. What is required to be proved is that the judgment-debtors have, or had, since the date of the decree, the means or capacity to pay off decree amount or some substantial portion of it and they refused or neglected to pay. When a person carries on a business, it does not automatically follow that business is profitable and there are means.[1160] The fact that order for detention may not serve the purpose of realising the decretal money, would not be sufficient. The legislative intent is clear. The purpose was to act as deterrent to all others and to provide an absolute civil liability for those who were found guilty and a decree passed in respect of the money in fiduciary capacity.[1161]

In order to satisfy whether the judgment-debtor has got means to pay the decree amount, filing of affidavit alone is not sufficient. It has got to be proved by adducing evidence both orally and documentary. It is only on the basis of the documents filed and the oral evidence adduced, the court can come to the conclusion whether the judgment-debtor got the means to pay the decree amount or not.[1162] In a case, the executing court after issuing show cause, did not hold any inquiry as contemplated of clause (1) of rule 40 of O XXI nor has complied the conditions laid down in proviso to section 51, so as to record his reasons after its satisfaction for detaining or sending the judgment-debtor in civil prison. Therefore, the order passed without filing the mandatory provisions were not sustained, and were accordingly quashed.[1163]

[s 51.20] Explanation

As by reason of section 168A of the Bengal Tenancy Act, 1885, property of the judgment-debtor other than the defaulting tenure or holding cannot be attached and sold in execution of the rent decree, the value of such other property cannot be taken into account in estimating the means of the judgment-debtor for the purpose of determining the question as to whether the judgment-debtor can be arrested.[1164]

1159. *D Viswanathan v The Karnataka Bank Ltd*, AIR 1988 Ker 274.
1160. *D Viswanathan v The Karnataka Bank Ltd*, AIR 1988 Ker 274.
1161. *Jolly George Verghese v The Bank of Cochin*, 1980 AIR 470 : (1980) 2 SCC 360 : (1980) 2 SCR 2 913.
1162. *P Azeez Ahmad v State Bank of India*, AIR 1995 Mad 194.
1163. *Subhash Chand Jain v Central Bank of India*, AIR 1999 MP 195.
1164. *Praful Chandra Ghosh v Naresh Chandra Bose*, AIR 1946 Cal 498 : (1946) 50 Cal WN : (655) : 81 Cal LJ 302.

[s 51.21] Operation of Section Subject to any Special or Local Law

By virtue of section 4 of the CPC, this section must be read subject to any conditions or limitations which may be prescribed by any local or special law. Sections 58A and 59 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1946, which ensure for the landholder, immunity from arrest, in execution proceedings are a special law, within the meaning of section 4 of the CPC, and have accordingly the effect of overriding this section.[1165] By virtue of section 17 of the Evacuee Property Act, as amended in 1951, the decree-holder is debarred from proceeding in any manner, against any property, declared as evacuee property or deemed to be such, in execution of a decree.[1166] Section 51 of the CPC is not applicable to issue of warrant of arrest under section 281 of Zamindari Abolition and Land Reforms Act, 1950.[1167]

The Supreme Court has held that attachment of property made in an execution does not get determined when an order of stay is passed under section 4 of the Tamil Nadu Indebted Agriculturists (Temporary Relief) Act, 1975. The stay under the Act was only in relation to further proceedings in pursuance of the attachment, that is, sale of the attached property. It was held that sale of the attached property made during the period of stay is void.[1168]

Raveendran J speaking for the Supreme Court Bench in the above case observed as follows:

> The execution application of the appellant was closed on 15-02-1975 in view of Section 4 of the Debt Relief Act staying execution against agriculturists. The stay of further proceedings in execution under section 4 of the Debt Relief Act was only for a specified limited period. The proviso to section 4 clearly implied that any attachment made in such stayed execution proceedings shall continue to be in affect, by providing that the Court will have to pass if necessary the orders for custody or preservation of the attached property during the pendency of the stay under the Debt Relief Act. Therefore the enactment of the Debt Relief Act did not determine the attachment. What was stayed or kept in abeyance during the period when the statutory stay of execution operated, was not the attachment, but the further proceedings in pursuance of the attachment, that is, sale of the attached property. On the expiry of the moratorium period under the Debt Relief Act on 17-10-1979, the decree holder became entitled to continue the execution by proceeding with the sale.[1169]

[s 51.22] Application of the section to Orders passed under the Banking Companies Act, 1949

Under section 45H of Banking Companies Act, 1949, the high court has power to execute an order passed under that Act, as if it were a decree, in the modes prescribed in this section.[1170] The bank account of the judgment-debtor was attached by the executing court. The order was passed on the assumption of an erroneous entry in the bank account, showing credit in the account of judgment-debtor, while in fact there was no such amount. The erroneous entry was corrected by the bank when detected. In such circumstances, the order of the executing court to the bank to pay the decretal amount is not sustainable as the decree is against the judgment-debtor and not the bank.[1171]

1165. *Seetharama Rao v Raja Kumar*, AIR 1961 AP 399.
1166. *Abdul Kaliq Khan v Custodian of Evacuee Property*, AIR 1954 Hyd 674.
1167. *TN Mathur v State of Uttar Pradesh*, (1993) Supp 1 SCC 722; *Ram Narain Aggarwal v State of Uttar Pradesh*, (1983) 4 SCC 276.
1168. *CS Mani(Dead) By Lr v B Chinnasamy*, AIR 2010 SC 3600 : (2010) 9 SCC 513.
1169. *CS Mani(Dead) By Lr v B Chinnasamy*, AIR 2010 SC 3600, p 3604 : (2010) 9 SCC 513.
1170. *Dhakuria Banking Corp Ltd v Sm Surabala Debi*, AIR 1953 Cal 610.
1171. *Indian Overseas Bank v Darbara Singh*, (1997) 11 SCC 338.

[s 51.23] State Amendment in Uttar Pradesh

In section 51, after clause (b), the following shall be added as a new clause (bb):

"*(bb)* by transfer other than sale, by attachment or without attachment of any property."[1172]

[S 52] Enforcement of decree against legal representative.—(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

SYNOPSIS

[s 52.1]	Scope of the Section	831	[s 52.6]	Out of the property of the deceased	834
[s 52.2]	Plea of Absence of Assets	833	[s 52.7]	Decree Against Wrong Person as Heir and Legal Representative	835
[s 52.3]	*Lis Pendens*	833			
[s 52.4]	Costs	834	[s 52.8]	Decree Against Executor who has not Intermeddled or Proved	836
[s 52.5]	Legal representative	834			

[s 52.1] Scope of the Section

Section 50 provides for a case where a decree has been passed against a party and the party dies before the decree is fully satisfied and the decree is sought to be executed against his legal representative. The present section provides for a case where the decree is passed against the legal representative of a deceased person. In the latter case, the legal representative is the judgment-debtor.[1173] If such a decree is for payment of money out of the property of the deceased, the section allows the decree to be executed against the property of the deceased in the hands of the legal representative,[1174] but so long as it remains in his hands. In a suit by a vendee for refund of consideration against the legal representatives of the vendor on the ground that the vendor had no subsisting title, the legal representatives are liable to refund only out of the assets of the deceased vendor in their hands.[1175] If the executor or administrator against whom the decree is passed, hands over the property to the legatee or heirs, the property cannot be redeemed in execution; a separate suit would be necessary.[1176] In order that the section may apply, the decree must not only be against the legal representative, but it must also be for the payment of money out of the property of the deceased.[1177] The form in which the decree is drawn up is not the relevant criterion. So long as the decree in substance directs payment out of the property, it is sufficient.[1178] Where the defendant dies pending the suit and

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1172. Uttar Pradesh Act 24 of 1954, section 2 and Schedule, Item 5, Entry 4 (w.e.f 30-11-1954).
1173. *Birdichand v Badasaheb*, AIR 1927 Bom 52 : (1927) 28 Bom LR 1322.
1174. *Champaklal Rupchand v Rayachand Thakorbhai*, AIR 1932 Bom 522 : (1932) 34 Bom LR 1005.
1175. *Susila Dei v Sridhar Rautray*, AIR 1970 Ori 89 : (1970) ILR Cut 911.
1176. *Satkari Banerjee v Sushil Kumar Mukherjee*, AIR 1951 Cal 577.
1177. *Lalji Kunverji v Bhatia Dungershi Jivandas*, AIR 1974 Guj 42.
1178. *Rani Brijraj Kumari v Manoranjan Prasad Singh*, AIR 1947 Pat 365 : (1946) 25 Pat 550; *Pannalal v Mst Naraini*, AIR 1952 SC 170 : 1952 SCR 544.

his legal representative are brought on record, it is essential that the decree should be passed against them. It was accordingly held that a decree passed against the deceased defendant and not the legal representatives was bad and inexecutable.[1179] It is not, however, competent for the court to pass a decree against the legal representatives so as to make them personally liable.[1180] A decree which merely states that the money is recoverable from the assets of the deceased without specifying in whose hands they are, is invalid and inexecutable.[1181] The court has no discretion to limit the decree that a particular item of the deceased's property should be first proved against.[1182] Whether a decree, passed against a judgment-debtor is sought to be executed under section 50 against his legal representatives, or whether the decree itself has been passed under this section against the legal representatives, the extent of their liability is the same. They are liable only for what has come into their hands as assets of the deceased and not duly accounted for.[1183] But in so far as the property of the deceased which has come into the hands of the legal representative has not been "duly" applied by him, the decree may be executed against the legal representative as if the decree was to that extent passed against him personally. An executor or administrator under the Indian Succession Act, 1925, section 323, is bound to pay the creditors of the deceased "equally and rateably"; if he fails to do so, he cannot be said to have applied the assets "duly" within the meaning of this section, and he will be personally liable to the extent to which he has not done so. To ascertain whether the assets have been duly applied, the court of execution may direct an inquiry into the accounts of the executor or administrator.[1184] The executor or administrator may show that he is not liable, as he has duly applied the property of the deceased which has come into his possession. This, in English law, is called the plea of *plene administravit*. In an Allahabad case[1185] Ashworth J differing from Mukerji J held that the plea could be raised in the suit itself. If the executor or administrator has paid a legacy and left no assets for the payment to the decree-holder, the latter has also his remedy under section 361 of the Indian Succession Act, 1925, and may require the legatee to refund. But this remedy must be exercised by suit, and the decree-holder cannot, in execution of a decree against the executor or administrator, attach property which he has parted with, to a specific legatee.[1186]

Sections 50 and 52 apply in two different situations. Section 52 applies where the defendant dies during the pendency of the suit and his legal representatives are brought on record and decree is passed against them. Under section 50 the decree is passed against the original debtor and the decree is sought to be executed against his legal representatives. Therefore, under section 50 the burden is on the decree-holder to show that the property in question has come into the hands of the legal heirs. But under section 52 the burden is on the legal representatives to show that they have not received the property from the deceased. Thus, in the case of a money decree passed against a person who was dead at the time of execution, it was for the legal representative/wife to show that she has not received property attached by Bank from her deceased husband.[1187]

1179. *Andi Vasudevan of Azhikkakathu v Bhagavathipillai Vasudevan*, AIR 1963 Ker 263.
1180. *Jayavanth Rai v Narsing Sakaram*, AIR 1923 Bom 414.
1181. *Madhavan v Choorppa*, AIR 1934 Mad 562 : (1934) Mad WN 800.
1182. *Chekka Suryanarayana, Receiver of RB Pydah Venkatachalapati Estate v Ynumala Rajyalakshmi Devi Amma*, AIR 1950 Mad 407 : 1950 1 Mad LJ 192.
1183. *Chandravathi Bai v Chaganlal*, (1960) II R 2 AP 449; *Venkatachal v Umayal Achi*, AIR 1958 Mad 395.
1184. *Daw Toke v Maung Ba Han*, AIR 1927 Rang 127 : (1927) 5 Rang 44.
1185. *Tamiz Bano v Nand Kishore*, AIR 1927 All 459 : (1927) 49 All 645.
1186. *Jaychandra v Satischandra*, AIR 1930 Cal 762 : (1931) 58 Cal 170; *Gocoolee Chandra v Machantosh*, (1879) 4 Cal 897; *Debi Prosanna Ghose v Indra Narain Pal*, AIR 1941 Cal 27 : (1941) 45 Cal WN 78.
1187. *Smt Sandhya Sisodiya v Syndicate Bank*, AIR 2007 MP 228 : 2007 (52) All Ind Cas 528 (Gwalior Bench).

If the legal representative is the heir of a deceased Hindu or Mahommedan, every payment by the heir on account of debt due by the deceased would be a due application of the assets, whether the debts were paid rateably or not. There is no analogy between the case of an executor or administrator governed by the provisions of the Indian Succession Act, 1925 and of an heir as a legal representative under the Hindu or Mahommedan law.[1188] Section 52 of the Code of Civil Procedure, 1908 adumbrates that a money decree passed against the legal representative of the deceased defendant, out of the property of the deceased in his hands, may be executed by attachment or sale of that property. If the legal representative fails to satisfy the court that he duly applied the property to discharge the debt, or the court is not satisfied of his so doing, the court would proceed against the legal representative personally and to apply the property by sale to satisfy the decree debt. At the time when the application for passing the final decree is filed, it is enough if the legal representative are impleaded, all or any of the legal representative or one of the legal representatives of the deceased defendant-judgment-debtor to represent the estate of the deceased. If the death of the defendant takes place-pending passing of final decree, they may be brought on record under section 151 of the CPC or under O I, rule 10 of the CPC.[1189]

[s 52.2] Plea of Absence of Assets

The suit is not the stage at which the question whether the deceased has left behind assets can be gone into. It is a matter which must be appropriately determined in execution proceedings.[1190] And where the decree passed under section 52 specified certain properties as the assets of the deceased, the decree-holder was held not barred from proving at the stage of execution, that other assets of the deceased had not come into the hands of the legal representatives and from proceeding against them.[1191] The burden is on the decree-holder to prove that the assets of the deceased have come into the hands of the legal representatives,[1192] and then it is for the latter to account for them.[1193] If they fail to satisfy the court that they have applied the property of the deceased, they are personally liable to the extent of the property in respect of which they so fail.[1194] The mere fact that the legal representatives of the deceased are parties to the decree which is against the assets of the deceased, does not render them personally liable in the absence of an order of the court to that effect.[1195]

[s 52.3] *Lis Pendens*

If it could be read from the objections that the objectors had purchased the property much before the institution of the suit and their vendor, so also they themselves were not joined as parties to the suit. If such was the objection, then application of section 52 of the Transfer

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1188. *Veerasokkaraju v Papiah*, (1903) ILR 26 Mad 792; *Haji Saboo Sidick v Ally Mahomed*, (1906) 30 Bom 27.
1189. *Ratna Alias Ratnavati(Smt) v Syndicate Bank*, (1995) 1 SCC 407.
1190. *Mohinuddin v Sayeed Unissa*, (1961) 2 AP 350 : (1961) 1 AP WR 241 : (1961) AP LT 213; *Tamiz Bhano v Nand Kishore*, AIR 1927 All 459 : (1927) 49 All 645; *Motoram v Daw*, AIR 1934 Rang 196; *Ranjit v Narmadid*, AIR 1931 Ngp 173.
1191. *Mohinduddin v Syed Unnissa*, (1961) 2 AP 350 : (1961) 1 AP WR 241 : (1961) AP LT 213.
1192. *Venkatachalam Chettiar v Umayal Achi*, AIR 1958 Mad 395 : (1958) 2 Mad LJ 26 : 71 LW 126; *Lakshmilal v Onkarlal*, AIR 1955 Raj 33.
1193. *Chandravath Bai v Chaganlal*, (1960) ILR 2 AP 449.
1194. *Lakshmi Lal v Onkarlal*, AIR 1955 Raj 33; *Venkatachalam Chettiar v Umayal Achi*, AIR 1958 Mad 395 : (1958) 2 Mad LJ 26 : 71 LW 126; *Amir S/O Shaikh Rustom Musalman v Saidanbai W/O Babu Alias Jan*, AIR 1960 MP 68.
1195. *Subramania v Ramabadra*, AIR 1956 TC 88.

of Property Act, 1882 was patently illegal. The order passed by the learned executing court cannot be allowed to stand, as not only it is contrary to law but the same is contrary to the facts. The order passed by the executing court was accordingly quashed.[1196] Revision petition was filed to assailed the orders on the ground that the salaries of the petitioners were attached in execution filed against the legal heirs of deceased Smt. Sumitra. The court dismissed the revision petition and denied the protection under section 50(2) CPC as deceased Smt. Sumitra died during the *pendente lite* and the petitioners were duly brought on record as her legal representatives.[1197]

[s 52.4] Costs

It has been held that when a suit is decreed against a legal representative with costs, the liability is only to pay the costs out of the assets of the deceased unless the decree otherwise provides.[1198]

[s 52.5] Legal representative

"Legal representative" means a person who, in law, represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.[1199]

Where a legal representative is sued on the ground that he has intermeddled with the estate, it is for the plaintiff to establish that the property belonged to the deceased.[1200] A decree obtained against one representative without any inquiry as to who are the legal representatives of the deceased, cannot bind the other legal representatives who are not made parties. Doctrine of "substantial representation" cannot be invoked in such a case.[1201]

As to how far a decree passed against one of several Mahommedan heirs binds the other heirs, see the undernoted case.[1202]

(As to the liability of Hindu sons for their father's debts see section 53 below, the Bombay Hindu Heirs Relief Act, 1886, and the observations in the judgment of the Full Bench in *Jamburao v Annappa.*[1203])

[s 52.6] Out of the property of the deceased

The expression "property" includes the income of immovable property though it cannot be both attached and sold.[1204] Income from a hereditary office in a temple requiring personal services is not property of the deceased' within this section.[1205] A decree was passed against a

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1196. *Ram Kumar Tiwari v Deenanath*, AIR 2002 Chhat 1.
1197. *Shiksha v Chirtrander Kumar* (2020) 197 Punj LR 386.
1198. *Sardar Ram Singh v Khirodhan Devi*, AIR 1963 Pat 151.
1199. *Dinamoni Chaudhurani v Elahatdut Khan*, (1904) 8 Cal WN 843. See section 2(11) and notes.
1200. *Sheonarayan Harlal Maheshwari v Kanhaiyalal Devidin*, AIR 1948 Ngp 168.
1201. *Upperi Janaki v Balakrishnan Nambiyar*, AIR 1981 Ker 52.
1202. *L Ram Charan Lal v Mt Hanifa Khatun*, AIR 1932 All 591 : (1932) 54 All 796.
1203. *Jamburao Satappa Kochari v Annappa Ramchandrappa Kabbur*, (1940) 42 Bom LR 1066, p 1076.
1204. *Kadiveluswami Nayagar v The Eastern Development Corp*, AIR 1924 Mad 530 (FB) : (1924) 47 Mad 411; *Manzur Hussain v Ram Rattan*, AIR 1936 Lah 236; *Shahanshah Begum v Akbar Hussain*, AIR 1938 Oudh 45 : (1938) 13 Luck 689; *Mt Phool Kunwar v Rikhi Ram*, AIR 1935 All 261.
1205. *Karunambal Ammal v Chellaya Gurukkal Alias*, AIR 1952 Mad 114 : (1951) 2 Mad LJ 395 : 64 LW 845 : 1951 Mad WN 729.

Hindu widow as the legal representative of her deceased husband and made realisable from the husband's estate in her hands. In order to defeat the execution, the widow made a fictitious gift of a house belonging to her husband, in favour of a person. It was held that the decree could be executed against the house.[1206] This right of the creditors of an ancestor to proceed against his assets in the hands of his heirs is lost if the assets are transferred by the latter for consideration and without notice of the creditors' claim; and the right is not revived even if the transfer is set aside on the insolvency of the heir under the provisions of the insolvency law.[1207] In one case, this section was invoked by a decree-holder to make the legal representatives of the deceased judgment-debtor liable to account for the profits received by them from out of the properties of the deceased in their hands and to make them available for satisfaction of the decree under O XXXIV, rule 6.[1208]

In a case the original defendant expired during the pendency of the suit. The legal representatives were not brought on record in the execution proceedings but in the original proceedings itself. It was held by the Karnataka High Court that the deceased defendant had one-third share in the suit schedule property and a charge has been created under the judgment and decree on the said property. Therefore, the decree-holder in executing the said decree against the legal representatives of the deceased is bound to proceed for recovery of money out of the property of the deceased.[1209]

Where the decree does not impose a liability on a Hindu widow personally, she can take the plea in execution that her personal property cannot be attached. Even where the decree purports to impose her personally liable, she can assail that part of the decree in appeal.[1210] In an Andhra Pradesh case for the recovery of a decretal debt, the decree-holder brought to sell the "*Matruka*" property of her late husband for the satisfaction of her decretal debt. The sale was confirmed and possession was delivered to the auction purchaser. The plaintiffs claimed to be the children of the judgment-debtor through his second wife. They subsequently came to know that the decree-holder did not deliberately bring them on record, in the execution proceedings. Their case was that the entire execution proceedings after the death of the judgment-debtor were vitiated by fraud and collusion and the sale was not binding on their shares. The plaintiff who claimed to be legal representatives of the deceased judgment-debtor, did not apply to be impleaded as such. The auction-purchaser was not a party to the proceedings and was a *bona fide* purchaser, not in collusion with the judgment-debtor or the decree-holder. It was held that the court sale, under which the auction purchaser had purchased the suit property, was valid and binding, even in respect of the shares of the plaintiff and was not liable to be set aside.[1211]

[s 52.7] Decree Against Wrong Person as Heir and Legal Representative

A decree obtained against an executor or administrator of the estate of a deceased person is a decree against the estate of the deceased. A decree against a *karnavan* as representative of the deceased binds the estate; and this is so even though there has been a disposition by Will of which the plaintiff was not aware;[1212] but a decree obtained against the heir of a deceased Hindu or Mahommedan as his legal representative, is not a decree against the estate of the

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1206. *Ram Piari v Diwan Shib Ram*, AIR 1934 Lah 659.
1207. *P Chettyar v T Chettyar*, AIR 1934 Rang 162 : (1934) 12 Rang 602.
1208. *Allahabad Bank v RSA Singh*, AIR 1976 All 447.
1209. *BS Ashok v Investment Trust of India* : 2010 (2) AIR Kar R 396.
1210. *Laxmidhar Sahu v Padmini Tripathi*, AIR 1991 Ori 9.
1211. *Chekuri Venkataraju v Kazi Nazeeruddin*, AIR 1983 AP 431 (DB).
1212. *Kolaremathu Ama v Madhavi*, AIR 1928 Mad 243 : (1927) Mad WN 894.

deceased even if the decree provides for the payment of the decretal amount of the property of the deceased in the hands of such heir. The question has largely been discussed whether a decree obtained against some of the legal representative or against persons wrongly believed to be legal representatives, is binding on the estate of the deceased. It was held in some cases that a decree obtained by the creditor of a deceased Hindu against a wrong person as his heir cannot be executed against the estate of the deceased, in the hands of the rightful heir;[1213] and that if the property of the deceased was sold in execution of the decree against a wrong person as heir, the auction- purchaser may be dispossessed by the rightful heir.[1214] The Calcutta High Court has held that if a plaintiff sues in good faith a person who appears to him to be the proper legal representative, the decree binds the estate of the deceased.[1215]

Likewise, where the plaintiff, in ignorance of a will left by the deceased, sued the heirs as legal representatives, it was held that in the absence of fraud or collusion, the estate was bound although under the will other persons were entitled to represent the estate. The High Court of Orissa has held likewise where the decree was against a person who was in possession ascertaining a claim to succeed the estate.[1216] This decision was approved by the Madras High Court in *Shanmugham v Govindaswamy*,[1217] where it was held that when the decree-holder *bona fide* impleaded a person in possession as the legal representative of the deceased defendant, the decree passed against him, bound all the legal representatives. On the question whether a decree obtained against some of the legal representatives binds the estate, the preponderance of judicial opinion is that it does, provided, however, that the plaintiff acted *bona fide*[1218] and was no fraud or collusion. This conclusion is based on the theory of substantial representation.[1219] This rule will not apply to cases where there is fraud or collusion or where there are circumstances indicating that the trial was not fair or real or where it is found that the absent heir had a special defence which was not and could not be tried.[1220] This would be the position even when a wrong legal representative is brought on record[1221] or where a decree is passed without the legal representatives having been brought on record but the estate is adequately represented by others.[1222]

[s 52.8] Decree Against Executor who has not Intermeddled or Proved

A creditor or a deceased debtor cannot sue a person named as executor in the will of the deceased, unless he has either administered, that is, intermeddled with the estate, or proved the Will. Whether a decree is obtained against such person and property belonging to the estate of the deceased is sold in execution of the decree, the sale does not bind the estate.

[S 53] Liability of ancestral property.—For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under

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1213. *Kaliappan v Somanna*, AIR 1927 Mad 197.
1214. *Amarchand And Anr v Paramanand*, AIR 1934 All 474.
1215. *Bibuti Bhusan Ray v Naredra Narayana Ghose*, AIR 1951 Cal 228.
1216. *Snat Chandra Deb v Bichitrananda Shahu*, AIR 1951 Ori 212 : (1951) ILR Cut 413.
1217. *Shanmugham v Govindaswamy*, AIR 1961 Mad 428 : 73 LW 640.
1218. *M Metilda v Kunjiram*, AIR 1969 Ker 149.
1219. *Daya Ram v Shyam Sundari*, AIR 1965 SC 1049.
1220. *Mohd Sulaiman v M Ismail*, AIR 1966 SC 792 : (1966) 1 SCR 937.
1221. *Shanmugham v Govindaswamy*, AIR 1961 Mad 428 : 73 LW 640; *Amarchand v Paramanand*, AIR 1934 All 474; *Jharu v Pardhan*, AIR 1937 Lah 277; *Krishnavathi v Gunga*, AIR 1941 Pat 299; *Bibuti Bushan Roy v Narendra Narayan*, AIR 1951 Cal 228; *Mst Karam Kaur v Marwal Chand*, AIR 1933 Lah 350; *Chacko Pyle v Iype Varghese*, AIR 1956 TC 147.
1222. *Manjappa v R Bhandary*, AIR 1968 Mys 202 : (1967) 2 Mys LJ 192.

Hindu law for the payment of the debt of deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

SYNOPSIS

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[s 53.2] Hindu Law 839
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[s 53.1] Scope of the Section

This section enacts a rule of procedure and its operation is attracted only when the son is under a liability under the Hindu Law. It does not, by itself, create or take away any substantive right.[1223] It has no application when the ancestor against whom a decree has been passed, is still alive.[1224] It has been designed to enlarge the class of property liable for execution under sections 50 and 52 by deeming certain property to have come into the hands of the legal representative as property of the deceased, which, in fact, has not done so. The class of property to which the section is applied is property in the hands of a son or other descendant of the deceased, which may not have descended to him from the deceased ancestor, but which under the Hindu Law, would be liable for the payment of his debt. It is, thus, descriptive of the class of property, which can be reached in execution and does not limit the nature of the debt for which execution can be levied.[1225] It has been enacted to enforce the recognised rule of the Hindu Law, namely, that members of a joint Hindu family may not escape the payment out of joint family property, of any debt incurred and decreed against their father before his death, provided that such debt is not tainted by immorality. The Bombay High Court, at one time, held that the section was restricted to this case only and was limited to money decrees and to property which a son had taken by devolution or succession and not by survivorship.[1226] This decision was later on overruled by a full bench of that court.[1227] The Madras High Court had, however, given the section a wider scope and held that it included all cases where property, which is liable under Hindu law for the payment of a debt of a deceased ancestor has come into the hands of a son, or other descendant. Therefore, a decree passed against a father, as manager of a joint Hindu family, for the recovery of property was enforced in execution against a son who had taken the property by survivorship.[1228] The Privy Council has held that section 53 is not limitative but descriptive, and is intended merely to enforce a recognised rule of Hindu

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1223. *Pannalal v Narayani*, AIR 1952 SC 170 : (1952) SCJ 211.
1224. *Bijaj Rai Singh v Ram Padarnath*, AIR 1936 Oudh 139.
1225. *Rao Bhimsingh v Shersingh*, AIR 1948 PC 1 : 74 IA 247 : (1947) 52 Cal WN 109 : 50 Bom LR 1.
1226. *Chunilal v Bai Mani*, (1918) 42 Bom 504. Approved in *Dwarka Das v Krishna Kishore*, AIR 1921 Lah 34 : (1921) 2 Lah 114, and *Jagannath v Moti Lal*, AIR 1923 All 539 : (1923) 45 All 455.
1227. *Jamburao v Annapa*, AIR 1941 Bom 23 : (1841) Bom 177 : 42 Bom LR 1066 (FB).
1228. *Meyappan v Meyappan*, AIR 1924 Mad 571 : (1924) 40 Mad LJ 471; *Shankerrao Deshmukh v Vinayak*, AIR 1951 Ngp 307 : (1950) Nag 806.

Law that a son is liable to pay the debt of his father which is not tainted by illegality or immorality.[1229] Section 50 is not limited to the execution of decrees for debt, but applies to all decrees. If section 53 is considered to be not descriptive but limitative and confined to a decree for debt, and if a joint son is not considered to be the legal representative of his father under section 50, a decree for possession or a decree other than a decree for a debt obtained against a father in a joint Hindu family, would not be enforceable in execution against the son, who is joint with his father and is brought on the record as his legal representative. In this case, the Bombay High Court held that a decree for an injunction passed against a father as manager of a joint Hindu family could be executed against a son who had taken the family property by survivorship. In the previous case,[1230] such an execution was refused and the son who had taken joint family property by survivorship, was held not to be the legal representative of his father; but this case was overruled by a full bench of that court[1231] and goes against the decision of the judicial committee in *Rao Bhimsing*'s case above on the ground that the decree was against the father personally, and not as representing the family. In the case of money decree, if the decree is against a coparcener personally, it cannot be executed after his death, against another coparcener who has taken the property by survivorship, if he is neither a son nor grandson but a nephew, who is under no obligation to pay the debt of the deceased.[1232]

The High Court of Bombay has held that the son of a Hindu, where there has been no appointment of an executor or administrator, in law, represents the estate of his father and is, therefore, his legal representative within the meaning of section 2(11) of the CPC.[1233] The Privy Council has also held that the son coming into an impartible ancestral estate of a *Mitakshara* family is a legal representative of his father who was the last holder.[1234] Hence, where there is an allegation that the estate of the father is in the hands of the son, the son is liable to have a decree passed against him for the father's debt, to be recovered only out of any assets of the father which may have come into his hands and are not duly accounted for. However, where there is a decree against both the father and son, but it is executed only against the father, the son's interest in the joint family property proceeded against, will not be affected.[1235]

This section assumes the existence of a debt; hence, where in a suit against the father on a mortgage of ancestral property, the sons are not impleaded but are brought on record after the death of the father after the preliminary decree and are not allowed to raise the question regarding the binding nature of the debt, the sons are not precluded from disputing the existence of the debt itself in a separate suit.[1236]

This section was first enacted in the Code of Civil Procedure, 1908 and a controversy then arose whether it applied to pending execution proceedings. It was held in *Inderjit v Arshad Ali*,[1237] that it did, whereas in *Gummurthi Naidu v Varadappa Chetty*,[1238] a different view was taken. The question is not one which is likely to arise for decision hereafter, but on principle when once it is held that the section enacts a rule of procedure and on that there has been no

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1229. *Rao Bhimsingh v Shersingh*, AIR 1948 PC 1 : 74 IA 247 : (1947) 52 Cal WN 109 : 50 Bom LR 1: *Ganesh v Narayana*, AIR 1931 Bom 484 : (1931) 55 Bom 709.
1230. *Chunilal v Bai Mani*, (1918) 42 Bom 504.
1231. *Jamburao v Annapa*, AIR 1941 Bom 23 (FB) : (1940) 42 Bom LR 1066.
1232. *Jagannath v Moti Lal*, AIR 1923 All 539 : (1923) 45 All 455.
1233. *Jamburao v Annappa*, AIR 1941 Bom 23 (FB) : (1940) 42 Bom LR 1066.
1234. *Rao Bhimsingh v Shersingh*, AIR 1948 PC 1 : 74 IA 247 : (1947) 52 Cal WN 109 : 50 Bom LR 1.
1235. *RK Iyengar v T Pillai*, AIR 1971 Mad 303.
1236. *Lakshamadu v Ramudu*, AIR 1939 Mad 687.
1237. *Inderjit v Arshad Ali*, 4 IC 492.
1238. *Gummurthi Naidu v Varadappa Chetty*, (1911) 2 Mad WN 386.

dispute, the conclusion is inescapable that it must apply to pending proceedings. The Kerala High Court has, on this principle, held that the section is applicable to decrees passed before the CPC, was extended to the area in question.[1239]

[s 53.2] Hindu Law

The expression Hindu Law would include in its ambit, the modern legislation on Hindu law. It should not be considered as only Hindu law prevailing before the Hindu Succession Act, 1956.

[s 53.3] Decree

The section is not limited to money decrees but applies to all decrees.[1240]

[s 53.4] Property in the Hands of a Son

This includes the undivided share of the son in the joint family property which is held by himself and other coparceners.[1241] But it will not include the *watan* property that is in the hands of the son, having regard to the provision in section 5 of the Bombay Hereditary Offices Act, 1874.[1242] It is, however, otherwise if the decree for money had been obtained against the *watandar* father and his son during the life-time of the father.[1243] Where a provident fund that is standing to the credit of a deceased judgment-debtor is paid to his dependent minor son under section 4(1) of the Provident Funds Act 19 of 1925, the amount so paid is not part of the assets of the father.[1244] This section applies in the case of the sons of a judgment-debtor only, and not in the case of his brother,[1245] or mother,[1246] or father[1247] or uncle.[1248] The judgments mentioned herein are all prior to the coming in force of the Hindu Succession Act, 1956, hence, will not be applicable in present circumstances. Where a suit on a mortgage by the father was filed against the sons and the grandsons but was dismissed against the latter, it was held that the interest of the grandsons in the joint property was not liable to attachment under the decree.[1249]

If the father dies leaving sons and also his own father and subsequently the father's father dies, it was held that the decree could not be executed against the ancestral property in the hands of the sons.[1250] This view has been dissented from, in the under mentioned case.[1251]

1239. *Gopalakrishna v Subramanaya Iyer*, (1961) Ker LJ 901 : (1961) Ker LT 1126.
1240. *Rao Bhimsingh v Sher Singh*, AIR 1948 PC 1 : 74 IA 247 : (1947) 52 Cal WN 109 : 50 Bom LR 1; *Ganesh v Narayan*, AIR 1931 Bom 484 : (1931) 55 Bom 709; *Meyappan v Meyappan*, AIR 1924 Mad 571 : (1924) 46 Mad LJ 471.
1241. *Malak Chand v Hira Lal*, AIR 1935 Oudh 510 (FB) : (1935) 11 Luck 449; *Phagu Mal v Dhani Ram*, AIR 1934 All 101; *Chotey Lal v Ganpat Rai*, AIR 1934 All 590 : 150 Ind Cas 411.
1242. *Vithaldas v Shrinivasrao*, AIR 1934 Bom 116 : (1934) 58 Bom 218; *Ramabai v Government of Bombay*, (1941) 43 Bom LR 232.
1243. *Vishwanath v Keshavbhat*, AIR 1934 Bom 119 : (1934) 58 Bom 273.
1244. *Thaj Mahomed Saib v Balaji Singh*, AIR 1934 Mad 173 : (1934) 57 Mad 440.
1245. *Sheo Gopal v Firm Ganesh Dass Ram Gopal*, AIR 1937 Oudh 327 : (1938) 13 Luck 241; *Veerappa Chettiar v Ramaswami Iyer* ILR 27 Mad 106; *Narasinbhat v Chenappa* ILR 2 Bom 479.
1246. *Govindamma v Bullemma*, AIR 1962 AP 243 : (1962) 1 Andh WR 151 : (1962) 1 Andh LT 240; affirming *Govindamma v Bullemma*, AIR 1957 AP 47.
1247. *Jaganath Prasad v Sitaram*, (1888)ILR 11 All 302.
1248. *Narasinbhat v Chenappa*, ILR 2 Bom 479.
1249. *Raja Ram v Raja Baksh*, AIR 1938 PC 7 : (1938) 13 Luck 61 : 40 Bom LR 277.
1250. *Binda Prasad v Raja Ballabh*, AIR 1926 All 220 : (1926) 48 All 245.
1251. *Devi Das v Jada Ram*, AIR 1933 Lah 857 : (1934) 15 Lah 50.

The expression "other descendant" shall include heirs as mentioned in the Schedule to the Hindu Succession Act, 1956.

[s 53.5] Liability of Ancestral Property in Execution Proceedings

Under the Hindu Law, when a son or grandson takes any ancestral property by survivorship, he is bound to pay out of such property, all debts of his ancestor, not incurred for immoral or illegal purposes. In the case of a decree against a Hindu father, there was a conflict of decisions under the Code of Civil Procedure, 1882 as to the procedure for enforcing this liability. The section settles this question of procedure.[1252] We proceed to consider the subject under the following four heads:

[s 53.5.1] Money Decree against Father: Execution after his Death: Partition

A and his sons *B* and *C* constitute a joint Hindu family owning an ancestral house. *D* obtains a decree against *A* for Rs 5,000. *A* dies and on his death, *B* and *C* take the ancestral property by survivorship. *D*, whose remedy is not confined to the one-third share of the father,[1253] applies for execution of the decree against *B* and *C* by attachment and sale of the whole of the family house. Is he entitled to do so or must he institute a fresh suit against *B* and *C* to recover the debt? According to the procedure prescribed by the CPC, *D* should bring *B* and *C* on the record as the legal representatives of *A* under section 50, and then apply under that section to the court which passed the decree to execute it against *B* and *C* to the extent of the ancestral property come to their hands. The words in section 50 are, "to the extent of *the property of the deceased* which has come to his [legal representatives] hands." According to the present section, the ancestral property in the hands of *B* and *C*, being liable under Hindu law for the payment of *A*'s debts, is deemed, for the purposes of section 50, to be the property of the deceased which has come to the hands of *B* and *C* as the legal representatives of *A*. If *B* and *C* object that the debt in respect of which the decree was passed was tainted with immorality, the question is one "relating to the *execution of* the decree" between the decree-holder and the "representative" of the judgment-debtor within the meaning of section 47, and it should be determined by the court executing the decree.[1254] This coincides with the view taken by the High Courts of Bombay and Calcutta under the Code of Civil Procedure, 1882.[1255] According to the Madras and Allahabad decisions under that Code, a decree against a Hindu father could not be executed against ancestral property in the hands of the sons, even to the extent of the father's interest in the property, and the only remedy of the decree-holder was to institute a regular suit against the sons. This view proceeded on the ground that the question whether the debts were tainted with immorality was not one that could be gone into in execution proceedings, and that the sons were not the "legal representatives" of their father so far as the ancestral property was concerned within the meaning of section 234 of the Code of Civil Procedure, 1882 (now replaced by Code of Civil Procedure, 1908).[1256] These decisions are no longer law.[1257]

1252. *Shiekh Karoo v Rameshwar*, AIR 1923 Pat 143 : (1921) 6 Pat LJ 451.
1253. *Narayan v Sagunabai*, AIR 1925 Bom 193 : (1925) ILR 49 Bom 113.
1254. *Ramanand v Chhotey Lal*, AIR 1923 All 124 : (1922) 20 All LJ 969.
1255. *Umed v Goman Bhaiji*, (1896) ILR 20 Bom 385; *Shivram v Sakharam*, (1909) 33 Bom 39; *Amar Chandra v Sebak Chand*, (1907) 34 Cal 642; *Hanmant v Ganesh*, (1919) 43 Bom 612, p 626.
1256. *Rani Varma v Koman*, (1882) 5 Mad 223; *Ariavedu v Doraisami*, (1888) 11 Mad 413; *Peraiyan v Seetharama*, (1904) 27 Mad 243 (FB); *Venkatarama v Senthivelu*, (1890) ILR 13 Mad 265; *Lachmi Narain v Kunji Lal*, (1894) ILR 16 All 449; *Jagannath v Sita Ram*, (1889) ILR 11 All 302; *Narsingha v Lalji*, (1901) ILR 23 All 206.
1257. *Bhadri Venkataswami v Mandi Tata Reddy*, AIR 1947 Mad 162 : (1947) ILR Mad 463.

[s 53.5.1.1] Partition.—

Under Hindu Law, the son, meaning thereby, a male descendant within three decrees, is under a pious obligation to discharge, out of his share in the joint family properties, the debts of his father which are neither illegal nor immoral even though they are not for purposes binding on the family. Being a substantive obligation, it is not destroyed by a partition taking place subsequent to the contracting of the debt.[1258] But judicial opinion was divided on the question as to the mode in which this obligation could be enforced after partition. It was held by the High Courts of Patna[1259] Nagpur[1260] and Bombay[1261] that after partition, the creditor could not execute a decree obtained against the father alone against the shares allotted to the sons on partition but that he must file a suit against him on the debt and execute the decree passed therein against the properties that fell to their share. The decisions of the Madras High Court on the question were conflicting. In *Venkatanarayana v Somaraju*,[1262] it was held by a full bench that where a partition takes place after a suit is filed against the manager or father, the decree could be executed against the joint family properties which are allotted to the coparcener or son as the suit must be taken to have been laid against the manager or father, in a representative capacity. But the preponderance of authority was in favour of the view that as the power of the father to represent must come to an end on division, a decree passed, thereafter, could not be executed against the properties in the hands of divided members.[1263] The controversy has now been set at rest by the decision of the Supreme Court in *Pannalal v Mst Narayani*,[1264] wherein it has been held that a decree obtained against the father cannot, after partition, be executed against the shares allotted to the sons.

[s 53.5.2] Attachment in Execution of Money Decree against Father: Death of the Father Before Sale

All the High Courts are agreed that where the father dies after attachment of the ancestral property, the proceedings in execution can be continued against the sons.[1265] And the Privy Council has accepted this view.[1266] The Supreme Court has also now reaffirmed it.[1267] In fact, having regard to the provisions of the present section, a separate suit against the sons would be barred by section 47.

1258. *Pannalal v Narayanisupra*; *Jakati v Borkar*, AIR 1959 SC 282 : [1959] SCR 1384 : (1959) SCJ 719.
1259. *Atul Krishna v Lal Nanaji*, AIR 1935 Pat 275 (FB) : (1935) 14 Pat 732.
1260. *Govindaram Dwarkadas v Nathanmal*, AIR 1937 Ngp 45 : (1938) ILR Nag 10; *Jai Narain v Sonaji*, AIR 1938 Ngp 24 : (1938) ILR Nag 136.
1261. *Surajmal v Motiram*, AIR 1940 Bom 22.
1262. *Venkatanarayana v Somaraju*, AIR 1937 Mad 610 (FB) : (1937) ILR Mad 888 : (1937) 2 Mad LJ 251; followed in *Venkataratna v Venkatasubbiah*, AIR 1950 Mad 136 (1949) 2 Mad LJ 539.
1263. *Tirumalaimuthu v Subramanya*, AIR 1937 Mad 458 : (1937) 1 Mad LJ 243; *Kuppan Chettiar v Masa Goundan*, AIR 1937 Mad 424 : (1937) 1 Mad LJ 249; *Official Receiver v Seshiah*, AIR 1941 Mad 262 : (1940) 2 Mad LJ 860; *Ramanathan v Ramanathan*, (1949) 2 Mad LJ 751.
1264. *Pannalal v Mst Narayani*, AIR 1952 SC 170 : (1952) SCR 544 : 1952 SCJ 211. For later decisions; *Suryanarayana v Ganesulu*, AIR 1954 Mad 203; *Chinnaramiah v Venkan Raju*, AIR 1954 Mad 864 : (1954) ILR Mad 834 : (1954) 2 Mad LJ 176; *Kumaji Sarimal v Devadatan*, AIR 1958 AP 216; *Padmavathi v Manilal*, AIR 1959 Bom 141.
1265. *Sivagiri Zamindar v Teruvengada*, (1884) 7 Mad 339; *Lachmi Narain v Kunji Lal*, (1894) 16 All 449; *Peary Lal v Chandi Charan*, (1906) 11 Cal WN 163.
1266. *Rao Bhimsingh v Shersingh*, AIR 1948 PC 11 : (1947) ILR Nag 830 : 74 IA 247 : (1947) 52 Cal WN 109 : 50 Bom LR 1.
1267. *Jakati v Borkar*, AIR 1959 SC 282 : (1959) SCR 1384 : (1959) SCJ 719.

[s 53.5.3] Mortgage Decree Against Father: Death of Father Before Sale

Where a decree is obtained against the father for sale of ancestral property mortgaged by him, and he dies before sale, the proceedings in execution may be continued against the sons. But the sons, not being parties to the suit, are entitled to raise, in execution proceedings, such questions as they could have raised if they had been made parties.[1268] They can dispute the *factum* of the debt, or they can show that the debt was incurred for immoral purposes and is not, therefore, binding on the property.[1269] But the Lahore High Court has held that the son is not entitled in the case of a mortgage decree to object in execution proceedings that the debt is immoral and not binding on him.[1270]

[s 53.5.4] Decree Against Sons for Father's Debt for Payment out of Ancestral Property

In such a case, the decree-holder may proceed to execute the decree by attachment and sale of the ancestral property come to the hands of the sons. The proceedings would be under section 52. The expression "Property of the Deceased" in that section would be construed in the light of the present section. In fact, section 53 is an explanation to sections 50 and 52, explaining the meaning of the expression "property of the deceased".

It will be seen that, under the present CPC, a creditor can follow the property in the hands of the sons or grandsons in execution not only in cases (b), (c) and (d), but also in case (a).

The four heads set forth above, refer to decree for the debt of a deceased ancestor, but as already stated, the section is not limited to such decrees, but includes all decrees against a deceased ancestor.

[s 53.6] Debt of a Deceased Ancestor

As to debts for which a Hindu son or grandson is liable, see *Pannalal v Naraini*.[1271]

[S 54] Partition of estate or separation of share.—Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

SYNOPSIS

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1268. *Chander Pershad v Sham Koer*, (1906) 33 Cal 676; *Umamaheswara v Singaperumal*, (1885) 8 Mad 376, *Hira Lal v Parmeshar*, (1899) 21 All 356.
1269. *Ramkrishna v Vinayak*, (1910) 34 Bom 354; *Indar Pal v Imperial Bank*, (1915) 37 All 214.
1270. *Shio Das v Karam Chand*, AIR 1934 Lah 438 : (1934) 15 Lah 772.
1271. *Pannalal v Naraini*, AIR 1952 SC 170 : (1952) SCR 544.

[s 54.1] High Court Amendment

Karnataka.—Forsection 54, substitute the following section:—

"S. 54. Partition of estate or separation of share

Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share of such an estate shall be made by the court in accordance with law if any, for the time being in force relating to the partition or the separate possession of shares and if necessary on the report of a revenue officer, not below the rank of *Tahsildar* or such other person as the court may appoint as commissioner in that behalf" [*CPC (Karnataka Amendment) Act, 1995 (Act 36 of 1998), section 2 (w.e.f. 1-2-2001)*]

[s 54.2] Alteration in the Section

The word "Government" was substituted for the words "the Crown" by the Adaptation of Laws Order 1950.

[s 54.3] Partition by Collector

Under section 54 of the Code of Civil Procedure, 1908, the collector can effect partition of an estate assessed to payment of land revenue.[1272]

This section is a reproduction of section 265 of the Code of Civil Procedure, 1882 with a few verbal alterations. Where a decree has been passed for partition or for separate possession of a share of an estate of the description mentioned in this section, the proper authority to effect the partition or to deliver possession of the share is the collector; the court has no power to do so.[1273] Section 54 does not talk about a final decree. All that is required of a civil court in a case for partition of an undivided estate assessed to payment of land revenue of government or for the separate possession of a share in such an estate is to pass a preliminary decree and declare the rights of the parties and give direction for such partition or separation to be made by the collector. Thereafter, the execution is to be effected by the collector. The civil court, after passing such a preliminary decree for partition, becomes *functus officio* and has no jurisdiction to act in any manner thereafter so as to pass a final decree or deliver possession to a party in accordance with such decree.[1274] But the partition intended to be left to the collector is one which has some impact upon the revenue and the revenue records. If a decree does not direct a share in one or more survey numbers to be separated, there is no reason why the work of allotment of the entire survey number assessed to payment of revenue to a particular party should be left to the collector.[1275] But *aliter* where the collector refuses to effect partition.[1276]

In a suit for partition, once the court passes the decree declaring shares of the parties in an undivided estate assessed to the payment of revenue to the government and orders division and separate possession of such estate in accordance with the shares so declared, then the court is enjoined to direct such partition or separation be effected by the collector or any Gazetted Officer subordinate to collector deputed by him in that behalf. Further, in order to give meaningful effect to such declaration and direction issued in terms of section 54 read with O XX, rule 18(1) of the CPC, the court is further enjoined to send the relevant

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1272. *Chandmal Dogarmal Shelot v Shantilal Valchand Shelot*, AIR 2003 Bom 445.
1273. *Gendmal Amolakchand v Laxman Tanba*, AIR 1945 Ngp 86 : (1944) ILR Nag 852; *Abdul Ali v Mirza Vigar Ali Beg*, AIR 1949 Oudh 37 : (1947) 23 Luck 77; *Dattatraya v Mahadaj*, (1892) 16 Bom 528.
1274. *Bhagwan Singh v Babu Shiv Prasad*, AIR 1974 MP 12.
1275. *Ragha v Ramji*, AIR 1974 Guj 36.
1276. *Sevakram Motiram v Chunilal Bhagchandra*, AIR 1951 Ngp 359.

papers to the concerned collector or Gazetted Officer. Once the papers are transmitted to the revenue officer, the court passing the decree for partition under O XX, rule 18(1) of the CPC becomes functus officio in relation to the decree for partition passed by it and all further proceedings for the execution of such decree are to be carried out by the concerned revenue officer. The civil court is not the executing court for the purpose of execution of the decree for partition of the estate which is subject to the assessment for payment of revenue to the government. Being so, the question of approaching the civil court under section 47 of the CPC, with grievance regarding non-compliance of such decree or acts in contravention thereof or in violation of law by the revenue officer in the course of execution of such decree does not arise at all. Certainly, the provisions of O XXI would not be attracted in such cases as the execution of a decree is not by the civil court. Being so, neither the provisions of section 47 nor those of O XXI of the CPC can be of any help in such cases. Further, the matters pertaining to the execution of such decrees cannot be dealt with under the exercise of inherent powers under section 151 of the CPC. Undoubtedly, therefore, it can be said that the grievance relating to refusal of the revenue officer to execute the decree and therefore, direction for the execution to be carried out in terms of the decree, i.e., as per the declaration of shares under O XX, rule 18 of the CPC can be entertained by the civil court in exercise of its inherent jurisdiction to pass order under section 151 of the CPC for compliance of the said declaration, i.e., for execution of the decree in accordance with the terms thereof. Therefore, in cases of contravention of provisions of law or transgression of law or non-enforceability of the decree for partition on account of events occurring subsequent to the passing of such decrees or in relation to the similar such grievances, the limited control which can be exercised by the civil courts can be only by way of an independent suit. The bar for suit under section 47 of the CPC could be applicable only in cases where the question can be determined by the court executing the decree. Once it is clear that the civil court is not the court executing the decree for partition of the estate which is subject to the assessment for payment of revenue to the government, the bar provided under section 47 of the CPC for an independent suit by the parties to the decree cannot come in the way of the party approaching the court with such suit regarding the grievance in relation of the execution of the partition decree.[1277]

In a partition suit pertaining to agricultural lands in the State of Maharashtra, the execution of decree is to be performed by Collector or his subordinate officer according to the provisions of section 85 of Maharashtra Land Revenue Code, 1965 and rules 5, 6, 7 of the Maharashtra Land Revenue (Partition of Holdings) Rules 1967. The civil court after passing the decree becomes *functus officio* so far putting the decree-holder in actual physical possession of the property. The provisions of O XXI, rule 35 of the CPC do not apply in case of possession of agricultural land.[1278]

[s 54.4] Application of the Section

If a decree is for the partition of an undivided estate assessed to the payment of revenue to government, the section requires that the partition should be carried out by the collector. In a case decided by a full bench of the High Court of Calcutta, there was a dictum to the effect that the section only applies to a decree which directs distribution of revenue as well

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1277. *Prakash Nathyaba Bhosale v Laxman Ganaba Bhosale*, AIR 2003 Bom 41.
1278. *Arun Ashruba Mhaske v Atmaram Dattu*, 2007 (4) Mah LJ 157 : (2007) 5 All MR 167.

as a division of land.[1279] This case has been followed by the Patna High Court.[1280] There is, however, nothing in the section which so limits its operation. In *Abdul Razak v Shreenath Ghosh*,[1281] Chief Justice Rankin said:

> It is idle to say that it is open to the plaintiff to insist that it be carried out by a commissioner under the civil court merely because he has not asked for partition of the revenue. Whether he has asked for partition of the revenue or not, if he has a right to the partition of an undivided estate, his right is to a complete partition and it is certainly the right of any other party to object to an incomplete partition which would leave his interest at the mercy of the plaintiff, if the plaintiff makes default in paying his share.

It has been held by the Nagpur High Court that a civil court is not competent to effect partition of revenue paying property if the parties to the suit had not specifically asked for separation of the liability of each of them, as regards payment of land revenue, but if the collector refuses to make a partition of the revenue paying property, the civil court can do so.[1282] Where the share to be divided is assessed to land revenue, the same shall be done by the deputy commissioner or an officer authorised by him and not by the court or by the commissioner appointed by the court.[1283] Where the decree in question was not a decree for partition *simpliciter* but under the decree, the partition was to take effect only if the judgment-debtor failed to pay the amount within the stipulated period, it was necessary for the court to see as to whether the clause as to partition had become operative before sending the papers to the deputy commissioner for partition under section 54 of the CPC. The order sending records to deputy commissioner for effecting partition without hearing the purchaser from judgment-debtor was improper. It also violates the principles of natural justice.[1284]

The section does not apply to the partition of a *mouza* which is part of a revenue paying estate.[1285] In such a case, the object of the suit is not to have the parent estate divided into several separate estates, but only to divide the lands of the *mouza* among persons who are jointly interested in them.[1286]

[s 54.5] For the Separate Possession of a Share of such an Estate

These words refer to the case of a man whose right is to the possession of an aliquot portion or share of the whole estate considered as one. In such a case, the partition is made by the collector, as it is the duty of the collector to see that the proper share of the revenue is put upon the particular land or share of land.[1287] This section does not bar the jurisdiction of a civil court to effect a partition of a revenue paying estate where no separate allotment of the revenue is asked for, and this applies also to proceedings before the arbitrators.[1288] A person on whom any

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1279. *Jogadeshwari v Kailash Chandra*, (1879) 24 Cal 725 (FB).
1280. *Radha Kishan v Bhola*, AIR 1934 Pat 365 : (1934) ILR 13 Pat 637; *Priyanath Roy v Sreedhar Chandra Roy*, AIR 1945 Cal 28 : (1945) Cal WN 223.
1281. *Abdul Razak v Shreenath Ghosh*, AIR 1931 Cal 93 : (1931) 58 Cal 122; *Fulchand v Vaman Rao*, AIR 1951 Hyd 86 : (1951) ILR Hyd 436; *Pratap Singh v Karpal Singh*, 3 Pepsu LR 173.
1282. *Sewakram v Chunnilal*, AIR 1951 Ngp 359 : (1951) ILR Nag 558.
1283. *Ramakrishnacharya v Sreenivasacharya*, AIR 1989 Kant 30 (DB).
1284. *Krishnabai v Krishna Rao Janantaro Desai*, AIR 1995 Ker 172.
1285. *Debi Singh v Sheo Lall Singh*, (1889) 16 Cal 203; *Jogadeshwari v Kailash Chandra*, (1897) 24 Cal 725 (FB); *Roy Kiran v Rama Nath*, AIR 1931 Cal 104 : (1931) 34 Cal WN 895; *Srinivasathathachar v Srinivasathathachar*, AIR 1933 Mad 259 : (1933) 56 Mad 443.
1286. AIR 1933 Mad 259 : (1933) 56 Mad 443; *Abdul Razak v Shreenath Ghosh*, AIR 1931 Cal 93 : (1931) 58 Cal 122.
1287. *KV Srinivasathathachar v Naravalur Srinivasathathachar*, AIR 1933 Mad 259 : (1933) 56 Mad 443; *Abdul Razak v Sreenath Ghosh*, AIR 1931 Cal 93 : (1931) 58 Cal 122.
1288. *Tikaram v Hansraj*, AIR 1954 Ngp 241.

interest has devolved on account of transfer during the pendency of any suit, or a proceeding can participate in the execution proceedings even though his name may not have been shown in the decree, preliminary or final. The collector may proceed to make allotment of properties in an equitable manner instead of rejecting his claim for such equitable partition on the ground that he has no *locus standi*. A transferee from a party of a property which is the subject matter of partition, can exercise all the rights of the transferor. Since a party can ask for an equitable partition, a transferee from him can also do so.[1289]

[s 54.6] Partition

The term "partition" in this section, is not confined to a mere division of the lands in question into the requisite parts, but includes the delivery of the shares to their respective allottees.[1290]

In a suit for possession filed by daughters claiming shares in the property of their father, when separate partitions are not claimed, the decree in such a case would be hit by section 54 and would be inexecutable in absence of identification of separate shares of parties in the suit land.[1291]

[s 54.7] Addition of Party after Preliminary Decree

It will not be permissible to add a party to a suit for partition after the preliminary decree if the addition requires the preliminary decree to be reopened to enable the party to reagitate matters decided under the preliminary decree because such matters became final. He can, however, be added if he has no objection to come on record subject to matters decided under the preliminary decree. It would be permissible to add him as party if he wants equities to be settled in his favour, as this has to be done under the final decree and the matter is still open after preliminary decree. He cannot however be allowed to be added if he wants to contest the whole suit on merits.[1292]

If the petitioners do not want to reopen the decree and they are accepting the decree as it is and they only want equities to be settled in their favour they can be added as parties to the *deukhast* proceedings.[1293]

In a suit for partition of a Joint Hindu Family property, where death of one of the parties to the suit occurs subsequent to the passing of the preliminary decree, shares of other parties thereby many change. Under such circumstances, the court can pass subsequent preliminary decree or amend the preliminary decree already passed. Such order making variation in shares is a decree in itself which would be appealable.[1294]

1289. *Khemchand Shanker Choudhary v Vishnu Hari Patil*, (1983) 1 SCC 18; *Anandi Devi v Mahendra Singh*, AIR 1997 Pat 7.
1290. *Parbhudas v Shankarbhai*, (1887) 11 Bom 662.
1291. *Eknathbuwa Gyanoba Bharati (deceased by LR) v Shesbabai Laxman Buwa*, 2009 (3) AIR Bom R 208 : (2008) 6 All MR 762 (Aurangabad Bench).
1292. *Mannubai Nandgopal Pande v Shriprasad Nandlal Pande*, (1979) Mah LJ 252; *Chandmal Dongarmal Shelot v Shantilal Valchand Shelot*, AIR 2003 Bom 445.
1293. *Chandmal Dongarmal Shelot v Shantilal Valchand Shelot*, AIR 2003 Bom 445.
1294. *Kusum Dashrath Kharmare v Popat Madhav Gangarde*, (2008) 1 Mah LJ 267 : (2008) 1 All MR 576 (Aurangabad Bench).

[s 54.8] Jurisdiction of court to Control Collector's Action

Where a decree relates to an estate of the kind mentioned in this section, it should not only declare the rights of the several parties interested in the property, but should direct the actual partition or separation to be made by the collector or any Gazetted Officer subordinate of the collector deputed by him in that behalf.[1295] Where a decree is sent by the civil court to the deputy commissioner for execution, the latter can delegate the function to his gazetted assistant; but the gazetted assistant cannot further delegate that function to the *tehsildar*. Proceedings taken by the *tehsildar* under such a delegation are without jurisdiction and void. The mere fact that the petitioner had a concern in the holding of the auction proceedings and had not protested against it, is not of any consequence at all. Therefore, the high court could not refuse to interfere with the impugned proceedings of the *tehsildar*, which were without jurisdiction.[1296] When a party to a decree, which has been sent to the collector under section 54 dies, or becomes insolvent or transfers his interest *pendente lite*, the collector need not send back the case to the court. Section 54 can be so construed that the collector will act in accordance with the law (if any) for the time being in force, relating to the partition or the separate possession of shares.[1297] After a decree for partition is passed under this section, the court has nothing further to do with it by way of execution.[1298] This section places the execution of the decree entirely in the hands of the collector. But if the collector contravenes the decretal command of the court, or transgresses the law for the time being in force, relating to partition, his action is subject to the control and correction of the court which passed the decree and sent it to him for execution.[1299] In such a case, the aggrieved party should proceed by an application under section 47, and not by a separate suit.[1300] Even where directions for partition have been given to the collector, by the court, if the partition has not been made or commenced, the court can recall the record, if it has been wrongly transmitted or directed.[1301] Where a collector has made a partition, there is nothing to prevent him from reversing the partition for mistake or other causes, before he has passed final orders and returned the proceedings to the court.[1302] An order directing partition by the collector is not a preliminary decree within O XX, rule 18. It is, so far as the court is concerned, a final decree and an order transmitting the papers to the collector is ministerial and not judicial and not appealable.[1303] It is competent to the collector to himself entertain an application for partition after a civil court passes a decree.[1304]

It has been held that, an objection that the collector has made an unequal partition is no ground for interference by the court with the order passed by the collector.[1305] But in a Madras case, where all the parties objected to a partition effected by the collector on the ground that

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1295. *Manjundappa v Sonnappa*, AIR 1965 Mys 73; *Rupan Rai v Subh Karan*, (1919) 41 All 207; *Asman Singh v Tulsi Singh*, (1917) 2 Pat LJ 221.
1296. *Putta Kamaiah v State of Karnataka*, AIR 1990 Kant 79.
1297. *Khem Chand v Vishnu*, AIR 1983 SC 124 : (1983) 1 SCC 18. See O xx, rule 18.
1298. *Ningappa Balappa v Abashkhan Gouskhan*, AIR 1956 Bom 345.
1299. *Dev Gopal v Vasudev*, (1888) 12 Bom 371 : 376; *Ganoji v Dhondu*, (1890) 14 Bom 450; *Purshottam v Balkrishna*, (1904) 28 Bom 238; *Ramchandra v Krishnaji*, (1916) 40 Bom 118 : 124–25; *Timmana v Govind*, AIR 1926 Bom 258 : (1926) 28 Bom LR 523.
1300. *Gendamal Amolakchand v Laxman Tanba*, AIR 1945 Ngp 86 : (1944) ILR Nag 852; *Krishnaji v Damodar*, (1903) 5 Bom LR 648.
1301. *NR Patil v Kariappa*, AIR 1965 Mys 46.
1302. *Krishnaji v Damodar*, (1903) 5 Bom LR 648.
1303. *Narasu v Narayanan*, AIR 1959 Mys 233 : 1958 Mys 718.
1304. *Prabudayal v Sub-Divisional Officer, Karvi*, AIR 1958 All 673.
1305. *Venkataraghava v Venkata Hanumantha*, AIR 1945 Mad 336 (FB) : (1946) ILR Mad 10; *Dev Gopal v Vasudeo*, (1888) ILR 12 Bom 371; *Shrinivas v Gurunath*, (1891) 15 Bom 527; *Bhimangauda v Hanmat*, (1918) ILR 42 Bom 689.

it was unequal, the court held that it had power to entertain the objection.[1306] The section in any case does not exclude the right of superior revenue authorities to examine and correct any decision or order of the collector in exercise of their appellate or revisional powers.[1307]

From the statutory definition though relating to payment of court-fees, it appears that engagement with the government by the estate holder is required to determine the payment of revenue and in absence of such engagement the estate must be separately assessed with revenue. The land or immovable property rateably assessed for revenue is not the estate as contemplated under section 54 of the CPC.

The individual land or immovable property enjoyed separately or jointly subject to payment of statutory revenue is not covered by the provision of section 54 of the CPC.[1308]

[s 54.9] Estate

The word "estate" is here used in its ordinary sense.[1309] *Sheri* lands, that is lands held under a lease from government for a fixed period, come within the terms of this section as revenue-paying lands[1310] but isolated plots of land which fall short of being the share of a co-sharer of a *mahal* do not.[1311] A *raiyatwari*-holding has been held not to be an "estate" within the meaning of the section.[1312]

[s 54.10] Estate Assessed to the Payment of Revenue

This section refers to estates assessed to revenue in one lump sum for the whole estate, and not to estates, like the ordinary paddy land holding in Burma, which are assessed at acre-rates.[1313] A *mouza* is generally part of a revenue paying estate, but is not itself an estate assessed to the payment of revenue.[1314] The words "estate assessed to the payment of land revenue"do not cover lands which have been built upon and become houses or factories.[1315]

[s 54.11] Limitation

Where the application for issuance of precepts to the collector, for effecting partition of shares in agricultural land accessed to the payment of land revenues as per shares indicated in the decree was dismissed merely because the application has been made almost after 45 years of the passing of the decree, the court would be considered to have committed serious error of law and jurisdiction and the order dismissing the application was liable to be set aside. The principle of equity made basis, for the order, could not be made applicable when law of limitation does not bar making such an application beyond any period. The law of limitation has to be read as provided in the statute, and it does not spring from the common law of the country or principle of equity. The application filed by the applicant for issuance of precept to

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1306. *Chinna v Krishnavanamma*, (1896) ILR 19 Mad 435.
1307. *Paygonda v Jingonda*, AIR 1968 Bom 198 : 69 Bom LR 579.
1308. *Ranjit Kumar Chakraborty v Jiban Chandra Chakraborty*, AIR 2001 Gau 73.
1309. *Secretary of State v Nundan Lall*, (1884) 10 Cal 435.
1310. *Dattatraya v Mahadaji*, (1892) 16 Bom 528.
1311. *Ram Dayal v Megu Lal*, (1884) 6 All 452; *Ram Khelawan v Sriram*, AIR 1952 All 191.
1312. *Muttuvayyangar v Kudalalagayyanagar*, (1883) 6 Mad 97; *Muttuchudambar v Karupa*, (1884) 7 Mad 382.
1313. *Maung Po Nyn v Ma Saw Tin*, AIR 1926 Rang 80 : (1927) Rang 206.
1314. *Abdul Razak v Shreenath Ghosh*, AIR 1931 Cal 93 : (1931) 58 Cal 122; *Roy Karan v Rama Nath*, AIR 1931 Cal 104 : (1931) 34 Cal WN 895.
1315. *Rameswarnath v Jageshwarnath*, AIR 1953 P&H 250 : (1954) ILR Punj 372.

the collector for effecting partition of the decree, being not an application for an execution of a decree, is not covered by any provisions contained in Limitation Act, 1963.[1316]

Arrest and Detention

[S 55] Arrest and detention.—(1) A judgment-debtor may be arrested[1317] in execution of a decree at any hour and on any day and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the [1318][State Government] may appoint for the detention of persons ordered by the Courts of such district to be detained:

Provided, firstly, that for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise:

Provided, secondly that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest had duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:

Provided, thirdly, that if the room is in the actual occupancy of woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The [1319][State Government] may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the [1320][State Government] in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he [1321][may be discharged] if he has not

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1316. *Ramrathibai v Suraj Pal*, AIR 1995 Bom 445; *Sanna Palaiah v Soncha Boraiah*, AIR 1998 Kant 87.
1317. No displaced person is liable to arrest or imprisonment in execution of any decree for the recovery of any debt: see section 30, Displaced Persons (Debts Adjustment) Act 70 of 1951. See also section 29 of Army Act, 1950 and Air Force Act, 1950, section 29 of Navy Act, 1957.
1318. Substituted for "Provincial Government" by AO, 1950.
1319. Substituted for "Provincial Government" by AO, 1950.
1320. Substituted for "Provincial Government" by AO, 1950.
1321. Substituted by CPC (Amendment) Act 3 of 1921, section 2, for "will be discharged".

committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court [1322][may release] him from arrest, and, if he fails so to apply and to appear, the court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

SYNOPSIS

[s 55.1]	High Court Amendment	850	[s 55.7]	Sub-section (4): Expresses his Intention to Apply to be Declared Insolvent	852
[s 55.2]	Changes Introduced by the Section	850	[s 55.8]	Sub-section (4): Within one month	852
[s 55.3]	Arrest of Judgment — Debtor	851	[s 55.9]	Sub-section (4): Discharge of Surety	852
[s 55.4]	Breaking Open of Outer Door	851	[s 55.10]	Realisation of Security	853
[s 55.5]	Sub-section (2)	851			
[s 55.6]	Sub-section (4): Insolvency After Order for Arrest	851			

[s 55.1] High Court Amendment

Calcutta.—In clause (1) insert the words "Calcutta or" after the words "Civil prison of" and before the words "the district in which"; and omit clauses (3) and (4), *vide* Cal Gaz Pt I, dated 20 April 1967.

[s 55.2] Changes Introduced by the Section

This section corresponds with section 336 of the Code of Civil Procedure, 1882—except in the following particulars:

(i) Any outer door of a dwelling-house may now be broken to effect the arrest of a judgment-debtor in execution of a decree. But the dwelling house must be in the occupancy of the judgment-debtor.[1323]

(ii) The security under sub-section (4) must not only be for the filing by the judgment-debtor of a petition in insolvency, but also for his appearance, when called upon, in any proceeding, upon the application in insolvency or upon the decree in execution of which he was arrested.[1324]

(iii) A power has been conferred on the local government to exempt certain persons from arrest [see sub-section (2)].

(iv) The words "Provincial Government" in sub-sections (1) and (2) were substituted for the words "Local Government" and the words "Official Gazette" in sub-section (2) were substituted for the words "local Official Gazette" by para 4 of the Government of India (Adaptation of India Laws) Order 1937.

1322. Substitued by CPC (Amendment) Act 3 of 1921, section 2, for "shall release".
1323. See sub-section, (1), proviso, (2).
1324. See notes below: "Discharge of surety."

[s 55.3] Arrest of Judgment — Debtor

Where the decree holder stated that judgment-debtor was owner of valuable land, the statement of another witness corroborated the version of the decree holder but the judgment debtor, without filing documents relating to said land, gave an evasive reply by stating that he cultivated the same land as the lessee, so the executing court without believing his version, directed for his arrest, the said finding of executing court could not be interfered with in revision.[1325]

[s 55.4] Breaking Open of Outer Door

The outer door may be broken open where a dwelling house is in the occupancy of the judgment-debtor, and he refuses or prevents access thereto. But this does not authorise him the breaking open of the outer door of a dwelling house merely because the judgment-debtor is to be found in that house.

[s 55.5] Sub-section (2)

The sub-section is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.

[s 55.6] Sub-section (4): Insolvency After Order for Arrest

If a judgment-debtor against whom an order for arrest has been made, is adjudicated insolvent without a protection order, the adjudication does not prevent his arrest, and the court of execution must require the judgment-debtor to give security under the latter part of sub-section (4), that he will appear when called upon in any proceeding in insolvency or upon the decree in execution of which he was arrested.[1326]

Where a judgment-debtor, apprehending his arrest in connection with execution of decree, filed an application under the Provincial Insolvency Act, 1920, it was held by Andhra Pradesh High Court that such application would be premature in view of the specific provision of section 55(3) of the Code.[1327]

In case of execution of a money decree, the duty of the court to inform the judgment-debtor that he may apply to be declared insolvent arises only after the judgment-debtor is arrested and brought before the court. Thus, where the arrest of the judgment-debtor did not take place on the date on which arrest warrant was issued, section 52 of the Provincial Insolvency Act, 1920 is not attracted and consequently pendency of Insolvency petition filed to adjudicate the judgment-debtor as insolvent would not affect the execution proceedings.[1328]

1325. *K Munir Athnam v D Bhaskar Naidu*, AIR 2006 (NOC) 1124 (AP) : (2006) 3 Andh LD 486.
1326. *MVLA Vishwanathan v Abdul Majid*, AIR 1925 Rang 305 : (1925) ILR 3 Rang 187.
1327. *Elluri Venkata Sai Surya Prakasa Rao v Guttikonda Srirama Murthy*, 2007 (1) Andh LD 152.
1328. *Vaddireddy Venkatata Subba Reddy v Narapureddy Kalyanamma*, 2008 (6) Andh LT 673 : 2009 (75) All Ind cas 866 : (2008) 6 Andh LD 585.

[s 55.7] Sub-section (4): Expresses his Intention to Apply to be Declared Insolvent

This expression of intention is equivalent to a statement made to the judgment-creditor by the judgment-debtor of an intention to suspend payment of his debts. It is, therefore, an act of insolvency as defined in s 9 of the Presidency-Towns Insolvency Act, 1909.[1329]

[s 55.8] Sub-section (4): Within one month

The court has no power to extend the period of one month for applying for adjudication. Section 148 does not apply to such a case.[1330] The word "month" is introduced into this section by way of defining the obligation of the surety. The intention expressed is to be declared insolvent and not to he declared insolvent at the end of a month provided nothing does turn up.[1331]

[s 55.9] Sub-section (4): Discharge of Surety

Sub-section (4) makes it clear that where a security bond is passed in the terms of that sub-section, that is, where a surety undertakes:

(i) that the judgment-debtor will within one month apply to be declared an insolvent; and

(ii) will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the security will be realised when there is a failure to comply with either condition.[1332] The surety, however, is not released by the mere filing by the judgment-debtor of the petition in insolvency; the security continues until a final order is made on the petition.[1333] A *bona fide* petition is a sufficient compliance with the condition of the bond. When a *bona fide* petition was presented within one month but was rejected as not being in proper form, and a fresh petition was presented later and the debtor was adjudged insolvent, the surety was discharged.[1334] A security-bond furnished for the appearance of the judgment-debtor is in the nature of a continuing guarantee and when the surety produces the judgment-debtor before the court and requests to be absolved from further liability under the bond, the court should not refuse to grant the prayer,[1335] but he cannot be discharged unless he has fully carried out his undertaking.[1336]

A surety under this section is discharged by the death of judgment-debtor before breach of either of the two conditions mentioned above.[1337] But the death of the judgment-debtor after the first condition has failed, namely, the undertaking to apply to be declared an insolvent within one month, cannot affect the surety's liability with regard to that condition.[1338] A surety

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1329. *Kishore Khanna v Netherlands Trading Society*, AIR 1930 Cal 555 : (1930) 34 Cal WN 401.
1330. *Narasinha v Rangachari*, AIR 1926 Mad 689 : (1926) 50 Mad LJ 477.
1331. *Kishore v Netherlands Trading Society*, AIR 1930 Cal 555 : (1930) 34 Cal WN 401.
1332. *Woriur Commercial Bank v Kaja Maroop*, AIR 1923 Mad 1081 : (1926) 52 Mad LJ 523.
1333. *Abdul v Mistri*, AIR 1922 Bom 340 : (1922) ILR 46 Bom 702; *IV Colato v U Aung Din*, AIR 1936 Rang 168 : (1936) 14 Rang 190.
1334. *Channappa v Yellappa*, AIR 1931 Bom 444 : (1931) 33 Bom LR 820.
1335. *Siraj-ud-din v Guranditta Mal*, AIR 1934 Lah 962.
1336. *Sankaranarayana v Peranisiram*, AIR 1942 Mad 101.
1337. *Krishnan v Ittiman*, (1901) 24 Mad 637; *Nabin Chandra v Mirtunjoy*, (1914) ILR 41 Cal 50.
1338. *Makanji v Bhukandas*, AIR 1924 Bom 428 : (1924) ILR 48 Bom 500.

is also discharged if the execution proceedings are struck off,[1339] or dismissed for default of appearance even though they are subsequently restored,[1340] but not if liability had already accrued under the bond by a breach of either of the two conditions before the proceedings were struck off.[1341] If the court makes an erroneous order discharging a surety, the decree-holder may apply for revision of the order, but cannot treat it as a nullity.[1342] When a person executes a surety-bond, undertaking to produce a judgment-debtor in the court on a particular day, the mere fact that the judgment-debtor is suffering from fever on that day does not absolve the surety from liability, when the illness is not so serious as to render his appearance in court physically impossible.[1343]

Sub-section (4) provides that if the judgment-debtor fails to apply or to appear, the court may either direct the security to be realised or commit the judgment-debtor to prison. This is an alternative and not a concurrent remedy. It does not mean that the court can proceed both against the surety and the judgment-debtor. If the surety is proceeded against and the amount is recovered from him, the judgment-debtor is committed to jail, in execution. If the judgment-debtor is committed to jail, the position is just the same as if the surety had never come forward.[1344] But the mere fact that the judgment-debtor is rearrested,[1345] or that a warrant is issued against him, is not sufficient of itself to discharge the surety.[1346]

[s 55.10] Realisation of Security

See section 145.

See O XXI, rule 40 (proceedings on appearance of judgment-debtor in obedience to notice or after arrest).

A woman cannot be arrested or detained in civil prison under O XXXVIII, rule 1 (arrest before judgment). If under section 56 of the CPC, the court cannot order the arrest or detention, in civil prison, of a woman in execution of a decree for the payment of money, it cannot certainly order her arrest in a suit filed for the recovery of money, where a decree is yet to be passed.[1347]

[S 56] Prohibition of arrest or detention of women in execution of decree for money.—Notwithstanding anything in this Part, the Court shall not order the arrest[1348] or detention in the civil prison of a woman in execution of a decree for the payment of money.

1339. *Lalji v Oodya*, (1887) 14 Cal 757.
1340. *Kali Ram v Umrao Singh*, AIR 1934 Lah 92.
1341. *Dedhraj v Mahabir*, (1920) 5 Pat LJ 417.
1342. *Nageshar v Gudrimal*, AIR 1933 All 382 : (1933) 55 All 548.
1343. Re *Kumarswamy Reddiar*, AIR 1938 Mad 530.
1344. *Raghubir Singh v Maharul Huque*, AIR 1942 Pat 506 : (1942) 21 Pat 644; *Makanji v Bhukandas*, AIR 1924 Bom 428 : (1924) 48 Bom 500.
1345. *Channappa v Yellappa*, AIR 1931 Bom 444 : (1931) 33 Bom LR 820; explaining a dictum in *Makanji v Bhukandas*, AIR 1924 Bom 428 : (1924) 48 Bom 500.
1346. *Makanji v Bhukandas*, AIR 1924 Bom 428 : (1924) 48 Bom 500.
1347. *Chelsea Mills v Chorus Girl*, AIR 1991 Del 129.
1348. No displaced person is liable to arrest or imprisonment in execution of any decree for the recovery of any debt: see section 30, Displaced Persons (Debts Adjustment) Act 70 of 1951. See also section 29 of Army Act, 1950 and Air Force Act, 1950, section 29 of Navy Act, 1957.

[s 56.1] Security for Costs

This section provides that a woman shall not be arrested in execution of a decree for the payment of money. At the same time, if the plaintiff is a woman and her suit is for the payment of money, she may be required to give security for the defendant's costs.[1349]

In the case of *Cyril Britto v UOI,*[1350] a Division Bench of the Kerala High Court specifically rejected the contention that section 56 of the CPC, which protects women from arrest or detention in execution of money decree is ultra vires Arts. 14 and 15 of the Constitution of India.

The constitutional validity of section 56 was challenged before the Bombay High Court being against Articles 14 and 15 of the Constitution.[1351] Upholding the validity, the Bombay High Court held that the court taking into consideration the object of such provision, the classification between men and women is quite reasonable, and the classification has sufficient nexus with the object.

[S 57] Subsistence allowance.—The [1352][State Government] may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

Subsistence allowance (O XXI, rule 39).

[s 57.1] High Court Amendment

Calcutta.—Substitute the words "The high court may, subject to the approval of the State Government" for "The State Government may". Omit the word "monthly" between the words "of" and "allowances" *vide* Cal. Gaz Pt I, dated 20 April 1967.

[S 58] Detention and release.—(1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(*a*) where the decree is for the payment of a sum of money exceeding [1353][[1354][five thousand rupees], for a period not exceeding three months, and]

[1355][(*b*) where the decree is for the payment of a sum of money exceeding two thousand rupees, but not exceeding five thousand rupees, for a period not exceeding six weeks]:

1349. See O XXV, rule 1(3).
1350. *Cyril Britto v UOI*, AIR 2003 Ker 259.
1351. *Shrikrishna Eknath Godbole v UOI,* PIL No. 166/2016, decided on 21 October 2016 (Bombay High Court)
1352. Substituted for "Provincial Government" by AO 1950.
1353. Substituted by Act 104 of 1976, section 22, for words "fifty rupees, for a period of six months, and", (w.e.f. 1-2-1977).
1354. Substituted for "one thousand rupees" by the CPC (Amendment) Act, 1999, section 5 (46 of 1999) (w.e.f. 1-7-2002) *vide* Notification. S.O. 603(E), dated 6 June 2002.
1355. Substituted for "(b) where the decree is for the payment of a sum of money exceeding five hundred rupees, but not exceeding one thousand rupees, for a period not exceeding six weeks"; by the CPC (Amendment) Act, 1999 (46 of 1999), section 5 (w.e.f. 1-7-2002).Earlier clause (b) was inserted by Act 104 of 1976, section 22 (w.e.f. 1-2-1977).

Provided that he shall be released from such detention before the expiration of the [1356][said period of detention]—

(*i*) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(*ii*) on the decree passed against him being otherwise fully satisfied, or

(*iii*) on the request of the person on whose application he has been so detained, or

(*iv*) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance:

Provided, also, that he shall not be released from such detention under clause (*ii*) or clause (*iii*), without the order of the Court.

[1357][(1A) For the removal of doubts, it is hereby declared that no order for detention of the judgment-debtor in civil prison in execution of a decree for the payment of money shall be made, where the total amount of the decree does not exceed [1358][two thousand rupees].]

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

SYNOPSIS

[s 58.1]	Alteration in the Section	855	[s 58.4]	Interim Protection Order	857
[s 58.2]	Period of Detention in Jail	856	[s 58.5]	Contempt of court	857
[s 58.3]	Re-arrest	857	[s 58.6]	Satisfaction of Decree	857

[s 58.1] Alteration in the Section

In clause (a) of sub-section (1), the words "fifty rupees for a period of six months and" were replaced by "one thousand rupees, for a period not exceeding three months" by the Code of Civil Procedure (Amendment) Act, 1976 (w.e.f. 1-2-1977). By subsequent amendment by the Code of Civil Procedure (Amendment) Act, 1999, *vide* its section 5, the words "one thousand rupees" were replaced by "five thousand rupees". This amendment was effective from 1 July, 2002.

By the Code of Civil Procedure (Amendment) Act, 1999, *vide* its section 5, the words "two thousand rupees" in sub-section (1A) were inserted in place of 'five hundred rupees'.

In clause (b) of sub-section (1), the words "five hundred rupees" have been replaced by "two thousand rupees", and the words "one thousand rupees" by "five thousand rupees" by section 5 by the said Amending Act of 1999.

The amended section is enforceable from 1 July 2002. It shall not apply to or affect any person detained in the civil prison, in execution of the decree before the commencement of the amended provision.

1356. Substituted by Act 104 of 1976, section 22, for certain words (w.e.f. 1-2-1977).
1357. Inserted by Act 104 of 1976, section 22 (w.e.f. 1-2-1977).
1358. Substituted for "five hundred rupees" by the CPC (Amendment) Act, 1999 (46 of 1999) (w.e.f. 1-7-2002) *vide* Notfication SO 603(E), datet 6 June 2002.

The effect of the amended provision is that a person could be detained in the civil prison in execution of a decree for payment of money, provided that the amount of money decree is exceeding Rs 2000. The period of detention is dependent upon the amount of decree. Where the amount of money decree is exceeding Rs 2000 but not exceeding Rs 5000, the imprisonment cannot exceed six weeks. Where the amount of money decree is exceeding Rs 5000, the period of imprisonment cannot exceed three months.

[s 58.2] Period of Detention in Jail

The section as it stood prior to its amendment, by the Code of Civil Procedure (Amendment) Act, 1976 provided that the period of detention shall be:

(i) six months the amount of the decree exceeded Rs 50; and

(ii) six weeks in any other case.

The words were thus such that the court had no discretion to fix shorter periods than those prescribed in the section.[1359] The Amending Act of 1976, first raised the limit to Rs 1000 and secondly, provided that where it does not exceed Rs 500 no detention in civil prison shall be ordered. Furthermore the words "not exceeding three months" and "not exceeding six weeks" gave discretion to the court to order detention for any period not exceeding the maximum provided in the section. The amended sub-section (1A) clarified that no detention can henceforth be ordered where the total amount of the decree does not exceed Rs 500. According to the Patna High Court, the amended sub-section (1A) applies even to pending cases, that is, to applications filed when the unamended section was in force but which were pending on 10 September 1976 when the amended section came into force.[1360] Where, however, the decretal amount is more than Rs 500, but does not exceed Rs 1000, the maximum period of detention is six weeks. Where the amount of the decree exceeds Rs 1000, the period of detention cannot exceed three months.[1361] A judgment-debtor who has been arrested and detained in civil prison in execution of a decree payable in instalments cannot again be arrested in execution of the same decree in respect of subsequent instalments, as there is only one decree, though payable by instalments.[1362]

It is a settled position of the law that under section 58 CPC, the person cannot be detained in the custody for period of more than three months in execution of money decree exceeding Rs 5000. Such person has to be released as quickly as possible unless the custody of such person is required in other case. Such person cannot be re-arrested for execution of decree under subsistence and furthermore, such release cannot discharge the person from his debt.[1363]

It has been held by the Calcutta High Court that under no circumstances a person can be detained in a civil prison for execution of a decree beyond a period of three months. Since the law sanctions detention only up to three months, detention beyond this period would be violative of Article 21 of the Constitution of India. Moreover, section 58(2) specifically lays down that such release would not be construed as discharge of his debts; it will not affect the

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1359. *Subudhi v Singi*, (1890) ILR 13 Mad 141.
1360. *Matal Chamar v Phagu Rai*, AIR 1978 Pat 143.
1361. *Pundlik v Maharastra State Finance Corp*, AIR 1992 Bom 48.
1362. *Dhanalakshmi Ammal v Krishnamurthi*, AIR 1951 Mad 756 : (1951) 1 Mad LJ 515 : 64 LW 259 : (1951) Mad WN 200.
1363. *Yogesh v Vellangallur Kurries Pvt. Ltd*, OP(C). No. 2816 of 2019, decided on 19 November 2019 (Kerala High Court).

interests of the decree-holder. In any case, it is open to the decree-holder to initiate appropriate proceedings for attachment of the properties of the judgment-debtor.[1364]

[s 58.3] Re-arrest

The immunity of judgment-debtor from a second arrest depends not only upon his having been arrested, but upon his having been detained in jail under the arrest. Thus, where a judgment-debtor, while acting as a pleader in court, was arrested and discharged on the ground that he was exempt from arrest under section 642 of the Code of Civil Procedure, 1882 (now section 135 CPC, 1908), it was held that he was liable to be re-arrested in execution of the same decree against him.[1365] Similarly, where a judgment-debtor was arrested, but was liberated without having been sent to jail, owing to non-payment of subsistence money, it was held that he was liable to be re-arrested in execution of the same decree.[1366] Sub-section (2) refers to release from detention in jail and not to release from detention in the court house.[1367]

[s 58.4] Interim Protection Order

A is arrested and committed to jail in execution of a decree against him. While in jail he files his petition in insolvency, and obtains an interim protection order for one week, and is thereupon released from jail. He then applies for a further protection order, but his application is refused. Is A liable to be re-arrested in execution of the same decree? The Calcutta High Court has held that he is not liable to be re-arrested, on the ground that a judgment-debtor once discharged from jail, cannot be arrested a second time in execution of the same decree.[1368] On the other hand, the High Court of Bombay has held that A is liable to be re-arrested, as the only cases in which a judgment-debtor is exempt from re-arrest are those specified in this section, and that release under an interim protection order is not one of them.[1369] The Calcutta decisions, it is submitted, are not correct.

[s 58.5] Contempt of court

This section does not apply to cases of imprisonment for contempt of court.[1370]

[s 58.6] Satisfaction of Decree

The question, which arises whether the debt can be said to have been discharged merely because the judgment-debtor has been detained in civil prison for a full term. Section 51 of the CPC merely prescribes different modes for achieving an object. If the object is the realisation of dues, this object cannot be said to have been achieved merely because the judgment-debtor was detained in civil prison. It is for this reason, there is provision in sub-section (2) of section 58

1364. *Samiran Sen v Arpita Sen*, AIR 2009 Cal 229 : (2008) 4 Cal LT 508.
1365. *Rajendra v Mohun*, (1896) 23 Cal 128.
1366. *H Raham v Ram Sahai*, (1904) 26 All 317.
1367. *Kesar Singh v Karam Chand*, AIR 1937 Lah 253.
1368. *Re Bolye Chund*, (1893) 20 Cal 874; *Judah v Secretary of State for India*, (1886) 12 Cal 445.
1369. *Shamji v Poonja*, (1902) 26 Bom 652; *Suraj Din v Mahabir Prasad*, (1911) 33 All 279.
1370. *Martin v Lawrence*, (1879) 4 Cal 655.

of the CPC that a judgment-debtor released from detention shall not, merely by reason of his release, be discharged from his debt.[1371]

[S 59] Release on ground of illness.—(1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(*a*) by the State Government on the ground of the existence of any infectious or contagious disease, or

(*b*) by the committing Court, or any Court, to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by Section 58.

Attachment

[1372]**[S 60] Property liable to attachment and sale in execution of decree.**—(1) The following property is liable to attachment[1373] and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hund is, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely:—

(a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;

(b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural

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1371. *Santosh Kumar Mode v Adaita Ballav Satpathy*, AIR 1992 Ori 29; *Padmanna Rajkrishna Sugar Works Ltd v Land Reforms Commr, UP,* AIR 1969 SC 897; *Malli K Dhanlakshi v Malli Krishnamurthy*, AIR 1951 Mad 756.

1372. For amendments to section 60, in its application to East Punjab, see the Punjab Relief of Indebtedness Act, 1934 (Punjab Act 7 of 1934), section 35, as amended by Punjab Acts 12 of 1940 and 6 of 1942.

1373. For immunity from attachment see Army Act, 1950, section 28; Air Force Act, 1950, section 28 and Navy Act, 1957, section 20.

produce as may have been declared to be free from liability under the provisions of the next following section;

(c) houses and other buildings (with materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to [1374][an agriculturist or a labourer or a domestic servant] and occupied by him;

(d) books of account;

(e) a mere right to sue for damages;

(f) any right of personal service;

(g) stipends and gratuities allowed to pensioners of the Government [1375][or of a local authority or of any other employer], or payable out of any service family pension funds notified [1376] in the Official Gazette by [1377][the Central Government or the State Government] in this behalf, and political pensions;

[1378][(h) the wages of labourers and domestic servants, whether payable in money or in kind[1379][***];];

[1380][(i) salary to the extent of [1381][the first [1382][[1383][one thousand rupees]] and two-thirds of the remainder] [1384][in execution of any other than a decree for maintenance]:

[1385][Provided that, where any part of such portion of the salary as is liable to attachment has been under attachment, whether continuously or intermittently, for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months, and, where such attachment has been made in execution of one and same decree, shall, after the attachment has continued for a total period of twenty four months, be finally exempt from attachment in execution of that decree;]]

[1386][(ia) one-third of the salary in execution of any decree for maintenance;]

[1387][(j) the pay and allowances of persons to whom the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957), applies;]

1374. Subs by CPC (Amendment) Act, 104 of 1976, section 23 (w.e.f. 1-2-1977), for the words "an agriculturist".
1375. Inserted by CPC (Amendment) Act, 104 of 1976, section 23 (w.e.f. 1-2-1977).
1376. For such notification, *see* Gazette of India, 1909, Pt I, p 5.
1377. Substituted by the A.O. 1937, for "the G.G. in C."
1378. Substituted by Act 9 of 1937, section 2, for clauses (h) and (i). The amendments made by that section have no effect in respect of any proceedings arising out of a suit instituted before 1 June 1937, see Act 9 of 1937, section 3.
1379. The words "and salary, to the extent of the first hundred rupees and one-half the remainder of such salary" omitted by Act 5 of 1943, section 2.
1380. Substituted by Act 5 of 1943, section 2, for clause (i) and proviso.
1381. Substituted by Act 26 of 1963, section 2, for "the first hundred rupees".
1382. Substituted by Act 104 of 1976, section 23, for "two hundred rupees and one-half the remainder" (w.e.f. 1-2-1977).
1383. Substituted for "four hundred rupees" by the CPC (Amendment) Act, 1999 (46 of 1999), section 6 (w.e.f. 1-7-2002) *vide* Notification. SO 603(E), dated 6 June 2002.
1384. Inserted by the CPC (Amendment) Act 66 of 1956, section 6 (w.e.f. 1-1-1957).
1385. Substituted for old proviso by CPC (Amendment) Act 104 of 1976, section 23 (w.e.f. 1-2-1977).
1386. Inserted by the CPC (Amendment) Act 66 of 1956, section 6 (w.e.f. 1-1-1957).
1387. Substituted by the CPC (Amendment) Act 104 of 1976, section 23 (w.e.f. 1-2-1977).

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, [1388][1925 (19 of 1925)], for the time being applies in so far as they are declared by the said Act not to be liable to attachment;

[1389][(ka) all deposits and other sums in or derived from any fund to which the Public Provident Fund Act, 1968 (23 of 1968), for the time being applies, in so far as they are declared by the said Act as not to be liable to attachment;

(kb) all moneys payable under a policy of insurance on the life of the judgment-debtor;

(kc) the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply.]

[1390][(l) any allowance forming part of the emoluments of any [1391][servant of the Government] or of any servant of a railway company or local authority which the [1392][appropriate Government] may by notification in the Official Gazette declare to be exempt from attachment, and any subsistence grant of allowance made to [1393][any such servant while under suspension;]

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by [1394][any Indian law], to be exempt from liability to attachment or sale in execution of a decree; and,

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any movable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

[1395][*Explanation I.*—The moneys payable in relation to the matters men- tioned in clauses (g), (h), (i), (ia), (j), (l) and (o) are exempt from attachment or sale, whether before or after they are actually payable, and, in the case of salary, the attachable portion thereof is liable to attachment, whether before or after it is actually payable].

[1396][*Explanation II.*—In clauses (*i*) and (*ia*),] "salary" means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (*l*), derived by a person from his employment whether on duty or on leave.

1388. Substituted by Act 9 of 1937, section 2, for "1897".
1389. Inserted by the CPC (Amendment) Act 104 of 1976, section 23 (w.e.f. 1-2-1977).
1390. Substituted by Act 9 of 1937, section 2, for clause (l).
1391. Substituted by Act 5 of 1943, section 2, for "public officer".
1392. Substituted by the A.O. 1937, for "G.G. in C."
1393. Substituted by Act 5 of 1943, section 2, for "any such officer or servant".
1394. Substituted by A.O. 1937, for "any law passed under the Indian Councils Acts, 1861 and 1892".
1395. Substituted by Act 104 of 1976, section 23, for *Explanation 1* (w.e.f 1-2-1977).
1396. Substituted by CPC (Amendment) Act, 104 of 1976, section 23 (w.e.f. 1-2-1977) for the words "*Explanation 2*—in clauses (h) and (i)".

[1397][*Explanation* [1398] [*III*].—In clause (*l*) "appropriate Government" means—

(i) as respects any [1399][person] in the service of the Central Government, or any servant of a [1400][Railway administration] or of a cantonment authority or of the port authority of a major port, the Central Government;

[1401][***];

(iii) as respects any other servant of the Government or a servant of any other [1402][***] local authority, the State Government.

[1403][*Explanation IV.*—For the purposes of this proviso, "wages" includes bonus, and "labourer" includes a skilled, unskilled or semi-skilled labourer.

Explanation V.—For the purposes of this proviso, the expression "agriculturist" means a person who cultivates land personally and who depends for his livelihood mainly on income from agricultural land, whether as owner, tenant, partner or agricultural labourer.

Explanation VI.—For the purposes of *Explanation V*, an agriculturist shall be deemed to cultivate land personally, if he cultivates land—

(a) by his own labour, or

(b) by the labour of any member of his family, or

(c) by servants or labourers on wages payable in cash or in kind (not being as a share of the produce), or both.]

[1404][(1A) Notwithstanding anything contained in any other law for the time being in force, an agreement by which a person agrees to waive the benefit of any exemption under this section shall be void].

(*2*) Nothing in this section shall be deemed [1405][***]to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land, [1406][***].

[1407][***]

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1397. Inserted by the A.O. 1937.
1398. Substituted by Act 104 of 1976, section 23, for "3" (w.e.f. 1-2-1977).
1399. Substituted by Act 5 of 1943, section 2, for "public officer".
1400. Substituted for "a Federal Railway" by AO, 1950.
1401. Clause (*ii*) omitted by the AO, 1948.
1402. The word "railway or" omitted by AO, 1950.
1403. Inserted by the CPC (Amendment) Act, 104 of 1976, section 23 (w.e.f. 1-2-1977).
1404. Inserted by Act 104 of 1976, section 23 (w.e.f. 1-2-1977).
1405. he letter and brackets "(a)" repealed by Act 10 of 1914, section 3 and Sch II.
1406. The word "or" repealed by Act 10 of 1914, section 3 and Sch II.
1407. Clause (b) repealed by Act 10 of 1914, section 3 and Sch II.

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[s 60.1] State Amendments

Andhra Pradesh.—(1) The following amendments were made by CPC (Andhra Pradesh) (Andhra Area) Amendment Act, 1950 (34 of 1950), section 2 (w.e.f. 2-1-1951).

In its application to the Andhra area of the State of Andhra Pradesh in clause (g) of the Proviso to sub-section (1) of Section 60, after the words "stipends and gratuities allowed to pensioners of the Government" insert the words "or of a local authority".

(2) In its application to the Telangana area of the State of Andhra Pradesh in the proviso to sub-section (1) of Section 60 :

(i) *after clause (g) insert the following:*—

(*gg*) pension granted or continued by the Central Government, the Government of the pre-Reorganisation Hyderabad State or any other State Government on account of past services or present infirmities or as a compassionate allowance;

(ii) after Explanation 2 insert Explanation 2A which is same as below with the addition of "clause (*gg*) or" after "under the provisions of" [Andhra Pradesh Act 18 of 1953 (w.e.f. 2-12-1953)].

(3) In its application to the whole State in the proviso to sub-section (*1*) of Section 60.

(i) *after clause (k) insert the following:—*

(*kk*) amounts payable: under policies issued in pursuance of the rules for the Andhra Pradesh Government Life Insurance and Provident Fund and the Hyderabad State Life Insurance and Provident Fund:"

(ii) *After Explanation 2 insert the following:—*

Explanation 2A.—Where any sum payable to a Government servant is exempt from attachment under the provisions of clause (*kk*), such sum shall remain exempt from attachment notwithstanding the fact that owing to the death of the Government servant it is payable to some other person".

(Andhra Pradesh Act 11 of 1953 and Act 10 of 1962).

(4) *The following amendments were made by Andhra Pradesh Act 24 of 1979, section 2 (dated 17 September 1979)*

(i) *In the proviso to section 60(1) after clause (kk) insert as under:—*

(*kkk*) amounts payable under the Andhra Pradesh State Employees' Family Benefit Fund Rules;

(ii) In Explanation 2A, for the expression "clause (*kk*) " substitute the expression "clauses (*kk*) and (*kkk*) ".

Delhi.—*As in Punjab.*

Gujarat.—*The following amendments were made by CPC (Bombay Amendment) Act, 1948 (Bom Act 60 of 1948), section 2, dated 30 November 1948.*

In sub-section (1) of Section 60:—

(a) after clause (g) of the proviso, the following new clause shall be inserted namely:—

"(gg) stipends and gratuities allowed to pensioners of a local authority", and

(b) in Explanation 1, after the brackets and letter "(g)" the brackets and letters "(gg)" shall be inserted.

Haryana.—Same as in Punjab.

Himachal Pradesh.—(1) *The following amendments were made by Himachal Pradesh Act, 31 of 1978, section 21, dated 1 April 1979.*

Amendments are the same as in Punjab, with the following modifications:—

(i) in sub-section (4) words "as defined in the Punjab Alienation of Land Act, 1900" not included.

(ii) Sub-section (5) not taken.

(iii) Sub-section (6) numbered as (5).

(2) (i) The following amendments were made by CPC (Himachal Pradesh Amendment) Act 6 of 1956.—

In sub-section (*1*) at the end of (*c*), insert the following:—

or compensation paid for such houses and buildings (including compensation for the materials and the sites and the land referred to above) acquired for a public purpose;

(ii) after clause (*c*) *insert* the following:—

(*cc*) compensation paid for agricultural lands belonging to agriculturists and acquired for a public purposes;"

Karnataka.—In its application to the Karnataka area, in the proviso to sub-section (*1*) after clause (*p*) insert:—

(*pp*) where the judgment-debtor is a servant of the State Government who has insured his life under the rules in force relating to the Official Branch of the Karnataka Government Life Insurance Department,—

(1) in the case of insurance effected prior to the ninth day of May, 1911, the whole of the bonus payable or paid thereunder to such servant, or in the event of his death to his nominee or other person or persons entitled to such bonus under the said rules; and

(2) in the case of insurance effected on or after the ninth day of May, 1911, and such insurance is compulsory, then the bonus in respect of the compulsory premia payable or paid to such servant, or in the event of his death to his nominee or other person or persons entitled to such bonus under the said rules." [Civil Procedure Code (Mysore Am), Act 14 of 1952 (w.e.f. 1-4-1951)].

Kerala.—*The following amendments were made in its application to the State of Kerala.*

(1) In its application to the State of Kerala including the Malabar district, in clause (g) of the Proviso to sub-section (1), after the words "stipends and gratuities allowed to pensioners of the Government" insert the words "or of a local authority"—CPC (Kerala Amendment) Act, 1957 (13 of 1957), section 3 (w.e.f. 1-10-1958). This amendment was made prior to the amendments made by the Contract Act 104 of 1976, section 23.

(2) In its application to the State of Kerala, in section 60(1), in the proviso after clause (*g*) insert as under:—

> (*gg*) all moneys payable to the beneficiaries under the Family Benefit Scheme for the employees of the Government of Kerala". [*Vide Kerala Act 1 of 1988, section 2 (w.e.f. 5-1-1988*]

Maharashtra.—In its application to the Hyderabad area of the State of Bombay, see the amendment in Andhra Pradesh (*vide* Hyderabad Act II of 1953 adapted by Bom (H) ALO 1956 and Bom AO 1957).

[Civil Procedure Code (Bom Am) Act 60 of 1948; (Hyderabad Am) 11 of 1953 as amended by Maharashtra Act 6 of 1965].

The following amendments were made by Maharashtra Act 65 of 1977, section 6, dated 19 December 1977.

In its application to the State of Maharashtra in section 60, in sub-section (1), in the proviso—

(a) *after clause (g) insert clause (gg), namely:*—

"(gg) in the Hyderabad area of the State of Maharashtra, any pension granted or continued by the Central Government or the Government of the former State of Hyderabad or any other State Government, on account of past services or present infirmities or as a compassionate allowance, which is not covered by clause (g);"

(b) *After clause (kb), clause (kbb), be inserted as under:*—

"(kbb) the amounts payable under the policies issued in pursuance of the Rules for the Hyderabad State Life Insurance and Provident Fund, which are not covered under clause (ka) or (kb)."

Explanation.—Where any sum payable to a Government servant is exempt from attachment under this clause or clause (gg) such shall remain exempt from attachment, notwithstanding the fact that owing to the death of the Government servant the sum is payable to some other person;."

Punjab.—[Punjab Relief of Indebtedness Act 7 of 1934, section 35 as amended by Punjab Acts 12 of 1940, 6 of 1942 and 14 of 1960].—

(a) In sub-section (*1*) in the Proviso:—

(i) In cl (c), for the words "occupied by him" the following words shall be deemed to be substituted, *viz.*:— "not proved by the decree-holder to have been let out on rent or lent to persons other than his father, mother, wife,

daughter, daughter-in-law, brother, sister or other dependants or left vacant for a period of a year or more".

(ii) After clause (*c*) the following clauses shall be deemed to be inserted, *viz*:—

(*cc*) Milch animals, whether in milk or in calf, kids, animals used for the purposes of transport of draught cart and open spaces or enclosures belonging to an agriculturist and required for use in case of need for tying cattle, parking carts, or stacking fodder or manure:

(*ccc*) one main residential-house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him:

Provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered".

(b) After sub-section (*2*) the following sub-sections shall be deemed to be inserted, *viz*:—

(3) Notwithstanding any other law for the time being in force an agreement by which a debtor agrees to waive any benefit of any exemption under this section shall be void.

(4) For the purposes of the section the word "agriculturist" shall include every person whether as owner, tenant, partner or agricultural labourer who depends for his livelihood mainly on income from agricultural land as defined in the Punjab Alienation of Land Act, 1900.

(5) Every member of a tribe notified as agricultural under the Punjab Alienation of Land Act, 1900, and every member of a scheduled caste shall be presumed to be an agriculturist until the contrary is proved.

(6) No order for attachment be made unless the court is satisfied that the property sought to be attached is not exempt from attachment or sale".

Rajasthan.—In sub-section (*1*) of Section 60 in the Proviso:—

(i) In clause (*b*) after the word "agriculturist" *insert* the words "his milch cattle and those likely to calve within two years" [Rajasthan Act 19 of 1958, w.e.f. 18-4-1958].

(ii) *after clause (k), insert the following:*—

(*kk*) moneys payable under Life Insurance Certificates issued in pursuance of the Rajasthan Government Servants Insurance Rules, 1953.

(iii) *after Explanation* 3 insert the following:

Explanation 4.—Where any money payable to a Government servant of the State is exempt from attachment under the provision contained in clause (*kk*), such money shall remain exempt from attachment notwithstanding the fact that owing to the death of a Government servant it is payable to some other person". (Rajasthan Act 16 of 1957).

Tamil Nadu.—*The following amendments were made by CPC (Madras Amendment) Act, 1950 (34 of 1950), section 2 (w.e.f. 2-1-1951) and Madras Act No 22 of 1957, section 3, dated 18 December 1957 and Madras (A.T.) ALO, 1961 w.e.f. 1-4-1960.*

In its application to the State of Madras including the Kanyakumari district and the Schencottah taluk of the Tirunelveli district, and the added territories the amendment made in Section 60 is the same as that of Kerala.

Union Territory (Chandigarh).—*The following amendments were made by Punjab Reorganisation Act, 1966 (31 of 1966), section 88, dated 1 November 1966.*

In its application to the Union Territory of Chandigarh amendments in the section are the same as in Punjab.

Union Territory (Pondicherry).—*The following amendments were made by Pondicherry (Extension of Laws) Act, 1968 (26 of 1968), section 3(i) and Schedule, Part II (w.e.f. 5-9-1968).*

In its application to the Union Territory of Chandigarh amendments in the section are the same as in Tamil Nadu.

Uttar Pradesh.—[Civil Procedure Code (UP Am) Act, 35 of 1948, *section* 2 (w.e.f. 28-8-1948)].—Add the following Explanation (1A) after Explanation 1 in sub-section (*1*) —

Explanation (1A).—Particulars mentioned in clause (*c*) are exempt from sale in execution of a decree whether passed before or after the commencement of the C P Code (United Provinces Amendment) Act, 1948, for enforcement of a mortgage of charge thereon".

[s 60.2] High Court Amendment

Calcutta High Court.—The following modifications were made by Calcutta Gazette, dated 27 April 1967, Pt I, section 757.

In its application to all the suits or proceedings in the Court of Small Causes, Calcutta, in section 60 add the provision after sub-section (1) "provided that nothing in this section shall be taken as conferring on the Court of Small Causes of Calcutta, any jurisdiction to attach and sell immovable property in execution of a decree—

Provided also that this section shall, so far as the court mentioned in the last preceding proviso is concerned, apply only to decrees obtained in suits instituted after the 31 May 1937, and the law applicable to suits instituted up to that date shall be the law which was here before in force in that court.

[s 60.3] Changes Introduced in Previous Law in 1908

This section corresponds with section 266 of the Code of Civil Procedure, 1882 except in the following particulars:

(i) In clause (a), the words "cooking vessels", "beds", and "and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman", were added. See notes below.

(ii) The latter portion of clause (h) relating to agricultural produce is new.

(iii) Clause (c) stood as follows in section 266 of the Code of Civil Procedure, 1882: "The materials of houses and other buildings belonging to and occupied by agriculturists."

(iv) In clause (g), the words "or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf" were added.

(v) Clause (h) was newly inserted. It is now reproduced in clause (1) with some modifications.

(vi) In clause (i), the words "or allowances equal to salary" and "while on duty" were added. See notes below.

(vii) Clause (k) is new. See notes below.

(viii) In clause (1), the words "whether payable in moneys or in kind" were newly inserted. The clause is now clause (h) with some additions.

(ix) The alterations in sub-section (2), clause (a), correspond with the alterations in sub-section (1), clause (c).

[s 60.4] Subsequent Amendments in Sub-section (1) Prior to Amending Act, 1976

(i) In clause (g) the words "pensioners of the Crown" and "the Central Government or the Provincial Government" were substituted for the words "pensioners of the Government" and "the Governor-General in Council" by para 3 and sch 1 of the Government of India (Adaptation of Indian Laws) Orders 1937, and the words "Official Gazette" were substituted for the words "Gazette of India" by para 4 of the Government of India (Adaptation of Indian Laws) Order 1937. By the Adaptation of Laws Order 1950, the word "Government" took the place of the word "Crown" and the word "State" was substituted for the word "Provincial".

(ii) Clause (h) as enacted in 1908 ran thus:

> "Allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty."

This provision, with certain modifications, has been transferred to clause (1) by the Code of Civil Procedure, (Second Amendment) 1937. In its place by the said Act, clause (1) was transferred as cl (h) with the addition of words "and salary to the extent of the first hundred rupees and one-half the remainder of such salary." The original clause (1) ran thus:

> "...the wages of labourers and domestic servants whether payable in money or in kind."

The words "and salary, to the extent of the first hundred rupees and one-half the remainder of such salary" were, however, omitted by the Code of Civil Procedure (Amendment) Act, 1943.[1408]

(iii) Clause (i) has been subjected to various amendments from time-to-time—

(a) By Act 26 of 1923, the words "twenty rupees" and "forty rupees" that existed in the clause as it stood in 1908 were replaced by the words "forty rupees" and "eighty rupees". Act 9 of 1937 raised the limit of exemption to the "first hundred rupees and one half of the remainder" of the salary, and by Act 26 of 1963 the words "the first two hundred rupees" were substituted for the words "first hundred rupees".

(b) Clause (i) with the amendment made by Act 26 of 1923 so far as it is relevant here ran thus:

> ...the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty,'to the extent of—

(i) the whole of the salary, where the salary does not exceed forty rupees monthly;

(ii) forty rupees monthly, where the salary exceeds forty rupees and does not exceed eighty rupees monthly; and

(iii) one moiety of the salary in any other case.

The clause was re-cast by Act 9 of 1937.

(c) By Act 20 of 1925, a proviso was added to clause (i). It ran thus:

> "*Provided* that where the decree-holder is a society registered or deemed to be registered under the Co-operative Societies Act, 1912, and the judgment-debtor is a member of the society, the provisions of sub-clauses (i) and (ii) shall be construed as if the word "twenty"

1408. See notes headed "clause (h)" below.

were substituted for the word "forty" wherever it occurs and the word "forty" for the word "eighty"."

This proviso was dropped when this clause was amended and re-enacted by Act 9 of 1937.

(d) A new proviso was added by Act 9 of 1937 with a view to see that a judgment-debtor is not continuously oppressed.

(e) By section 2, of the Code of Civil Procedure (Amendment) Act (V of 1943), the present clause and proviso were substituted for the old clause and proviso.

(f) Word "Government" has been substituted for the word "Crown" by Adaptation of Laws Order 1950.

(g) By the Amendment Act 66 of 1956, the words "in execution of any decree other than a decree for maintenance" were inserted in the clause and a fresh clause (i-a) was added.

4. Clause (j) was amended by the Amending Act 35 of 1934 and the Government of India (Adaptation of Indian Laws) Order 1937. The clause originally ran thus:

"...the pay and allowances of persons to whom the Indian articles of war apply."

The words "the Naval Discipline Act as modified by" were omitted by the Adaptation of Laws Order 1950, and the section 10 of Code of Civil Procedure (Amendment) Act, 1951, the words and figures "the Army Act, 1950" were substituted for the words and figures "the Indian Army Act 1911, or the Burma Army Act." The words "The Air Force Act, 1950, or" were inserted by Act 66 of 1956.

5. In clause (k) the year of the Provident Funds Act now in force is given. The amendment was made by Act 9 of 1937.

6. (a) Clause (1) was enacted by Act 9 of 1937 — It deals with the question of allowances. The original clause which dealt with the question was clause (h) of the CPC as enacted in 1908. The present clause requires a notification by the appropriate government before exemption can be claimed.[1409]

(b) In this clause (1), the words "appropriate Government" were substituted for the words "Governor-General in Council" by para 3 and sch 1 of the "Government of India (Adaptation of Indian Laws) Order 1937, read with the Government of India (Adaptation of Indian Laws) Supplementary Order 1937. So also, the words "Official Gazette" were substituted for the words "Gazette of India" by para 4 of the said Order of 1937. For the words "public officer' and any such officer or servant' the words "Servant of the Crown" and "any such servant" respectively were substituted by section 2 of the Code of Civil Procedure (Amendment) Act, 1943, word "Government" has been substituted for the word "Crown" by the Adaptation of Laws Order 1950.

7. In clause (o) the words "any Indian law" were substituted for the words "any law passed under the Indian Councils Acts 1861 and 1892", by the Government of India (Adaptation of Indian Laws) Order 1937.

8. The explanation to sub-section (1) was numbered as explanation 1 and the words "and in the case...actually payable" were added by the Amending Act 9 of 1937, with effect from 1 June 1937. The words "servant of the Crown" were substituted for the

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1409. See note as to clause (k) above.

words "public officer" by section 2 of the Code of Civil Procedure (Amendment) Act, 1943, and the word "Government" has been substituted for the word "Crown" by the Adaptation of Laws Order 1950.

9. Explanation 2 is new. It was added by Act 9 of 1937. It explains the word "salary" used in clauses (h) and (i). It took effect from 1 -6-1937.

10. Explanation 3 was added by para 3 Sch 1 of the Government of India (Adaptation of Indian Laws) Order 1937. By section 2 of the Code of Civil Procedure (Amendment) Act, 1943, in clauses (i) and (ii) the word "person" was substituted for the words "public officer" and in clause (iii), the words "the servants of the Crown" were substituted for the words "public officer". Clause (ii) was omitted by Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. By the Adaptation of Laws Order 1950, the words "a Railway Administration" were substituted for the words "a Federal Railway" and in clause (iii), the words "railway or" which appeared before "local authority", are omitted and the word "Government" is substituted for the word "Crown".

[s 60.5] Amendments in Sub-section (2) Prior to Amending Act, 1976

This sub-section, as it stood in 1908; comprised of two clauses (a) and (b), and clause (h) was repealed by Act 10 of 1914, Sch 11. The Amendment Act, 1976 does not make any changes in this sub-section.

[s 60.6] Changes Made by the Amendment Act, 1976

(i) Clause (c) to the proviso to sub-section (1) has been amended so as to extend the exemption from attachment and sale to houses and other buildings belonging to not only an agriculturist but also to a labourer or a domestic servant.

(ii) Clause (g) to the proviso to sub-section (1) has been amended so as to extend the exception to stipends and gratuities allowed to pensioners of a local authority or any other employer.

(iii) Clause (i) has been amended to enlarge the exception as to salary to the extent of "the first four hundred rupees and two thirds of the remainder. The new proviso to clause (i) does away with the distinction between judgment-debtors who are government servants or railway employees and other salaried judgment-debtors.

(iv) Clause (j) has been substituted so as to extend to all persons to whom the Navy Act, 1957 applies.

(v) The new clause (kb) extends the exception from attachment, to moneys payable under life insurance policies.

(vi) The new clause (kc) exempts from attachment, interest of tenants in a residential building governed by rent Acts.

(vii) Explanations (I) and (II) are altered in consonance with changes carried out in clauses (g), (h), (i), (ia), (k), (l), and (o).

(viii) Explanations (IV) (V) and (V1) define the expressions "wages", "labourer", "agriculturist" and when such an agriculturist "shall be deemed to cultivate land personally".

(ix) Sub-section (IA) has been added so as to render an agreement waiving the benefit of any of the exceptions under sub-section (1) void.

[s 60.7] Changes Made by the Amendment Act, 1999

In clause (i) of proviso to sub-section(1), the words "four hundred rupees" have been replaced by "one thousand rupees" by section 6 of the Code of Civil Procedure (Amendment) Act, 1999. The amendment which came in to effect from 1 July 2002 does not exempt salary from attachment to the extent mentioned in clause (i) of the section 60 before the commencement of amended provisions.

[s 60.8] In Execution of a Decree

The expression "decree", in this section, refers to a money-decree, and not a mortgage decree, for, attachment is not necessary in mortgage decrees. The result is that the exemptions from attachment and sale contained in the proviso to this section do not apply to a mortgage decree for sale.[1410] Provisions of section 60(1) proviso and section 60(1A), do not apply to a mortgage decree. Execution of a mortgage decree in regard to a residential house is not barred by section 60(1A), which prohibits waiver of the exemption.[1411] A mortgage decree itself directs the sale. No attachment is necessary. Hence, properties exempt under section 60(1) proviso, can be sold pursuant to the final decree for sale. As no attachment is necessary, no scope exists either for invoking section 60(1) main part, or for considering exemption under section 60(1) proviso.[1412] Section 60(1) does not apply to a sale held in revenue recovery proceedings.[1413] In section 60(1)(c), proviso the words "attachment or sale" really contemplate the case of attachment and sale. In the proviso "or" should be read as "and", since the latter word is the word used in the main part. In a mortgage decree there is no question of attachment. Hence, the exemptions from attachment do not apply to a mortgage decree.[1414] Wherein order is made for the payment of a fictitious sum without giving any opportunity to any person against whom the order is made, to show cause against the passing of such an order for the said sum, the order is a nullity. When a decree for order is illegal, any sale held in execution of such a decree or order and confirmed cannot be set aside on the ground that it was illegal when the sale is in favour of third party. But where a decree or order is a nullity, it will be deemed to have no existence at all and any sale held in execution of any decree or order must also be held to be null and void.[1415]

[s 60.9] Saleable Property

Subject to the proviso to sub-section (1), all saleable property which belongs to the judgment-debtor may be attached and sold in execution of a decree against him. The equity of redemption of a mortgagor in mortgaged property is "saleable property" within the meaning of this section, and is, therefore liable to be attached and sold in execution of a decree against

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1410. *Mubarak v Ahmad*, AIR 1924 All 328 (FB) : (1924) ILR 46 All 489; *Alla Baksh v Cheeram*, AIR 1945 Lah 123 : 47 Punj LR 107.
1411. *KK Lakshmi v State Bank of Travancore*, AIR 1988 Ker 311.
1412. *Nabisa Beevi v Manager, Canara Bank Nagarcoil*, AIR 1984 Mad 249.
1413. *State of Punjab v Dina Nath*, AIR 1984 SC 352 : (1984) 1 SCC 137.
1414. *Lavnan v Subanna*, AIR 1988 Kant 40; *Rewali v Chiranjilal*, AIR 1944 Lah 29 followed.
1415. *Surinder Nath Kapoor v UOI*, (1988) Supp SCC 626.

him.[1416] If transfer of a particular property is prohibited by law, it cannot be attached, because it is not saleable property. Hence, a tenancy right whose transfer is prohibited by section 14(1)(b), Delhi Rent Control Act, 1958, cannot be attached.[1417] The legislature never contemplated in section 15(1) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 that the lessee of a non-residential premises cannot transfer and assign the interest in the lease hold rights. Thus, where the notification was issued permitting transfer of interest of the lessee in the business premises under proviso to section 15(1) of Bombay Rent Act, the goodwill and tenancy rights in such premises would be saleable property over which the lessee would have disposing power and therefore, they would be liable to attachment and sale under section 16 of the CPC and section 15(1) of Bombay Rent Act would be no bar.[1418] A preliminary decree for the realisation of unpaid consideration on a mortgage bond is attachable under this section.[1419] The share of a partner in a partnership business is "saleable property", and can be attached and sold in execution of a decree obtained against him by his creditor.[1420] A preliminary decree for accounts in a suit for dissolution of partnership and accounts[1421] as also a preliminary decree in favour of the judgment-debtor in a suit for accounts[1422] is attachable. The right to claim specific performance of a contract to sell land is also attachable and saleable.[1423] Similarly, a right to purchase shares or even an option to do so is a right to property. The benefit under such a contract does not become non-assignable by a condition that certain consideration has to be paid for such purchase. That being so, such a right is attachable.[1424] A life-interest in trust funds is attachable and saleable in execution of a decree against the life-tenant.[1425] Similarly, a vested remainder can be attached and sold in execution of a decree against the remainderman.[1426] The beneficial interest of the party, in which the judgment-debtor has no legally transferable interest or the judgment-debtor in a deed of trust can be attached if it is vested but not if it is contingent.[1427] The interest of a member of a *Kshatriya tarwad* is liable to attachment and sale as it is partible under the law.[1428] The expression "saleable property" connotes that the property in question is saleable by court auction at a compulsory sale. Such a connotation implies that the concerned property is capable of being transferred. Consequently, the property in which the judgment-debtor has no legally transferable interest or the transfer of which is prohibited by any law for the time being in force, cannot be sold in court auction and is not a saleable property. On this principle, the Bombay High Court in *Harsukh Jadhavji Joshi v Ramesh H Shah*[1429] held that under section 29(2) of the Maharashtra Co-operative Societies Act, 1960, and the bye-laws of the housing society in question, a member of such society was a tenant of premises allotted to him and as such had no saleable interest or disposing power without the consent of the society. Any attachment and sale of such interest in execution of a decree

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1416. *Parashram v Govind*, (1897) 21 Bom 226.
1417. *Belrex India Ltd v Shinghal Electric Co*, AIR 1983 Del 430.
1418. *Union Bank of India v Mitter Sain Rup Chand*, AIR 1995 Bom 371(DB).
1419. *Ismail v Johri Mal*, AIR 1937 All 652.
1420. *Jagat Chunder v Iswar Chunder*, (1893) 20 Cal 693, see O XXI, rule 49.
1421. *Ratanshi v Tricumji*, AIR 1940 Pat 107 : (1940) 18 Pat 698.
1422. *Mono Mohan v Kali Kinkar*, AIR 1935 Cal 751.
1423. *Rudra v Krishna*, (1887) 14 Cal 241.
1424. *Champaran Sugar Co. v Haridas*, AIR 1966 Cal 134 : 69 Cal WN 815.
1425. *Abdul Latef v Doutre*, (1889) ILR 12 Mad 250.
1426. *Annaji v Chandrabai*, (1893) ILR 17 Bom 503; *Matimala v Surendra Nath*, AIR 1936 Cal 802.
1427. *Rajes Kanta Roy v Srimathi Shanti Debi*, AIR 1957 SC 255 : (1957) SCR 77 : 1957 SCJ 197 : 1957 SCA 440.
1428. *Bank of New India v Ponnamma*, AIR 1961 Ker 105 : (1960) ILR Ker 906.
1429. *Harsukh Jadhavji Joshi v Ramesh H Shah*, AIR 1974 Bom 87 : (1973) 75 Bom LR 649.

passed against such a member by a third person was illegal. In appeal,[1430] the Supreme Court, reversing the high court, held that a flat in a tenant co-partnership housing society was liable to attachment and sale in execution of a decree against a member in whose favour or for whose benefit it has been allotted by the society, that the right to occupy such a flat assumed significant importance and acquired, under the law, a stamp of transferability in furtherance of the interest of commerce and that in the absence of unambiguous and clear legal bar it would not be in the interest of commerce to impose a ban on its saleability. It further held that there was no absolute prohibition either in the Act or the rules or in the bye-laws against transfer of interest of a member and that though the flat was owned by the society, the allottee had a right or interest to occupy the same and that there was nothing in section 31, showing that the right to occupy, which was a right which can be sold in auction, was not attachable in execution proceedings. Though there were certain restrictions under section 29(2), and bye-law 71D, they were not such that their breach would render the transfer void. It is submitted that this decision requires reconsideration since—

(i) it fails to take into consideration various aspects relating to the rights of such building societies both under the Co-operative Societies Act, 1912 and the bye-laws made thereunder;

(ii) the fact that, the society is, and remains, even after allocation of a flat to its member, the owner of such a flat;

(iii) that though the allottee-member can transfer the occupancy rights in such a flat, such right is not absolute and is limited in that the society has, in certain circumstances, under its own rules, to which the member and his right to transfer is subject to, the right to refuse to accept the transferee as its member. These rights of such a society, which was not before the court, have not been adequately considered and so also the consequences following from the judgment on a large number of such societies. The judgment does not consider the question as to what would happen to the execution sale, if the society for valid reasons were to refuse, under its rules, to accept the auction-purchaser as its member. Such a situation would involve such a society into litigation to prevent which is the principal object of the Co-operative Societies Act, 1912. In view of the impact of the judgment on a number of such societies, the court ought at least to have given a chance to the society to be heard before it gave the judgment affecting its right. The adjudication of an Indian citizen as insolvent in a foreign state does not affect the rights of the decree-holder to attach and sell his immovable properly in this country.[1431] The fact that the property attached is the only source of livelihood does not exempt it from attachment.[1432]

The word "saleable", in this section means saleable by auction at a compulsory sale under the orders of the court. It has no references to property made non-transferable by an agreement between the parties to a transaction. It has, accordingly, been held that a condition in a permanent lease that the landlord would re-enter if the tenant made any transfer of the land demised, does not make the land unsaleable in execution. The lease forbids a sale by the tenant, but does not prevent a sale by the court.[1433] Likewise, when the law allows the transfer of a property subject to certain restrictions or under certain conditions, it can be attached

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1430. *Ramesh H Shah v Harsukh J Joshi*, AIR 1975 SC 1470 : (1975) 2 SCC 105 : 1975 SCR 270; *Vrajlal v Pandya v Dr Jaswant Shivlal*, AIR 1977 Guj 131.
1431. *Lakhpat Rai v Atma Singh*, AIR 1962 P&H 228 : (1961) ILR 2 Punj 166.
1432. *Harisingh v Chandasingh*, AIR 1968 Bom 380 : 70 Bom LR 95 : (1968) Mah LJ 352.
1433. *Keshab v Ajahar*, (1914) 19 Cal WN 1182; *Golak Nath v Mathuranath*, (1893) 20 Cal 273.

and sold[1434] but if the prohibition by the statute is absolute, as for example, in the case of evacuee property under the provisions of Punjab Evacuees (Administration of Property) Act, 1947, then the property be attached or sold;[1435] however, when the property is not alienable by a coercive process of law, it has been held that the court can hardly be deemed to have jurisdiction to attach it.[1436] Country liquor is "saleable" property within the meaning of this section, though the permission of the collector may be necessary to the sale under the Abkari Act.[1437]

[s 60.9.1] Government Grant Containing Prohibition Against Alienation

When a government grant contains a prohibition against alienation of an estate and the power of voluntary transfer is thus taken away, and the judgment-debtor is only entitled to enjoy profits during his life-time, the decree-holder can proceed only against the profits and not against the estate.[1438]

[s 60.9.2] Security Deposit

Money or other valuable security deposited as security for the due performance of duty by a servant with his master, may be attached in execution of a decree against the servant, but the attachment will be subject to the lien which the master has upon the deposit, and the deposit cannot be sold until the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment.[1439] Security deposit made by the appellant to England for the costs of the respondent can be attached, as the appellant has the power of disposal over the same for his benefit.[1440]

[s 60.9.3] Land Assigned for Maintenance

Where land was assigned to a Hindu widow for her maintenance with a proviso against alienation, it was held that she had no saleable interest in the usufruct.[1441]

[s 60.9.4] Non-transferable Office

A religious office is not saleable property.[1442] Similarly, the right of managing a temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, is not saleable.[1443] The right to officiate at funeral ceremonies is also not saleable.[1444] The property of a temple cannot be sold away from the temple. But there is no objection to the sale of the right,

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1434. *Direndranath Chandra v Satish Chandra*, AIR 1956 Pat 4; *Niresh Chandra v Paresh Chandra*, AIR 1959 Ass 61.
1435. *Aminchand v Nashan Begum*, AIR 1954 P&H 235; *Sheik Mohd Din v Thakar Singh*, AIR 1952 P&H 428 : (1952) ILR Punj 546.
1436. *Ramchandra v Sukhdeo*, AIR 1935 Ngp 133.
1437. *Purshottam v Balvant*, (1908) 10 Bom LR 13.
1438. *Ganjhu Upendra Singh v Ganjhu Meghanath Singh*, AIR 1939 Pat 598 : (1939) ILR 18 Pat 370.
1439. *Karuthan v Subramanya*, (1886) 9 Mad 203.
1440. *Province of Bengal v Bholanath Sen*, AIR 1950 Cal 174 : (1949) 54 Cal WN 322.
1441. *Diwali v Apaji*, (1886) 10 Bom 342; *Gulab Kuar v Bansidhar*, (1893) 15 All 371; *Bansidhar v Gulab Kuar*, (1894) 16 All 443.
1442. *Kuppa v Dorasami*, (1883) ILR 6 Mad 76; *Narasimma v Anantha*, (1882) ILR 4 Mad 391; *Rangasami v Ranga*, (1893) ILR 16 Mad 146; *Mancharam v Pranshankar*, (1882) ILR 6 Bom 298.
1443. *Durga Bibi v Chanchal*, (1882) ILR 4 All 81; *Rama Varma v Ramannayar*, (1882) ILR 5 Mad 89; *Rajah Vurmah v Ravi Vurmah*, (1876) ILR 1 Mad 235 : 4 IA 76; *Gnanasambanda Pandara Sannadhi v Velu Pandaram*, (1900) ILR 23 Mad 271 : 27 IA 69; *Srimati v Ratanmani*, (1897) 1 Cal WN 493; *Shailojanund v Peary*, (1902) ILR 29 Cal 470.
1444. *Jhummun v Dinooath*, (1871) 16 WR 171.

title and interest of the servant of a temple in land belonging to the temple which he holds as remuneration for his service, the interest sold being subject in the hands, of the alienee to determination by the death of the original holder, or by his removal from office for failure to perform the service.[1445] Crops standing on properties which constitute emoluments of *archaka* service are liable to attachment and sale in execution of a decree.[1446]

[s 60.9.5] Service of a Public Nature

Land burdened with the performance of a service of a public nature, *eg* land held on *Swastivachakam* service tenure, is inalienable, and cannot be attached.[1447]

[s 60.9.6] Chhotanagpur Encumbered Estates Act, 1896

Land released from management under the Chota Nagpur Estates Act, 1896, is under section 12A of that Act inalienable during the life-time of the holder without the sanction of the commissioner. Without such sanction it cannot be attached and sold.[1448]

[s 60.9.7] Restraint Upon Anticipation

The income of property subject to a restraint upon anticipation accruing due after the date of the judgment, cannot be attached in execution of a decree against the separate property of a married woman passed under section 8 of the Married Women's Property Act, 1874.[1449]

[s 60.9.8] Right of Residence

The right of a widow under the Hindu law to reside in her husband's family house is a purely personal right and cannot be transferred. Such right cannot be attached in execution as it is not "saleable" property,[1450] even if the right has been asserted by her by obtaining a decree in a subsequent suit against the creditor purchaser of the house.[1451]

[s 60.9.9] Right of a Patentee

See the case under noted.[1452]

[s 60.9.10] Burmese Marriage Property

The interests of parties to a Burmese Buddhist marriage in the marriage property is an indeterminate interest and not saleable within the meaning of this section.[1453] Under section 10 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, the amount standing to the credit of a member in the fund is immune from attachment. This immunity is

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1445. *Lotlikar v Wagle*, (1882) 6 Bom 596; *Bishen Chand v Nadir Hossein*, (1888) 15 Cal 329 : 15 IA 1.
1446. *Kutumba Rao v Govardhanam*, AIR 1957 AP 349 : (1957) Andh LT 219 : (1957) 1 Andh WR 139; *Kesavacharyulu v Venugopalasami*, AIR 1956 AP 109.
1447. *Anjaneyalu v Sri Venugopala*, AIR 1922 Mad 197 : (1922) 45 Mad 620.
1448. *Khitanarain v Surju*, AIR 1931 Pat 364 : (1931) ILR 10 Pat 582.
1449. *Goudkoin u.Vencatesa*, (1907) 30 Mad 378.
1450. *Salakshi v Lakshmayee*, (1908) 31 Mad 500.
1451. *Karuppahi v Singaravelu*, AIR 1935 Mad 848. For other kinds of property which cannot be alienated, see Transfer of Property Act, 1882, section 6.
1452. *Radha Kissen v Hira Lal*, AIR 1939 Cal 283 : (1938) 2 Cal 618.
1453. *Ma Paing v Maung Shwe Hpan*, AIR 1927 Rang 274 : (1927) 5 Rang 478.

available, even to a fund managed under a scheme framed by the organisation under the act.[1454] There was unimpeachable evidence that a widow was residing in a part of a building, with her children. The decree-holder was not establishing that the widow was residing elsewhere or, that the property in dispute was in the possession of any person other than the widow. Objection under section 47, to the effect that being a residential house, it could not be attached in execution of a decree, was upheld.[1455]

[s 60.9.11] Interest of Tenant of a Non-residential Premises

Section 56 of Maharashtra Rent Control Act, 1999 leaves no manner of doubt that it enables the tenant to claim or receive any sum of any consideration, as a condition of the relinquishment, transfer or assignment of his tenancy of any premises. It indicates that the tenant has a disposing power in respect of the interest in the tenancy in the non-residential premises for his own benefit either by surrendering it to the landlord for any sum or consideration or transfer or assign the tenancy for consideration. Clause (kc) appended to the proviso of sub-section (1) of section 60, CPC prohibits the attachment and sale of interest of the lessee of a residential building to which the Maharashtra Rent Control Act, 1999 applies the Rent Control Act applies but the said prohibition is not applicable to the interest of a tenant of a non-residential premises to which the Act applies and therefore, it can safely be held that the interest of the tenant in the non-residential premises to which the Act of 1999 applies is attachable and saleable in execution of the decree against the tenant.[1456]

It is a settled position of the law that under section 58 CPC that the person cannot be detained in the custody for period of more than three months in execution of money decree exceeding Rs 5000. Such person has to be released as quickly as possible unless the custody of such person is required in other case. Such person cannot be re-arrested for execution of decree under subsistence and furthermore, such release cannot discharge the person from his debt.[1457]

Section 56 of Maharashtra Rent Control Act, 1999, gives a valuable right and creates a further interest in respect of premises let to a tenant. In view of section 56 of the 1999 Act *a fortiorari* tenancy rights of a tenant constitute saleable property and give tenants a disposing power in respect thereof and the same are, therefore, liable to be attached and sold in execution of a decree. Tenancy rights thus can be attached and sold in execution of a decree. However, this cannot affect the rights of the landlords/head tenants in any manner, for the right of a tenant under section 56 of the 1999 Act can only be exercised with the consent of the landlord. In execution of a decree against the tenant-sub-tenant, the court cannot force an unwilling landlord/head tenant to enter into such an agreement. But if such an agreement is entered into by the landlord or head tenant with a tenant or sub-tenant as the case may be, the consideration received by the latter is liable to be attached and sold. Further, if the landlord and/or the head tenant is willing to enter into an agreement as contemplated in sections 26 and 56, it would be possible for the executing court to force the tenant or sub-tenant to enter into an agreement contemplated therein. Needless to say, the executing court at that stage would not confirm the agreement, sale, assignment or transfer unless it is satisfied that the same was reasonable, fair and genuine. In this regard, such a sale would be no different from a sale of any other property.[1458]

1454. *Tata Iron & Steel Co v Bir Singh*, AIR 1982 Pat 130.
1455. *Pushpamala Jain v Bank of Baroda*, AIR 1990 P&H 28.
1456. *TES Pvt Ltd v Indian Chemicals*, AIR 2004 Bom 198 (FB).
1457. *Yogesh v Vellangallur Kuries Pvt Ltd*, OP(C). No. 2816 of 2019, decided on 19 November 2019 (Kerela High Court).
1458. *VL & F Co v PB and M Works Pvt Ltd*, AIR 2003 Bom 217.

[s 60.10] "Property"

A sues *B* for partnership accounts. The question of accounts is then referred to arbitration with the consent of the parties. Before the award is made, *X*, a creditor of *A*, applies for attachment of the "rights and interest" of *A* in the award. The attachment cannot be allowed for the expectant claim under an inchoate award is not "property" within the meaning of this section.[1459] Money paid into court, as a fine in a criminal case against a judgment-debtor is, after the order imposing the fine is set aside, attachable under this section, as money belonging to the judgment-debtor even before the issue of a refund certificate.[1460] Money deposited by a judgment-debtor, voluntarily, in another suit is liable to attachment though such attachment has to abide the result of that suit.[1461] Where the judgment-debtor acquired certain *bhoomidari* rights, and on her death, her adopted son succeeded to them, those rights were the assets of the deceased and were liable to be attached in execution of a decree against the deceased.[1462] An annuity payable to a deity under the UP Zamindari Abolition and Land Reforms Act, 1950 in lieu of the *zamindari* property is liable to he attached in execution of a decree against the deity.[1463]

The doors and windows of a building cannot be separately attached. for they have no separate existence as property.[1464] An unascertained right in unascertained property could not be the subject of attachment.[1465]

[s 60.11] Coparcenary Property

A creditor having a decree against a Hindu father alone, can attach and sell in execution thereof, the interest of the sons in the joint Hindu family property, on the principle of pious obligation of the sons to discharge the liability of the father. Even if the decree is against the father alone and whether the sons are represented by the father or not, the judgment-creditor can proceed to execute the decree against the son's interest in the joint family property unless the debt is held to be *avyavaharika*.[1466] But, if there has been a partition between the father and the sons, a decree obtained thereafter against the father cannot be executed against properties which have fallen to the shares of the sons, even though the debt in respect of which the decree was passed was contracted before the partition.[1467]

[s 60.12] Disposing Power

A property may not belong to a judgment-debtor, and yet he may have a disposing power over it exercisable for his own benefit. In such cases, the property is liable to attachment and sale, subject to the proviso to this section.

1459. *Syud Taffuzzool v Raghoonath*, (1871) 14 Moo Ind App 40.
1460. *Harnam Singh v Salig Ram*, (1912) PR No 91318.
1461. *M Kasiyya v J Pullayya*, AIR 1974 AP 220.
1462. *Kishan Singh v Babu Singh*, AIR 1973 All 196 : (1973) All LJ 280.
1463. *Sarup Lal v Radha Manoharji*, AIR 1975 All 18.
1464. *Peru v Ronu*, (1885) ILR 11 Cal 164.
1465. *Bebee Tokui v Davod*, (1856) 6 Moo Ind App 510.
1466. *Kanchan v Babu Bhai*, AIR 1967 Raj 184 : (1967) Raj LW 290.
1467. *Pannalal v Mst Narain*, AIR 1952 SC 170 : (1952) SCR 544 : 1952 SCJ 211; *Kuppuswami v Rangaswami Gounder*, AIR 1962 Mad 383 : (1962) 2 Mad LJ 132 : 75 LW 144.

[s 60.12.1] Trustee of a Charity

A trustee of a religious endowment has no disposing power over the corpus of the trust estate exercisable for his own benefit; hence the corpus cannot be attached.[1468]

[s 60.12.2] Life Interest

Where under a compromise with a reversioner, a Hindu widow was allowed to keep certain property for her life, and she agreed not to alienate it, and on her death, the property was to pass to the reversioner, it was held that she had no disposing power over the property.[1469] In the case of an impartible *zamindari*, if a junior member is given a specified share in profits in lieu of maintenance during his life-time, unless the right to receive profits corresponds to joint ownership in the property, it has been held that the right is purely personal and is not capable, of being attached.[1470]

[s 60.12.3] Bonus Sanctioned by Railway Company

A bonus sanctioned by a railway company, to its servant, is virtually a gift which must be completed either by a document or by actual payment as required by section 123 of the Transfer of Property Act, 1882. A railway company sanctioned a bonus to *A*, and the amount was forwarded to the district paymaster of the company for payment to *A*. Before the amount was paid to *A*, it was attached in the hands of the paymaster by a creditor of *A*. It was held that the amount could not be attached, for the gift was not complete, and *A* had, therefore, disposing power over the money.[1471]

[s 60.12.4] Delivery to Post Office

A sends a cover containing currency notes to the post office for delivery to *B*, the addressee. Can the cover be attached while it is still in the Post Office by a creditor of *B*? It has been held that it can be attached, the reason given being that the cover is in the disposing power of *B*. When once the letter has been posted, the property in it becomes vested in the addressee.[1472]

[s 60.12.5] Auctioneer

An auctioneer has no disposing power over the whole of the sale proceeds of goods sold by him, but only over that portion of it which represents his commission. Hence, the whole of the sale proceeds in the hands of an auctioneer cannot be attached in execution of a decree against him but only so much of it as represents his commission.[1473]

[s 60.12.6] Life Policy

Where a married man effects a policy on his own life, and the policy is expressed on the face of it to be for the benefit of his wife, or of his wife and children or any of them, then, in

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1468. *Bisen Chand v Nadir Hossein*, (1888) 51 Cal 329 : 15 IA 1.
1469. *Basangowla v Irgowdati*, AIR 1923 Bom 276 : (1923) 47 Bom 97.
1470. *Ramchandra v Sukhdeo*, AIR 1935 Nag 133.
1471. *Janki Das v East Indian Railway*, (1884) 6 All 634; *Natha v Schiller*, AIR 1924 Bom 88 : (1923) 25 Bom LR 599.
1472. *Narasimhulu v Adiappa*, (1890) 13 Mad 242.
1473. *Smith v Allahabad Bank*, (1901) 23 All 135.

cases to which the Married Women's Property Act, 1874, applies, the simple declaration on the face of the policy that the policy is for the benefit of his wife or children amounts to a trust for them, and the policy cannot be attached by his creditors [see section 6 of the Married Women's Property Act, 1874]. But in cases to which that Act does not apply, such a declaration is not sufficient to create a trust, and the insured has a disposing power over the policy for his own benefit, and the policy may be attached by his creditors, unless it has been assigned as provided by section 130 of the Transfer of Property Act, 1882, or a trust has been declared in respect thereof as provided by section 5 of the Indian Trusts Act, 1882. But, where the policy is not expressed to be for the benefit of the wife or children, and they are simply named as the persons who are to receive the amount in case of the prior death of the assured, there is no trust created and the amounts continue to belong to the assured and can be attached.[1474] There was a conflict of opinion as to whether section 5 of the Act applied to Hindus, for it was held by the High Court of Madras that it did,[1475] and by the High Courts of Bombay,[1476] and Calcutta,[1477] that it did not. But the Act has been amended (see Act 13 of 1923), and the provisions of that section are made applicable to policies of insurance effected by Hindus, Mahommedans, Sikhs or Jains in Madras after 31 December 1913 (being the year of the Madras decision), and in other parts of British India after 1 April 1923; but nothing contained in the amending Act is to affect any right or liability which has accrued or been incurred under any decree of a competent court passed before 1 April, 1923. The word "property" is used in the widest possible sense and includes properties belonging to the coparceners of a joint Hindu family over which the father and the manager has a disposing power.[1478] Money deposited in court can be attached but the attachment will be subject to the result of the suit.[1479]

[s 60.13] "Debts"

Debts are expressly mentioned in the section, and they are liable to attachment and sale. A debt is an obligation to pay a liquidated (or specified) sum of money.[1480] Money that has not yet become due, does not constitute a debt, for there is no obligation to pay that which has not yet become due. The word "debt", in this section, means an actually existing debt, that is, a perfected and absolute debt. Rent, which has not become due, is not a debt and cannot be attached.[1481] A sum of money which might, or might not, become due, or the payment of which depends upon contingencies which may or may not happen, is not a debt.[1482] A money-claim that has already become due is a debt, and it may be attached as such, though it may be payable at a future day; but a money-claim accruing due is not a debt and cannot be attached. The attachment must operate at the time of the attachment and not be anticipatory so as to fasten on a claim that may ripen into a debt at some future time.[1483] A debt for the purpose of being attachable need not have become payable. For instance, a bond which has not

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1474. *Ramballav v Gangadhar*, AIR 1956 Cal 275.
1475. *Balamba v Krishnayya*, (1914) 37 Bom 483 (FB).
1476. *Shankar v Umabai*, (1913) 37 Bom 471.
1477. *Eshami Dasi v Gopal*, (1914) 18 Cal WN 1335; *Krishna v Mst. Promila*, AIR 1928 Cal 518 : (1928) 55 Cal 1315.
1478. *Muthulal Agarwal v The Trustees of Provident Fund of Tin Plate Co.* AIR 1956 SC 675 : (1956) SCC 336 : (1956) SCR 100 : (1956) SCJ 406.
1479. *Joseph's Tile Works v Kottayam Bank*, AIR 1953 TC 21.
1480. *Webster v Webster*, (1862) 31 Bea v 393.
1481. *Lachman v Jarundan*, AIR 1928 All 193 : (1928) 50 All 507.
1482. *Haridas v Barodo Kishore*, (1900) 27 Cal 38.
1483. *Syud Jaffurzool v Ragbeenath*, (1871) 14 Moo Ind App 40, p 50; *Sher Singh v Sri Ram*, (1908) 30 All 246.

matured and which will become payable after some time, is a debt which can be attached and sold.[1484] So also, it has been held that a debt due to the judgment-debtor under a promissory note is attachable even though the note has been endorsed to a *benamidar*, who holds it in trust.[1485] But, it would be otherwise if the endorsement was made *bona fide* in favour of a third party. A contractor to the military authorities entered into an arrangement with a bank. The arrangement was that the bank would finance him against his bills for supplies under the contract. The contractor executed an irrevocable power of attorney in favour of the bank, authorising the bank to receive payment of the bills. The contractor made out a bill on the authorities and delivered the same to the bank for collection, with the endorsement that the amount under the bill should be paid to the bank. The bank duly sent the bill for payment, but before it could receive payment, a judgment-creditor in execution of a money-decree, attached it. The attachment was held not to be valid on the ground that the power of attorney coupled with the endorsement on the bill, amounted to an equitable assignment of the fund by way of security.[1486] The word "debts" includes a share of debts.[1487] A mere right to receive profits, the profits not having yet accrued due, is not attachable.[1488] The right to receive profits in future, unless it is incidental to the ownership of property, is incapable of being attached and sold.[1489] But a decree directing an inquiry into, *mesne* profits can be attached and sold.[1490]

A debt that is enforceable, only by a foreign court, is not liable to attachment under this section.[1491]

ILLUSTRATIONS

(i) *A* delivers goods to his agent, *B*, for sale.*B* sells the goods, and receives the sale proceeds. The sale proceeds in the hands of *B* constitutes a "debt" due to *A*, and they may, therefore, be attached while in *B*'s hands in execution of a decree against *A*, *Madho Das v Ramji*.[1492]

(ii) *A* is bound under a deed to pay a monthly allowance to *B* for *B*'s maintenance. *C*, who holds a decree against *B*, attaches, in August, the allowance for September. The attachment is not valid, for the allowance can only be attached as a "debt" and the allowance for a debt due to *B* at the time of attachment in August: *Haridav v Barbda Kishore*.[1493]

(iii) *A* agrees to sell his property to *B* for Rs 2,000 to be paid to *A* on the execution of the conveyance. The purchase-money payable to *A* is not a 'debt' owing to him by *B* until the conveyance is executed, Hence, its cannot be attached before the execution of the conveyance in execution of a decree against *A*, *Ahmaduddin v Majlis Rai*.[1494] But once the sale is completed, the amount representing the purchase-money may be attached in the hands of *B*, and it does not make any difference that the whole is payable in one sum or by instalments or in the shape of periodical payments; *Harshankar v Baijnath*.[1495]

(iv) Maintenance allowance that has already become due, "private" pensions that have already become due, and the wages of private servants [other than those mentioned in clause (h)] that have already become due are "debts" within the meaning of this section, *Kasheeshuree v Greesh*

1484. *Bansi Lal v Mohammad Hafiz*, AIR 1939 Pat 77 : (1939) ILR 17 Pat 706.
1485. *Venkatarama v Valli Akkal*, AIR 1935 Mad 181 : (1935) 58 Mad 693.
1486. *Bharat Nidhi Ltd v Takhatmal*, AIR 1969 SC 313 : (1969) 1 SCR 595.
1487. *Upendra Mohan v Malini Mohan*, AIR 1937 Cal 199 : (1937) 2 Cal 48.
1488. *Jagarnath v Kishen*, (1867) 7 WR 266; *Sher Singh v Sri Ram*, (1908) 30 All 246; *Nawab Khajeh Habibula v Kaviraj*, AIR 1929 Cal 352 : (1928) 33 Cal WN 282 : 121 Ind Cas 751.
1489. *Ramchandra v Sukhdeo*, AIR 1935 Ngp 133.
1490. *Prasanna Kumar v Asutosh Roy*, AIR 1914 Cal 60 : (1914) 18 Cal WN 450.
1491. *Ghanshamlal v Bhansali*, (1881) ILR 5 Bom 249.
1492. *Madho Das v Ramji*, (1894) ILR 16 All 286.
1493. *Haridav v Barbda Kishore*, (1900) ILR 27 Cal 38; *Nilkunto v Hurro*, (1978) 3 Cal 414.
1494. *Ahmaduddin v Majlis Rai*, (1881) ILR 3 All 12.
1495. *Harshankar v Baijnath*, (1901) ILR 23 All 164. As to attachment of right to claim specific performance, see note above : "Saleable property".

Chunder; (maintenance)[1496] *Bhoyrub v Madhub Chunder*;[1497] *Ayyavayyar v Virasami*;[1498] *Devi Prasad v Lewis*.[1499] But arrears of maintenance payable under the order of a criminal court are not liable to attachment as a debt, if the right to receive maintenance is only a personal right created by the order, *Giribala Dasi v Nirmalabala*.[1500]

(v) *A* agrees to advance Rs 5,000 to *B* on a mortgage of *B*'s property. *B* advances Rs 3,000 only. *C*, who holds a decree against *B*, seeks to attach the balance, of Rs 2,000 payable by *A* to *B* as a debt due by *A* to *B*. *C* cannot attach the balance, for it is not a debt due by *A* to *B*. It is clear that if *A* fails to pay the balance, *B* is not entitled to specific performance, and his only remedy against *A* is by way of damages for non-payment of the balance, *Phul Chund v Chand Mal*;[1501] *Sewa Singh v Milki Singh*.[1502]

As to the mode in which a debt may be attached, see O XXI, rule 46; and O XXI, rule 79.

[s 60.14] Clause (a): Cooking Vessels

This clause should be liberally interpreted. Cooking vessels are not only vessels in which food is actually cooked, but also vessels necessary for cooking operations, such as a *thali* and a *Gagra*.[1503]

[s 60.15] Clause (a): Ornaments

Ornaments on the person of a Hindu wife, forming part of her *stridhan*, cannot be attached in execution of a decree against the husband, even though the Hindu law concedes him a personal right of user.[1504] The *mangalsutra*, a neck ornament which is worn by a Hindu married woman during the life-time of her husband without ever removing it, is also exempted from attachment.[1505] A dress or a personal clothing intended for wearing is wearing apparel, whether used or new. If a new apparel is kept for use at a future date, it is nonetheless a wearing apparel.[1506]

[s 60.16] Clause (b): Tools of Artisans

In *Ramachandra Ayyar v Sesha Ayyangar*,[1507] it was observed:

> The word 'artisan' has a well-recognised meaning and is roughly synonymous with craftsman or mechanic.

See also the under mentioned cases for the meaning of the word artisan.[1508] This clause should be liberally construed. Even tools of complicated character such as those of a goldsmith would fall within the proviso,[1509] as also a lathe, a drilling machine and a weeding machine.

1496. *Kasheeshuree v Greesh Chunder*, (1866) 6 WR Mis 64 (maintenance).
1497. *Bhoyrub v Madhub Chunder*, (1880) 6 CLR 19 (private pensions).
1498. *Ayyavayyar v Virasami*, (1898) 21 Mad 393.
1499. *Devi Prasad v Lewis*, (1908) 31 All 304 (wages of private servants).
1500. *Giribala Dasi v Nirmalabala*, AIR 1935 Cal 578 : (1935) 62 Cal 404 : 157 IC 1089.
1501. *Phul Chund v Chand Mal*, (1908) ILR 30 All 252.
1502. *Sewa Singh v Milki Singh*, AIR 1936 Lah 727 : (1936) 17 Lah 270 : 164 IC 258.
1503. *Bindeshari v Banshi Lal*, AIR 1932 All 344 : (1932) 54 All 399.
1504. *Tukaram v Gunaji*, (1871) 8 BHC (AC) 129.
1505. *Appana v Tangamma*, (1885) 9 Bom 106.
1506. *Hiralal v Harison*, AIR 1974 Pat 39.
1507. *Ramachandra Ayyar v Sesha Ayyangar*, AIR 1943 Mad 523 : (1943) 1 Mad LJ 414 : 56 LW 301.
1508. *Nihal Singh v Siri Ram*, AIR 1939 Lah 388 (FB); *Karan Chand v Official Receiver, Simla*, AIR 1938 Lah 936 : (1934) 15 Lah 26; *Maniklal v Ramesh Chandra*, AIR 1955 Cal 290 : 59 Cal WN 466; *Kanhaiyalal v Sunder Lal*, AIR 1957 Raj 353.
1509. *Punnavanam v Muthuswami Achari*, AIR 1962 Mad 444.

too, operated by electric power.[1510] Nor is it necessary that they should actually be in use at the time of the attachment. It is sufficient if they can be used when required.[1511] Sewing machines in a tailor's shop are exempt from attachment under this proviso.[1512] Mechanical tools are covered by section 60(1), proviso (b) of the CPC (case law reviewed).[1513] The following have been held not to be artisans: a surgeon or doctor,[1514] a musician,[1515] a firm.[1516] A person who does not himself use the lathe machines is not an "artisan" (even assuming that lathe machines are tools), if the machines are actually used only by his employees. In *Bindeshari v Banchilal*,[1517] an extended meaning was given to the word "artisan" as including a person who works in the production of commodities, and it was held that a soap boiler who practiced the art of making soap was an artisan and the paraphernalia of his soap factory were the tools of an artisan. So also, utensils used for making sweetmeats were held to be tools of an artisan.[1518] But these decisions were dissented from by the Madras High Court in *Ramachandra Ayyar v Sesha Ayyangar* and *Punnavanam v Muthuswami Achari* and by the Rajasthan High Court in *Kanhayalal v Sunderlal*, wherein it was held that a *halwai* was not a mere artisan, but more a shopkeeper who purchased commodities and processed them and that accordingly utensils used by him for preparing sweetmeats were not exempt from attachment under this proviso.

[s 60.17] Clause (b): Implements of Husbandry

Charaks, kadhais, and planks of timber used by an agriculturist for extracting sugar juice from sugarcane which he has grown on his field, and for turning into jaggery, are implements of husbandry, within the meaning of clause (b), and are exempt from attachment.[1519] It has been held that a motor tractor cannot be said to be an implement of husbandry. It is not indispensable to agriculture.[1520] It was however held in *Dwarka v Meerut Municipality*,[1521] that even a tractor used for large-scale agricultural operations fell within this proviso but this decision had been dissented from by the High Court of Madhya Pradesh which has held that engines and pumps installed for running a flour mill are not implements exempt from attachment under this proviso.[1522] The High Court of Madras also has held that an oil engine used as a quick mode of drawing water from a well is not indispensable to an agriculturist to cultivate his land and is not accordingly exempt from attachment. The ground on which the high court so held, was that the principle underlying clause (b) is that artisans who depend for their livelihood on the tools which they possess or the implements of husbandry which they, as agriculturists, require to earn, their livelihood should alone be exempted and that the word "livelihood" in the clause connoted the idea of means of living or subsistence.[1523] The question arises whether the pump set is an "implement of husbandry" belonging to an agriculturist and exempt from attachment and sale under sub-clause (b) of section 60(1). The Supreme

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1510. *Harjiram v Ghanshaym*, AIR 1972 Raj 62.
1511. *Kanhaiyalal v Sunder Lal*, AIR 1957 Raj 353.
1512. *Ahmed Sayeed v Kanizak*, AIR 1941 All 157 : (1941) All 278.
1513. *Harjiram v Ghanshyam Das*, AIR 1972 Raj 62 (case law reviewed).
1514. *Karamchand Sood v Official Receiver*, AIR 1938 Lah 936 : ILR 15 Lah 26 : 34 PLR 809.
1515. *Manikyam v Manikamma*, AIR 1942 Mad 4 : (1941) 2 Mad LJ 671 : 1941 Mad WN 783.
1516. *Champaklal v Swastik Bharat Kala Kendra*, AIR 1960 Bom 276 : 61 Bom LR 1356.
1517. *Bindeshari v Banchilal*, AIR 1932 All 344 : (1932) 54 All 399.
1518. *Mahabir v Raghunandan*, AIR 1935 All 848 : (1935) All LJ 1011.
1519. *Lakshman v Narhari*, AIR 1924 Bom 294 : (1923) 25 Bom LR 1211.
1520. *Saligram v Sheopratap*, AIR 1939 Ngp 3 : (1939) ILR Nag 355.
1521. *Dwarka v Meerut Municipality*, AIR 1958 All 561.
1522. *Mathra Bai v Kanhaiyalal*, AIR 1959 MP 375; *Saligram v Swaran Pratap*, AIR 1939 Ngp 3 : (1939) ILR Nag 355.
1523. *Aruamugha v Marappa*, AIR 1973 Mad 46 : (1972) 2 Mad LJ 145.

Court, despite having an opportunity in the above noted matter, decided not to pronounce a finding on the above subject, hence, the conflicting High Court judgments would prevail in the respective area.[1524]

[s 60.18] Clause (c): Houses Occupied by Agriculturists

The term "agriculturist" includes persons engaged in cultivating the soil for remuneration, although they may have no interest in the soil either as proprietor or tenant.[1525] It means a small holder who tills the soil and cultivates it and not a large landed proprietor, even though his sole income is from land.[1526] The term means a person who personally engages himself in tilling the soil and whose livelihood depends upon the proceeds derived from that tillage of the soil. The true test is whether a man personally engages in tilling and whether this occupation is essential to his maintenance.[1527] In *Pattabhirama Rao v Venkatasubbamma*,[1528] it was held that a person might be an agriculturist even though he cultivated the lands, not personally, but through labourers, if he maintained himself from the income therefrom. In *Chandravathi Tewari v UP Government*,[1529] a Full Bench of the Allahabad High Court held on a review of the authorities that whether a person was an agriculturist depended not on whether the income from the lands was the main source of his livelihood but whether his main occupation was agriculture, i.e., tilling the lands or directing or supervising agricultural operations. An agriculturist does not cease to be one when he is unable to cultivate his land in a year of scarcity.[1530] The meaning of the word "agriculturist" in this provision came up for consideration before the Supreme Court in *Appasaheb v Bhalchandra*,[1531] and it was held that before a person could claim to be an agriculturist "he must at least show that he was really dependent for his living on tilling the soil and was unable to maintain himself otherwise." It was accordingly held that a person who had a substantial income from lands other than those cultivated by him as home farm lands and also cash allowances, was not an agriculturist and that a building constructed by him was not within the exemption. In the case of a minor, if it is shown that his main income is derived from agriculture, it is immaterial that his lands are cultivated by labourers engaged for that purpose. Such a minor is an agriculturist.[1532] The Code of Civil Procedure, 1882 (now replaced CPC, 1908), section 266, exempted from attachment only the materials of houses occupied by agriculturists. But it was held that even a house occupied by an agriculturist could not be attached provided it was occupied by an agriculturist as such,[1533] that is to say, it was

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1524. *Shanti Devi v State of Uttar Pradesh*, (1997) 8 SCC 22.
1525. *Devare v Vaikunt*, (1917) 41 Bom 475.
1526. *Hanmuntrao v Dhunaraj*, AIR 1948 Bom 229 : (1947) ILR Bom 687 : 49 Beng LR 867; *Muthu Venkatarama v Official Receiver*, AIR 1926 Mad 350 : (1926) 49 Mad 227; *Balwant Singh v Anjaman Imadad*, AIR 1939 Lah 40; but see observations in *Gowardhendas v Mohanlal*, AIR 1938 Ngp 366 : (1938) ILR Nag 461.
1527. *Nihal Singh v Siri Ram*, AIR 1939 Lah 388 (FB); *Parvata Neni v Official Receiver, Masulipatam*, AIR 1937 Mad 551 (FB) : (1937) ILR Mad 777; *Mst Araz Bibi v Mubarak Ali*, AIR 1938 All 85 : (1937) All LJ 1314.
1528. *Pattabhirama Rao v Venkatasubbamma*, AIR 1952 Mad 807 : (1952) 1 Mad LJ 291.
1529. *Chandravathi Tewari v UP Government*, AIR 1961 All 183 : (1961) 1 All 141 : (1961) All LJ 88.
1530. *Pukh Raj v Prabha*, AIR 1970 Raj 108 : (1969) Raj LW 495.
1531. *Appasaheb v Bhalchandra*, AIR 1961 SC 589 : (1961) 2 SCR 163 : (1961) 1 SCA 735 : (1962) 2 SCJ 563; *Keshav Nandan v Bank of Bihar*, AIR 1977 Pat 185.
1532. *P Bachubhai v Lalita*, AIR 1972 Guj 31, p 33.
1533. *Radhakisan v Balwant*, (1883) ILR 7 Bom 530; *Bank of Chettinad v Ko San Ok*, AIR 1933 Rang 227 : (1933) 11 Rang 372; *Radha Krishna v Maiku*, AIR 1936 Oudh 155.

occupied by him *bona fide* for the purposes of agriculture.[1534] The burden of proving that it was so occupied, lies on the agriculturist-debtor and it must be proved by him in execution proceedings.[1535] The exemption extends after the death of the agriculturist, to his representative occupying the house in good faith as an agriculturist.[1536] If, under a deed of settlement, the settlee had only the right to enjoy the income of the house, without any power to alienate it and after his death the house was to go to his heirs absolutely, the right conferred on the settlee was not attachable in execution of a decree for maintenance of his wife; but a receiver can be appointed to collect the rent and thus satisfy the decree.[1537] If, however, a money-decree was passed against a person, who was not an agriculturist, and his non-ancestral house was attached during his life-time, and the house was on his death inherited by his son, who occupied it as an agriculturist, it was held that the house could not be released from attachment.[1538]

The right under the above provision is a personal right available to an agriculturist or a labourer or a domestic servant. It is neither heritable nor alienable. It can be enforced only during the life time of the person who is entitled to claim the right and after the death of the person concerned, the said right ceased to exist.[1539] But if, by a consent decree, an agriculturist agrees in consideration of time being given to him that his house may be attached and sold on default in payment of the decretal amount, the house may be attached and sold on default,[1540] for the privilege is one that may be waived.[1541] According to the High Court of Andhra Pradesh, the protection under section 60(1) proviso (c) cannot be waived. The protection given to the agriculturist against attachment of his residential house, is based upon high public policy of the state as any interruption of agricultural operations is against the national interests and it may lead to fall, in agricultural production. Such policy of the state cannot be defeated and any waiver of such a right is opposed to public policy.[1542] It is submitted that the Andhra view is the correct view.

If a house occupied by an agriculturist is specifically mortgaged, it is not protected from sale in execution of a decree upon the mortgage. Clause (c) does not prohibit the sale of property specifically mortgaged, though it may be occupied by an agriculturist as such, unless he is prohibited by law from mortgaging or selling it.[1543]

Under this clause, the main residential building and all other buildings attached to it, would be within the exemption. When the whole building is used for residential purposes, the

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1534. *Jivan v Hira*, (1888) 12 Bom 363; *Mirza v Jhenda Ram*, AIR 1930 Lah 1034 : (1931) 12 Lah 367; *Basavayya v Official Receiver*, AIR 1960 AP 458.
1535. *Pandurang v Krishnaji*, (1904) 28 Bom 125; *Jamna Prasad v Raghunath*, (1913) 35 All 307; *Mirza v Jhenda Ram*, AIR 1930 Lah 1034 : (1931) 12 Lah 367; *Matu Ram & Sons v Eligin Mills Co*, AIR 1974 Del 205.
1536. *Radhakisan v Balvant*, (1883) 7 Bom 530; *Badri Chandra v Indrajit*, AIR 1932 All 508 : (1932) 54 All 736.
1537. *S. Chenchulakshmi v A. Subramanian*, AIR 1972 Mad 348 : (1972) 1 Mad LJ 206.
1538. *Hirda Ram v Mohammad Din*, AIR 1936 Lah 895; *Balde v Singh v Sher Singh*, AIR 1939 Lah 556; *Gurparshad v Kishen Chand*, AIR 1938 Lah 608; *Buraj Ban Krishna Behari*, (1953) Raj 759 : (1954) Raj LW 241.
1539. *Parbathy Antherjanam v Indian Bank*, AIR 1996 Ker 159.
1540. *Uzir v Haradeb Das*, (1920) 24 Cal WN 575.
1541. *Ganga Bishun v Jagmohan*, AIR 1927 Pat 233 : (1927) 6 Pat 254; *Ramadin v Seth Sheodutt*, AIR 1938 Nag 544; *Ganpatrao v A.V Zinzarde*, AIR 1948 Ngp 392 : (1948) ILR Nag 530.
1542. *Duggirala Balurama Krishnayya v Arukapudi Jagannadhan Rao*, AIR 1983 AP 136 (DB).
1543. *Bhagwandas v Kashibai*, (1880) 4 Bom 25; *Bhola Nath v Kishori*, (1912) 34 All 25; *Mubarak v Ahmad*, AIR 1924 All 328 (FB) : (1924) 46 All 489; *Khemchand v Melaram*, AIR 1955 J&K 33; *Santha Kumari v Suseeladevi*, AIR 1969 AP 355; *Kochumariam v KV Co.*, AIR 1974 Ker 78.

fact that there is a shop in the ground floor, will not take it out of the exemption.[1544] What is contemplated is actual possession. A house which is dilapidated and unoccupied and not used for agricultural purposes is not exempt.[1545] The exemptions enumerated in section 60 are applicable to proceedings by way of attachment and sale by the official receiver in exercise of powers vested in him under the Provincial Insolvency Act, 1920.[1546] Exemption under section 60(1)(c) is available to an individual and not to their legal heirs.[1547] It has been held that the special provisions in favour of agriculturists do not offend Article 14 or Article 15 of the Constitution.[1548]

The Amendment Act, 1976, has extended the benefit now to a labourer and a domestic servant. Both terms "labourer" and "domestic servant" are used in their ordinary meaning and not in any technical sense. A house or a building belonging to and occupied by a labourer or a domestic servant would have the benefit of this clause. The court, in an execution proceeding for the realisation of decretal amount by selling the immovable property (*viz* residential house), found that the judgment-debtor was not an agricultural labourer, but was only a mason by profession. Still, the refusal of the benefit of section 60(1), proviso (c) to the judgment-debtor was unjustified. Initially, the burden is on the judgment-debtor to show that he is entitled to the benefits of section 60. But, once he has discharged his burden and the decree-holder adduces evidence that the judgment-debtor is not an agricultural labourer, but is only a mason, the finding given by the lower court must be accepted. A mason by virtue of the nature of the work that has been done by him, can be termed as a skilled labourer. Therefore, the judgment-debtor, who is mason and who is residing in his own residential house, is entitled to claim that his residential house is not liable to attachment and sale in execution of a decree, in view of section 60(1) (c) read with *Explanation IV* to the proviso.[1549]

[s 60.19] Clause (e): Right to Sue for Damages

"*Mesne*-profits" are in the nature of damages, and the right to sue for mesne-profits is a right to sue for "damages". Such a right cannot, therefore, be attached and sold in execution of a decree against the person entitled to the right. Thus, if *A* is entitled to claim mesne-profits from *B* for wrongful dispossession of his lands, *A*'s right to claim mesne-profits from *B* cannot be attached and sold in execution of a decree against *A*. If the right is attached and sold and purchased by *X*, *X* is not entitled to sue *B* for the mesne-profits, the sale to him being void.[1550] An insolvent's right to sue for contribution is not a right or property, under this clause, exempting it from vesting in the official receiver under section 28(5) of the Provincial Insolvency Act, 1920.[1551] For the test of "mere right to sue for damages" see *Bansigopal v PK Banerji*.[1552]

1544. *Aga Jaffer Ali v Radha Kishen*, AIR 1951 Punj 433; *Brij Mohan Lal v Bakshi Ram*, AIR 1975 P&H 214.
1545. *Channu v Khem Karan*, AIR 1961 All 566.
1546. *Basavayya v Official Receiver*, AIR 1960 AP 458.
1547. *Subramanian v Chellapandi*, CRP (MD) No. 1817 of 2011 and M.P. (MD) No. 1 of 2011, decided on 3 January 2020 (Madras High Court).
1548. *Rura Ram v Gurbachna*, AIR 1954 P&H 254.
1549. *Challa Ramaiah v Desu Guruvaiah*, AIR 1989 AP 56.
1550. *Shyam Chand v Land Mortgage Bank*, (1883) 9 Cal 695.
1551. *Surannamukhi v Virupakshmma*, AIR 1969 AP 23.
1552. *Bansigopal v PK Banerji*, AIR 1949 All 433. As to a decree for *mesne*-profits, see note 410, section 75.

[s 60.20] Clause (f): Right of personal service

A *vritti* is a right to receive certain emoluments as a reward for personal service, and is, therefore, exempt from attachment and sale.[1553] But a priest's share in the *utpat* or net balance of the offering to a deity may be attached and sold.[1554] The *birt maka brahmani*, or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service and cannot therefore be attached.[1555] *Jatri bahis*, which merely contain the names and addresses of pilgrims who are clients of the judgment-debtor and which are of use to him to perform personal service to the pilgrims are not attachable.[1556] *Gangaputras* occupy sites on the bank of the Ganges where they erect wooden platforms for the use of pilgrims who bathe there and from whom they receive offerings. This right to offerings is a right of personal service and cannot be attached; but the right of occupancy of the sites and wooden platforms are attachable.[1557] A *pala* or turn of worship is by custom alienable to persons within a limited circle and is attachable.[1558] Where the *khadim's* share in the offerings of the shrine was by custom allowed to be sold among the *khadims* themselves, it was held that the right to such a share was liable to attachment and sale in execution of a decree but that the right should be sold only to a *khadim*.[1559] In the absence of any custom to the contrary or connection between the shares of the offerings of a temple and the right to officiate as a priest thereof, the shares cannot be said to be emoluments attached to the office and are liable to attachment and sale.[1560] Money due to a firm of managing agents is not for personal service and so can be attached.[1561] The right of the judgment-debtor to receive offerings in the Kalkaji temple, Delhi, was held to be exempt from attachment under this proviso as no custom sanctioning transfer was established.[1562]

[s 60.21] Clause (g): Gratuity Allowed by Government or Local Authority or any Other Employer

The gratuity referred to in this section is a bonus allowed by government to its servants in consideration of past service. It may be allowed to one who is not a "pensioner" or it may be allowed to a pensioner in addition to his pension. In either case, it is exempt from attachment.[1563] The amount earned by a deceased employee (judgment-debtor) which has become payable to his legal representative, is not exempt from attachment. The amount had lost the character of gratuity, as it is now payable to the legal representatives of the employee. Once the employee dies, it cannot be held that the department holds the money in trust for the legal representatives.[1564] Gratuity amount due from the Postal Department to the heirs of

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1553. *Ganesh v Shankar*, (1886) 10 Bom 395; *Govind v Ramkrishna*, (1888) 12 Bom 366; *Rajaram v Ganesh*, (1899) 23 Bom 131.
1554. *Digamber v Hari*, AIR 1927 Bom 143 : (1927) 29 Bom LR 102; followed in *Muhammad Ali v Muhammad Nazi*, AIR 1934 Lah 57 : (1934) 15 Lah 136.
1555. *Durga Prasad v Shambhu*, (1919) 41 All 656.
1556. *Lachman v Baldeo*, AIR 1922 Pat 556 : (1922) 1 Pat 619.
1557. *Ganpat v Kashmiri Bank*, AIR 1929 Oudh 444 : (1930) 5 Luck 206.
1558. *Haridas v Charu Chandra*, AIR 1933 Cal 757 : (1933) 60 Cal 1351.
1559. *Muhammad Ali v Muhammad Nazi*, AIR 1934 Lah 57 : (1934) 15 Lah 136.
1560. *Nand Kumar v Ganesh Das*, AIR 1936 All 131 : (1936) 58 All 457.
1561. *Purasattamdas v Baijnath*, AIR 1941 Cal 240.
1562. *Har Parshad v Prem Singh*, AIR 1952 P&H 138.
1563. *Bawan Das v Mul Chand*, (1884) 6 All 173; *Muhammad v Carlier*, (1882) 5 Mad 272 (decided under the Code of 1877 which did not include "gratuities").
1564. *Sathyavathy v Bhargavi*, AIR 1991 Ker 377 (DB).

a deceased judgment-debtor is within this proviso and cannot be attached.[1565] The exemption, now, applies also to stipends and gratuities allowed to pensioners of a local authority or of any other employer. Gratuity payable to an employee under the Payment of Gratuity Act, 1972 would now be exempt from attachment and sale.

[s 60.22] Stipends Payable Out of Service Family Pension Fund Notified in the Official Gazette

For notifications issued under this clause [i.e. clause (g)], see General Statutory Rules and Orders, vol III.

[s 60.23] Political Pensions

All pensions of a political nature payable directly by the Government of India are political pensions. A pension which the Government of India has given a guarantee that it will pay by a treaty obligation contracted with another sovereign power is a political pension.[1566] *Khandan* allowance granted under the *Tonk Khandan Rules* is political pension and exempt from attachment.[1567] Arrears of political pension due to a pensioner and lying in the hands of government at the time of his death do not lose their character of political pension by reason merely of the pensioner's death. The character of the fund remains unchanged so long as it remains unpaid in the hands of government and it is not liable to attachment in the hands of government in execution of a decree against the deceased. But once the fund has passed out of the hands of government into the hands of the legal representative of the deceased, it may be attached like any other portion of the deceased's estate.[1568] Where the amount is disbursed and it goes into a bank account it would retain its original character until the amount is withdrawn from the bank account or converted into any other assets or investment. This carry over period would be relatively short and the readdressed would be as to whether the disbursement is still intact in its original form. If that is so, it could still be identifiable in its original status and the immunity would carry over.[1569]

A grant of a zamindari by government as a reward for past services rendered by a person to government is not a pension, but a gift, and may, therefore, be attached in execution of a decree against the grantee. The word "pension" in this section implies periodical payments of money by government.[1570] *Cis-sutlej jaghirs* have been held to be exempt from attachment under this proviso.[1571] Allowances granted to the *Candyan pensioners* of Ceylon,[1572] to the members of the family of the King of Oudh[1573] to the members of the Mysore family,[1574] and

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1565. *Subramanya Iyer v Hyder*, AIR 1955 Mys 419; *Calcutta Docklalous Board v Sandhya Mitra*, (1985) 2 SCC 1.
1566. *Bishambar v Imdad Ali*, (1891) 18 Cal 216 : 17 IA 181; *Muthusami v Prince Alagia*, (1903) 26 Mad 423; *Shiv Narain Singh v Munilal*, AIR 1934 Lah 881; *Achhru Mal v Balwant Singh*, AIR 1937 Lah 178 : (1937) Lah 415; *Raja Babhadar Singh v Shankar Das*, AIR 1937 Lah 211.
1567. *Abdul Bais Khan v Budh Singh*, AIR 1973 Raj 201.
1568. *Valia v Anujani*, (1903) 26 Mad 69.
1569. *Vigneshwar v Ganga Bai Kom Narayan Bhatt Prasad*, AIR 1997 Kant 149.
1570. *Lachmi Narain v Makund*, (1904) 26 All 617; *Nawab Bahadur v Kernani Bank*, AIR 1931 PC 160 : 58 IA 215 : ILR 59 Cal 1; *Bhiwaji Chunilal v Raje Chamshing*, AIR 1948 Ngp 194 : (1947) ILR Nag 616.
1571. *Harnam Singh v Ramji Das Pohlumal*, AIR 1951 P&H 225.
1572. *Muthusami v Prince Alagia*, (1903) 26 Mad 423.
1573. *Bisambar Nath v Imdad Ali*, (1891) 18 Cal 216 : 17 IA 181.
1574. *Mahamed v Mohamed*, (1867) 7 WR 169.

to the descendants of the *Nawab* of Carnatic,[1575] or paid by a foreign State by an arrangement with the Government of India to a deposed Maharaja,[1576] are instances of political pensions. Compensation paid to *Jagirdars* when their estates were abolished and taken over by government[1577] and compensation paid to displaced persons[1578] are not political pensions. The view expressed by the High Court of Madhya Pradesh in *Usman Ali Khan v Sagarmul*,[1579] that privy purse given to a prince on the merger of his state in the Union of India was not a political pension was reversed by the Supreme Court in appeal[1580] on the ground that the periodical payment of money by the Government of India to a ruler of a former Indian State as privy purse was made on political considerations and under political sanctions and not under a right legally enforceable in any municipal court. Such a payment was strictly a political pension and the use of the expression "privy purse" instead of the expression "pension", being due to historical reasons, was immaterial.

[s 60.24] Private Pensions

Private pensions, as distinguished from government pensions, are not exempt from attachment and they may be attached either as "debts" or as "property belonging to the judgment-debtor" within the meaning of this section. But they neither constitute "debts" nor "property belonging to the judgment-debtor" until they have become due and payable. Hence, they cannot be attached before they have become due and payable. Pensions granted by railway companies to their servants were held to be private pensions.[1581]

[s 60.25] Clause (h): Wages of Labourers

A "labourer" is a person who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education.[1582] Thus, persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun by them are labourers, and their wages cannot be attached.[1583] A weaver in a textile mill is a labourer within this proviso[1584] but not a clerk.[1585] A winch man working under the Calcutta Dock Labour Board is not a labourer since before he could be engaged he had to undergo training prescribed by section 21 of the Calcutta Dock Workers (Regulation of Employment) Scheme.[1586] The old provision only applied to the wages of labourers and domestic servants and there was no provision to exempt the salary of a person in private employment. It was observed in the under mentioned case[1587] that from the collection of words used in the clause, it was arguable that the word "salary" in the clause was intended to mean salary of labourers and domestic servants only. It has, however, been held that though the latter part of the clause should have been the subject of a separate clause, yet on a consideration of the entire section,

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1575. *Mahomed v Comandur*, (1869) 4 MHC 277.
1576. *Dongarchand v Madho Singh*, AIR 1927 Mad 604 : (1927) 50 Mad 711.
1577. *Ambsingh v Jathamal*, AIR 1961 Raj 473 : (1961) Raj LW 429.
1578. *KB Co-op Credit Bank v NS Verma*, AIR 1962 Bom 121.
1579. *Usman Ali Khan v Sagarmul*, AIR 1962 MP 320.
1580. *Usman Ali Khan v Sangarmal*, AIR 1965 SC 1798.
1581. *Bhoyrub v Madhub Chunder*, (1880) 6 CLR 19.
1582. *Mniswami v Viswanatha*, AIR 1957 Mad 773 : (1957) 2 Mad LJ 400 : 70 LW 701.
1583. *Jechand v Aba*, (1881) 5 Bom 132.
1584. *Mansuri Ibrahim Mohamed v Kantilal Balabhai*, AIR 1956 Bom 276.
1585. *Manilal v Mohan Lal*, AIR 1945 Bom 102 : (1945) ILR Bom 899.
1586. *Bhikari Behara v Dhanapatee*, AIR 1970 Cal 176 : 73 Cal WN 943.
1587. *Janendra Kumar v Akash Chandra*, AIR 1938 Cal 325.

there is no doubt that the clause protects from attachment, salary of all persons in receipt of it other than public officers and servants of a railway company or local authority, so far as the protection goes.[1588] These questions do not, now, arise as the subject of wages of domestic servants and labourers has been put in a separate clause.

There is a conflict of judicial opinion on the question whether wages include bonus declared and payable to labourers. One view is that bonus is, as held by the Supreme Court,[1589] a payment contingent on the earning of profits and is *ex gratia* and it is therefore not wages, and is liable to attachment.[1590] As against this, it has been held that bonus might be impressed with the character of wages either by statute or by agreement of parties, that, in such cases, it cannot be attached and the question must be decided on a consideration of the facts of each case.[1591] On consideration of the definition of gratuity in different enactments, and the board analogy of the term with bonus, gratuity, payable on retirement, to a labourer has been held to be "wages";[1592] so also bonus.[1593]

[s 60.26] Clause (i): Salary

The clause applies to all salaries and is not confined to salaries of any particular category or categories of persons. The Amendment Act, 1976, has increased the exempt amount from the first two hundred and one half of the remainder to the first four hundred[1594] rupees and two-thirds of the remainder. The proviso to the clause gives additional protection. So far it applied only to government officers, railway employees and employees of a local authority. As now amended, it applies to all employees. The salary can be attached only partially, since it is exempt to the extent of the first four hundred rupees and two-thirds of the remainder. In view of this exemption it was held that a public officer could not be required to pay into court, a part of his salary as a condition precedent to his being adjudged insolvent.[1595]

The exemption did not occur in the Code of Civil Procedure, 1859 (now replaced by CPC. 1908). Hence the salary of the persons mentioned in the clause was attachable to the extent of the whole as "debt". It was, therefore, not attachable until it had become due.[1596] Under the subsequent Codes of 1877, 1882 and the present Code of Civil Procedure 1908, the salary to the extent to which it is attachable, may be attached in advance.[1597] Originally, the object of the exemption appears to be to enable an officer to maintain himself and his family in a position suitable to his rank. Now the object is human consideration. But as regards the portion of the salary that is attachable, it not a valid reason for refusing that the attachment, if allowed, would not leave the judgment-debtor enough to live on.[1598] A member of a provincial

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1588. *Re Hormusji Jomshedji*, AIR 1939 Sau 134.
1589. *Muir Mills Co. Ltd v Suit Mills*, AIR 1955 SC 170 : (1955) 1 SCR 1991 : 1955 SCJ 214 : 1955 SCA 321; *Meenakshi Mills Ltd v Workmen*, AIR 1958 SC 153 : 1958 SCA 440.
1590. *Munisami v Visvanatha*, AIR 1957 Mad 773 : (1947) 2 Mad LJ 400 : 70 LW 701; *Sheo Dutt Singh v Ali Mohamad*, 63 Cal WN 207; *Muhamad v Rucky*, AIR 1962 Ker 63.
1591. *Jeevanlal v Ramtuji Bhaji*, AIR 1945 Bom 119; *Harji Malla v Karsanji*, AIR 1954 Sau 19; *Nathamal Sucheti v Dasarath*, AIR 1959 Mys 96 : (1958) ILR Mys 132.
1592. *Badlu Prasad v Tirjuji Sitaram*, AIR 1965 MP 42.
1593. *Ganpathia v Swaminatha*, AIR 1969 Mad 440 : (1969) 2 LLJ 159; *P Krishna Rao v Thimmakkan*, AIR 1970 Mad 135 : (1969) 2 Mad LJ 241; *Gopalan v Angamali Chit Fund*, AIR 1977 Ker 120.
1594. Now "one thousand" as per Amending Act, (46 of 1999).
1595. *Jahar Ali v Mushardan*, AIR 1930 Pat 326 : (1930) ILR 9 Pat 304.
1596. *Om Prakash Gupta v United Provinces*, AIR 1951 All 205; *Tejram v Kusaji*, (1870) 7 BHC (AC) 110.
1597. *Beard v Egerton*, (1883) 6 Mad 179; *Bhoyrub v Madhub Chunder*, (1880) 6 CIR 19.
1598. *Debi Prasad v Lewis*, (1918) 40 All 213.

legislative assembly was held not to be a public officer and therefore O XXI, rule 48 would not apply to him.[1599]

This clause does not apply to arrears of salary.[1600] Dearness allowance has been held to be part of salary and should be taken into account in calculating the attachable amount.[1601] But it would be otherwise where there is a statutory provision specifically exempting it from attachment.[1602] The deductions made on account of provident fund under the Provident Funds Act, 1925 as also under the provisions of the Income-tax Act, 1960 (now replaced by Income Tax Act, 1961) by way of advance income tax should be made from the non-attachable portion of the salary.[1603] But the deduction of amount towards repayment of temporary advance taken from General Provident Fund is not exempt and cannot be excluded from attachment of salary.[1604] It has been held that when, salary has become exempt from attachment under the proviso to this clause, it would not be legal to appoint a receiver therefore as that would be defeating the policy underlying it.[1605] Even where a part of the attachable portion of the salary has been under attachment for 24 months, the prescribed exemption applies.[1606] A comparison of section 60, prior to amendment and after amendment, would show that in so far as attachment beyond 24 months is concerned, there is no change, though the extent of salary which can be attached under the provision now in force is more, which is, in fact, beneficial to the decree-holder. Therefore, in so far as attachment beyond 24 months is concerned, there is no difference in the provision as it existed at the time when the rule came in force, and the provisions now applicable in that behalf.[1607]

[s 60.27] Salary of Private Servant — *Explanation I*: The moneys payable in relation to matters exempt from attachment or sale

Prior to its recent amendment, a distinction was made between particulars mentioned in clauses (g). (h), (i), (j), (l) and (o) and salary of a person other than that of a servant of the government, railway company or local authority in that the former were exempt from attachment or sale whether before or after they were actually payable and the latter only when lit was actually payable. In view of this distinction, it was held that the salary of a private servant to the extent allowable could be attached a debt and hence it would not be attached before it had become due.[1608] This distinction has now been done away with by the amended *Explanation (I)*. Hence it can be attached in advance and before it has become due.

[s 60.28] Clause (j)

The pay of soldiers and followers of the Indian Army is under section 28 of the Army Act, 1950 and is exempt from attachment.

1599. *Satyapriya Bannerjee v Kundanmull*, AIR 1939 Cal 428 : (1939) 1 Cal 523.
1600. *UOIv Hira Devi*, AIR 1952 SC 227 : (1952) SCR 7655 : 1952 SCJ 326 : 1952 SCA 323; *Divisional Accounts Officer v Radha Kissen*, AIR 1959 Cal 666 : (1958) Cal LJ 208.
1601. *Srinivasan v Padmasini Ammal*, AIR 1957 Mad 622; *Champa Devi v Sat Narain*, 74 Punj LR 211.
1602. *Pashupatinath v Gomi Shankar*, AIR 1956 Pat 159 : ILR 34 Pat 406.
1603. *Ibid*; *Superintendent, RMS Division, Calcutta v Co-op Society, Howrah*, AIR 1944 Cal 135 : (1944) 2 Cal 137; but see *Municipal Corp of Rangoon v Ram Behari*, AIR 1939 Rang 432.
1604. *Florence Mabel RJ v State of Kerala*, AIR 2001 Ker 19.
1605. *Kasiprasad v AA D'Cruz*, AIR 1958 Cal 19 : 61 Cal WN 740.
1606. *Biman Kumar v Commercial Engineering Corp Ltd*, AIR 1983 Cal 45 (DB).
1607. *Ibid.*
1608. *Ayyavayyar v Virasami*, (1898) 21 Mad 393; *Debi Prasad v Lewis*, (1909) 31 All 304; *Ramgopal v Misrilal & Sons*, AIR 1953 Mys 127 : (1954) ILR Mys 5.

[s 60.29] Clause (k): Compulsory Deposits in Provident Funds

The expression "compulsory deposit" is defined in section 2(a) of the Provident Funds Act, 1925 as being a subscription to, or deposit in, a provident fund which, under the rules of the Fund, is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premium in respect of a policy of life insurance, and includes, etc. By section 3 of the Act it is provided that a compulsory deposit in any government or Railway Provident Fund shall not be liable to attachment under any decree or order of any civil, revenue or criminal court in respect of any debt or liability incurred by the subscriber or depositor. A compulsory deposit cannot be attached so long as it retains the character of compulsory deposit. Thus contribution to the funds under the Employees State Insurance and Employees Provident Fund Act, though not mentioned in the clause should be given the benefit of exemption.[1609] An objection to attachment of compulsory deposit can be made by the garnishee.[1610] This also applies to the provident fund of any institution to which the provisions of the Act have been extended.[1611] A deposit which when it was made, was a "compulsory deposit," continues to retain that character so long as it remains in the hands of the railway company. Portion of salary to be paid as compulsory deposit in Provident Fund does not assume the character of compulsory deposit until the deposit is actually made.[1612] It does not lose that character though the employee may have ceased to be in the service of the company by retirement, resignation or dismissal, and though he may have become entitled in that event to be paid the amount due to his credit in the provident fund. It has been held by the Supreme Court that provident fund remaining unpaid to the subscriber after his retirement retains its character as a compulsory deposit and cannot be attached nor could a receiver be appointed therefore.[1613] In a case, the Supreme Court has further held that so long as the provident fund dues are not paid to the government employees on retirement or otherwise, the government is a trustee in respect of them and has, as such, an interest in maintaining an objection in the court against attachment.[1614] It makes no difference that the amount had been transferred from the provident fund account to a miscellaneous account.[1615] But once it is paid out by the company on the happening of any of the above events, it loses the character of "compulsory deposit" and it may be attached in the hands of the party to whom it has been paid.[1616] Where a subscriber to the Railway Provident Fund elected to be governed by the Provident Funds Rules and requested payment in sterling and by bank draft in a bank in England and the Railway Administration drew thereupon cheques in favour of

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1609. *Behudoor v Pasupathy*, AIR 1973 Ker 175 : (1973) 1 LLJ 516.
1610. *MSM Railway v Chengali Syedali*, AIR 1950 Mad 402.
1611. *Mai Dan v Imperial Bank of India*, AIR 1936 Lah 694; *Krityanand v Saileswar*, AIR 1937 Pat 22 : (1936) 15 Pat 779.
1612. *Superintendent, RMS Division, Calcutta v RMS Division Co-op. Credit Society Ltd, Howrah*, AIR 1944 Cal 135.
1613. *UOI v Hira Devi*, AIR 1952 SC 227 : [1952] SCR 765 : (1952) SCJ 326 : (1952) SCA 323; *Taj Mahamad v Balaji*, AIR 1934 Mad 173 : ILR 57 Mad 440; *Abdul Wahidkhan v Remy Charles*, AIR 1965 Mys 303.
1614. *UOI v JC Fund and Finance*, AIR 1976 SC 1163.
1615. *Iswardas v Gregory*, AIR 1955 Cal 509 : 96 Cal LJ 126.
1616. *Veerchand v BB and CI Railway*, (1905) 29 Bom 259; *Sett Mamna Lal v Gainsford*, (1908) 35 Cal 641; *Hindley v Joy Narain*, (1919) 46 Cal 962; *Secretary of State v Raj Kumar*, AIR 1923 Cal 585 : (1923) 50 Cal 347; *Devi Prasad v Secretary of State*, AIR 1924 All 68 : (1923) 45 All 554; *Official Assignee of Madras v Mary Dalgains*, (1903) 26 Mad 440; *Nagindas v Ghelabhai*, (1920) 44 Bom 673 (insolvency of railway servant); *Gauri Shankar v RJ De Cruz*, AIR 1927 Oudh 22 : (1926) 1 Luck 313 (insolvency of railway servant); *Walchand v Williams*, AIR 1935 Bom 396 : (1935) 59 Bom 517; *Joseph Benjamin Bonjour v Official Assignee*, AIR 1956 Mad 283; *Central Bank v MV Rao*, AIR 1949 Cal 144 : (1945) 1 Cal 277.

the Reserve Bank with instructions to convert them into sterling and to transmit the amounts to be subscriber's bank in England, it was held that the Reserve Bank was the agent of the Railway Administration and not of the subscriber and therefore the monies remained under the control of the Railways as Provident Fund money and was exempt from attachment.[1617] The same principle applies to the case of an optional subscriber who cannot, under the rules, demand payment of his deposits at his option.[1618] Under section 3(2) of the Provident Funds Acts 1925 any sum standing to the credit of a subscriber vests on his death in the dependent to whom it is payable under the rules of the Fund; it cannot therefore be attached as assets of the deceased.[1619] Gratuity payable to government pensioner cannot be attached, even in enforcement of an order relating to maintenance. Even if the pensioner has not raised the objection, the attaching creditor cannot get the benefit of the attachment.[1620]

Annual contribution of an employee to the Provident Fund cannot be deducted from the salary, for calculating the attachable portion of the salary.[1621]

Exemption of Provident Fund amount from attachment under section 60(1)(k) is available, only so long as the amount is in the hands of the trustees. The exemption does not survive after the amount is received by the employee entitled to the same.[1622]

A sum standing to the credit of a subscriber under a benefit fund scheme which the company may or may not pay, in its uncontrolled discretion, is not a debt which can be attached.[1623]

A compulsory deposit is not liable to be attached under the Criminal Law (Amendment) Ordinance 1944, its provisions being subject to section 60(1).[1624] The Supreme Court has held that contributions to a Provident Fund in which the subscriber has, under the rules, a present interest and over which he has not divested himself of his power of control are not exempt from attachment under this proviso.[1625] Monies payable under an insurance policy on the life of the judgment-debtor are totally exempt from attachment and sale, irrespective of whether the policy matures during the life-time of the assured or whether the money is payable after his death.[1626]

Under the new clause (ka), deposits in funds to which the Public Provident Fund Act, 1968 applies and which are, under that Act, exempted from attachment are under this section also exempt. So also, the moneys payable under an insurance policy on the life of the judgment-debtor. Under another new clause (kc) the interest of a tenant of a residential building, to which a Rent Act applies, is saved from attachment, such interest being a personal interest of a statutory tenant. The proviso to section 60(1) of the CPC enumerates the properties that are not liable for attachment. As per clause (1), allowances forming part of the emoluments notified by the government in the Official Gazette to be exempt from attachment is not attachable. It is not disputed that the government has notified that dearness allowance, city

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1617. *UOI v Radha Kissen*, AIR 1969 SC 762 : (1969) 1 SCC 225.
1618. *Jagannath v Tara*, AIR 1924 Pat 524 : (1924) 3 Pat 74.
1619. *Thaj Mahomed v Balaji*, AIR 1934 Mad 173 : (1934) 57 Mad 440.
1620. *Rangamma v CS Appaji Murthy*, AIR 1989 NOC 52 (Kant).
1621. *Kausalay Devi v Parveen Bankers*, AIR 1980 Ker 148.
1622. *Madhavan Nambiar v Syndicate Bank*, AIR 1991 Ker 367.
1623. *Jiwan Hansraj v Irrawaddy Flotilla Co*, AIR 1933 Rang 23 : (1933) 11 Rang 116.
1624. *NK Banerji v State of Bihar*, AIR 1961 Pat 384.
1625. *Muktilal v Trustees of the Provident Fund of the Tin Plate Co of India Ltd*, AIR 1956 SC 336 : (1956) SCR 100.
1626. *Federal Bank Ltd v Indira Devi Kunjamma*, AIR 1986 Bom 101.

contributory allowance and house rent allowance are exempt from attachment. Therefore, the said amount must be excluded in deciding the attachable portion of the salary.[1627]

[s 60.30] Clause (kb)

The legislative object behind this exemption protected under proviso (kb) to section 60(1), CPC, is that the money payable under the policy of insurance of life of a policy holder is intended to give some security to his heirs and legal representatives. Such legislative object, cannot, in any way be diluted, merely because the policy amount sought to be attached is that of the judgment debtor or otherwise; as otherwise, the intention of the legislature to provide security to the legal representatives of the policy holder would be defeated.[1628]

Proviso (kb) to section 60(1) CPC, no doubt, exempts all money payable under the policy of insurance under the life of the judgment debtor, but the policy amount under life insurance scheme only confers a right not on the policy holder but on his legal representatives. Therefore, moneys payable under the insurance policy of a judgment debtor are entirely exempted from the attachment and sale, irrespective of the circumstances as to whether the insurance policy matures during the life time of the assured or the moneys become payable after the death of the judgment debtor.[1629]

[s 60.31] Interest of a Lessee in a Residential Building

Section 60 of the CPC, sets out the properties which are not liable to attachment and sale. The exclusion of properties refers specifically to residential premises under section 60(1) (kc) and not to premises used for non-residential purposes.[1630]

[s 60.32] Clause (l): Allowances of a government servant

Under the Code of Civil Procedure, 1882, it had been held that, in the absences of any specific provision, allowances (being less than salary) of a public officer, while absent from duty, stood on the same footing as the salary of a public officer while on duty and were exempt from attachment, only to the extent to which salary was exempt, and no more. Thus, where an officer was on sick leave on half pay which was Rs 150, it was held that the decree-holder could attach, only Rs 75.[1631] In 1908, when the new CPC was enacted, clause (h), as it then stood, was enacted so that the whole of Rs 150 was exempted from attachment. The present clause makes the exemption depend upon the terms of a notification by the appropriate government and by *Explanation 2*, any allowance declared exempt from attachment, is excluded from the definition of the term salary. A plain reading of the provisions of section 60(1)(l) shows that in order that an allowance forming part of the emoluments be exempt from attachment, two conditions must be satisfied *viz.*:

(i) allowance must be payable to a government servant or servant of a railway company or a local authority; and

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1627. *AB Sasidharan v KCT S Sadhaka Sangham*, AIR 1995 Ker 153.
1628. *Regional Manager, LIC of India v John Bosco*, AIR 2002 Mad 348.
1629. *Regional Manager, LIC of India v John Bosco*, AIR 2002 Mad 348; *Sarbiti Devi v Usha Devi*, AIR 1984 SC 346.
1630. *Union Bank of India v Mittersain Rup Chand*, AIR 1995 Bom 371 (DB).
1631. *Beard v Egertton*, (1883) 6 Mad 179.

(ii) the said allowance must be exempted from attachment by the appropriate government by issue of an appropriate notification in the Official Gazette, or must be a subsistence grant or allowance to any such servant.[1632]

The Explanation (1) inserted by Act 14 of 1976 states that the money payable in relation to the matters mentioned in clauses (g), (h), (i), (ia), (j), (l) and (o) are exempted from attachment or sale whether before or after they are actually payable. In other words, the amounts payable, namely, subsistence grant or allowance payable to the person under suspension till it is in the hands of the employer is exempt. The words used is "actually payable" and not "paid". Therefore, there is a clear indication that the above amounts in the hands of the employer is exempted from attachment.[1633]

[s 60.33] Clause (m): Expectancy of Succession etc.

The interest, which a Hindu reversioner has in the immovable property of a deceased Hindu, on the death of the deceased's widow, is "an expectancy of succession by survivorship"; in other words, it is an interest expectant on the widow's death to which the reversioner can only succeed if he survives the widow.[1634] The interest in the pre-empted property of a successful pre-emptor who has not yet paid the pre-emptive price fixed by his decree, is a merely contingent interest which cannot be attached.[1635] But the interest which a coparcener has in money awarded to him on partition, is a vested interest although payment is deferred.[1636] It has been held by the Privy Council that the words "or other merely contingent or possible right or interest" in this sub-clause, cannot be construed as applying only to such possible rights or interest as are *ejusdem generis* with an expectancy of succession by survivorship, that is to say, with a *spes successionis.*[1637] A contingent interest, though transferable, is not attachable; it is only vested interests that can be attached.[1638] Thus, where a certain portion of purchase price in respect of a house was left reserved, till certain conditions were satisfied, the liability to pay the reserved balance becomes attachable, once those conditions are satisfied.[1639]

[s 60.34] Clause (n): Right to Future Maintenance

If *A* is entitled to a monthly maintenance allowance under an agreement, the allowance cannot be attached until after it has become due.[1640] It cannot be attached prospectively, that is, before it has become due.[1641] So long as maintenance granted under section 488 of the Code of Criminal Procedure, 1973 is not realised it continues to be a right of future maintenance.[1642] In other words, arrears of maintenances may be attached, but not the right to future maintenance. Where the judgment-debtor was entitled under his father's will to a monthly allowance and it was claimed to be for maintenance, it was held that the decree-holder was entitled to attach

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1632. *AB Vorkady v United Bank of India*, AIR 1996 Kant 79.
1633. *Velraj v Muthiah*, AIR 2008 Mad 239 : 2008 (5) Mad LJ 1307.
1634. *Ram Chunder v Dhurmo*, (1871) 15 WR 17 (FB); *Anandibai v Rajaram*, (1898) 22 Bom 984; *Pestonji v Patrick*, AIR 1936 Sau 65.
1635. *Gorak Singh v Sidh Gopal*, (1906) 28 All 383. See O XX, rule 14.
1636. *Alagirisami v Lakshmanan*, AIR 1926 Mad 371 : (1926) 50 Mad LJ 79.
1637. *Pestonji v Anderson*, AIR 1939 PC 6 : (1939) Bom 36.
1638. *Rajes Kanta Roy v Srimathi Shanti Debi*, AIR 1957 SC 255 : (1957) SCR 77.
1639. *Basant Lall v Dwarka Prasad*, AIR 1978 All 436.
1640. *Kasheeshuree v Greesh Chunder*, (1866) 6 WR 64 Mis; *Bala Prasad v Ajodhya Prasad*, AIR 1952 Pat 78.
1641. *Haridas v Baroda Kishore*, (1900) 27 Cal 38; *Asad Ali Haidar Ali*, (1911) 38 Cal 13; *Palikandy v Krishnan*, (1917) 40 Mad 302.
1642. *Shiela Rani v Durga Parshad*, AIR 1965 P&H 79 : (1964) ILR 2 Punj 477 : 66 Punj LR 1111.

what had fallen due and become arrears, but not future allowances and that portion; only of the allowances which could be referred to maintenance was exempt and not the excess.[1643] A hereditary grant of an allowance of paddy out of the *melwaram* of certain land is not a right to future maintenance so as to be exempt from attachment under this section.[1644] Where a person holds villages under a deed, which provides that he is to hold them and receive the profits in lieu of maintenance without power of transfer, the interest of such person in the village is a right to future maintenance.[1645] So also, allowances directed to be paid to beneficiaries under a deed of *Wakf* were held to be maintenance not liable to be attached.[1646] Where a widow made a gift of all the properties inherited by her, from her husband to her daughters and they, in turn, settled some properties on her for maintenance, it was held that they could not be attached.[1647] Likewise, when properties allotted for maintenance are transferred, subject to an obligation to maintain the transferor, it was held that they could not be attached.[1648] But the grant of a heritable estate to a *Khorposhdar* in lieu of maintenance is liable to attachment in the absence of the proof of a special custom that his right was not absolute.[1649] But an annuity is not a "right to future maintenance," and it may be attached and sold.[1650] An annuity payable under the UP Zamindari Abolition and Land Reforms Act, 1950 is not exempt from attachment.[1651]

[s 60.35] Objection that Property is not Liable to Attachment and Sale: When to be Raised

A obtains a decree against *B*, and applies for execution of the decree by attachment and sale of certain property belonging to *B*. The property is attached and sold, and purchased by *C*. *B* then applies to the court to set aside the sale on the ground that the property was not liable to attachment and sale. Can the application been entertained? It has been held that if *B* was a party to the order for sale, or was aware of it and did not appeal against it, he is precluded from questioning the propriety of the order after the sale, and he cannot therefore impeach the sale. A judgment-debtor who might have raised objection prior to the sale, but who has refrained from doing so, and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable.[1652] It has been held that; the judgment-debtor can raise this objection that the properties are exempt from attachment under this section at any time before sale[1653] but it is well-settled that the objection is not open when the sale has been confirmed.[1654] But if

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1643. *Chittoory Venkataraju v Thermmana Satiraju*, AIR 1954 Mad 946 : (1954) 2 Mad LJ 324; but see *Official Receiver v Venkayya*, AIR 1960 AP 353 : (1959) 2 Andh WR 524 : (1959) Andh LT 931.
1644. *Ashfaq Md Khan v Nazir Bamma*, AIR 1942 Oudh 410 : (1942) 18 Luck 147; *Vaidyanatha v Eggia*, (1907) 30 Mad 297; *Province of Orissa v Rangamma*, AIR 1950 Ori 220.
1645. *Rajindra Narain v Sunderara Bibi*, AIR 1925 PC 176 : (1925) 52 IA 262; *Bansidhar v Gulab Kuar*, (1894) 16 All 443, in appeal from *Gulab Kuar v Bansidhar*, (1893) 15 All 371 (Hindu widow).
1646. *Zahinuddin Hussain v Chokkey Lal*, AIR 1952 All 662.
1647. *Sampato Kuer v Dulhein Mukha Debi*, AIR 1960 Pat 360.
1648. *Official Receiver v Venkayya*, AIR 1960 AP 353 : (1959) 2 Andh WR 524 : (1959) Andh LT 931.
1649. *Ramprasad v Motiram v Surya Rao*, AIR 1957 AP 215.
1650. *Sundar Bibi v Raj Indar*, AIR 1921 All 120 : (1921) 43 All 617; *Chunni Lal v Jai Gopal*, AIR 1936 Lah 55 : (1936) 17 Lah 378.
1651. *Sarup Lal v Radha Manoharji*, AIR 1975 All 18. See note to section 51 : "Receiver of future maintenance".
1652. *Ramchaibar Misra v Bechu Bhagat*, (1885) 7 All 641; *Umed v Jas Ram*, (1907) 29 All 612; *Pandurang v Krishnaji*, (1904) 28 Bom 125; *Dwarkanath v Tarini Sankar*, (1907) 34 Cal 199; *Lala Ram v Thakur Prasad*, (1918) 40 All 680; *Sabha Ram v Kishan Singh*, AIR 1931 All 112 : (1930) 52 All 1027 : 133 IC 478; *Mahadeo v Khanderao*, AIR 1939 Bom 526 : (1939) ILR 41 Bom LR 1166; but see *Ram Chandar Singh v Sarupa*, AIR 1939 Lah 103 : (1939) Lah 103.
1653. *Kannan v Govindan*, (1960) ILR 2 Ker 234 : (1962) Ker LJ 668 : (1962) Ker LT 675.
1654. *Ramanlal v Shantilal*, AIR 1961 All 178.

B was not aware of the proceedings in attachment of the property, or of the proceedings in connection with the sale thereof, the application to set aside the sale may be entertained even after the sale is confirmed.[1655] The same rule applies where a sale effected by the collector is sought to be set aside on the ground that the property was not ancestral and therefore could not legally be sold by the collector.[1656] Right to object to attachment and right to object to sale are independent of each other. The proviso uses the word "or" the frequent debtor can object even after court has directed issue of warrant. Constructive *res judicata* does not apply in such a case.[1657]

[s 60.36] Waiver: Sub-section (1A)

On the question whether it was open to the judgment-debtor to waive the benefit of the exemptions under the proviso to sub-section (1), the authorities were divided; some holding that they could be waived[1658] and some taking the view that they could not be.[1659] This conflict has, by enacting sub-section (IA), been resolved in favour of the latter view that no such waiver is legal and valid.

[s 60.37] Explanations: (I) – (VI)

In a case to which the provisions of the Amending Act of 1937 did not apply, it was held that there was nothing which restricted the word "salary" to an emolument which was payable monthly or that it had reference to the emolument payable to a man holding a permanent or a semi-permanent employment.[1660] The expression "salary" as defined by Explanation II means the total monthly emoluments excluding allowances exempt from attachment under clause (1). The allowances exempt under clause (1) are first to be deducted from the total emoluments for the purpose of arriving at the salary. That would be the salary out of which, under clauses (i) and (ia), one-third is to be excluded if the decree in execution is one for maintenance.[1661] Dearness and house rent allowances are to be excluded from total emoluments for the attachable portion of the salary.[1662]

Explanations II to VI are definitions which are intended for clarification.

[s 60.38] Application of the Section

This section enacts a rule of procedure. It was accordingly held that a creditor who had obtained a decree prior to the coming into force of the Code of Civil Procedure, 1908 on 25 January 1950 in Rajasthan, could, in execution, attach the salary of a judgment-debtor

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1655. *Durga Charan v Kali Prasanna*, (1899) 26 Cal 727.
1656. *Daulat Singh v Jugal Kishore*, (1900) 22 All 108; see section 69 and Sch III to the Code of Civil Procedure 1908.
1657. *Ram Singh v Bherulal*, AIR 1982 MP 95.
1658. *Rajendra Kanwar v Chetanlal*, AIR 1940 Lah 65; *Uzir Biswas v Hara Dev*, AIR 1920 Cal 424; *Chittarmal v Ramdevi*, AIR 1927 Pat 233; *Mahadeo v Dhamukal*, AIR 1946 All 432; *Bala Prasad v Ajodhya Prasad*, AIR 1952 Pat 78 : ILR 30 Pat 1146.
1659. *Subramanya v Satyanathan*, AIR 1942 Mad 391 : (1942) ILR Mad 640 : 203 IC 200; *MSM Rly v Rupchand*, AIR 1950 Bom 155 : (1950) Bom 185; *Ram Naresh v Ganesh Mistri*, AIR 1952 All 680; *Indesry v Parasuram*, (1961) Raj LW 261.
1660. *Bansi Lal v Mohammad Hafiz*, AIR 1939 Pat 77 : (1939) 17 Pat 706.
1661. *Kasturi Radhakrishna Murty v K Lakshminarasamma*, AIR 1972 AP 256.
1662. *Kaushalya Devi v Praveen Bankers*, AIR 1980 Ker 148; *AB Sasidharan v Kootukadu Cherupuskas*, AIR 1995 Ker 152; Central Government Compilation of Treasury Rules, vol 1, rule 225, note 2, referred to.

only to the extent provided in this section.[1663] On the same principle, it was held that further proceedings in an execution petition which had been filed in 1951 but were pending till 1956, could be taken, only in accordance with proviso (i) as amended in 1956.[1664] But a single judge of the Allahabad High Court has, in *Sheo Baran Singh v Mohan Lal*,[1665] taken a contrary view and has observed that the Amendment Act 36 of 1963 which raised the exemption limit of salary from Rs 100 to Rs 200 was not retrospective in as much as clauses (a) to (i) of section 60(1) were not procedural and that they conferred substantial rights on judgment-debtors protecting certain classes of property from attachment. On this reasoning, the high court rejected the judgment-debtor's contention that on the enactment of the Amendment Act, attachment of his salary which was above Rs 100 but below Rs 200, which was levied before the amendment, should be lifted.

[s 60.39] Crown Debts

Debts due to the state have no priority under this section.[1666]

[s 60.40] State Amendment

Andhra Pradesh.—In its application to the Andhra area of the State of Andhra Pradesh in clause (g) of the proviso to sub-section (1) of section 60, the words of a local authority' shall be inserted after the words "stipends and gratuities allowed to the pensioners of the Government"—Code of Civil Procedure (Andhra Pradesh) (Andhra Area) Amendment Act, 1950.

Note.—The title of Madras Amendment Act (XXXIV of 1950) has thus been amended by the Andhra Pradesh Act (IX of 1961).

In its application to the whole of the State of Andhra Pradesh, in the proviso to sub-section (1) of section 60—

(i) after clause (k) the following clause shall be inserted, namely:

(kk) amounts payable under policies issued in pursuance of the rules for the Andhra Pradesh Government Life Insurance and Provident Fund.

(ii) after explanation 2, the following explanation shall be inserted, namely:

Explanation 2A.—Where any sum payable to a government servant, is exempt from attachment, under the provisions of clause (kk), such sum shall remain exempt from attachment notwithstanding the fact that owing to the death of the government servant it is payable to some other person.'—Code of Civil Procedure (Andhra Pradesh) Telengana Area, Amendment Act (XI of 1953) originally the Code of Civil Procedure (Hyderabad Amendment) Act (XI of 1953). This Act has been amended and extended to the entire State of Andhra Pradesh by the Code of Civil Procedure (Andhra Pradesh Unification and Amendment) Act (X of 1962).

The following amendment were made by Andhra Pradesh Act 24 of 1979, section 2 (dated 17 September 1979):

(i) In the proviso to section 60(1) after clause (kk) insert as under—

(kkk) amounts payable under the Andhra Pradesh State Employees Family Benefit Fund Rules;"

(ii) In Explanation 2A, for the expression "clause (kk)" substitute the expression "clauses (kk) and (kkk)."

1663. *Abdul Gafur v Ram Narain*, AIR 1951 Raj 926.
1664. *Pralhad v Mst Sakhu Bai*, AIR 1961 Bom 142.
1665. *Sheo Baran Singh v Mohan Lal*, AIR 1968 All 147.
1666. *Murli Tahilram v Asomal & Co*, AIR 1955 Cal 423 : 59 Cal WN 701.

In its application to the Hyderabad area of the State of Andhra Pradesh in the proviso to sub-section (i) of section 60—

(i) after clause (g) the following clause shall be inserted, namely:

(gg) pension granted or continued by the Central Government, the Government of Hyderabad or any other State Government on account of past services or present infirmities or as a compassionate allowance, and;

(ii) in Expln 2A, for the word, brackets and letter "clause (kk)" the words, "brackets and letters" clause (gg) or clause (kk)' shall be substituted—Andhra Pradesh Act (XVIII of 1953), originally the Code of Civil Procedure (Hyderabad Second Amendment) Act (18 of 1953).

Gujarat—In sub-section (i) of section 60—

(a) after clause (g) of the proviso, the following new clause shall be inserted, namely:

(gg) stipends and gratuities allowed to pensioners of a local authority.

(b) in Explanation I, after the brackets and letter "(g)" the brackets and letters "(gg)" shall be inserted.

Himachal Pradesh—In section 60, sub-section (1).

(i) at the end of clause (c), add the following words, namely:

or compensation paid for such houses and buildings (including compensation for the materials and the sites and the land referred to above) acquired for a public purpose; and

(ii) after clause (c) insert the following, namely:

(cc) compensation paid for agricultural lands belonging to agriculturists and acquired for a public purpose;

[Code of Civil Procedure (Himachal Pradesh Amendment) Act, 1956 (6 of 1956), section 2 w.e.f. 17-5-1956].

Karnataka (previously Mysore)—In its application to the State of Karnataka except Bellary district, in the proviso to sub-section (1) of section 60 after clause (p), the following clause shall be added, namely:

(pp) where the judgment-debtor is a servant of the State Government who has insured his life under the rules in force relating to the Official Branch of the Mysore Government Life Insurance Department—

(i) in the case of insurances effected prior to the ninth day of May 1911, the whole of the bonus payable or paid thereunder to such servant, or in the event of his death to his nominee or other person or persons entitled to such bonus under the said rules; and

(ii) in the case of insurance effected or after the ninth day of May 1911, and such insurance is compulsory, then the bonus in respect of the compulsory premium payable or paid to such servant, or in the event of his death to his nominee or other person or persons entitled to such bonus under the said rules.

—Code of Civil Procedure [Mysore Amendment Act (XIV of 1952) (w.e.f. 1-4- 1951)].

Kerala—In clause (g) of the proviso to sub-section (1), after the words "stipends and gratuities allowed to pensioners of the Government", insert the words "or of a local authority"—Kerala Act 13 of 1957, section 3.

Maharashtra—In sub-section (1) of section 60—

(a) after clause (g) of the proviso, the following new clause shall be inserted, namely:

(gg) in the Hyderabad area of the State of Maharashtra, any pension granted or continued by the Central Government or the Government of the former

State of Hyderabad or any other State Government, on account of past services or present infirmities or as a compassionate allowance, which is not covered by cl (g);

Maharashtra Act No. LXV of 1977, section 6(a);

(b) in its application to the Hyderabad area of the State of Bombay—after clause (*kb*), insert the following:

(kbb) the amounts payable under the policies issued in pursuance of the Rules for the Hyderabad State Life Insurances and Provident Fund, which are not covered under clause (ka) or (kb).

Explanation: Where any sum payable to a Government servant is exempt from attachment under this clause or clause (gg), such sum shall remain exempt from attachment, notwithstanding the fact that owing to the death of the Government servant the sum is payables to some other person;

Maharashtra Act No. LXV of 1977, section 6(b).

Punjab and Haryana—In its application to the State of Punjab including the Pepsu area thereof as it was immediately before 1 November 1956—

(a) In sub-section (1), in the proviso:

(i) In clause (c), for the words "occupied by *him*" the following words shall be deemed to be substituted, *viz.*:

not proved by the decree-holder to have been let out on rent or let to persons other than his father, mother, wife, son, daughter, daughter-in-law, brother, sister or other dependants or left vacant for a period of a year or more.

(ii) After clause (c), the following clauses shall be deemed to be inserted, *viz*:

(cc) milch animals, whether in milk or in calf, kids, animals used for the purposes of transport or draught cart and open spaces or enclosures belonging to an agriculturist and required for use in case of need for tying cattle parking carts or stacking fodder or manure;

(ccc) one main residential house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him: provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered.

Vide Punjab Acts VII of 1934, XII of 1940 and VI of 1942 and Act XLIV of 1960.[1667]

(b) After sub-section (2), the following sub-sections shall be deemed to be inserted, *viz.*:

(3) Notwithstanding any other law for the time being in force an agreement by which a debtor agrees to waive any benefit of any exemption under this section shall be void.

(4) For the purposes of this section the word "agriculturist" shall include every person whether as owner, tenant, partner or agricultural labourer who depends for his livelihood mainly on income from agricultural land as defined in the Punjab Alienation of Land Act, 1900.

(5) Every member of a tribe notified as agricultural under the Punjab Alienation of Land Act 1900, and every member of a scheduled caste shall be presumed to be an agriculturist until the contrary is proved.

(6) No order for attachment shall be made unless the court is satisfied that the property sought to be attached is not exempt from attachment or sale.

1667. *Vide Bhan v Kapoor Chand*, AIR 1967 P&H 53 : (1966) HR 2 Punj 400 : 68 Punj LR 591; *Yogesh Sharma v Devi Dayal Jain*, AIR 1977 Del 270.

Punjab Relief of Indebtedness Act, VII of 1934, section 35 (as amended by Punjab Acts 12 of 1940 and 6 of 1942 and 44 of 1960).

For decisions on the Punjab amendment, see the under mentioned cases.[1668] Section 60 of the CPC applies to attachment and sale in execution of a decree of a civil court only and has no application to an attachment and sale under any other statute unless made expressly applicable thereto. The Punjab Land Revenue Act contains a complete code providing for the modes and machinery for recovery of arrears of revenue. There is no provision in this Act which makes the provisions of section 60, of the CPC applicable to attachment, and sale for recovery of revenue under the Act, nor is there any provision in the Act corresponding to clause (ccc) of the proviso to section 60(1), CPC. The properties, if any, which are exempt from attachment and sale in revenue recovery proceedings under the said Act, would be only such properties, as are so exempted by the said Act.[1669]

Rajasthan—In the proviso to sub-section (1) of section 60—

(i) in clause (b), after the word "agriculturist", the words "his milch cattle and those likely to calve within two years" shall be inserted.

— Rajasthan Act XIX of 1958.

(ii) after clause (k), insert the following:

(kk) moneys payable under Life Insurances certificates issued in pursuance of the Rajasthan Government Servants Insurance Rules 1953;

(iii) after expln 3, insert the following explanation:

Explanation IV—Where any money payable to a Government servant of the state is exempt from attachment under the provision contained in clause (kk), such money shall remain exempt from attachment notwithstanding the fact that owing to the death of a Government servant it is payable to some other person.

— Rajasthan Act XVI of 1957.

Tamil Nadu—In its application to the State of Madras including the Kanyakumari district and Shencottah *taluk* of the Tirunelveli district, and the added territories the amendment made in section 60 is the same as that of Kerala — Code of Civil Procedure (Madras Amendment) Act 1950, section 2 (wef 2 January, 1951) and Madras Act XXII of 1957, section 3 (18 December, 1957) and Mad (AT) ALO, 1961 [wef 1 April 1960].

Uttar Pradesh—Add the following Explanation 1A after Explanation 1 in section 60, sub-section (1):

*Explanation 1*A—Particulars mentioned in clause (c) are exempt from sale in execution of a decree whether passed before or after the commencement of the Code of Civil Procedure (United Provinces) (Amendment) Act, 1948, for enforcement of a mortgage or charge thereon.

—Code of Civil Procedure (UP) (Amendment) Act, 1948 (UP Act XXXV of 1948), section 2 (28 August, 1948).

The following allowances payable to any public officer in the service of the UP Government shall be exempt from attachment by order of a court, namely:

1668. *Agha Jafar Ali Khan v Radha Kishan*, AIR 1951 P&H 433; *Firm Ganga Ram v Firm Jai Ram*, AIR 1957 P&H 293 : (1957) ILR Punj 1558; *Sampat Kumar v Nathu Ram*, AIR 1958 P&H 326 : (1958) ILR Punj 1445; *Narain Devi v Durga Devi*, AIR 1959 P&H 324 : 61 Punj LR 219; *Ram Lal v Piaral Lal*, AIR 1973 SC 2124 : (1973) 2 SCC 192.

1669. *State of Punjab v Dina Nath*, (1984) 1 SCC 137; *Kiran Bala v Surinder Kumar*, AIR 1996 SC 2094 : (1996) 4 SCC 372.

(i) All kinds of travelling allowances.

(ii) All kinds of conveyance allowances.

(iii) All allowances granted for meeting the cost of

(a) uniform; and

(b) rations.

(iv) All allowances granted as compensation for higher cost of living in localities considered by Government to be expensive localities including hill stations.

(v) All house rent allowances.

UP Govt (Judicial Department) Notification No 2156 VII-362 dated 17 January 1941.

(vi) All allowances granted to provide relief against increased cost of living.

UP Govt (Judl) Dept Notification No 2692/Vll dated 15 July 1949.

Union Territory (Chandigarh)—In its application to the Union Territory of Chandigarh, amendments in the section are the same as in Punjab—Punjab Reorganisation Act, 1966, section 88 (1 November 1966).

Union Territory (Pondicherry)—In its application to the Union Territory of Pondicherry, amendment in the section is the same as in Tamil Nadu-Pondicherry (Extension of Laws) Act, 1968, section 3(i) and Schedule, Pt 11 (w.e.f. 5-9-1968).

[S 61] Partial exemption of agricultural produce.—The State Government [1670][* * *] may, by general or special order published in the Official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the State Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

[s 61.1] Be Exempted from Liability to Attachment or Sale

These words are wide enough to include agricultural produce which has been hypothecated.[1671]

[S 62] Seizure of property in dwelling-house.—(1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

1670. The words "with the previous sanction of the G.G. in C" omitted by Act 38 of 1920, section 2 and Sch I, Pt I.

1671. See section 60, clause (b). As to attachment of agricultural produce, see O 21, rules 44–45. As to sale of such produce, see O 21, rules 74–75.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to present its clandestine removal.

SYNOPSIS

[s 62.1] High Court Amendment 901
[s 62.2] Changes introduced in the section 901
[s 62.3] Dwelling-house..... 901

[s 62.1] High Court Amendment

Calcutta.—In sub-rule (2) omit the words "unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto", after the words "be broken open" and before the words" but when the person".

Add the proviso after sub-rule (2)—

Provided that the Court may, after service of such notice as it thinks proper, direct the breaking open of an outer door of a dwelling-house in possession of the judgment-debtor who prevents access thereto *vide* Cal Gaz Pt I, dated 20 April 1967.

[s 62.2] Changes introduced in the section

This section corresponds with section 271 of the Code of Civil Procedure, 1882, except that the prohibition against breaking open any outer door of a dwelling-house has been relaxed where the dwelling-house is in the occupancy of the judgment-debtor.[1672]

[s 62.3] Dwelling-house

A shop or a godown is not a "dwelling-house" within the meaning of this section.[1673]

[S 63] Property attached in execution of decrees of several Courts.—(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Courts under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

[1674][*Explanation.*—For the purposes of sub-section (2), "proceeding taken by a Court" does not include an order allowing, to a decree-holder who has purchased property at a sale held in execution of a decree, set-off to the extent of the purchase price payable by him.]

1672. See note to section 55 : "Breaking open of outer door".
1673. *Damodar v Ishwar*, (1879) ILR 3 Bom 89.
1674. Inserted by CPC (Amendment) Act 104 of 1976, section 24 (w.e.f. 1-2-1977).

SYNOPSIS

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[s 63.1] High Court Amendment

Calcutta.—Add as sub-section (3)—

(3) For the purposes of this section the Court of Small Causes of Calcutta shall be deemed to be of the same grade as a district court. *vide* Cal Gaz Pt I, dated 20 April 1967.

[s 63.2] Changes Introduced in the Section

This section corresponds with section 285 of the Code of Civil Procedure, 1882 except for the following particulars:

(i) The words "is under attachment" have been substituted for the words 'has been attached'. (See notes below, under the head "Is under attachment").

(ii) Sub-section (2).[1675]

[s 63.3] Object of the Section

The object of this section is to prevent different claims arising out of the attachment and sale of the same property by different courts; in other words, it is to prevent confusion in the execution of decrees.[1676] The principle underlying this section is the principle of convenience, of avoiding multiplicity of proceedings and of fair distribution and not the principle of exclusion.[1677]

[s 63.4] Application of the Section

A attaches certain property in execution of a decree obtained by him against *B* in the small causes court at Surat. The same property is subsequently attached by *C* in execution of a decree obtained against *B* in the court of the subordinate judge at Surat. The court of the subordinate judge is a court of higher grade than the small causes court, and it is, therefore, the proper court under this section for deciding objections to the attachment, for determining claims made to the property, and for ordering the sale thereof and receiving the sale proceeds.[1678]

The section does not require that the higher court should have appellate or revisional jurisdiction over the other court. It has reference only to the gradation of courts. The subordinate court is a court of higher grade in relation to the court of the district *munsif*.[1679] In Rajasthan, the court of the civil judge is of a grade higher than that of the additional *munsif*.[1680]

1675. See notes below.
1676. *Ram Narain v Mina*, (1898) ILR 25 Cal 46; *Bykant Nath v Rajendro Narain*, (1886) 12 Cal 333.
1677. *Surendra Kumar v Jamini Kumar*, AIR 1936 Cal 723 : (1937) 1 Cal 391; *Ramchandra v Digambar Tejiram*, AIR 1960 Bom 230 : (1960) ILR Bom 8 : 61 Bom LR 1665 (FB).
1678. *Turmuklal v Kalyandas*, (1895) 19 Bom 127; *Ballu Ram v Raghubar*, (1894) 16 All 11; *Govidbux v Azim Khan*, AIR 1963 Raj 224.
1679. *Gouri Shankar v Kasi Prasad*, AIR 1957 Cal 648 : 61 Cal WN 725.
1680. *Daulat Singh v Karni Dan*, AIR 1968 Raj 296.

The section casts upon the court of the higher grade, the duty of distributing the sale proceeds and thereby, in effect, executing not only its own decree but the decree of the inferior courts, irrespective of the fact that applications for execution of the decrees are not made to the court of the higher grade but are made to the courts of the lower grade before the receipt of the assets.[1681] In a case to which this section applies, the receipt of assets by one of the courts contemplated in the section, amounts to a constructive receipt of assets by each of such courts.[1682] Decree-holder obtained attachment before judgment, in respect of certain immovable property. But he did not proceed against that property in execution proceedings. It was held, that he would not be entitled to call in aid section 63, for claiming rateable distribution when the assets were brought to sale in another court.[1683]

[s 63.5] Sub-section (2)

This sub-section was added in 1908. It declares in effect that a proceeding in execution shall not be deemed to be invalid merely because it was taken by a court which, having regard to sub-section (1), ought not to have taken it. Under the Code of Civil Procedure, 1882, there was a conflict of decisions on the question whether the rule contained in section 285 of that Code [now sub-section (1)] was a rule of procedure only or whether it affected jurisdiction. The High Courts of Calcutta,[1684] Bombay,[1685] and Madras,[1686] held that the rule was merely a rule of procedure, and did not oust the jurisdiction of the inferior court in proceedings in execution of its own decree. On the other hand, the High Court of Allahabad held that the section affected jurisdiction, that is to say, it took away the jurisdiction of the inferior court in the several matters specified in the section.[1687] The result was that where a sale was effected by a court of lower grade in a case where it ought to have been effected by a court of higher grade, the sale according to the Calcutta, Bombay and Madras decisions, was not for that reason invalid, but, according to the Allahabad decisions, it was absolutely void as one made without jurisdiction. Sub-section (2) gives effect to the Calcutta, Bombay and Madras decisions.[1688] The term "court" here means a court to which the CPC applies. The Registrar of Co-operative Societies is not a court, although an attachment order passed by him has the same effect as the one by a civil court.[1689]

There is yet another point which may be considered in the form of an illustration. *A* obtains a decree against *B* in the court of a subordinate judge. In execution of the decree, certain property belonging to *B* is attached by the subordinate judge's court. *C* obtains a decree against *B* in a district court. The same property is then attached by the district court in execution of *C*'s decree. The property is sold by the subordinate judge in execution of *A*'s decree, although the

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1681. *Dhirendra Rao v Virbhadrappa*, AIR 1935 Bom 176 (1935) 59 Bom 310; *Thanmull v KKrishnaswami*, AIR 1935 Mad 988.
1682. *Thanmull v Krishnaswami*, AIR 1935 Mad 988; *Simla Banking & Industrial Co Ltd, Lahore v Indo-Swiss Trading Co. Ltd, Calcutta*, AIR 1938 Lah 754.
1683. *K Suryavati v Suryakantam*, AIR 1984 AP 227.
1684. *Bykant Nath v Rajendro Narain*, (1886) 12 Cal 333; *Ram Narain v Mina*, (1898) 25 Cal 46; *Gopi Chand v Kasimunneesa*, (1907) 34 Cal 836.
1685. *Abdul Karim v Thakordas*, (1898) 22 Bom 88; *Turmuklal v Kalyandas*, (1895) 19 Bom 127; *Patel Naranji v Haridas*, (1894) 18 Bom 458.
1686. *Kunhayan v Ithukutti*, (1899) 22 Mad 295.
1687. *Chiranji v Jawahir*, (1904) 26 All 538; *Har Prasad v Jagan Lal*, (1905) 27 All 56; *Durpati v Bibi Ramrach Pal*, (1909) 31 All 527.
1688. *Srinivasachariar v Appavoo*, AIR 1924 Mad 889 : (1924) 47 Mad LJ 720; *Giris v Sri Krishna*, AIR 1924 Cal 168 : (1923) 38 Cal LJ 266; *Veeraya v Veeraraghavayya*, AIR 1961 AP 298 : (1961) 1 Andh WR 218.
1689. *Profulla Chandra v Calcuttal Credit Corp*, AIR 1965 Assam 21.

proper court to sell the property is the district court, and it is purchased by *X*. Subsequently, the same property is sold by the district court in execution of *C*'s decree, and it is purchased by *Y*. Which of the two purchasers has the better title? According to the decision of the Calcutta High Court in *Bykant Nath v Rajendra Narain*,[1690] *X*, the first purchaser, would take an indefeasible title:

(i) if the sale was held by the subordinate judge's court in ignorance of the attachment by the district court; and

(ii) the purchase was made by *X* without notice of the attachment by the district court; but if the sale was held by the subordinate judge's court after notice of the attachment by the district court, or the property was purchased by *X* with notice of that attachment, the purchase of *X* would be liable to be defeated by the purchase of *Y*.

According to the decision of the Bombay High Court in *Abdul Karim v Thakordas*,[1691] it was quite enough to give an indefeasible title to *X* if he purchased without notice of the attachment by the district court. The Bombay court did not regard any notice which the inferior court may have of the attachment by the superior court as of any consequence, for the simple reason that the jurisdiction of a court cannot depend upon notice. A similar view was taken by the Madras High Court.[1692] Under the present section, it seems *X* would take an indefeasible title to the property, whether or not he or the subordinate judge's court had notice of the attachment by the district court.

The result, therefore, is that where property is under attachment by two courts of different grades and the property is sold by the court of lower grade in contravention of the provisions of sub-section (1), the sale is not thereby rendered invalid, though the court selling the property and the purchaser at the court of sale may be aware of the irregularity. The course to be adopted by the court of higher grade in such a case is to accept the sale made by the lower court, and to call for the proceeds of the sale and to distribute them rateably amongst all the decree-holders.[1693] Where both the courts are subordinate to the district court, the procedure, according to the Bombay High Court,[1694] is for the party interested to apply to that court to have the sale proceeds transferred to the court of higher grade; according to the Calcutta High Court,[1695] the court of higher grade should move the district court for that purpose. The Bombay High Court has held that it is competent to the petitioner to apply to the court of higher grade for a transfer of the sale proceeds to that court and that court is competent to make the order.[1696] If the court of the lower grade has given the decree-holder leave to bid and set-off, that according to the Calcutta High Court, is a proceeding which is saved by sub-section (2) and the assets available for rateable distribution are the balance of purchase money after such set-off.[1697] But the other High Courts have taken the view that though the sale itself is valid, the rights of the other decree-holders for rateable distribution under section 73 are not affected by sub-section (2) and the amount of set-off might be required to be produced for distribution

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1690. *Bykant Nath v Rajendra Narain*, (1886) ILR 12 Cal 333.
1691. *Abdul Karim v Thakordas*, (1898) 22 Bom 88.
1692. *Kunhayan v Ithukutti*, (1899) 22 Mad 295.
1693. See *Bykant Nath v Rajendra Narain*, (1896) 12 Cal 333; *Patel Naranji v Haridas*, (1894) 18 Bom 458 : 463; *Nilkanta v Gosto*, (1919) 46 Cal 64; *Karupan v Somasundaram*, AIR 1927 Mad 67 : (1926) 51 Mad 661; *Surendra v Jamini*, AIR 1936 Cal 723 : (1936) 40 Cal WN 1307.
1694. (1894) ILR 18 Bom 458.
1695. *Nilkanta Rai v Gosto Behari Chatterjee*, (1919) ILR 46 Cal 64.
1696. *Deekappa v Chanbasappa*, AIR 1925 Bom 420 : (1925) 49 Bom 655.
1697. *Ahinath v Nipal Chandra*, AIR 1937 Cal 55.

among the decree-holders.[1698] The legislature has now resolved this conflict by enacting the new Explanation which provides that the expression "proceeding taken by a court" does not include an order allowing to a decree-holder set-off to the extent of the purchase price payable by him and thereby accepting the view taken by the majority of the high courts.

If the same property is attached by a *munsif* and by a subordinate judge and is then sold by the *munsif* to *X*, the sale is valid. But, if after the sale, the decree-holder in the subordinate judge's court applies to that court for sale, the question arises whether *X* is entitled to apply to the subordinate judge under section 47 to stop the sale on the ground that the title to the property has passed to him. According to the Madras High Court, he is, the reason given being that he is the "representative" of the judgment-debtor within the meaning of section 47.[1699] According to the Calcutta High Court, he is not, the reason given being that he is not the "representative" of the judgment-debtor.[1700] The question of such an auction-purchaser being a representative or not, can no longer arise in view of the new explanation II to section 47 where under, such a purchaser is deemed to be a party to the suit in which the decree has been passed.

[s 63.6] "Is under attachment"

These words have been substituted for the words "has been attached" to make it clear that the provisions of this section do not apply unless there are two or more attachments existing at the same time.[1701] This section is attracted only when there is more than one attachment, in execution of a decree. An attachment before judgment does not become one in execution of a decree, until a decree is passed and an application for execution is filed. Where, in execution of a decree, a garnishee produced money in the court of the district munsif, who, acting under this section sent the same to the court of the subordinate judge who had passed an order for attachment before judgment. Of the amount, it was held that this section had no application and that the district munsif should have paid the amount to the decree-holder who had obtained the garnishee order.[1702] Where property, which is under attachment, in execution of a decree of a superior court is sold by a court of lower grade in execution of a charge decree, this section can have no application as there is no question of more than one attachment and the sale will be valid; and the superior court cannot pass an order transferring the sale proceeds to itself for distribution among the decree-holders.[1703]

[s 63.7] Decrees of more courts than one

This section applies only as between civil courts of different grades or as between revenue courts of different grades. It does not apply where one decree is that of a civil court and another that of a revenue court. Hence, where the same property is attached by a civil court and a revenue court, and it is sold by the revenue court, the purchaser is entitled to the property and it cannot be sold in execution of the decree of the civil court.[1704]

The High Court of Madras has held that even if the decrees are passed by the same court, still this section will apply. The object of the section is to deal with the several attachments, no

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1698. *Meghraj Easwardar v Corp of Madras*, AIR 1936 Mad 797 : ILR 59 Mad 1028; *Kesara Rao v Moolchand*, AIR 1937 Ngp 393 : (1937) ILR Nag 466; *Vishnu Ram v Bank of Bihar*, AIR 1946 All 291 : (1946) ILR All 346; *Ramchandra v Digambar Tejiramsupra*, wherein, the previous authorities are discussed.
1699. *Srinivasachariar v Appavoo*, AIR 1924 Mad 889 : (1924) 47 Mad LJ 720.
1700. *Mahadeo Lal v Darsan*, (1911) 15 Cal WN 542.
1701. *Stowell v Ajudhia*, (1884) 6 All 255; *Fatima Khatun v Ashananda*, (1939) 1 Cal 488.
1702. *Subramaniam v Pakkiriswami*, AIR 1957 Mad 159 : (1957) 1 Mad LJ 9.
1703. *Surajben v Raichand*, AIR 1963 Guj 140.
1704. *Roshan Lal v Muhammad*, AIR 1921 Lah 142 : (1921) 43 All 612.

matter whether the decrees passed are by the same court or by different courts. The emphasis is upon the word "attachment" and not upon the word "decrees".[1705]

[s 63.8] This Section Cannot be Controlled by Section 38

Where acting under this section, the decree of the court of the lower grade is called up by the court of the higher grade, the latter court has jurisdiction to sell the attached property. This section, if the facts apply, cannot be controlled or governed by section 38.[1706]

[s 63.9] Rateable distribution

See notes to section 73, "court to which application for execution should be made."

[S 64] Private alienation of property after attachment to be void.—[1707][(1)] Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

[1708][(2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.]

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

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1705. *Megraj v Corp of Madras*, AIR 1936 Mad 797 : (1936) 59 Mad 1028.
1706. *Venkata Reddi v Venkataratnam*, AIR 1939 Mad 169 : (1939) ILR Mad 248.
1707. Section 64 renumbered as sub-section (1) by CPC (Amendment) Act, 2002 (22 of 2002), section 3 (w.e.f. 1-7-2002) *vide* Notification. S.O. 604(E), dated 6 June 2002.
1708. Sub-section (2) inserted by CPC (Amendment) Act, 2002 (22 of 2002), section 3 (w.e.f. 1-7-2002) *vide* Notfication SO 604(E), dated 6 June 2002.

[s 64.1] Changes Introduced in the Section

Section 276 of the Code of Civil Procedure, 1882 was as follows:

> When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the-attachment.

The section [new sub-section (1)] differs from the corresponding section 276 of the Code of Civil Procedure 1882, in the following respects:

(i) The words "by actual seizure or by written order duly intimated and made known in manner aforesaid" after the words "where an attachment has been made" in section 276 have been omitted as being mere surplusage.[1709]

(ii) The words "during the continuance of the attachment", which occurred in section 276, have been omitted, and the words "contrary to such attachment" have been substituted for them.[1710]

(iii) The explanation to the section is new.[1711]

Vide the Code of Civil Procedure (Amendment) Act, 2002, by section 3, section 64 was renumbered as sub-section (1) wef 1 July 2002 and a new sub-section (2) was inserted in the section. The sub-section (2) inserted by the Act of 2002 is in the nature of an exception to sub-section (1) and provides that nothing in section 64 shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. It is relevant to mention here that sub-section (1) of section 64 provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payments to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

The object of section 64 is to prevent fraud on decree-holders and to secure the rights of the attaching creditor against the attached property by prohibiting private alteration pending attachment. Merely passing of an order of attachment does not *ipso facto* constitute attachment; it must be followed by a procedure laid down in O XXI. Many a times there is a gap between passing of the order of attachment and actual attachment, which allows a dishonest litigant to prejudice the rights of the attaching creditors by transferring the attached property before the order of attachment could be executed. Where the property sought to be attached is transferred and registered after attachment, the order of attachment prevails over the transfer. The difficulty arises where the property sought to be attached is contracted for such transfer or delivery but is entered into before an order of attachment is executed, and the registration of the transfer takes place after order of attachment is executed.

The Supreme Court in *Vannarakkal Kallathil Sreedharan v Chandramaath Balakrishnan*,[1712] has made the following observations:

> Under a contract of sale entered into before attachment the conveyance after attachment in pursuance of the contract passes on good title in spite of the attachment. ... The

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1709. *Sinnappan v Arunachalam*, (1919) 42 Mad 844. See notes below: "Where an attachment has been made."
1710. See notes below "Contrary to such attachment."
1711. See notes below: "Explanation to the Section, etc."
1712. *Vannarakkal Kallathil Sreedharan v Chandramaath Balakrishnan*, (1990) 3 SCC 291.

agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Though s 64 of the Code of Civil Procedure was intended to protect the attaching creditor, but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore the obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor.

Further the Supreme Court[1713] has observed:

> When the property belonged to the defendant-judgment debtors (vendors) and the sale deed had already been executed by them prior to the attachment before judgment and only its registration remains, then neither the attachment before judgment nor a subsequent attachment or court sale of the property would confer any title by preventing the relation back. The fact that the document of sale had not been registered until after the attachment makes no difference. Even an unregistered document can be received as evidence for purposes mentioned in the proviso to s 49 of the Registration Act. The contention that till registration, the execution, the execution of the sale deed does not confer any rights whatsoever on the vendee cannot be accepted.

The legislature by the insertion of sub-section (2) desired to limit the benefits of the above-mentioned judgments to *bona fide* transfers. In any transaction for transfer or delivery of the property attached, where the contract is executed and registered before attachment, the mischief of sub-section (1) shall not apply. It shall, however, apply to following situation.

(i) Where the property is transferred and registered after attachment.

(ii) Where the property is transferred before attachment but registration takes place after attachment.

The transactions, which fall in the mischief of sub-section (1), are void as against all claims enforceable under the attachment. In the opinion of authors, this amendment is very fair and protects the interest of *bona fide* purchasers as well as that of attaching creditors.

[s 64.2] Object of the Section

A sues *B* for Rs 5,000. *B* owns a house worth Rs 5,000 and he has no other property. *B* may sell or mortgage the house notwithstanding the institution of the suit against him and he may sell or mortgage it even after a decree has been passed against him in the suit, and the sale or mortgage in either case will be perfectly valid and pass a good title to the transferee.[1714] But if the property is attached in execution of the decree, any private transfer of the property by *B* contrary to such attachment shall be void as against all claims enforceable under the attachment.[1715] The object of the section is to prevent fraud on decree-holders,[1716] and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alterations pending attachments.[1717]

1713. *Hamda Ammal v Avadiappa Pathar*, (1991) 1 SCC 715.
1714. *Pullen Chetty v Ramalinga Chetty*, (1870) 5 Mad HCR 368.
1715. *Devi Sahai v Govindrao*, AIR 1965 MP 275; *Kusuma Dei v Malati*, AIR 1969 Ori 195.
1716. *Shivlingappa v Chanbasappa*, (1960) 360 Bom 337, p 339.
1717. *Dinobundhu v Jogman*, (1902) 29 Cal 154 : 29 IA 9; *Supreme General Films Exchange Ltd v Brijnath*, AIR 1975 SC 1810; *PG Munnuswami v PR Panduranga*, AIR 1978 AP 47.

It may be noted that by insertion of sub-section (2) *vide* Amending Act (22 of 2002); the transfer or delivery of property in respect of which there was registered contract before the attachment is immune from the effect of sub-section (1).

[s 64.3] Where An Attachment has been Made

An attachment to render a subsequent alienation invalid must be made in the manner prescribed by the Code of Civil Procedure. Thus, a promissory note must be attached by actual seizure as provided by O XXI, rule 51, and not by the issue of a prohibitory order. The mere issue of a prohibitory order does not amount to an attachment within the meaning of this section.[1718] The same is the position where an injunction is issued, the breach of which may attract punishment, but does not render a completed sale null and void.[1719]

Where monies were due to a judgment-debtor under a contract entered into with the Public Works Department, the provision of law applicable for attachment of the same is O XXI, rule 52, and not O XXI, rule 46; and, where the court issued a notice under rule 52, requesting the officer to hold them subject to his further orders, the attachment is complete and the subsequent assignment thereof by the judgment-debtor is hit by this section.[1720] Similarly, in the case of immovable property, the attachment to render a subsequent alienation invalid must be made in the manner prescribed by O XXI, rule 54; an order for attachment is not enough.[1721] An attachment made under that rule operates as a valid prohibition against alienation from the date on which the necessary proclamation is made and a copy of the order of attachment is affixed as provided by that rule, and not from the date of the order of attachment.[1722] In *Muthiah Chetti v Palanipp*,[1723] Lord Shaw said:

> A fascicules of clauses, beginning at Rule 41 of Order XXI and applicable to 'attachment of property' shows in instance after instance that attachment is a real thing, with a variety of real applications suited to the nature of the property to be attached. These instances go to show that under the Code of Civil Procedure in India the most anxious provisions are enacted in order to prevent a mere order of a court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished. Their Lordships need not repeat in another form these propositions. The *order* is one thing, the *attachment is* another. No property can be declared to be attached unless first the Order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done.

Thus where the order for attachment of immovable property was served on the judgment-debtor and his attorney but the writ of attachment was not served by proclaiming it by beat of drum upon the land before the challenged alienation by the judgment-debtor, it was held

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1718. *Subramania v Chokkalinga*, AIR 1923 Mad 317 : (1923) 46 Mad 415.
1719. *Kusuma Dei v Malati*, AIR 1969 Ori 195.
1720. *Hemraj v Waman Rao*, AIR 1954 MB 378.
1721. *Pokhpal Singh v Kanhaiya Lal*, AIR 1946 All 438 : (1946) ILR All 788; *Nur Ahmad v Altaf Ali*, (1878) 2 All 58; *Ganga Din v Khushali*, (1885) 7 All 709; *Satya Charan v Madhub*, (1905) 9 Cal WN 693; *Ahmad Yar v Bose*, AIR 1925 Lah 483 : (1925) 7 Lah LJ 501; *Bharat Chandra v Gauranga*, AIR 1927 Cal 885 : (1928) 55 Cal 454.
1722. *Romanayakudu v Boya*, (1919) 42 Mad 565 : 50 IC 261; *Sinnappan v Arunachalam*, (1919) 42 Mad 844 (FB); *Mula Ram v Jiwandaram*, AIR 1923 Lah 423 : (1923) 4 Lah 211; *Auru Jogulu v Thammanna*, AIR 1954 Cut 394; *Mahadeo v Janak Singh*, AIR 1954 Bom 251 : (1954) ILR Bom 695; *Jagannath v Kahabir*, AIR 1955 Pat 231; *Venkatasubbarao v Krishnayya*, AIR 1956 AP 59; *Monoharlal v Bengal Immunity Co.*, AIR 1945 Cal 308 : (1945) 1 Cal 601.
1723. *Muthiah Chetti v Palanipp*, AIR 1928 PC 139 : (1928) ILR 51 Mad 349 : 55 IA 256; *Nabadwipchandra v Loke Nath*, AIR 1933 Cal 212 : (1932) 59 Cal 1176.

that the alienation was not affected.[1724] In *Mohammad Akbar Khan v Mian Musharaf*,[1725] the Privy Council held that where there is ample evidence of an attachment, in the absence of any evidence to the contrary, it ought to be presumed that all necessary formalities were complied with.[1726] An injunction restraining alienation of property by the judgment-debtor does not operate as an attachment of the same for the purpose of this section.[1727] In an Allahabad case, the executor sued for the recovery of a debt which was due to the estate of the deceased. The court ordered attachment of the property of the judgment-debtor. It was held that attachment before judgment terminates when the suit is dismissed. Transfer during the subsistence of the attachment is void.[1728] Where a suit is restored after setting aside its dismissal, then interim attachments and other interlocutory orders automatically revive. Any sale of attached property, in the meantime, becomes void under this section.[1729]

[s 64.4] Attachment before Judgment

An alienation of property made after attachment before judgment is void to the same extent, as an alienation made after attachment under a decree.[1730] Section 64 is meant to safeguard the interests of the creditor. It applies to attachment before judgment also. As against the attaching creditor, a sale would not be effective, but, if the order of attachment is withdrawn or the claim of the creditor is otherwise satisfied, the sale deed executed, would convey good title to the transferee. Hence, if a person has purchased the property attached before judgment, the transfer is ineffective and void, as against the interest of the creditor purchaser. Petition for release of the disputed property under O XXI, rule 58 is not maintainable.[1731] The attachment, however, must be made in the manner prescribed by the Code of Civil Procedure, and, in the case of immovable property, as prescribed by O XXI, rule 54.[1732] The High Court of Madras has held that an alienation of property, after it is actually attached, pursuant to an order for attachment before judgment, is void under this section, even though the property was not actually attached in pursuance of the order for attachment before judgment, until after the passing of the decree,[1733] the ground stated being that the validity of an order for attachment before judgment does not depend on the time when the property is actually attached. This decision is of doubtful authority.[1734] Where an order of attachment before judgment was made in accordance with Form No 5 and not under O XXI, rule 54(2), and no objection was raised by the defendant to whom notice was issued, it has been held that an objection that the attachment was not made under proper provision of law is not open subsequently as it does not go to the root of jurisdiction and can be waived and accordingly, an alienation made after such attachment was hit by the section.[1735] Non-affixation of notice in revenue office is not material irregularity and the private sale during attachment will be valid only if shown

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1724. *Monoharalal Bannerjee v Bengal Immunity Co. Ltd*, AIR 1945 Cal 308 : (1944) 49 Cal WN 226.
1725. *Mohammad Akbar Khan v Mian Musharaf*, AIR 1934 PC 217 : (1934) 61 IA 371.
1726. See the Indian Evidence Act 1872, section 114.
1727. *Ram Lakkan v Mahbood Hasan*, AIR 1954 All 422 : (1944) All LJ 118.
1728. *Dhan Singh v Bapoo Ram*, AIR 1981 All 1.
1729. *Nancy Johnydom v Prabhatilal*, (1987) 4 SCC 78.
1730. *Gann v Jangi Lal*, (1899) 26 Cal 531; *Shivlal v Taniram*, AIR 1928 Bom 444 : (1938) 30 Bom LR 1136; *Tarak Nath v Sanat*, AIR 1929 Cal 494 : (1929) 57 Cal 274.
1731. *Rushi Mahakur v Dibya Shankar*, AIR 1988 Ori 145.
1732. *Bharat v Gauranga*, AIR 1927 Cal 885 : (1928) 55 Cal 545; *Venkatasubbarao v Krishnayya*, AIR 1956 AP 59.
1733. *Venkatasubbiah v Venkata Seshaiya*, (1919) 42 Mad 1.
1734. See notes above : "Where an attachment has been made".
1735. *Gaya Thakur v Bhagwat Prasad*, AIR 1963 Pat 286.

that substantial injustice is caused to purchaser.[1736] Where there is a suit for declaration of title and permanent injunction, sale of property in ignorance of temporary injunction is only voidable and not void.[1737] When a suit is dismissed, an attachment before judgment terminates without any order of the court. If the judgment is reversed on appeal or annulled on review, the judgment does not revive the attachment so as to affect alienation shade before the date of such reversal.[1738] In the under mentioned case, the sale by the judgment-debtor to the third party and the sale by the purchaser to another person (the respondent), were affecting during the substance of the attachment and before the dismissal of execution case, section 64 would render the sale void as against the appellant decree-holder.[1739]

[s 64.5] Private Transfer

[It may be noted that after insertion of sub-section (2) by Amendment Act of 2002, the transfer or delivery of property in respect of which there was registered agreement before the attachment is not void. The following text is therefore indicative of the judicial opinion prior to said amendment.]

The expression "private transfer" means a voluntary sale, gift, or mortgage in contravention of the attachment, and not the enforced execution of a conveyances or assignment in obedience to a decree of a court competent to pass it.[1740] The decree may be one on an award,[1741] even though the matters in difference were referred to arbitration without the intervention of the court.[1742] It is only a private transfer that is avoided by the section. A court sale in execution of a decree declaring a charge and delivery of the property by reason thereto is not hit by the section.[1743] Releasing an easement by the dominant owner to the servient owner is a transfer within the meaning of this section.[1744] Where pending a litigation between *A* and *B* as regards a cinema house, *X* filed a suit against *A* and obtained attachment before judgment of the house and thereafter *A* and *B* agreed to treat it as their partnership property and a compromise decree was passed in those terms, it was held that the agreement and the decree had the effects of transferring an interest in favour of *B*, and were hit by this section.[1745]

[s 64.6] Contract for Sale

It may be noted that after insertion of sub-section (2) by the Amendment Act of 2002, the transfer or delivery of property in respect of which there was registered agreement before the attachment is not void. The following text is therefore indicative of the judicial opinion prior to said amendment.

1736. *Peta Thallamma v Padmallu Gopala Krishna Murthy*, AIR 2003 AP 353.
1737. *Prana Krushna v Uma Kanta Panda*, AIR 1989 Ori 148 (DB).
1738. *Dular Singh v Ramchandar*, AIR 1934 All 165.
1739. *Nancy John Lyndon v Prabhati Lal Choudhary*, (1987) 4 SCC 78. See notes to O 38, rule 9.
1740. *Imperial Bank of India v Balasubramania*, AIR 1945 Mad 412; *Qurban Ali v Ashraf Ali*, (1882) 4 All 219; *Shankari Sitaya v Mudaragaddi*, AIR 1924 Mad 610 : (1924) 46 Mad LJ 361; *Lakshman v Ramchandra*, AIR 1932 Bom 301 : (1932) 34 Bom LR 117.
1741. *Saburdas Mahasukram v Gopalji Nandas*, AIR 1943 Bom 283 : 45 Bom LR 526; *Narayana v Biyari*, AIR 1922 Mad 221 : (1922) 45 Mad 103.
1742. *Mohomed Afzal Khan v Abdul Rahman*, AIR 1932 PC 235 : ILR 13 Lah 702 : 59 IA 405.
1743. *Neelacanda v Parameswara Kurup*, AIR 1954 Tr & Coch 176 : (1953) ILR Tr & Coch 396.
1744. *Kristodhone v Nandarani*, (1908) ILR 35 Cal 889.
1745. *Ramakanta v Bhagban Ram*; AIR 1962 Assam 56.

The Calcutta High Court has held that a contract for sale entered into before an attachment does not create any interest or charge which can prevail over the attachment.[1746] In a previous case,[1747] Woodroffe J held that the contractual obligation prevailed over the attachment. This is the view taken by the High Courts of Bombay[1748] and Nagpur.[1749] In a Madras case,[1750] the learned judges said that it does not seem to be sound sense that when a creditor attaches property, which is subject to a particular obligation, he should be able to override it. The attachment will not override the conveyance made in performance of contract of sale prior to the attachment; but will fasten on any purchase money paid after the attachment.[1751] In *Varughese v Ouseph Lonan*,[1752] the High Court of Travancore-Cochin has held, dissenting from the view of Cumming J that where the judgment-debtor sells property subsequent to an attachment but pursuant to an agreement entered into prior to the attachment, the sale is valid and the attachment would take effect only on the purchase money paid by the vendee subsequent to the attachment. Where there is a contract for sale, attachment made thereafter does not affect a prior agreement to sell. Attachment could only fasten on the debtor's right to the unpaid purchase money, according to the Kerala High Court.[1753] The Supreme Court has now held that a conveyance executed after attachment, but in pursuance of pre-attachment agreement, passes good title to the property so conveyed. The reasoning was that a contract for sale creates an obligation to sell and the judgment-debtor cannot be relieved of this obligation by the attachment.[1754]

Order of attachment cannot be considered as a bar to register the document. Sale of the subject property, pending the order of attachment is void only as against the claims enforceable under the order of said attachment and not in respect of other claims. Therefore, the sale of the property, which is under attachment, cannot be said to be illegal where the parties to the transaction have nothing to do with the pending proceedings in which the order of attachment was passed.[1755] Sale certificate has to be registered with proper stamping and has to be returned to the petitioners.[1756]

[s 64.7] Private Transfer[1757] Void Only as Against Claims Enforceable under the Attachment

(i) In execution of a decree obtained by *A* against *B*, certain property belonging to *B* is attached. During the pendency of the attachment, *B* mortgages the property to *C*.

1746. *Tarak Nath v Sanat*, AIR 1929 Cal 494 : (1930) ILR 57 Cal 274.
1747. *Madan Mohan v Rebati Mohan*, (1916) 21 Cal WN 158.
1748. *Basappa v Hanmappa*, AIR 1939 Bom 492 : (1939) 41 Bom LR 943.
1749. *Ghusaram v Parashram*, AIR 1936 Ngp 163 : (1936) ILR Nag 172; *Durga Prasad v Seetla Prasad*, AIR 1940 Oudh 80.
1750. *Venkata Reddi v Yellappa Chetti*, (1917) 38 IC 107.
1751. *Veeraraghavayya v Kamala Devi*, AIR 1935 Mad 193 : (1935) 68 Mad LJ 67; *Veerappa v Venkatarama*, AIR 1935 Mad 872 : (1936) 59 Mad 1. This was also the view of Pearson J in *Tarak Nath v Sanat* 57 Cal 274, where he disagreed with Cumming J in his interpretation of the judgment of Woodroffe J in *Madanmohan v Rebati* 21 Cal WN 158.
1752. *Varughese v Ouseph Lonan*, AIR 1952 Tr & Coch 467 : (1952) Tr & Coch 201.
1753. *Narayanan Nair Ramkrishnan Nair v Zacharia Kuriakose*, AIR 1991 Ker 152.
1754. *KK Sreedharan v C Balakrishnan*, (1990) 1 Scale 519 (SC); *Handa Amual v Aradippa Patkar*, (1991) 1 SCC 715.
1755. *Sabapathi Palanisamy v The Sub Registrar, Avinashi*, WP No.17901 of 2020, decided on 11 December 2020 (Madras High Court); see also, *Karuppanna Gounder v K Manian*.
1756. *Sabapathi Palanisamy v The Sub Registrar, Avinashi*, WP No.17901 of 2020, decided on 11 December 2020 (Madras High Court)
1757. *Anund Lall v Jullodhur*, (1872) 14 Moo Ind App 543; *Dinendronath v Ramkumar*, (1881) 7 Cal 107, 118; *Swarup Chand v Jankiramayya*, AIR 1942 Mad 330 : (1942) 1 Mad LJ 318; *Official Receiver, Muzaffarnagar v Chandra Shekhar*, AIR 1977 All 77.

The property is then sold in execution of the decree and purchased by *D*. Here, the mortgage having been made contrary to the attachment is void as against *A*'s claim, and *D* is entitled to take the property free from the mortgage created by *B*.[1758] This illustration shows the operation of the section.[1759]

(ii) *B*'s property is attached in execution of a money-decree obtained by *A*. While the attachment is pending, *B* sells the property to *C*, who pays off a mortgage prior to *A*'s suit. The property is then sold in execution and is purchased by *D*. The sale to *C* being contrary to the attachment, is void as against *D*. *C* may have a right of subrogation to the prior mortgagee, but that does not give him a right to possession as the mortgage was not usufructuary.[1760]

(iii) *B*'s property is attached in execution of a money-decree obtained by *A* against him. While the attachment is pending, *B* sells the property to *C*, and pays, out of the sale proceeds, the amount of the decree into court and the attachment thereupon ceases (see O XXI, rule 55). The sale to *C* is valid, the decree having been satisfied by payment into court, and there being no claim outstanding which is enforceable under the attachment.[1761] Moreover, an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation contrary to the attachment.[1762]

(iv) In execution of a decree obtained by *A* against *B*, the properties of the latter were attached. *B* then sold them to *C*. The properties were then sold in execution and purchased by *D*. The title of *C* cannot prevail against that of *D* even though he had acquired the interest of the decree-holder prior to sale.[1763]

(v) *A* obtains a decree against *X* and attaches his properties in execution. *B* obtains a decree against *X* and in execution of his decree attaches the same properties, which are then given as security for the decree by *X*. *B* then sells the properties in execution. The sale is not hit by the section, as it is in furtherance of the attachment, as not in enforcement of the security bond.[1764]

(vi) On the same principle, where *A* attaches *B*'s property in execution of a decree obtained by him against *B*, and applications are thereafter made by other decree-holders, *C*, *D* and *E* for rateable distribution without attaching the property in execution of their decrees, and subsequently *B* sells the property to *F* and pays off *A* (the attaching creditor), the other decree-holders, namely *C*, *D* and *E* are not entitled to question the alienation to *F*. In the first place, the alienation can hardly be said to be an alienation contrary to the attachment within the meaning of this section, for the alienation was the means by which the decree in execution of which the attachment was made was satisfied. In the next place, it cannot be said that the claims of *C*, *D* and *E* are "claims for the rateable distribution of assets" within

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1758. *Srinivasa v Vellayan*, AIR 1926 Mad 966 : (1926) 51 Mad LJ 143.
1759. See note below: "Private sale to decree-holder".
1760. *Bijai v Raghunath*, AIR 1926 All 734 : (1926) 48 All 698, on appeal *Bijai v Rudra*, AIR 1929 PC 288 : (1930) 32 Bom LR 144.
1761. *Umesh Chunder v Raj Bullub*, (1882) 8 Cal 279; *Anund Lall v Jullodhur*, (1872) 14 Moo Ind App 543 : 550; *Abdul Rashid v Gappa Lal*, (1898) ILR 20 All 421; *Khushalchand v Nandram*, (1911) 35 Bom 516; *SPLKSM Chettyar v U. Sient*, AIR 1932 Rang 103 : (1932) 10 Rang 199.
1762. *Annamalai v Palamalai*, (1918) 41 Mad 265 : 276 (FB); *Mehar Chand v Joti Prasad*, AIR 1934 All 1057; *Radha Ballabha v Bohra Makhan Lal*, AIR 1937 All 641.
1763. *Dasarathlal v Ananthkumar*, AIR 1951 Ngp 311 : (1951) ILR Nag 416.
1764. *Ramaswami v Muthuveerappa*, AIR 1958 Mad 531.

the meaning of the explanation to the section, for, to bring section 73 [which provides for rateable distribution] into play, certain conditions are necessary, and one of them is that there should be assets held by the court. In the case, now under consideration, no assets came into the hands of the court at all. Therefore, *C, D* and *E* are not entitled to question the alienation by *B* to *F*, and the alienation is perfectly valid.[1765]

(vii) A decree-holder, though entitled to rateable distribution as contemplated by the Explanation to the section, is not entitled to question a private alienation under this section, unless his claim be one "enforceable under the attachment"within the meaning of this section. The "attachment" referred to in this section is the attachment under which the execution sale is made. Therefore, a "claim enforceable under the attachment" means a claim enforceable under the attachment under which the execution sale is made.[1766] A claim, under any other attachment, is not a "claim enforceable under the attachment" within the meaning of this section. The result is that:

(a) if *A* obtains a decree against *B*, and *B*'s property is attached in execution of the decree; and

(b) *B* subsequently alienates the property to *C*; and

(c) the property is thereafter attached and sold in execution of a decree obtained by *D* against *B*, and it is purchased by *F*; and

(d) *C* sues *F* for possession, then:

C's title is to be preferred to *F's* title, and *C* is entitled to possession of the property. *D* cannot object to the alienation to *C*, for the alienation to *C* was prior to his attachment. Nor is *A* entitled to question the alienation, for the sale in execution was not made under his attachment but under *D*'s attachment. The sale having been made under *D*'s attachment, *A*'s claim cannot be said to be a "claim enforceable under the attachment" within the meaning of this section. The result would be the same even if we substitute *A* for *D*, that is, even if the decree-holder in both cases was the same person. This is the effect of the decision of their Lordships of the Privy Council in *Mina Kumari v Bijoy Singh*,[1767] a case under section 276 of the Code of Civil Procedure, 1882 which did not contain the explanation which now occurs at the end of the present section. But the decision proceeded on the assumption that *Sorabji v Govind*,[1768] considered in the notes below was good law, an assumption which involved the proposition now quoted in the explanation. *Mina Kumari*'s case, therefore, would also govern cases under the present section.

If, in the case, put above, the property was sold by the court under *A*'s attachment, instead of *D*'s and *D* had applied for execution before the court received the proceeds of the sale, the alienation to *C* would be void, it being contrary to *A*'s attachment, and further, *D* would be entitled to rateable distribution under section 73.

The attaching decree-holder may agree with a purchaser of the property from the judgment-debtor pending the attachment that he will not bring the property to sale in execution of

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1765. *Annamalai v Palamalai*, (1918) 41 Mad 265 (FB); *Bhupal v Kundan Lal*, AIR 1921 All 45 : (1921) 43 All 399; *Radha Ballabha v Bohra Makhan Lal*, AIR 1937 All 641.
1766. *Annamalai v Palamalai*, (1918) 41 Mad 265 (FB); *Kasherchand v Wasa Begum*, AIR 1937 Ngp 1.
1767. *Mina Kumari v Bijoy Singh*, 44 IA 72.
1768. *Sorabji v Govind*, (1892) ILR 16 Bom 91.

his decree. Such an agreement has the effect of rendering the alienation valid as against the attaching creditor.[1769] The same would follow where there is a waiver by the attaching decree-holder. But such waiver has to be proved by evidence of clear-cut intention.[1770] A lease in contravention of section 64 (i.e., after and during the subsistence of the attachment) is voidable at the instance of the person who has purchased the property in execution. Against such a purchaser, lessee cannot claim the status of the tenant.[1771] A lease created during the subsistence of an attachment in contravention of section 64 is voidable.[1772]

[s 64.8] Contrary to Such Attachment

These words have been substituted for the words, "during the continuance of the attachment", which occurred in section 276 of the Code of Civil Procedure, 1882. The words "during the continuance of the attachment" were too wide, in that, they comprised alienations that could not possibly prejudice the rights of an attaching creditor, as where property is mortgaged by *A* to *B*, and the equity of redemption is subsequently attached at the instance of *C*, in execution of a decree obtained by *C* against *A*, and pending the attachment, the mortgage is transferred by *B* and *A* to *D*. In such a case, the transfer of the mortgage, though made during the continuance of the attachment, cannot prejudice *C*, the attaching creditor, for the effect of the transfer is merely to substitute *D* for *B*. But the transfer having been made 'during the continuance of the attachment', it came literally within the old section 276, though it was not contrary to the attachment, and it was accordingly contended, in a case before the judicial committee under section 276, that the transfer was void as against *C*. But this contention was overruled. Their Lordships held that the object of section 276 was merely to prohibit alterations contrary to the attachment, and that an alienation such as the above by *B* and *A* to *D* cannot, in any sense, be said to be contrary to the attachment.[1773] The words "contrary to the attachment" have now been substituted for the words 'during the continuance of the attachment' and they give effect to the Privy Council ruling, noted above. The object of the section is to safeguard the interest of the judgment-creditors and not to deprive the judgment-debtor, of his interest, in the property under attachment. Therefore, transfer of shares under attachment is void, if it becomes necessary to auction, or otherwise transfer, the attached shares for enforcement of claims. But if the attachment is for any reason raised, the transfer, though made during the continuance of attachment, would be valid.[1774] Similarly, a renewal, though pending the attachment of a mortgage already existing on the property, is not a transfer contrary to the attachment. But if the amount secured by the renewed mortgage exceeds the amount due under the original mortgage at the date of the attachment, the additional security is to that extent void.[1775] If a judgment-debtor transfers property after it has been attached in execution, and the property is then sold in execution, the transfer is void as against the auction-purchaser, even if the auction-purchaser is a surety for the satisfaction of the decree,[1776] but the

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1769. *Gangayya v Venkataramaya*, AIR 1923 Mad 230 : (1923) 44 Mad LJ 80.
1770. *Ramchandra v Ramchandra*, AIR 1970 Ori 164.
1771. *Om Prakash Garg v Ganga Sahu*, (1981) 3 SCC 553.
1772. *Johney D Couto v State of Tamil Nadu*, AIR 1988 SC 109 : (1988) 1 SCC 116 : (1988) 1 SCR 787.
1773. *Dinobundhu v Jogmaya*, (1901) 29 Cal 154, p 166 : 29 IA 9, p 10; *Srinivasa v Vellayan*, AIR 1925 Mad 388 : (1924) 47 Mad LJ 913 (where the mortgage prior to the attachment was not kept alive); *Prakasa v Yelamarti*, AIR 1926 Mad 1082 : (1926) 51 Mad LJ 358; *Qurban Ali v Ashraf Ali*, (1882) 4 All 219.
1774. *MK Sugar Mills v JK Sugar Mills*, AIR 1965 All 135 : (1963) 33 Com Cas 1142; *Official Receiver, Muzaffarnagar v Chandra Shekhar*, AIR 1977 All 77.
1775. *Mahadevappa v Srinivasa*, (1882) 4 Mad 471.
1776. *Dasarathlal v Anand Kumar*, AIR 1951 Ngp 311.

transferee is a person whose interests are affected by the sale and is entitled to apply under O XXI, rule 90, to set aside the sale.[1777] Where a decree-holder attached property in execution of his decree and another decree-holder applied for rateable distribution without attaching the property, in execution of his decree and subsequently the judgment-debtor alienated the property and paid-off the attaching decree-holder, it was held that the alienation to satisfy the decree under which the attachment was made, was not contrary to such attachment within the meaning of this section and that the other decree-holder was not entitled to question the alienation under the section.[1778] The attachment which a judgment-creditor can have is as respect of the right, title and interest of his debtor at the date of attachment. He cannot have any right higher than that of his debtor at such date. Accordingly, if a person, having a contract of sale in his favour has a pre-existing right of specific performance, the attachment would not affect such right, for, the interest of the judgment-debtor in the attached property was subject to the promisee's right of specific performance. It follows that where an agreement for sale has been entered into prior to the attachment and the property is purchased by the promisee in specific performance of the agreement as a result of a consent decree, the right of such a promisee would prevail over the purchase of the property by the judgment-creditor at a court sale in consequence of the attachment.[1779] An attaching creditor does not attach the physical property but only the right of the judgment-debtor in it on the date of the attachment. If the judgment-debtor has incurred an obligation upon that right, prior to the attachment, such as an agreement to sell or mortgage, the attaching creditor cannot ignore such obligation as if the property was the absolute property of the debtor.[1780] What the section provides is that where property has been attached, any subsequent alienation is void against all claims enforceable under that particular attachment.[1781] An attachment effected after private alienation, is not assisted by an attachment before the alienation.[1782] When a sale is set aside, as the result of a deposit under O XXI, rule 89, the decree becomes satisfied and the attachment is extinguished and a mere claimant for rateable distribution who had not attached the property cannot claim the benefit of this section and assail the alienation made by the judgment-debtor.[1783]

[s 64.9] Explanation to the Section: Claims for Rateable Distribution of Assets under Section 73 are Claims Enforceable Under An Attachment

The Explanation to the section was inserted in 1908. *A* obtains a decree against *B*, and in execution of the decree attaches Rs 7,000 belonging to *B* in the hands of a railway company. *B* then assigns the said sum in the hands of the railway company to his attorneys for costs due to them subject to *A*'s attachment. After the assignment, *C*, another creditor of *B*, obtains a decree against *B*, and in execution of his decree, attaches the said sum in the hands of the railway company. Thereafter, the company pays the said sum to the Sheriff of Bombay. The assignment by *B* to his attorneys, though made prior to *C*'s attachment, is void as against *C*'s claim, for, *C*'s claim is a claim for rateable distribution of assets (Rs 7,000) within the meaning of section 73 and therefore, a claim enforceable under the attachment of *A* by virtue of the explanation to this section. *C* is, therefore, entitled to be paid in priority to *B*'s attorneys.

1777. *Naranappier v Chidambaram*, AIR 1933 Mad 96 : (1932) 63 Mad LJ 945.
1778. *Mehar Chand v Joti Prasad*, AIR 1934 All 1057 : (1935) 33 All LJ 4.
1779. *Purna Chandra v Daulat Ali*, AIR 1973 Cal 432.
1780. *Angu Pillai v MSMK Chettiar*, AIR 1974 Mad 16 : (1973) 1 Mad LJ 334.
1781. *Byrappa v S. Mani*, AIR 1970 Mys 152 : (1969) 2 Mys LJ 465.
1782. *Nana Rao v Arunachalam*, AIR 1940 Mad 385 (FB) : (1940) Mad 526.
1783. *Johor & Sons Ltd v Mathew*, AIR 1962 Ker 106; following *Ramiah v Namiah*, AIR 1943 Mad 165 : (1943) Mad 175.

This is the law under the present CPC, and it is in accordance with the view taken by the Bombay High Court in *Sorabji v Govind*,[1784] decided under section 276 of the Code of Civil Procedure, 1882. The view taken by the other high courts was that *C*'s claim, being a claim merely for rateable distribution cannot be said to be a claim enforceable under the attachment, but this view is no longer law.[1785] The explanation gives effect to the Bombay decision. But the explanation does not apply unless the claim of the subsequent decree-holder can be said to be a claim for rateable distribution within the meaning of section 73. Now, the essential condition of enforcement of claims for rateable distribution under section 73 is that there should be assets held by the court (see section 73 below), and that condition was satisfied in *Sorabji v Govind;* but if there be no assets received by the court, as would be the case, if no payment was made by the railway company to the Sheriff, and *A*'s attachment came to an end (O XXI, rule 55) by *B* satisfying *A*'s decree out of court and certifying it to the court under O XXI, rule 2, *C*'s claim cannot be enforced as a claim for rateable distribution, and the assignment to the attorneys will prevail over any claim, that may be made by *C* under his subsequent attachment.[1786] The explanation to the section protects only those decree-holder who are entitled to rateable distribution under section 73, and no decree-holder can be entitled to rateable distribution under that section unless there are assets held by the court.[1787] In a Calcutta case,[1788] *A*, an execution creditor, attached a debt and the garnishee paid the money to the Sheriff. The judgment-debtor obtained a stay order restraining the execution creditor from executing his decree for two months, the money being ordered to remain in the meanwhile in the hands of the Sheriff. While the money was with the Sheriff, *B* another creditor, attached the money before judgment, obtained a decree and applied for execution. *B* contended that he had a right of rateable distribution because while the money was in the Sheriff's hands, it had not been received by the court. But it was held that the money was assets received by the court when it was paid to the Sheriff, that *B* had no right of rateable distribution as his application was after the receipt of assets; and that, therefore *B*'s attachment could not affect the rights of *A* as execution creditor. At the same time, it must be noted that it is not enough that a decree-holder is entitled to rateable distribution under section 73; to bring the explanation into play, it is also necessary that his claim must be one, enforceable under the attachment within the meaning of the present section.[1789] The result is that the decree-holder is not entitled to the benefit of the explanation and is not entitled to question a private alienation unless—

(i) he is entitled to rateable distribution under section 73, for which it is absolutely necessary that there should be assets held by the court; and

(ii) where there has been a sale in execution, his claim is one enforceable under the attachment under which the sale was made as explained in Illustration 41 under note, "A private transfer under this section".

1784. *Sorabji v Govind*, (1892) 16 Bom 91, referred to in *Mina Kumari v Bijoy Singh*, (1917) 44 IA 72 : ILR 4 Cal 662; followed in *Chunilal v Karamchand*, AIR 1922 Bom 241 : (1922) 46 Bom 895; *Pratapa v AEL Mission*, AIR 1926 Mad 307 : (1926) 19 Mad 38.
1785. *Manohar v Ram Autar*, (1903) 25 All 431; *Kunhi v Makki*, (1900) 23 Mad 478; *Durga Churn v Monmohini*, (1888) 15 Cal 771.
1786. *Jetha Bhima & Co v Lady Janbai*, (1912) 37 Bom 138; *Mina Kumari v Bijoy Singh* 44 IA 72 : 78 : 44 Cal 662 : 673; *Annamalai v Palamalai*, (1918) 41 Mad 265 : 275 : 285.
1787. *Annamalai v Palamalai supra*; *Chindha v Chhaganlal*, AIR 1928 Bom 545 : (1928) 30 Bom LR 1488; *Babu Ram v Kaloo Mal*, AIR 1934 All 1069 : (1934) All LJ 1091.
1788. *Murlidas v Baijnath*, AIR 1930 Cal 623 : (1930) 57 Cal 736.
1789. *Mina Kumari v Bijoy Kumar*, (1917) 44 IA 72, p 79.

As regards the first condition, it is obvious that it cannot be present if the judgment-debtor satisfies the claim of the decree-holder out of court, and that is what happened in the under mentioned cases.[1790] In the Privy Council case of *Mina Kumari v Bijoy Singh*,[1791] the first condition was satisfied or assumed to be satisfied, but the second condition was not.

The wider meaning given to the expression "claims enforceable under the attachment" by the explanation is confined to the purposes of section 64 only. There is no such provision in rule 58 or rule 60 of O XXI. Hence, an order made under O XXI, rule 58 cannot be given a wider meaning so as to cover not only the decree in execution but other decrees as well.[1792]

[s 64.10] Private Transfer under O XXI, Rule 83

The High Court of Bombay has held that a private transfer of his property by a judgment-debtor made pursuant to the provisions of O XXI, rule 83, is absolute, notwithstanding the provisions of this section, even against claims enforceable under the attachment.[1793] The contrary has been held by the Madras High Court.[1794]

[s 64.11] Mortgage Executed Before But Registered after Attachment, not Affected

An attachment will not affect a subsequent alienation. Under section 47 of the Registration Act, 1908, a registered instrument operates from the date of execution. So, if property is attached after the date of execution but before the date of registration of a mortgage, the mortgage will not be invalid as against claims enforceable under the attachment.[1795] But, the position seems to have been reversed by insertion of sub-section (2) of the Code of Civil Procedure (Amendment) Act, 2002, effective from 1 July 2002.

[s 64.12] Attachment Raised and Subsequently Restored

Where the property of a defendant is attached, and the attachment is subsequently raised by the executing court, but the attachment is restored by the high court on appeal, the order of the high court relates back to the date when the attachment was first made, with the result that an alienation of the property made by the judgment-debtor between the date on which the attachment was raised and that on which it was restored, is void, as against all claims enforceable under the attachment.[1796] Likewise, when an execution petition, under which the attachment is effected, is subsequently dismissed and in consequence the attachment ceases and subsequently the order dismissing the execution petition is set aside, whether it be in appeal, revision or a suit, the attachment revives as from the date when it was effected and any

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1790. *Jetha Bhima & Co. v Lady Janbai*, (1912) 37 Bom 138; *Annamalai v Palamalai*, (1918) 41 Mad 265 (FB); *Rangi Ram v Gangu*, (1919) PR No 5 p 93; *Bhupal v Kundan Lal*, AIR 1921 All 450 : (1921) 43 All 399. Another case in which there may be no assets held by the court, is where the decree-holder is given leave to bid and to set-off the amount of the decree against the purchase-money under O XXI, rule 72, and the former exceeds the latter; *Mina Kumari v Bijoy Singh*, ILR 44 Cal 662 : (1917) 44 IA 72, p 78.
1791. *Mina Kumari v Bijoy Singh*, ILR 44 Cal 662 : (1917) 44 IA 72.
1792. *Bibi Amar Kaur v Shiv Karan*, AIR 1965 P&H 206 : (1965) 1 Punj 160.
1793. *Shivlingappa v Chanbasappa*, (1906) 30 Bom 337.
1794. *Thiraviyam v Lakshmna*, (1918) 41 Mad 616.
1795. *Nabadwipchandra v Loke Nath*, AIR 1933 Cal 212 : (1932) 59 Cal 1176.
1796. *Annapurna Patrani v Lakshmana Kavi*, AIR 1950 Mad 740; *Jeta Bakhsh v Kunta*, (1912) 34 All 490; *Gopal v Kashi*, (1920) 42 All 39; *Dular Singh v Ram Rhander*, AIR 1934 All 165.

private alienation of the property thereafter would be hit by the section.[1797] But this section contemplates only one attachment and no other. Hence, the attachment during the subsistence of which an alienation is made must be the same attachment under which all claims of the attaching creditor are enforceable. Therefore, where a attaching-creditor has got levied two attachments on the same property, one after the other, but the first attachment has come to an end and the attaching creditor enforces his claim under the second attachment, a transfer made by the debtor during the subsistence of the first attachment would not be void.[1798]

[s 64.13] Private Sale to Decree-holder

A obtains a decree against *B*. In execution of the decree, *B*'s property is attached. Pending the attachment, *B* sells the property to *C*. *A* then buys the same property from *B*. Is the sale to *C* void under this section? No, because *A* brought the property not at a court-sale, but by private treaty with *B*. The title obtained by the purchaser on a private sale of properly in satisfaction of a decree, differs from that acquired upon a sale in execution. Under a private sale, the purchaser derives title through the vendor, and cannot acquire a title better than his. Under an execution sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold.[1799]

[s 64.14] Effect of Striking off Execution Proceedings or of Removing them from the File

An attachment is not necessarily at an end because the execution case is struck-off or removed from the file. The effect of such a proceeding depends on the circumstances of each case. Where, after an attachment has been made, the proceedings in execution are struck-off or removed from the file under circumstances which render a fresh attachment necessary to bring the judgment-debtor's property to sale, a private transfer of the property by the judgment-debtor made after the proceedings are struck-off is valid, though the same property may subsequently be re-attached in execution of the same decree on a fresh application for execution. But if the execution proceedings are struck-off or removed from the file under circumstances which render a fresh attachment necessary to bring the judgment-debtor's property to sale, a private transfer of the property by the judgment-debtor made after the proceedings are struck-off is valid, though the same property may subsequently be re-attached in execution of the same decree on a fresh application for execution. But if the execution proceedings are struck-off or removed from the file under circumstances which do not render a fresh attachment necessary, the transfer is void as against all claims enforceable under the attachment, and the mere fact that a fresh application for attachment is subsequently *made* in execution of the same decree will not render the transfer valid. The reason is that in the former case, the proceedings in execution are deemed to have terminated on their being struck-off or removed from the file, and the attachment is deemed to be at an end, and the transfer having been made after the termination of the attachment, it cannot be affected by the subsequent attachment. In the latter case, however, the proceedings in execution are merely suspended,

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1797. *Susila Bala v Guest Keen Williams Ltd*, (1949) 1 Cal 177.
1798. *Motilal Madan Chand Lodha v Ragho T Patil*, AIR 1974 Bom 261 : 76 Bom LR 207 : (1974) Mah LJ 404.
1799. *Dinendranath v Tarakchandra*, (1881) 7 Cal 107; *Budhu v Barkat Ram*, (1920) 2 Lah LJ 99.

and the first attachment is, therefore, deemed to subsist, and the second application for attachment is a superfluity.[1800] Whether the execution proceedings have been struck-off or removed from the file under one or the other circumstances is a question of fact in each case.[1801] But where a fresh application for attachment is made, the presumption is that the first attachment has ceased and the burden of proof is on the party alleging that the first attachment was still subsisting when the second application was made and that the second application was superfluous.[1802] *B*'s property is attached in execution of a decree obtained against him by *A*. The execution proceedings are then "struck-off". *B* then sells the property to *C*. The property is again attached on a fresh application by *A*. Is the sale valid? There being a fresh application for attachment, the presumption is that the first attachment ceased from the moment the proceedings were struck-off. The sale would, therefore, be valid and the second attachment inoperative unless *A* showed that the first attachment was still subsisting at the date of transfer and that the second application was superfluous.

The above cases would not have arisen if the court, instead of making an order for "striking off proceedings" or "removing proceedings from the file", had made an order either dismissing the application or adjourning the proceedings where the court was, by reason of default on the part of the decree-holder, unable to proceed further with the proceedings in execution. The practice of "striking off proceedings" or "removing proceedings from the file" had no justification under any of the previous Codes. To put a stop to this practice, it is now expressly provided by O XXI, rule 57, that where any property has been attached in execution of a decree, but by reason of the decree-holder's default, the court is unable to proceed further with the application for execution, it shall either dismiss the application, or for any sufficient reason adjourn the proceedings to a further date; upon the dismissal of such application the attachment shall cease. Cases like the above are not likely to arise under the CPC, if the procedure prescribed by O XXI, rule 57, is strictly followed. The High Court at Calcutta has commented on the impropriety of such orders as "struck-off" or "dismissed for the present" on an execution application.[1803]

[s 64.15] Effect of Dismissal of Execution in Default

If the execution petition was dismissed for default on the part of the decree-holder, the executing court has no other option, but to direct that the attachment shall cease.[1804]

Thereafter, fresh proceedings in execution petition had been filed. Though it is stated that all the execution proceedings are deemed to be the continuation of the earlier proceedings, it cannot be accepted in view of the provisions of section 64, CPC as interpreted by the Supreme Court.[1805]

1800. *Kishen Lal v Charat Singh*, (1901) 23 All 114; *Puddomonee Dosee v Muthooranath*, (1874) 12 Bom LR 411; *Pearey Lal v Chundi Charan*, (1906) 11 Cal WN 163; *Shaikh-Kumar-ud-din v Jawahir Lal*, 32 IA 102.
1801. *Mohunt Bhagwan v Khetter Moni*, (1896) 1 Cal WN 617; *Rangaswami v Periasami*, (1894) ILR 17 Mad 58; *Mungul Pershad v Girja Kant*, (1882) ILR 8 Cal 51 : 8 IA 123; *Srinivasa v Sami Rau*, (1894) ILR 17 Mad 180; *Mahomed v Kishore-Mohun*, (1895) 22 Cal 909 : 22 IA 129; *Duad Ali v Ram Prasad*, (1915) 37 All 542; *Yakub Ali v Durga*, (1915) 37 All 518.
1802. *Hafiz v Abdullah*, (1894) 16 All 133.
1803. *Krishna Kamini v Gireeschandra*, AIR 1936 Cal 293 : (1936) 63 Cal 57 : 39 Cal WN 1030.
1804. *Athiappa Asari v Chinna Gounder*, (1980) 93 Mad LW 542; *Kaliammal v S Sambu*, AIR 2003 Mad 6
1805. *M Marathachalam Pillai v Padmavathi Ammal*, (1970) 2 SCWR 174; see also *Kaliammal v S Sambu*, AIR 2003 Mad 6.

[s 64.16] Attachment Does Not Create a Charge

Attachment creates no charge or lien upon the attached property.[1806] It only confers a right on the decree-holder to have the attached property kept in *custodia legis* for being dealt with by the court in accordance with law.[1807] It merely prevents and avoids private alienations; it does not confer any title on the attaching creditors.[1808] There is nothing in any of the provisions of the CPC which, in terms, makes the attaching creditor a secured creditor or creates any charge or lien in his favour over the property attached.[1809] But an attaching creditor acquires, by virtue of the attachment, a right to have the attached property kept in *custodia legis* for the satisfaction of his debt, and an unlawful interference with that right constitutes an actionable wrong. Thus, it is an actionable wrong if *A* cuts and carries away crops attached by *B* in execution of a decree against *C*, and a suit will lie at *B*'s instance against *A* to recover from *A*, damages which should not, however, exceed the value of the attached property.[1810] A person, who claims under a private transfer from the judgment-debtor after attachment is not entitled, to notice under O XXI, rule 22, as the decree-holder is entitled to ignore all alienations subsequent to the attachment.[1811]

[s 64.17] Effect of Order of Adjudication on Attachment

Where a judgment-debtor has been adjudicated an insolvent, the whole of his property vests in the official assignee. What is the effect of an order of adjudication on an attachment levied prior to the date of the adjudication order? Has the attaching creditor, by reason of his prior attachment, priority over the official assignee in respect of the property attached by him prior to the date of the adjudication order, or is the official assignee entitled to claim that the attached property by virtue of the adjudication order, as part of the property of the insolvent? The courts in India had held that whether the attachment is before judgment,[1812] or in execution of a decree,[1813] the attaching creditor had no priority over the official assignee. These decisions were based on the ground that an attachment in India does not create any charge or lien upon the attached property such as attaches in England upon seizure under a writ of *fi fa*;[1814] and that once the order of adjudication is made; the attaching creditor is relegated to the same position as other creditors. Again, the Presidency Towns Insolvency Act, section 53, and the Provincial Insolvency Act, section 51, both enact that if execution

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1806. *Sarkies v Bundho Baeed*, (1869) 1 NWPHC Rep 172; *Soobul Chunder v Russick Lall*, (1888) 15 Cal 202; *Zemindar of Karvetnagar of Trustee of Tirumalai*, (1909) 32 Mad 429; *Frederick Peacock v Madan Gopal*, (1902) 29 Cal 428; *Narayan Ganesh v Fatma Duad*, AIR 1952 Bom 70 : (1952) Bom 83 : 53 Bom LR 821; *Hansraj v Dhanwant Singh*, AIR 1961 P&H 510 : (1961) ILR Punj 369 : 63 Punj LR 391; *Govt. of Travancore Cochin v Bank of Cochin Ltd*, AIR 1954 TC 243 (FB) : (1954) TC 281.
1807. *Krishan v Travancore Bank Ltd*, AIR 1956 TC 34.
1808. *Sheoraj Singh v Gajadhar Prasad*, AIR 1942 Oudh 465 : (1942) 18 Luck 366; *Motilal v Karrab-ul-din*, (1898) 25 Cal 179 : 24 IA 170; *Raghunath Das v Sundar Das*, (1914) 42 Cal 72 : 41 IA 251; *Ram Bhaj v Ram Das*, AIR 1923 Lah 261 : (1922) 3 Lah 414; *Subbarao v Official Receiver*, AIR 1965 AP 52.
1809. *Kristnaswamy v Official Assignee of Madras*, (1903) 26 Mad 673; *Deputy Commr of Police, Madras v S. Vedantam*, AIR 1936 Mad 132 : (1936) 59 Mad 428; *Manickam Chettiar v Income Tax Officer, Madras*, AIR 1938 Mad 360 (FB) : (1938) ILR Mad 744; *Kamala Bala Dasi v Surendra Nath Ganguly*, AIR 1937 Cal 517 : (1937) 2 Cal 675.
1810. *Shankaralinga v Kandasami*, (1907) 30 Mad 413.
1811. *Anasuryamma v Venkatagiri Rao*, AIR 1957 AP 38.
1812. *Kristnasawmy v Official Assignee of Madras*, (1903) 26 Mad 673.
1813. *Frederick Peacock v Mohan Gopal*, (1902) ILR 29 Cal 428; *Jitmand v Ramchand*, (1905) 29 Bom 405; *Sir Chand v Murli Lal*, (1912) 34 All 628; *Raghunath Das v Sundar Das*, 41 IA 251; *Muhammad Sharif v Radha Mohan*, (1919) 41 All 274.
1814. *Re Prem Lal Dhar*, (1917) 44 Cal 1016.

of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of execution against the official assignee or the official receiver except in respect of assets realised before the order of adjudication. On the other hand, certain dicta of the Privy Council in the case of *Anantapadmanabhaswami v Official Receiver*,[1815] raise a doubt as to the correctness of these decisions. In this case, property in Madras had been attached in execution of a decree in 1926, but the judgment-debtor was adjudged insolvent in 1928 by a foreign court—the District Judge of Secunderabad. The Official Receiver, Secunderabad, objected to the continuance of the execution proceeding on the ground that the property had vested in him. The Madras High Court upheld the objection as the official receiver had priority over the attaching creditor. The Privy Council reversed this decision for the reason that the question was one of the comity of nations and not one of the municipal bankruptcy codes of either country; and that although a foreign adjudication order will be recognised as effective, it will not be allowed to interfere with any process at the instance of a creditor already pending, even though the process be incomplete. The case was one of a foreign adjudication order and their Lordships were careful to distinguish a foreign adjudication order which operates under a rule of international law from a British adjudication order which operates by force of a statute. But, as to British Adjudication Orders, their Lordships observed that such orders would not be affected by section 64, as they were not private transfers. Their Lordships then proceeded to suggest that the test was whether the insolvent could have assigned the property to the trustee in bankruptcy. This seems to imply that if the judgment-debtor is prevented by the attachment from alienating the property, the property will not vest in the official receiver or the official assignee. With reference to the case law as to the effect of an attachment their Lordships said:

> In *Krishnaswamy Mudaliar v Official Assignee of Madras*,[1816] the court appears to have ignored the opinion expressed by this Board in *Suraj Bunsi Koer v Sheo Proshad Singh*,[1817] which was cited to them, and to have taken a dictum in the judgment of this Board in *Motilal v Karrab-ul-din*[1818] from its context and used it for a purpose which it did not have in view. In *Frederick Peacock v Madan Gopal*,[1819] the case of *Suraj Bunsi Koer* was not referred to and the dictum from *Moti Lal*'s casewas similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das v Sundar Das Khetri*,[1820] was also referred to, but that decision proceeded on an admission by counsel, the point was not argued and the case of *Suraj Bunsi* was not referred to.

Where property has been sold before the order of adjudication and before the executing court had knowledge of the insolvency proceedings and there is no application to have the property delivered to the receiver, the executing court has jurisdiction to continue the execution proceeding.[1821] Where an order of adjudication is passed after attachment, but before sale, the attached property vests in the official assignee or receiver. The attaching creditor cannot obtain satisfaction of his decree by sale. The order of adjudication has the effect of divesting the right of the attaching creditor and remits him to the position

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1815. *Anantapadmanabhaswami v Official Receiver*, AIR 1933 PC 134 : 60 IA 167, p 174–75 : 37 Cal WN 553.
1816. *Krishnaswamy Mudaliar v Official Assignee of Madras*, (1903) ILR 26 Mad 673.
1817. *Suraj Bunsi Koer v Sheo Proshad Singh*, (1878-79) 6 IA 88.
1818. *Motilal v Karrab-ul-din*, (1897) 24 IA 170.
1819. *Frederick Peacock v Madan Gopal*, (1902) ILR 29 Cal 428.
1820. *Raghunath Das v Sundar Das Khetri*, (1914) ILR 42 Cal 72 : 41 IA 251.
1821. *Chandumal v Bhikamchand*, AIR 1936 Ngp 117 : (1936) ILR Nag 41.

of an ordinary creditor.[1822] A transfer of property which is under attachment, is liable to be challenged only by the attaching creditor and persons whose claim arises under the attachment and not by other persons. It was, accordingly held that where the father was adjudicated insolvent and the official receiver sold the interest of his sons also, it was not open to them to question the same on the ground that their shares had been attached by the decree-holder before adjudication.[1823]

[s 64.18] Presidency Towns Insolvency Act, 1909

Under that Act, the father's power of alienating for his debts, his son's share in the joint property of a Hindu *Mitakshara* family vests in the official receiver but the Madras High Court has held that it is subject to the attachment made by the son's creditor which had been made before the vesting.[1824]

[s 64.19] Effect of Winding-up Order on Attachment

The position of the liquidator of a registered company differs from that of the official assignee in that the property of the company does not vest in him. An attachment, therefore, made on the property of the company at the instance of a decree-holder before the winding-up of the company cannot be released at the instance of the liquidator.[1825]

[s 64.20] Sub-section (2)—Concept of Registration

Section 64(2) of the CPC has been inserted by Amendment Act, 2002. Section 64, as it originally stood, has been renumbered as section 64(1). Section 64(1), inter alia, provides that where an attachment has been made, any private transfer or delivery of property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. Sub-section (2) protects the aforesaid acts if made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. The concept of registration has been introduced to prevent false and frivolous cases of contracts being set up with a view to defeat the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid, if it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in sub-section (2) of section 64.[1826]

Sale

[S 65] Purchaser's title.—Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

1822. *Subbarao v Official Receiver*, AIR 1965 AP 52.
1823. *Ramachandran v Kanni Velan*, AIR 1959 Ker 141.
1824. *Swarup Chand v Jankiramayya*, AIR 1942 Mad 330 : (1942) 1 Mad LJ 318.
1825. *Amrita Lal v Anukul*, (1916) ILR 43 Cal 586.
1826. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : JT 2005 (6) SC 486.

SYNOPSIS

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[s 65.1] Corresponding Section of the Code of Civil Procedure, 1882

Section 316 of the Code of Civil Procedure 1882 ran as follows:

> When a sale of immovable property has become absolute in manner aforesaid, the court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before:
>
> Provided that the decree under which the sale took place was still subsisting at that date.

The first part of section 316 now stands as O XXI, rule 94, with slight verbal alterations. The second part, with certain substantial alterations to be presently noted, stands as section 65. The proviso to section 316 was omitted altogether.

[s 65.2] Changes Introduced in the Section

Under section 316 of the Code of Civil Procedure, 1882, the title to immovable property sold at an execution sale vested in the purchaser from the date of the certificate of sale, that is, the date on which the sale became absolute. Under the present section, the title to such property, where the sale has become absolute vests in the purchaser from the time when the property is sold, and not from the time when the sale becomes absolute. If the sale is otherwise in order, and the property is purchased by a stranger, the sale must be confirmed even though the decree in execution of which the sale was held, is reversed on appeal after the sale and before its confirmation.[1827] With the omission of proviso to section 316, it is not necessary that the decree must subsist at the date of the confirmation of the sale.

[s 65.3] Vesting of Property in Auction— Purchaser

In the case of a private sale of immovable property, the property vests in the purchaser from the time when the deed of sale is executed. The reason is that a voluntary sale becomes absolute on execution and delivery of the deed by the vendor. In the case, however, of a court sale, the property does not vest in the purchaser, immediately on the sale thereof. The reason is that a compulsory sale does not become absolute until sometime after the sale. A period of at least 30 days must expire from the date of sale before the sale can become absolute. During that

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1827. *Sorimuthu v Muthu Krishna*, AIR 1933 Mad 598 : (1933) ILR 56 Mad 808.

period, the sale is liable to be set aside at the instance of the judgment-debtor, on the ground of irregularity in publishing or conducting the sale, or on deposit by him in court, of the amount specified in the sale proclamation together with a percentage on the purchase money by way of compensation to the purchaser (O XXI, rules 89–90). An application by the judgment-debtor to set aside the sale in either of these two cases, must be made within 30 days from the date of sale. Where such an application is made, the sale does not become absolute merely on the passing of an order of confirmation, but on the termination of proceedings commenced with such an application to set aside the sale or the order confirming such sale.[1828]

If no such application is made, an order confirming the sale must be made and the certificate under O XXI, rule 94 issued.[1829] It is upon such confirmation that the sale becomes absolute (O XXI, rule 92). Once an order was made under O XXI, rule 92 confirming the sale, the title of the auction-purchaser related back to the date of the sale as provided under section 65 of the CPC. The title in the property, thereafter, vests in the auction-purchaser and not the judgment-debtor.[1830] After the sale has become absolute, a certificate is granted by the court to the purchaser, which is called a certificate of sale (O XXI, rule 94). Such certificate bears as date, the day on which the sale became absolute. It is only when the sale becomes absolute that the sold property vests in the purchaser.[1831] But though the property does not vest in the purchaser until the sale has become absolute, when it does vest in him it shall be deemed to have vested on the sale becoming absolute from the time when it was sold. The vesting of the property is thus made to relate back to the date of sale[1832] even when the sale is held by the collector under rules framed by the local government under section 68 of the CPC[1833] and the auction-purchaser is entitled to sue for profits from the date of the purchase.[1834] Though the sale does not become absolute till confirmation and the title till then does not vest in the purchaser, another decree-holder cannot enforce his decretal claim by attaching the same property.[1835] The High Court of Gujarat has held that since the title as well as possession as acquired by the auction-purchaser after the sale becomes absolute, the judgment-debtor, where the property is let out to the tenants, continues to be the landlord till then, and can collect the rents.[1836]

The fact that the purchaser has not taken possession of property through court or that he has taken only symbolical possession, does not affect his title as that is complete when the sale is confirmed.[1837] As the title of the purchaser vests not on the date of sale but on the date of its confirmation, it may be defeated by events subsequent to the sale which prevent its

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1828. *Narayan Pillai v Damodaran*, AIR 1967 Ker 159.
1829. *Bishan Paul v Mothu Ram*, AIR 1965 SC 1994; *Janak Raj v Gurdial Singh*, AIR 1967 SC 608; *Kocherlokota Venkata Jagannatha Rao Guru v Ravu Venkata Kumara Mahipati Rao*, 63 IA 304 : 4 Cal WN 1130.
1830. *Sagar Mahila Vidhayala, Sagar v Pandit Sadashiv Rao Harshe*, (1991) 3 SCC 588.
1831. *Vishnu v Yusuff*, AIR 1925 Bom 483 : (1925) 27 Bom LR 963.
1832. *Jamuna Devi v Mangal Das*, AIR 1946 Pat 644 : (1945) ILR 25 Pat 13; *Abdul Rahman v Fateh Narain*, AIR 1926 Oudh 189 : (1926) 1 Luck 80; *Nidphal v UOI*, AIR 1966 All 360; *Marimuthu v Ambujam Amfmal*, AIR 1978 Mad 50.
1833. *Ram Krishan v Satwa*, AIR 1949 Ngp 127 : (1948) ILR Nag 610.
1834. *Shyam Lal v Sunder Lal*, AIR 1937 All 661; *Bhagavandas Krishnadas v PS Soma Iyer*, AIR 1969 Ker 263 : (1969) Ker LJ 80.
1835. *VTC Chettiar v PSP Chettiar*, AIR 1973 Mad 313.
1836. *Chimanlal Narsibhai v Amratlal Chhotalal*, AIR 1974 Guj 218.
1837. *Giriyamman v Ramachandran*, AIR 1954 TC 384; *Velayudhan v Ouseph*, AIR 1953 TC 574; *Abdul Basti v Abdul Alim*, AIR 1952 P&H 407.

confirmation. Thus, where the property sold was an estate which had, after the sale vested in the state, the sale could not be confirmed and the purchaser could get no title.[1838]

There is a conflict of opinion as to the right of a decree-holder auction-purchaser who is permitted to set-off the purchase to claim interest thereon after the date of sale. One view is that he is bound to set-off the purchase amount as on the date of sale and that the decree would stand *eo extanti* satisfied as on that date and cannot carry interest thereafter.[1839] The other view is that the vesting of title in the auction-purchaser has nothing to do with the decree-holder's right to withdraw the amount from court and that, therefore, the purchase amount to set-off should carry interest after the date of confirmation of sale.[1840] It is submitted that the latter view is doubtful. The decree-holder purchaser is entitled to profits from the date of sale as purchase by him takes effect from that date and it seems illogical that he should be entitled to both the interest on the purchase money and mesne profits from the land from the date of purchase till the date of confirmation.

[s 65.4] Successive Purchasers at Sales in Execution of Money Decrees

Under the Code of Civil Procedure, 1882, section 316, the property sold vested in the purchaser from the date of certificate of sale, and not before. This gave rise to some difficulty when the question arose as to which of two successive auction-purchasers should have priority in cases where the later purchaser had the certificate of sale issued to him first. Had the question been determined with exclusive reference to the terms of that section, the priority would have rested with the purchaser who first procured the certificate of sale. But this inequitable result was avoided, and the difficulty was got over by holding that the first purchaser has, by his prior purchase, obtained an equitable interest in the property, and that the subsequent purchaser must be deemed to have purchased the property subject to such interest.[1841] No such difficulty can arise under the CPC, for it is provided by the present section that the property is to be deemed to have vested in the purchaser from the date of sale, and not from the date of the certificate of sale.

ILLUSTRATION

In execution of a money-decree obtained by *A* against *B*, certain immovable property belonging to B is sold and purchased by *P1*. The same property is subsequently purchased by *P2* at a sale in execution of a money-decree obtained by *C* against *B*. *P2* obtains a certificate of sale first, and is placed in possession of the property. Subsequently *P1* obtains a certificate of sale, and sites *P2* for possession. Under the present section, *P1* is entitled to possession, for the property is to be deemed to have, vested in him from the date of sale, and the sale to him was prior to the sale to *P2*. The same result was arrived at under the Code of Civil Procedure 1882 by holding that *P2* bought subject to *P1*'s equitable interest and he could not, therefore, retain possession against *P1* after *P1*'s title was perfected by the issue of a certificate to him. The principle is that a prior sale in pursuance of an attachment prevails over a subsequent sale even if the subsequent sale is in pursuance of an earlier attachment.[1842]

But where property is sold in execution of a decree to *P1*, and the sale is set aside on the ground of irregularity under O XXI, rule 90, and the sale property is subsequently sold in execution of another decree and is purchased by *P2*. *P2* is entitled to priority as against *P1*, even though the sale to *P1* may subsequently be confirmed. The sale to *P1* not having been confirmed until after the

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1838. *Ramachandra v Eva Mitra*, AIR 1960 Pat 378 : ILR 38 Pat 1.
1839. *Vairavan Chettiar v Rayalu Ayyar & Co*, AIR 1951 Mad 844 : (1951) 1 Mad LJ 298.
1840. *Kishan Lal v Kothari Jathmal*, AIR 1959 MP 115.
1841. *Yeshwant v Govind*, (1886) ILR 10 Bom 453; *Chintamanra v Vithabai*, (1887) ILR 11 Bom 88.
1842. *VST Venkita Reddiar v S Noordeem*, AIR 1978 Ker 11.

sale to *P2*, *P1* is not entitled to priority over *P2*. Even under the Code of Civil Procedure, 1882, *P1* would not be entitled to priority over *P2*, for the sale to him (*P1*) having been set aside, it could not be said that *P2* purchased subject to *P1*'s interest in the property. *P1* had no interest in the property when it was sold to *P2*.[1843]

[s 65.5] Successive Purchasers at Sales in Execution of Mortgage Decrees

Priority between successive purchasers of the same mortgaged property in execution of mortgage decrees against the same mortgagor is determined by the dates of the several purchases, and not by the dates of the several mortgages.[1844]

[s 65.6] Suit for Possession by Auction-purchaser

It was held under the Code of Civil Procedure, 1859, that a purchaser of immovable property at a court-sale could not maintain a suit for possession thereof against a third person, unless he had a certificate of sale issued to him before suit, although the sale had become absolute. The reason given was that the transfer of property to a purchaser at a court-sale was not complete until a certificate of sale was issued to him. The decisions turned upon the language of section 259 which provided that the "certificate shall be taken and deemed to be a valid transfer of such right, title and interest" as had passed from the judgment-debtor to the purchaser. The line of reasoning adopted was that if a certificate was to be taken as a transfer, the transaction must necessarily be incomplete until the certificate was issued. The said words were construed as controlling the operation of section 256 which provided that a sale became absolute when it was confirmed by the court.[1845] But it was held that as against the judgment-debtor and his representatives, the purchaser's title became complete on the confirmation of the sale.[1846] Under the present section, it seems, that an auction-purchaser can maintain a suit for possession even against a person not a party to the suit after the sale is confirmed by the court, though no certificate has been issued to him before the institution of the suit, provided it is produced at or before the passing of the decree. The reason is that property under the present section vests in the purchaser immediately the sale is confirmed by the court and the vesting is not postponed until the grant of a certificate. In a case under the Code of Civil Procedure, 1859 where the equity of redemption of the judgment-debtor was sold, it was held that the purchaser was entitled to sue the mortgagee for redemption, even before the issue of certificate, the reason given being that the suit was not one in ejectment on title, but one for redemption and, therefore, of an equitable nature, and the purchaser was equitably entitled to redeem. The certificate in that case was produced at the hearing.[1847]

[s 65.7] *Mesne* profits

Under the Code of Civil Procedure, 1882, the property sold vested in the purchaser from the date of the sale certificate and not before. Hence, it was held that the purchaser was entitled to mesne-profits from the date of the certificate, and not from the date of sale.[1848] Under the

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1843. *Banke Lal v Jagat Narain*, (1900) ILR 22 All 168.
1844. *Kutti v Subramania*, (1909) 32 Mad 485; *Nanakchand v Telukdye*, (1880) ILR 5 Cal 265; *Bogi Arijisah v Kannappa*, AIR 1954 Mad 266 : (1953) 1 Mad LJ 477; *Giriyamman v Ramachandram*, AIR 1954 TC 384.
1845. *Padu v Rakhmai*, (1873) 10 Bom HC 435; *Harkishandas v Bai Ichha*, (1880) ILR 4 Bom 155.
1846. *Raj Kishan v Radha Madub*, (1874) 21 WR 349; *Kushal v Bhimabai*, (1888) ILR 12 Bom 589; *Shivram v Ravji*, (1883) ILR 7 Bom 254.
1847. *Krishnaji v Ganesh*, (1882) 6 Bom 139.
1848. *Amir Kazim v Darbari*, (1902) 24 All 475; *Shiam Lal v Nathe Lal*, (1911) 33 All 63.

present section, the property is to be deemed to vest in the purchaser from the date of sale. The purchaser, therefore, is entitled to mesne-profits from the date of sale.[1849]

[s 65.8] Title of Auction-purchaser

Under the Code of Civil Procedure, 1882, property sold in execution of a decree vested in the purchaser so far as regards the parties to the suit and persons claiming through or under them. That is to say, a purchaser at a court-sale was entitled to hold the property only against the judgment-debtor and his representatives but not against third parties. The words italicised above, which occurred in section 316 of the Code of Civil Procedure 1882, have been omitted in the present section. The omission, however, has not the effect of enlarging the purchaser's rights, and a purchaser at a judicial sale will, now, as before, get a good title only against persons bound by the decree, but not against strangers.[1850]

[s 65.9] Sale When Void and When Voidable

A sale in execution of a decree is void, if the court has no jurisdiction to sell the property. Thus, a court has no jurisdiction to sell property in execution of a decree, if the notice required by O XXI, rule 22, is not served.[1851] Similarly, a court has no jurisdiction to sell the property of a person who was not a party to the suit in which the property was sold or property represented on the record.[1852] Again, the court of first instance has no jurisdiction to sell property after an order is made by the appellate court for stay of execution.[1853] In each of these cases, the sale is a nullity, and may be disregarded without any proceeding to set it aside.[1854]

But where a court has jurisdiction to sell the property, and there has been an irregularity in the course of execution proceedings, the sale is not void, but merely voidable. Thus, where the notice required by O XXI, rule 22, is served upon a person who was not, in fact, the legal representative of the deceased judgment-debtor, but whom the court wrongly held to be his legal representative the sale is voidable, and not void.[1855] Similarly, a sale is voidable and not void if there has been material irregularity or fraud in publishing or conducting the sale — O XXI, rule 90.

Irregularities of Procedure in Obtaining Decrees or in Execution Proceedings.—Provided that the court has jurisdiction to sell, a purchaser at a court-sale is not bound to inquire into the correctness of the decree or of the order for sale. 'To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution, than he is as to the correctness of the judgment upon which the execution issues'.[1856] "Strangers to a suit are justified in believing that the court has

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1849. *Ma Hawa Bi v Sein Kho*, AIR 1928 Rang 67 : (1927) 5 Rang 803; *Abdul Ghani v Lal Chand*, AIR 1940 Lah 230.
1850. *Umes Chunder v Zahur Fatima*, (1891) 18 Cal 164, 178 : 17 IA 201.
1851. *Raghunath Das v Sundar Das*, 41 IA 251.
1852. *Khairajmal v Diam*, (1905) 32 Cal 296 : 32 IA 23; *Radha Pradad v Lal Sahab*, (1819) 13 All 53 : 17 IA 150; *Beni Prasad v Mukhtesar*, (1899) 21 All 316; *Rashid-un-Nissa v Muhammad*, (1909) 36 IA 168; *Payidanna v Lakshminarasamma*, (1915) 38 Mad 1076.
1853. *Ramanathan v Arunachellam*, (1915) 38 Mad 766.
1854. *Khairajual v Daim*, (1905) 32 Cal 296, p. 312.
1855. *Malkarjun v Narhari*, (1901) 25 Bom 337, 348 : 27 IA 216; *Amarchand v Parmanand*, AIR 1934 All 474.
1856. *Rewa Mahton v Ram Kishen Singh*, (1887) ILR 14 Cal 18, 24 : 13 IA 106; *Mothura Mohun Ghose v Akhoy Kumar Mitter*, (1888) 15 Cal 557; *Narayan v Kaliana*, (1896) ILR 19 Mad 219.

done that which by the direction of the Code it ought to do".[1857] Therefore, when property sold in execution of a decree under the order of a competent court is purchased by a stranger *bona fide* and for value, the sale cannot be set aside on the ground that the judgment-debtor has a cross-decree of a higher amount and the court, therefore, ought not to have directed the sale,[1858] or that the decree had been satisfied out of court before the sale,[1859] or that the court wrongly held that the defendant was served with the summons and on that finding passed an *ex parte* decree against him,[1860] or that though an attachment was subsisting at the date of the sale, the decree-holder's application for an order of sale had been dismissed for want of prosecution before sale,[1861] or that the property was not liable to attachment and sale within the meaning of section 60,[1862] or that the execution of the decree was barred by limitation,[1863] or that the decree proceeded upon an erroneous view of the law,[1864] or that the decree was one which the court ought not to have passed.[1865]

The above principles apply in favour of a third party purchasing at a court-sale; they do not apply where the decree-holder himself is the purchaser. The reason is that where the decree-holder himself is the purchaser, he "must be held to have had notice of all the facts" relating to the suit and execution proceedings.[1866] Nor do they apply in favour of a party to the suit, though he may not be a decree-holder.[1867] Auction sale was confirmed in the name of the highest bidder. Sale certificate was, however, issued in the name of a society. It was held that the sale did not become void thereby. The judgment-debtor cannot file a suit for possession on the basis of title. The society (the holder of the sale certificate), cannot be held to be a trespasser. Even if it is presumed that the sale certificate was wrongly issued in the name of the society, yet the sale in favour of the highest bidder was not void and the judgment-debtors could not take the stand that they were the true owners of the disputed house as the sale itself was void and that they were not required to file a suit for setting aside the sale. The sale of the property in question was perfectly valid and, as soon as the sale was confirmed in favour of the highest bidder under O XXI, rule 92 of the CPC, the judgment-debtor ceased to have any right or title in the property.[1868]

[s 65.10] Effect of Reversal of Decree Upon Sale where Decree Reversed after Confirmation of Sale

There is a great distinction between decree-holders who come in and purchase under their own decree, which is afterwards reversed or modified, and *bona fide* purchasers who come in

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1857. *Malkarjun v Narhari*, (1901) ILR 25 Bom 337, 347 : 27 IA 216; *Paresh Nath v Hari Charan*, (1911) ILR 38 Cal 622.
1858. *Rewa Mahton v Ramkishen Singh*, (1887) ILR 14 Cal 18 : 13 IA 106.
1859. *Mothura Mohun Ghose v Akhoy Kumar Mitter*, (1888) ILR 15 Cal 557; *Yellappa v Ramchandra*, (1897) ILR 21 Bom 463.
1860. (1911) 38 Cal 622.
1861. *Rangasami v Periasami*, (1894) ILR 17 Mad 58.
1862. *Dwarkanath v Tarini*, (1907) ILR 34 Cal 199; *Umed v Jas Ram*, (1907) ILR 29 All 612; *Pandurang v Krishnaji*, (1904) ILR 28 Bom 125.
1863. *Saroda Churn v Kahomed*, (1885) ILR 11 Cal 376.
1864. *Girdharee Lall v Kantoo Lall*, (1875) 14 Beng LR 187 : 1 IA 321.
1865. *Kaunsilla v Chandar Sen*, (1901) ILR 23 All 25. See notes to section 60, "Objection that property not liable to attachment and sale when to be raised", notes to O XXI, rule 22, "Consequence of omission to give notice", and "Notice to wrong person", and notes to O XXI, rule 90, "Material irregularity in publishing or conducting the sale".
1866. *Khiarajmal v Daim*, (1905) ILR 32 Cal 296, 315 : 32 IA 23; *Mina Kumari v Jagat v Settani*, (1844) 10 Cal 220; *Gungapershad v Gopal Singh*, (1897) ILR 11 IA 234.
1867. *Official Receiver v Chettiappa*, AIR 1926 Mad 78 : (1925) ILR 48 Mad 767.
1868. *Sagar Mahila Vidyalaya v Pandit Sadashiv Rao Harsha*, AIR 1991 SC 1825 : (1991) 3 SCC 588.

and buy at a sale in execution of the decree to which they are not parties, and at a time when that decree is a valid and subsisting decree and when the order for sale is valid order. A *bona fide* purchaser, who is a stranger to the decree, does not lose his title to the property by the subsequent reversal or modification of the decree. But, where the decree-holder himself is the purchaser, the sale may be set aside if the decree is subsequently reversed or modified. Where the purchaser is a stranger, the judgment-debtor whose property is sold is entitled only to the sale proceeds of the property if the decree is subsequently reversed. But where the purchaser is the decree-holder, he is bound to restore the property to the judgment-debtor.[1869]"A sale in execution of a decree at which a third party becomes the purchaser is upheld, notwithstanding the subsequent reversal of the decree, because otherwise there will be less inducement of intending purchasers to buy at an execution-sale, and consequently less chance of property fetching proper value at such sales".[1870] But where property sold in execution of a decree is bought by the decree-holder, and it is subsequently re-sold by him to a *bona fide* purchaser for value, such purchaser acquires a good title, though the decree may be subsequently reversed.[1871] A stranger auction-purchaser who is not a party to the decree, is protected against the vicissitudes of fortune of the litigation and remain unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The property *bona fide* purchased ignorant of the litigation should be protected. The judicial sale in particular would not be robbed of all their sanctity. It is a sound rule based on legal and equitable and consideration but a distinction is made between such purchaser and a decree-holder who purchases the property in execution of his own decree which is afterwards modified or reversed. Where the purchaser is the decree-holder, he is bound to restore the property to the judgment-debtor by way of restitution. The true question is whether the stranger auction-purchaser had knowledge of the pending litigation about the decree under execution. If it is shown by evidence that he was aware of the pending appeal against the decree when he purchased the property, court cannot assume that he was a *bona fide* or innocent purchaser for giving him protection against restitution. His knowledge about the pending litigation would make all the difference in the case. He may be a stranger to the suit, but he must be held to have taken calculated risk in purchasing the property. He is evidently a speculative purchaser and in that respect, he is in no better position than the decree-holder purchaser. The need to protect him against restitution therefore, seems to be unjustified. Similarly the auction-purchaser who was a name lender to the decree-holder or who has colluded with the decree-holder to purchase the property, also could not be protected to retain the property, if the decree is subsequently reversed.[1872]

[s 65.11] Effect of Reversal of Decree upon Sale where Decree Reversed Before Confirmation of Sale

On referring to sections 316 of the Code of Civil Procedure, 1882, it will be observed that it contained a proviso, the effect whereof was stated to be that a sale could not be confirmed if, at the time of application for confirmation, the decree under which the sale was effected

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1869. *Zain-ul-Abdin v Muhammad Asghar Ali*, (1888) ILR 10 All 166 : 15 IA 12; *Mukhoda v Gopal Chunder*, (1899) ILR 26 Cal 734; *Umedmal v Srinath*, (1900) ILR 27 Cal 810; *Paresh Nath v Hari Charan*, (1911) II R 38 Cal 622, 627; *Shirbai v Yesoo*, (1919) II R 43 Bom 235, 238; *Piari Lal v Hanif-un-Nisa*, (1916) ILR 38 All 240 (stranger purchaser); *Chintaman v Chunisahu*, (1916) 1 Pat LJ 43, 46, (decree-holder purchaser); *Agha Husain v Qasim Ali*, AIR 1926 All 35 : (1925) ILR 23 All LJ 946.
1870. *Mukhoda v Gopal Chunder*, (1899) II R 26 Cal 734, 737. See notes to section 144, "Who may apply for restitution."
1871. *Shick Ismal v Rajah Raushar*, (1907) ILR 30 Mad 295; *Marimuthu v Subbarayar*, (1903) 13 Mad LJ 231.
1872. *Chinnammal v P Arumugham*, (1990) 1 SCC 513.

had ceased to be a subsisting decree.[1873] That proviso has not been reproduced in the present section. Under the present section, therefore, a sale held in execution of a decree may be confirmed, in any event where the purchaser is a third party, though the decree has been reversed before confirmation of the sale.[1874]

[s 65.12] What Passes at a Court Sale

See notes to O XXI, rule 94.

[s 65.13] Non-application of Section

The application of section 65 turns upon the scope of section 341 of UP Zamindari Abolition and Land Reforms Act, 1950, which applies the provisions of the CPC to the proceedings taken under that Act. Section 341, however, applies to the court only so far as it can be applied consistently with the Act and not in derogation of it. As is clear, the procedure incorporated in UP Zamindari Abolition and Land Reforms Act and the rules made under it specifically exclude the operation of section 65 of the CPC.[1875]

[S 66] Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.—[1876][*Rep. by Benami Transactions (Prohibition) Act, 1988 (45 of 1988), sec. 7 (w.e.f. 19-5-1988).*]

The section prior to its repeal, was as follows:

> "(1) No suit shall be maintained against any person claiming title under a purchase certificate by the court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims [and in any suit by a person claiming title under a purchase so certified, the defendant shall not be allowed to plead that the purchase was made on his behalf or on behalf of some-one through whom the defendant claims.]
>
> (2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."

1873. *Doyamoyi Dasi v Sarat Chunder*, (1898) ILR 25 Cal 175; *Mul Chand v Mukta*, (1888) ILR 10 All 83; *Ram Sukh v Ram Sahai*, (1907) ILR 29 All 591; *Nataraja v Ramaswamy*, AIR 1922 Mad 481 : (1922) ILR 45 Mad 856.

1874. *Sarimuthu v Muthu Krishna*, AIR 1933 Mad 598 : (1933) ILR 56 Mad 808; *Venkates Kotadia v Shanta Bai*, (1960) 2 Mad LJ 346; *Ambujammal v Thangavelu Chettiar*, (1941) 1 Mad LJ 193. See O XXI, rule 92(1) and note the words, "court shall make an order confirming the sale."

1875. *Jagdish Sugar Mills Ltd v CIT, Lucknow*, (1986) 3 SCC 578.

1876. Omitted by the Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988), section 7 (w.e.f. 19-5-1988), prior to its omission section 66 stood as under :

> **"S 66. Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.—**(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims, and in any suit by a person claiming title under a purchase so certified, the defendant shall not be allowed to plead that the purchase was made on his behalf or on behalf of someone through whom the defendant claims.
>
> (2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."

The above section was repealed and replaced by the Benami Transaction (Prohibition) Act, 1988. We are providing hereinafter the commentary on the above section as it stood before its repeal for the benefit of those who would be interested in understanding the law as it stood prior to its repeal.

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[s 66.1] Section Explained

In a case where the real owner is in possession of the property and the *benamidar,* whose name is entered in the certificate of sale files against him a suit for possession, the real owner is prevented from a defence that the plaintiff is only a nominal purchaser. The bar now is against the real owner both as a plaintiff and as a defendant in a suit by or against his *benamidar* whose name as a purchaser is certified by the court.

[s 66.2] *Benami* Purchases

The object of the section is to put a stop to *benami* purchase at execution-sales,[1877] and to secure the best price for the properties sold in court auction.[1878] If *A* under a secret understanding with *B* purchases property with his own money but in *B*'s name, the purchase is said to be *benami*. In such a case *B* is merely a *benamidar* or ostensible owner; he holds the property in trust and *A* may compel him to transfer the property to him (*A*). If, however, *A*'s object in purchasing the property in *B*'s name was to defraud his creditors *and the object of the fraud is carried out*, the court will not assist *A* in recovering possession of the property from *B*; but if the object of the fraud is not carried out, the court will assist *A* in recovering possession of the property from *B* notwithstanding *A*'s primary intention to effect a fraud. This is the law as applicable to *benami* purchases at a *private sale*.[1879] The law, however, is different as to *benami* purchases at a court sale. If *A* purchases property in *B*'s name at a court sale and a certificate of sale is issued to *B* (O XXI, rule 94), *B* will *conclusively* be deemed to be the real purchaser as against *A*, and no suit will lie under this section by *A* against *B* for possession of the property, unless *A* can prove that *B*'s name was inserted in the certificate fraudulently or without his

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1877. *Bibi Kaniz Ayesha v Mojibul Hassun Khan*, (1941) ILR 20 Pat 855 : (1942) AP 230; *Prem Sukh Gulgulia v Habib Ullah*, (1945) AC 355 : (1945) 49 Cal WN 371; *Bodh Singh v Ganesh Chunder*, (1874) 12 Beng LR 317; *Ganga Sahai v Kesri*, 37 All 544 : (1942) IA 177 : 19 Cal WN 1175.
1878. *Latchumanan v Veerappa*, AIR 1956 Mad 10.
1879. *Govinda v Lala Kishun*, (1901) ILR 28 Cal 370; *Jadunath v Ruplal*, (1906) ILR 33 Cal 967; *Chenviappa v Puttappa*, (1887) ILR 11 Bom 708; *Sidlingappa v Hirasa*, (1907) ILR 31 Bom 405; *Yaramati v Chundru*, (1897) ILR 20 Mad 326; *Muthuraman v Krishna*, (1906) ILR 29 Mad 72; *Munisami v Subaryar*, (1908) ILR 31 Mad 97; *Kondeti v Nukamma*, (1908) ILR 31 Mad 485. See Indian Trusts Act, 1882 section 84.

consent [see sub-section (2)]. The plaintiff filed a suit against a third party in the name of *A* and also obtained a decree in favour and in the name of *A*. The plaintiffs also executed the decree in the name of *A* and purchased in execution of that decree the property in question in the name of *A* at a court auction. The plaintiff thereafter took possession of the property and remained in possession without any difficulty from *A*. But after *A*'s death, his sons got their names mutated and dispossessed the plaintiffs. The plaintiffs thereupon filed a suit against *A*'s sons for possession which suit was held barred under sub-section (1).[1880] The same rule applies even if the claim made by the beneficial owner is not for the whole of the property of which of the property the defendant is certified purchaser. Thus, if *B* is the certified purchaser of certain property, part of which was purchased by him on his own account, and part *benami* of *A*, *A* is not entitled to maintain a suit under this section for recovery of the *part* purchased by *B benami* for him.[1881] This is so because the beneficial owner has necessarily to rely on the sale certificate issued in favour of the person in whose name the auction purchase has been made.[1882] The mere fact, however, that the plaintiff has described the defendant as a *benamidar* does not make the transaction *benami* if it was not *benami* in fact; it is a mere misdescription, and it is no ground for refusing the plaintiff relief to which he is otherwise entitled.[1883]

Sub-section (1) as it stood before its recent amendment laid down a bar against a suit by the real owner against the certified purchaser or person claiming title under him. The recent amendment provides an additional bar and that is that where the real owner is in possession of the property and the person, in whose favour the sale certified as certified by the court stands, files a suit against him for possession, the real owner as the defendant is barred from pleading that the purchase was made on his behalf or on behalf of someone through whom he claims. The bar under sub-section (1) is against the real owner both as a plaintiff in a suit filed by him against the certified purchaser and against him as a defendant in a suit filed by such purchaser.

[s 66.3] Section Must be Construed Strictly

Where a transaction is once made out to be *benami*, the courts of India, which are bound to decide according to equity and good conscience, will deal with it in the same manner as it would be treated by an English Court of equity.[1884] That is to say, effect will be given to the real and not to the nominal title, unless the result of doing so would be to work a fraud upon innocent persons.[1885] The present section provides that when property is sold at a court sale, no suit shall be maintained against the certified purchaser on the ground that the purchase was made *benami*. It provides in effect that the certified purchaser shall be *conclusively* deemed to be the real purchaser, and shall not be liable to be ousted on the ground that his purchase was really made on behalf of another. In other words, the provisions of the present section bar the equitable jurisdiction of the courts. The section, therefore, must be construed strictly and not extended beyond its express terms. But though the section prohibits suits against the certified purchaser to assert a *benami* title against him, *it does not make benami purchases illegal.*

1880. *Jadunandan Singh v Baldeo Singh*, 1965 AP 384.
1881. *Durga v Bhagwandas*, (1901) 23 All 34; see *Bishan Dayal v Kesho Prasad*, (1937) All 113 : (1937) AA 176. On appeal to Privy Council (1940) 42 Bom LR 138 : (1940) A PC 202. But see *Hari v Ramchandra*, (1907) 31 Bom 61.
1882. *Rangasami Gounder v Easwarmurthi*, (1967) ILR 2 Mad 112 : (1967) 2 Mad LJ 162 : 1967 AM 437.
1883. *Venkatappa v Jaldyya*, (1919) ILR 42 Mad 615 (FB).
1884. *Re Kahandas*, (1881) ILR 5 Bom 154.
1885. Mayne's, *Treatise on Hindu Law and Usage*, section 442.

The object of the stringent provisions of this section is to discourage *benami* purchases at court sales, but not to render such purchases *illegal*.[1886]

[s 66.4] Scope of the Section

The section refers to execution sales only and has no application to a sale held by receiver,[1887] not to sales held under the rules of the Co-operative Societies Act and sale certificates issued thereunder,[1888] not to revenue sales.[1889] But the section applies to sales held by a Collector in execution of decrees of civil courts transferred to him under section 67.[1890] *Benamidar* possesses ostensible title. He holds and represents the property for all practical purposes to the entire world, "except the real owner." Section 66 of CPC does not create any legal bar for a *benamidar* to recognise the title of a legal owner. He can do so, by an instrument which constitutes a deed of release. It is well settled that the purchaser of a property from an ostensible owner is protected from the real owner, save for the want of knowledge of a real owner. Hence a *benamidar* can transfer a valid title to the purchaser.[1891]

[s 66.5] Whether Section Retrospective

The High Court of Calcutta has held that this section does not apply if the sale was held and confirmed before 1 January 1909, when the present Code came into force, and that the section applicable is section 317 of the Code of 1882.[1892] That is also the view of the Lahore High Court.[1893] But if the sale was held before, but confirmed after that date, the present section applies for the title of the execution purchaser cannot be said to have been perfect until the confirmation of the sale.[1894] It is submitted that even if the sale was confirmed before 1 January 1909, this section would apply to the case and not section 317.[1895]

[s 66.6] Suits outside the section

Sub-section (1) as it stood before its recent amendment provided a bar only against a suit by the real owner against his *benamidar* on the ground that the purchase was made on behalf of him—the plaintiff. In other words, it was only in suits *against the certified purchaser* as the defendant that such purchaser was to be conclusively deemed to be the real purchaser. That being so, it was held that if the real owner was in actual possession, he could resist a suit filed against him by the certified purchaser for possession or for rents or profits and plead that such

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1886. *Girija Nandini Devi v Bijendra Narain*, AIR 1967 SC 1124 : (1967) 1 SCR 23; *Ranchhoddas v Manga Bhika Bhole*, (1950) AB 277; *Shrideo Ram Mandir v Nathu Ram*, (1941) Nag 90 : (1941) AN 84; *Ganga Sahai v Kesri*, 42 IA 177 : (1915) 37 All 545; *Buhuns v Lalla Buhoree*, (1872) 14 Moo Ind App 496; *Lokhee v Kallypuddo*, (1875) 23 WR 358 : 2 IA 154; *Muhammad Abdul Jalil v Muhammad Obaid Ullah*, (1929) 56 IA 330 : 51 All 675 : (1929) APC 228; *Qandhara v Gokal Chand*, (1933) 14 Lah 712 : (1933) AL 636; *Abdul Hamid Muhammed*, (1920) 2 Lah LJ 353, p 359.

1887. *Narain Das v Ramchandra*, (1926) 48 All 209 : ('26) AA 124.

1888. *Srinivasacharyulu v Hanumantha Rao*, (1955) AAP 10 : 1954 Mad WN 915.

1889. *Munnabi v Mohanlal*, 1952 Nag 366 : (1953) AN 259.

1890. *Gangaram v Thulsiram*, 1954 Nag 166 : (1954) AN 77.

1891. *Satyabhamabai v Pandurang Marotrao Pawar*, AIR 1990 Bom 134 (AA Desai, J).

1892. *Promotha Nath v Mohini*, (1920) ILR 47 Cal 1108.

1893. *Jai Kishan v Parmeshri*, (1937) AL 471.

1894. *Fazlul v Sardar*, (1928) 32 Cal WN 112 : ('28) AC 338.

1895. *Muhammad Abdul Jalil v Muhammad Obaid Ullah*, (1929) 56 IA 330, pp 331, 332 : 51 All 675 : (1929) APC 228 : 31 Bom LR 1393, pp 1395–1396.

certified purchaser was only his *benamidar*.[1896] This is no longer correct since the Amendment Act, 1976, has added that such a defence by the real owner is no longer available to him. But a suit by a certified purchaser as plaintiff for a declaration that he had purchased the property at the auction sale in his own right and not in *benami* is not barred.[1897] The section is also no bar to a suit by the beneficial owner for possession against the judgment-debtor pursuant to an agreement made between them after the sale of the property, provided the certified purchaser is joined as a party to the suit, and he does not claim the property.[1898] Section 66 does not bar the *benamidar* from recognising the title of the real owner by executing an instrument of release.[1899] In a Patna decision where all important cases were noticed and summarised *X* purchased the property at a court sale in the *benami* of *Y*. He then agreed to sell it to *Z*. *Y* proceeded on this agreement and executed the conveyance in favour of *Z* who paid the price not to *X* but to *Y*. A suit by *X* against *Y* to recover the money was held not to be barred.[1900] Again, if *C*, the certified purchaser sells the property purchased to *D*, and then *D* agrees to sell it to *P*, who is the beneficial owner, a suit by *P* against *D* to enforce the agreement of sale is based on a contract which is a separate transaction and outside the section.[1901]

The section applies, as is clear from its words either when a suit is filed by a person claiming to be the real purchaser as plaintiff against the certified purchaser as the defendant on the allegation that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. This is clear from the word "plaintiff" in sub-section (1). The section now provides a further bar against the beneficial owner claiming to be so in a suit against him by the certified purchaser for possession where the former is in possession. The question as to whether the bar applies to suits for partition was left open in *Jitendra Nath Sur v Amarendra Nath Sur*.[1902] In that case *A* was alleged to have purchased a property at a court sale in the *benami* of one of his sons, *B*. After *A*'s death, his other son *C* filed a suit for partition against *B* claiming a share in that property. It was contended that this section was not a bar as in a partition suit every defendant was in the position of a plaintiff and the defence of *B* that it was his own acquisition was to be regarded as a claim made by him as if he was the plaintiff. The point was left open as the court found that the property was purchased by *B* with his own money.

[s 66.7] Suit by a Third Person for a Declaration that the Certified Purchaser is merely a *Benamidar*

Under the corresponding section 317 of the Code of 1882, the high court of Calcutta held that the only suits barred under that section were suits brought by *the beneficial owner as plaintiff* against the certified purchaser as defendant, and that suits brought by a *third party as plaintiff* against the certified purchaser as defendant for a declaration that the property, though

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1896. *Lokhee v Kallypuddo*, 1875 23 WR 358 : 2 IA 154; *Jan Muhammad v Ilahi Baksh*, (1876) 1 All 290; *Govinda v Lala Kishun*, (1901) ILR 28 Cal 370; *Vishnu v Ragho*, (1903) 5 Bom LR 329; *Ghazi-ud-din v Bishan Dial*, (1905) 27 All 443; *Haji Mohammad v Nur Fatma Begum*, (1938) All 556 : ('38) AA 391; *Kesavan Padmanabhan v Sanku Narayanan*, AIR 1958 Ker 368 : 1958 Ker LJ 99 : 1958 Ker LT 524.
1897. *Abdul Bari v The Uncovenanted Service Bank*, (1896) ILR 18 All 461.
1898. *Prem Sukh Gulgulia v Habib Ullah*, (1945) AC 355 : (1945) 49 Cal WN 371; *Sheo Shankar v Mahabir Prasad*, (1947) 26 Pat 505 : ('48) AP 350; *Saradindu v Gosta*, (1922) 27 Cal WN 208 : (1923) AC 302; see *Asghari Begam v Kanhaiya Lal*, (1936) All LJ 1169 : (1936) AA 750.
1899. *Satyabhamabai v Pandurang Pawar*, AIR 1990 Bom 134 (DB).
1900. *Sheo Shanker v Mahabir Prasad*, (1947) ILR 26 Pat 505 : ('48) AP 350.
1901. *Allibhai v Dadu*, (1931) 33 Bom LR 1296 : (1931) AB 578; *Muniappa v Thangavelu*, (1937) AM 362.
1902. *Jitendra Nath Sur v Amarendra Nath Sur*, (1945) AC 458 : (1945) 79 Cal LJ 248.

ostensibly sold to the certified purchaser, is liable to satisfy a claim of such third party against the beneficial owner, were not barred under that section.[1903] On the other hand, the High Courts of Madras[1904] and Allahabad[1905] held that even suits brought by *third person as plaintiff* were barred under that section. The present section gives effect to the Calcutta decisions by providing in the sub-section (2) that:

> Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

ILLUSTRATION

> *A* obtains a decree against *B*, and attaches certain property alleged to belong to *B*. *C* objects to the attachment, alleging that he is the certified purchaser of the property, having purchased the same at a court-sale held in execution of a decree obtained against *B* by *D*. *A* alleges that the property was purchased by *C benami* for *B*, and sues *C* for a declaration that *C* was merely the *benamidar* for *B*. The suit is not barred under this section, for it is a suit not by the *beneficial owner*, but by a *third person*.

[s 66.8] Suit by Beneficial Owner in Possession for Declaration of Title

There is a conflict of opinion whether a suit by a beneficial owner in *possession for a declaration* of his right to the property against the certified purchaser is barred under this section. The High Court of Calcutta in a case under section 317 of the Civil Procedure Code of 1882, held that such a suit was not barred under that section.[1906] On the other hand, the High Court of Allahabad held that such suit was barred under this section.[1907] *A* obtains a decree against *B*. In execution of the decree, certain property belonging to *B* is sold. *B* purchases the property in *C*'s name. The certificate of sale is granted to *C*, but *B continues in possession* of the property. After a few years *C* gives notice to the tenants not to pay rent to *B*. *B* thereupon sues *C* for a *declaration* that he is the real purchaser and for an injunction restraining *C* from interfering with his tenants. The suit is not barred according to the Calcutta decision. It is barred according to the Allahabad decision. In the Calcutta case, the court said: "It is not a case in which the plaintiff seeks to obtain a decree for *possession* against the ostensible purchaser. Resting, as it does, on an *existing possession*, we do not think that it is a suit of the nature prohibited by section 317." As to this it was observed by Strachey CJ in the Allahabad case cited above:

> If the learned Judges in that case meant to lay down that section 317 applies only where the plaintiff, being out of possession, seeks to recover possession from a certified purchaser, and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession was not the real purchaser, I cannot agree with them.

Bannerji J said: "The first paragraph [of the section] is not confined to a suit for recovery of possession only." The correctness of the Calcutta decision was doubted by the same court in

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1903. *Kanizak v Monohur*, (1886) ILR 12 Cal 204; *Subha Bibi v Hara Lal*, (1894) 21 Cal 519.
1904. *Rama Kurup v Sridevi*, (1893) ILR 16 Mad 290. But see *Kollantavida v Tiruvalli*, (1897) ILR 20 Mad 362.
1905. *Delhi and London Bank v Partab Bhaskar*, (1899) ILR 21 All 29; *Kishan Lal v Garuddhwaja Prasad*, (1899) 21 All 238; *Ram Narain v Mohanian*, (1904) ILR 26 All 82; *Khuda Baksh v Aziz Alam*, (1905) ILR 27 All 194; *Sarju Prasad v Bindeshri*, (1911) ILR 33 All 382.
1906. *Sasti Churn v Aunopurna*, (1896) ILR 23 Cal 699.
1907. *Bishan Dial v Ghazi-ud-din*, (1901) ILR 23 All 175.

the under mentioned cases,[1908] but the principal of that decision was followed by the same high court in another case.[1909] It was held in the last-mentioned case that where a Mahomedan father purchases property at a court-sale with his own money in the name of one of his sons, *and then lets the property to a tenant and the tenant pays rent to him*, this section is no bar to a suit by the other sons against the tenant and the son in whose name the property was brought for recovery of rent after their father's death. The Patna High Court holds that a suit for a declaration of a title by the beneficial owner is barred, and that it is immaterial whether the plaintiff is in possession and seeks confirmation of possession, or whether he is out of possession and seeks to recover possession.[1910] It is submitted that the Patna view is correct. The words "no suit" with which sub-section (1) commences takes in all suits against the certified purchaser by the beneficial owner and it is immaterial whether such beneficial owner is in possession and seeks a declaration that it is rightful or whether he is not in possession and wants to recover it.

Where the beneficial owner has been in possession *for twelve years or upwards*, a suit will lie at his instance against the *benamidar* for a declaration of his title to the property. The basis of such is the plaintiff's *title by possession*. The suit is based, not on the ground that the defendant is a *benamidar*, but on the *title by possession*. Such a suit does not come within the purview of this section.[1911]

[s 66.9] Persons Claiming through Beneficial Owner

This section precludes a suit by the beneficial owner or one claiming through him.[1912] The amendment in sub-section (1) similarly precludes a plea by the defendant that the purchase by the plaintiff was made on his behalf or on behalf of someone through whom the defendant claims. It does not preclude a suit by a person who does not claim through the beneficial owner, but claims through another person.[1913] An attaching decree-holder does not claim under his judgment-debtor and is not debarred from claiming that property standing in the name of a third person really belongs to the judgment-debtor and that is expressly saved by sub-section (2).[1914]

[s 66.10] Joint Purchase

The provisions of this section are designed "to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affects the title of persons otherwise beneficially interested in the purchase".[1915] It has accordingly been held that where one of several holders of a joint mortgage decree applies for execution of the decree under O XXI, rule 15, on behalf of all, and the purchase money is set off against the entire amount of the debts, the other decree-holders are entitled to a

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1908. *Hanuman Pershad v Jadu*, (1916) ILR 43 Cal 20, 26; *Umasasi v Akrur*, (1926) ILR 53 Cal 297 : (1926) AC 542.
1909. *Mahamad v Mahammad*, (1919) 24 Cal WN 51.
1910. *Keshri Mull v Sukan Ram*, (1933) 12 Pat 616 : (1933) AP 264.
1911. *Karim v Bibi Sakina*, 1964 SC 1254; *Muhammad Abdul Jalil v Muhammad Obaid Ullah*, (1929) 56 IA 330 : 51 All 675 : (1929) APC 228; *Karamuddin v Naimut*, (1892) 19 Cal 199. See also *Bishan Dial v Ghazi-ud-din*, (1901) 23 All 175, pp 178—179; *Ram Chardra v Jaith Mal*, ('34) AA 990; *Dolgovind v Anathbandhu*, AIR 1954 Ori 244.
1912. *Karim v Bibi Sakina*, *supra*.
1913. *Narain v Durga*, (1913) 35 All 138.
1914. *Shaligram v Narainsa*, 1954 Nag 457 : (1954) AN 223.
1915. *Ganga Sahai v Keshri*, (1915) 37 All 545, pp 554—555 : 42 IA 177, 182.

declaration that the purchase was made on behalf of all the decree-holders,[1916] and so when one of three legal representatives of the deceased decree-holder applied to execute the decree under O XXI, rule 15(l) the purchase by him was held to ensure for the benefit of the other legal representatives as well and a suit by them for partition of their shares was held to be not hit by the section.[1917] Where the defendant is the holder of the certificate of sale, another person cannot claim that he was the owner of half of the property.[1918]

Where property is purchased at a court-sale by a member of a joint Hindu family in his name, but *with family funds*, the other members are entitled to sue him for a declaration that the purchase was made on behalf of the family, though the certificate of sale is in his name. The section does not apply to such a case. This was decided by their Lordships of the Privy Council in *Bodh Singh v Gunesh Chunder*,[1919] a case under the Code of 1859. Their Lordships said:

> [The provisions of the section] cannot be taken to affect the right of members of a joint Hindu family, who *by the operation of law*, and not by virtue of any private agreement or undertaking [such as exists between a benamidar and the beneficial owner], are entitled to treat as part of their common property an acquisition, howsoever made, by members of the family in his sole name, if made by the use of the family funds.

The same principle applies where the parties stand in the relation of partners, and the purchase is made by one of the partners in his name with partnership funds;[1920] or by the agent of one of the parties on behalf of all but the sale-certificate is not taken in the name of all.[1921] It cannot however be assumed that merely because two persons jointly provide funds for purchasing the property at an auction sale that constituted a partnership for a single venture.[1922] It has been generally held that when the plaintiff claims property not on the ground that the purchase was *benami* for him but on the ground that he is entitled to it under some general principles of law such as trust or on the basis of an agreement between the parties, this section has no application.[1923] It has been held by a Full Bench of the Andhra High Court that a suit based on allegations of *benami* is within the prohibition of the section and must fail, unless it falls within sub-section (2) and that it makes no difference that the parties stand in fiduciary relationship to each other and that section 82 of the Trusts Act is subject to this section.[1924] But persons who are not partners cannot contract themselves out of the section; and if several persons purchase property at a Court-sale in the name of one of them, the others cannot maintain a suit for their share against the certified purchaser.[1925]

When property is purchased at a court-sale by two or more persons jointly, the executing court has no power to grant the certificate of sale to one of them only without the consent of

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1916. *Ganga Sahai v Keshri*, (1915) 37 All 545 : 42 IA 177, *supra; Achhaibar v Tapasi*, (1907) 29 All 557; *Bibi Kaniz Ayestha v Mojibul Hassan Khan*, (1941) 20 Pat 855 : (1942) AP 230.
1917. *Thimmappa v Subba Rao*, AIR 1960 Mys 249.
1918. *Shivnarayan v Baulal*, AIR 1988 MP 123.
1919. *Bodh Singh v Gunesh Chunder*, (1874) 12 Beng LR 317; *Durgadas v Bagalananda*, (1934) 61 Cal. 440 : (1934) AC 567 : 38 Cal WN 494; *Girija Nandini Devi v Bijendra Narain*, AIR 1967 SC 1124 : (1967) 1 SCR 93 : 46 Pat 193.
1920. *Achhaibar v Tapasi*, (1907) 29 All 557, 561; *Vishvanath v Pandharinath*, (1926) 50 Bom 600 : ('26) AB 525; *Ratanlal Haiarilal v Seth Lakshmi Narain*, (1962) A MP 28 : (1962) Jub LJ 75.
1921. *Bhudarsao v Samarathmal*, (1940) AN 1.
1922. *Rangaswami Goundar v Easwarmurthi*, (1967) 2 Mad 112 : 1967 AM 437 : (1967) 2 Mad LJ 162.
1923. *Suryanarayana v Venkatasubbiah*, 1951 (2) Mad LJ 76 : (1951) AM 943 : 64 LW 608; *Lakshmanan Chettiar v Veerappa Chettiar*, 1955 (2) Mad LJ 460; *G Raman v G Keshavan*, AIR 1959 Ker 249 : 1959 Ker LT 304.
1924. *Kotaiah v Venkatasubbaiah*, 1961 (2) And WR 196 : (1962) AAP 49; *Jaduvandan Singh v Baldeo Singh*, AIR 1965 AP 384.
1925. *Iswar Chandra v Kabiruddin*, (1934) 61 Cal 371 : ('19) AC 322.

the others. If it does so, the case is one within sub-section (2), and the other purchasers are entitled to maintain a suit against the certified purchaser for their share of the property.[1926]

If a joint Hindu family consists of *A* and his sons, and *A* purchases property at a court-sale with the family funds without the concurrence of his sons in the name of a third person, are the sons entitled to recover their share of the property from the third person [certified purchaser]? The High Court of Madras[1927] has held that they are, the reason given being that the purchase cannot in such a case be said to have been made by the father on behalf of the sons, and the sons are not, therefore, beneficial owners, and the section does not apply. On the other hand, the Allahabad High Court has held that if a managing member makes a purchase in the name of a third person, the purchase though made without the consent of his sons, must be deemed to have been made "on behalf of the sons," and the sons are precluded by this section from maintaining the suit.[1928] The Allahabad High Court purports to follow the Privy Council ruling in *Suraj Narain v Ratan Lai*,[1929] but that case, as pointed out by the Madras High Court, was a case under section 317 of the Code of 1882, which contained the words "on behalf of *any other person*," now altered into "on behalf of the *plaintiff*". The view expressed by the Allahabad High Court has been dissented from by the Calcutta High Court in *Durgadas v Bagalananda*.[1930] The Madras High Court has again considered the question in the light of the authorities referred to above and has held affirming its previous decision in *Nataraja v Ramaswami supra* that the sons are not precluded from recovering their share on the ground that the purchase was *benami*.[1931]

[s 66.11] Where Beneficial Owner is in Possession with Permission of Certified Purchaser

The High Court of Madras has held that if after obtaining a certificate of sale, the purchaser acknowledges that his purchase is *benami* and gives up possession, or does some act which clearly indicates an intention to waive his right, or restore the property to the beneficial owner, such act may, by reason of the antecedent relation between the parties, operate as a valid transfer of the property from the purchaser to the beneficial owner. Thus, if *A* is the *manager* of *B*'s estate [and this is the antecedent relation between the parties], and the estate is sold in execution of a decree against *B*, and is purchased by *B* in *A*'s name, a suit will lie at the instance of *B* against *A* for possession, if, after obtaining the certificate of sale, *A* delivers possession of the property to *B*, and then disturbs *B* in his possession. The reason given is that the permission to hold possession amounts to a *transfer of title* from the *benamidar* to the beneficial owner and the suit is thus based not on the ground that the purchase was *benami* but on a fresh title created by the transfer.[1932] The High Court of Allahabad has dissented from this view, and held, relying on the Privy Council case of *Lokee v Kallypuddo*,[1933] that the mere permission to hold possession cannot give or transfer a title from the *benamidar* to the

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1926. *Bhabatram v Durgesh*, (1926) 51 Cal 992 : (1926) AC 719.
1927. *Nataraja v Ramaswamy*, (1922) 45 Mad 856 : (1922) AM 481; *Natesa v Venkatramayan*, (1883) 6 Mad 135; *Minakshi v Kalianarama*, (1897) 20 Mad 349.
1928. *Baijnath Das v Bishen*, (1921) 43 All 711 : (1921) AA 185 (purchased by manager, in his wife's name); *Ram Rup v Khadiru*, (1928) 50 All 52 : (1928) AA 619.
1929. *Suraj Narain v Ratan Lai*, (1917) 44 IA 201, p 211 : 40 All 159, 170.
1930. *Durgadas v Bagalananda*, 61 Cal 440 : 38 Cal WN 494 : (1934) AC 567 : 150 IC 1051.
1931. *Krishna Bhatta v Ganapathi*, AIR 1955 Mad 648.
1932. *Monappa v Surappa*, (1888) 11 Mad 234; *Sankunni v Narayanan*, (1894) 17 Mad 282; *Kumbalinga v Ariaputra*, (1895) 18 Mad 436; *Venkatappa v Jalayya*, (1912) 43 Mad 615, 616.
1933. *Lokee v Kallypuddo*, (1875) 23 WR 358 : 2 IA 154.

real owner, and that a suit like the above would be barred under this section.[1934] The Calcutta High Court has followed the Allahabad decision.[1935] However that may be, if the certified purchaser allows the beneficial owner to take possession, the section does not enable him to sue the beneficial owner for possession, because possession has come into the hands of the person entitled to it.[1936] This is so because as the section then stood the only bar was as against a suit by a beneficial owner against his *benamidar*. The section as now amended contemplates a suit by a *benamidar* against a beneficial owner or someone who claims through him. In such a- suit the defendant-beneficial owner is barred from taking the plea that the purchase by the plaintiff was on his behalf or on behalf of someone through whom he claims and therefore cannot recover possession from him. But where *A* purchased property in execution *benami* in the name of *B* and got into possession of the properties and thereafter *B* dies and his son *C* had his name entered in mutation proceedings and then *A* was dispossessed, a suit by him for declaration of title and possession was held barred by this section.[1937]

[s 66.12] Suit for Specific Performance against Certified Purchaser

In *Venkatappa v Jalayya*,[1938] a full bench of the Madras High Court held that this section does debar a plaintiff from maintaining a suit for specific performance against the certified purchaser, if the plaintiff's claim is based upon an agreement to convey the property entered into *after* the purchase. The decision in *Venkatappa's* case was approved by the Judicial Committee in *Ramatbai v Peria*.[1939] In *Ramatbai's* case it was held that the present section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement made after the purchase to transfer the property to the plaintiff in pursuance of an agreement made before it. If the contract is subsequent to the purchase, such a purchase is not affected by the section.[1940] It has been held by the Bombay High Court that even a contract entered into prior to the sale is not hit by the section and a suit to enforce it again st the auction purchaser is maintainable[1941] but there are observations in the decisions of the Calcutta High Court which take a different view.[1942]

[s 66.13] Certified Purchaser

Where a purchaser, who had not obtained a certificate was sued, and afterwards applied for and obtained a certificate, it was held that he was a certified purchaser within the meaning of this section.[1943]

1934. *Bishan Dial v Ghazi-ud-din*, (1901) 23 All 175, 179-180.
1935. *Harish v Nripandra*, (1920) 24 Cal WN 1024; *Ali Ahmad v Shamsunnessa*, (1938) 42 Cal WN 1059 : (1938) AC 602.
1936. *Muhammad Abdul Jalil v Muhammad Obaid Ullah*, (1929) 56 IA 330 : 51 All 675 : (1929) APC 228.
1937. *Saligram v Baldeo*, AIR 1960 Pat 56.
1938. *Venkatappa v Jalayya*, (1919) 42 Mad 615; *Baburam v Dokhina*, (1919) 24 Cal WN 27.
1939. *Ramatbai v Peria*, (1920) 47 IA 108 : 43 Mad 643. See also *Balaram v Nakru*, (1928) 30 Bom LR 821 : (1928) APC 75.
1940. *Prem Sukh Gulgulia v Habab Ulla*, (1945) AC 355 : (1945) 49 Cal WN 371; *Haran Chandra v Ram Kumar*, (1932) 35 Cal WN 940 : (32) AC 170.
1941. *Nimalchand v Madanlal*, 1952 Bom 40 : (1952) AB 30.
1942. *Haran Chandra v Ram Kumar*, supra; *Upendra v A. Ahmed*, 61 Cal 371 : (1934) AC 322.
1943. *Aldwell v Ilahl Baksh*, (1883) 5 All 478.

[s 66.14] Successor in Title of Certified Purchaser

This section bars a suit not only against a certified purchaser, but also against persons claiming title from him.[1944] Under the Code of 1882 there was a conflict of decisions as to whether section 317 of that Code was a bar to suits against persons claiming title from the certified purchaser. On the one hand the High Courts of Madras, Allahabad and Calcutta held that the expression "certified purchaser" in section 317 of that Code *did not include* a person claiming through or under the certified purchaser, such as an heir or an assignee,[1945] and that that section, therefore, was no bar to a suit against such person. On the other hand, the Bombay High Court held that the expression "certified purchaser" *included* his successor in title.[1946] The present section contains a legislative recognition of the view taken by the High Court of Bombay.[1947] It is obvious that the section does not apply where the real owner seeks a declaration of his title against a person who does not claim under a certified purchaser.[1948]

[S 67] Power for [1949][State Government] to make rules as to sales of land in execution of decrees for payment of money.—[1950][(1)] The [State Government] [1951][* * *] may, by notification in the Official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the State Government, to make it impossible to fix their value.

[1952][(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the [1953][State Government] may, by notification in the Official Gazette, declare such rules to be in force, or may, [1954][* * *] by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.]

[1955][(3) Every rule made under this section shall be laid, as soon as may be after it is made, before the State Legislature.]

Sub-section (2) was inserted in the section by the Code of Civil Procedure Amendment Act I of 1914. As to the result where no notification is issued as provided by sub-section (2), see the under mentioned cases.[1956]

1944. *Sowkar Kamurudeen v Noor Mahomed*, (1915) 28 Mad LJ 251.
1945. *Theyyavelan v Kochan*, (1898) 21 Mad 7; *Sibta v Bhagoli*, (1899) 21 All 196; *Dukhada v Srimonto*, (1899) 26 Cal 950.
1946. *Hari v Ramchandra*, (1907) 31 Bom 61.
1947. *Manji v Hoorbai*, (1911) 35 Bom 342, 347.
1948. *Abinas Chandra v Pratul Chandra*, (1928) 55 Cal 1070 : ('28) AC 448.
1949. Subs. for "Provisional Government" by A.O. 1950.
1950. Section 67 renumbered as sub-section (1) of that section by Act 1 of 1914, section 3.
1951. The words "with the previous sanction of the GG in C." omitted by Act 38 of 1920, section 2 and Sch I.
1952. Added by Act I of 1914, section 3.
1953. Substituted for "Provisional Government" by AO 1950.
1954. The words "with the previous sanction of the G.G. in C., " omitted by Act 38 of 1920, section 2 and Sch I.
1955. Inserted by the Delegated Legislation Provisions (Amendment) Act, 1983 (20 of 1983), section 2 & Schedule (w.e.f. 15-3-1984).
1956. *Kishore Chand v Ishar Singh*, (1913) PR No 89, p 318; *Fakir v Amin Chand*, AIR 1921 Lah 223 : (1921) 3 Lah LJ 5.

Delegation to Collector of Power to Execute Decrees against Immovable Property

[S 68—72].—[*Rep. by the Code of Civil Procedure* (*Amendment*) *Act, 1956* (*66 of 1956*), *sec.7 (w.e.f. 1-1-1957).*]However, section 16 of the Amendment Act, 1956 provides:

> Where before the commencement of this Act, the execution of a decree has been transferred to the Collector under section 68 of the Principal Act and is pending before the Collector on such commencement, then notwithstanding the omission of sections 68 to 72 inclusive and the third schedule to the principal Act, the decree shall be executed by the Collector in accordance with the provisions of the said sections and the said schedule, as if this Act had not been passed.

In view of the above saving provision, those interested in pending cases are requested to refer to the previous edition for the commentary therein and also to *MN Gujjar v GS Belekar.*[1957]

Distribution of Assets

[S 73] Proceeds of execution sale to be rateably distributed among decree-holders.—(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons:

Provided as follows:—

(*a*) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(*b*) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(*c*) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the express of the sale;

secondly, in discharging the amount due under the decree;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

1957. *MN Gujjar v GS Belekar*, AIR 1965 Mys 250; *Kuber Singh v Digvijay Singh*, AIR 1968 All 125.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

SYNOPSIS

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[s 73.1] High Court Amendment

Calcutta.—Omit clause (*c*) of the proviso in sub-rule (*1*). *Vide* Cal Gaz Pt I, dated 20 April 1967.

[s 73.2] Changes Introduced by the Section

The present section differs from the corresponding section 295 of the Code of Civil Procedure, 1882, in the following respects:

(i) The words, "where assets are held by a court," have been substituted for the words, "whenever assets are realised by sale or otherwise in execution of a decree." This it is submitted, introduces an important alteration, though the High Court of Bombay has held otherwise.[1958]

(ii) The words, "before the receipt of such assets," have been substituted for the words, "prior to the realisation."[1959]

1958. See notes, "Assets held by a court".
1959. See notes, "Before the receipt of the assets".

(iii) The words "by which such assets are held" are omitted after the words "made application to the court."

(iv) The word, "passed," has been added after the word, "money".[1960]

(v) The words, "interest in," in clause (b) have been substituted for the words, "right against," to bring the wording of that clause into line with the Transfer of Property Act, 1882, section 96. This is a mere verbal alteration.

[s 73.3] Rateable Distribution: Object of the Section

What is contemplated under the provisions of section 73 of the Code of Civil Procedure, 1908 is the existence of more than one decree against the same judgment-debtor and the decree holders have made their applications for execution of their decrees and have not been fully satisfied. Once that is the position, as soon as the assets of the judgment-debtor are received by another court, they can make an application under section 73 for rateable distribution without getting their decrees transferred to the court which received the assets. Even the attachment of the assets of the judgment-debtor, by all the decree holders is also not necessary and the requirement is only to make an application after the receipt of the assets by the court, an application under section 73 for rateable distribution. If such applicant fulfils the other requirements contemplated under section 73, he is entitled for rateable distribution.[1961]

The object of section 73 is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property.[1962]

The object of this section is to provide a cheap and expeditious remedy for the execution of money-decrees held against the same judgment-debtor by adjusting the claims of rival decree-holders without the necessity for separate proceedings.[1963] The doctrine of rateable distribution does not apply to more than one decree held by the same decree-holder.[1964] Under the Code of Civil Procedure, 1859, section 270, the creditor who first attached the property had a prior claim to have his decree satisfied out of the sale-proceeds to the exclusion of other creditors, but now, all judgment-creditors who apply to the court prior to the receipt of the sale-proceeds by the court, are entitled to share rateably.[1965] In *Bithal Das v Nand Kishore*,[1966] Strachey CJ said:

> The object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one *separately* attaching and *separately selling* that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the *same* footing, and making the property *rateably* divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property.

1960. See notes, "Same judgment-debtor".
1961. *Kanakam Srinivasa Rao v Ganga Venkateswara Rao*, AIR 2003 AP 38.
1962. *Boban v sajith Kumar*, AIR 2004 Ker 181 (DB).
1963. *Hasoon Arra v Jawadoonnissa*, (1879) 4 Cal 29.
1964. *Mohd Jan v H Abdul Satar*, AIR 1971 Del 132 : 73 Punj LR 253.
1965. *Kommachi v Pakker*, (1897) 20 Mad 107, p 111.
1966. *Bithal Das v Nand Kishore*, (1901) 23 All 106, 110; *Hari Lal v Chatrun Prasad*, AIR 1941 All 110; *Himatmal Devchand v Abdul*, AIR 1945 Bom 76 : 46 Bom LR 757.

A obtains a decree against *B* in court *X* for Rs 4,000, and applies to that court for execution of his decree by attachment and sale of certain property belonging to *B*, and the property thereupon attached. *C* then obtains a decree also against *B* in court *X* for Rs 2,000, and applies to that court for execution of his decree by attachment and sale of the same property attached in execution of *A*'s decree. The property is then sold by the court in execution of *A*'s decree for Rs 3,000. *C* is entitled to share rateably in the net sale-proceeds, that is to say, if the net sale-proceeds amount to Rs 3,000, *A* will be paid Rs 2,000 and *C* will be paid Rs 1,000. It is not necessary to entitle *C* to participate in the assets that he should have given notice to *A* of the application made by him for execution of his decree.[1967] The section is wide enough to include transferees of decrees.[1968]

While considering the question of rateable distribution, only the unsatisfied portion of the decree ought to be taken into account.[1969] Rateable distribution should be made according to the amount due to each decree-holder at the time the distribution is made and not according to the amount due at the time when the assets were received by court.[1970]

If a plaintiff obtains a decree on the admission of the defendant[1971] and the decretal amount is directed to be recovered out of a sum due to the defendant judgment-debtor in another court, a rival decree-holder cannot claim rateable distribution out of the sum.[1972]

The section has no application to money belonging to third persons and deposited into court for a specific purpose. Thus, when a person, not a judgment-debtor, deposits into court, money for the express purpose of satisfying the mortgage decree and extinguishing the mortgage lien, that money does not belong to the judgment-debtor and is not available for rateable distribution.[1973] Where *A*, who had obtained a decree for reconveyance of properties on payment of a certain amount, entered into an agreement with *B* whereby *B* was to advance the amount and take a usufructuary mortgage over the properties therefor after reconveyance is obtained and in case of failure to obtain reconveyance was to be repaid out of the monies in court deposit, it was held that the latter were not assets belonging to the judgment-debtor and this section had no application.[1974] The language of the section is clear that the assets distributable are only what may be left over after deducting the costs.[1975]

[s 73.4] Attachment of Salary

Rateable distribution applies to attachment of salary which is attachable even though it is already under attachment by reason of O XXI, rule 48.[1976] The restriction imposed by section 60(1)(i) on the rights of the decree-holder to attach salary, operates only when the dispute is between him and the judgment-debtor. It has no application when the dispute is as to the rights of the decree-holders inter se. It is, therefore, not open to one decree-holder

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1967. *Chunni Lal v Jugal Kishore*, (1905) 27 All 132.
1968. *Venkatachellam v Subrahmaniam*, AIR 1941 Mad 795.
1969. *Chokkalingam v Muthuswami*, AIR 1934 Mad 426 : (1934) 58 Mad 59.
1970. *Co-op Society, Central Bank, Daryapur v Ganpat*, AIR 1935 Ngp 214.
1971. See O XII, rule 6.
1972. *Ram Govind Pandey v Brij Ratan Das*, AIR 1937 All 424.
1973. *Gopalan v Naniamma*, AIR 1957 TC 107.
1974. *Ramakrishna Chetty v Chinna Thangavelu Chetty*, AIR 1956 Mad 574 : (1956) 2 Mad LJ 101 : 69 LW 289.
1975. *Commercial and Industrial Bank Ltd v Mir Sarfaraz Ali Khan*, AIR 1956 Hyd 65 (FB) : (1956) ILR Hyd 79.
1976. *Hongkong & Shanghai Banking Corp v Paresh Lal Roy*, AIR 1939 Cal 485 : (1939) 1 Cal 40.

claiming rateable distribution under this section to raise an objection based on section 60(1)(i) against another decree-holder.[1977]

[s 73.5] Conditions for Rateable Distribution

To entitle a decree-holder to participate in the assets of a judgment-debtor, the following conditions must be present:

(i) The decree-holder claiming to share in the rateable distribution should have applied for execution of his decree to the appropriate court.

(ii) Such application should have been made prior to the receipt of the assets by the court.

(iii) The assets of which a rateable distribution is claimed must be assets held by the court.

(iv) The attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money.

(v) Such decrees should have been obtained against the same judgment-debtor.

No rateable distribution can be claimed under the section unless all the conditions enumerated above are fulfilled.[1978]

[s 73.6] Application for Execution

In order to entitle a decree-holder to the benefits of this section, it is necessary that he must have applied for execution before the receipt of assets are provided under O XXI, rule 11.[1979] It is not necessary that he should have, in addition filed an independent application for rateable distribution.[1980] Even the attachment of the assets of the judgment-debtor by all the decree-holders is not necessary and the requirement is only to make an application after the receipt of the assets by the court, an application under section 73 for rateable distribution. If such applicant fulfils the other requirements, contemplated under section 73, he is entitled for rateable distribution.[1981] A decree-holder who has not applied for execution cannot claim the benefit of rateable distribution.[1982]

An execution petition is not bad under this section for not containing all the particulars required by O XXI, rule 11. It is sufficient if it substantially complies with it.[1983] The question is, whether a decree-holder can participate in rateable distribution, if he has applied for that only without applying for execution. In *Balaji v Gopal*,[1984] it was held that he was not. In *Devorojo Kuer v Jadunandan*,[1985] an application under O XXI, rule 11 was held to be sufficient,

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1977. *Damodar Das v Kasi Prasad*, AIR 1956 Cal 112; *Indar Chand v Ganshyam Missir*, 9 Cal LJ 210; *Khariulla Khan v Meeran Khan*, AIR 1941 Ngp 239; but see *Himatmal Dev Chand v Abdul*, AIR 1945 Bom 76 : 46 Bom LR 757.
1978. *Boban v Sajith Kumar*, AIR 2004 Ker 181 (DB).
1979. *Krishna Shankar v Chandra Shankar*, (1881) 5 Bom 198; *RM Pandey v Md. Kazim*, AIR 1939 Rang 20.
1980. *Jambanna v Honnappa*, AIR 1957 AP 1017 : 1956 Andh WR 1047; *Peddi Reddi Gangaraju v Mangamma*, AIR 1958 AP 334; *Surajlal v PRK Sagar Works*, AIR 1961 All 371; *Shyam Sundar & Co v S Veeri & Co*, AIR 1962 Mys. 12.
1981. *Anakam Srinawasa Rao v Ganga Venkateswara Rao*, AIR 2003 AP 38.
1982. *K. Suryavati v T Suryakantam*, AIR 1984 AP 273.
1983. *Abdul Salam v Veerabadra*, AIR 1929 Mad 763 : 57 Mad LJ 97 : (1929) Mad WN 611 : 30 LW 110.
1984. *Balaji v Gopal*, AIR 1929 Ngp 148.
1985. *Devorojo Kuer v Jadunandan*, AIR 1931 All 92.

although the applicant did not ask for attachment or sale of the property but only for rateable distribution of the assets to be realised at the execution sale of another decree-holder. A similar view was taken in *Kasi Prosad v Motilal*,[1986] where it was held that while a bare application for rateable distribution would not be valid under this section, an application which contains all the particulars required in O XXI, rule 11, would be valid though it did not pray for any of the reliefs mentioned in O XXI, rule 11, but only for rateable distribution. In *Saraswathi v Govinda Rao*, it has been held that rateable distribution is one of the modes of execution recognised by the CPC and a decree-holder who specifies that relief in the execution petition is also entitled to share in the distribution.[1987] Where he has recovered a part of the decretal amount out of court and filed an execution application for the balance, he would be entitled to rateable distribution even if such application is closed for want of bidder at the auction-sale.[1988]

A decree-holder who has applied for execution will be entitled to rateable distribution even though he has not attached the properties, provided he satisfies the other conditions mentioned in the section.[1989] It is not necessary to entitle a decree-holder to claim the benefit of this section that he should have given notice of execution to the other decree-holders or to the judgment-debtor.[1990] Before the decree-holder can claim rateable distribution under this section, the application must be one which on the face, of it is entitled to succeed.[1991] Where the execution application was not accompanied by a copy of the decree, as required by the rules of the Calcutta High Court, it was held that there was no valid execution petition and the decree-holder was not entitled to participate in the distribution.[1992]

The Andhra Pradesh High Court has held that a person who is a stranger to the execution proceeding, has no *locus standi* to file petition under section 73 of the Code for distribution of assets.[1993]

[s 73.7] Application of the Section to Orders

The section also applies where an application for execution is in respect of an order which has the force of a decree, as for instance, an order made under section 469 of the Companies Act, 1956.[1994]

[s 73.8] Court to which Application for Execution should be Made

Those decree-holders alone were, under the old law, entitled to rateable distribution who have applied for execution of their decrees as provided by O XXI, rule 11[1995] to the court by which the assets are held.[1996] Under the present CPC, it is sufficient that the application has been made to the appropriate court. This is because under section 63 where property has been attached in execution of decrees of several courts, the receipt of assets by one court

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1986. *Kasi Prosad v Motilal*, AIR 1959 Cal 566 : 63 Cal WN 983; *Fulsinh Kesari v Vallabhdas*, AIR 1969 Guj 200 : 10 Guj LR 148.
1987. *Saraswathi Bai v Govinda Rao*, AIR 1961 MP 145 : (1961) Jab LJ 166.
1988. *K. Srinivasa v Noor Mahomed*, AIR 1970 Mad 504.
1989. *Mangi Lal v Thakurse Bhai*, AIR 1954 Hyd 238 : (1954) ILR Hyd 411; *Manora Bai v Sultan Bakath*, AIR 1968 AP 113.
1990. *Chunilal v Jugal Kishore*, 17 All 132; *Brij Ballap v Hazarimal MBLJ*, (1954) HCR 142.
1991. *Krishnaji v Vishnu*, AIR 1938 Bom 90.
1992. *Satyendranath v Bibuthi Bhusan*, AIR 1963 Cal 104.
1993. *E. Subba Reddy v G. Dhananjay*, AIR 2007 AP 16 : 2006 (6) Andh LT 98.
1994. *Lyallpur Bank Ltd v Ramji Das*, AIR 1945 PC 60 : 72 IA 85 : (1945) 20 Luck 152 : 47 Bom LR 640.
1995. Code of Civil Procedure 1882, section 235.
1996. *Krishnashankar v Chandrashankar*, (1881) 5 Bom 198.

constitutes receipt of assets by the other courts.[1997] The High Court of Punjab has taken the view that the appropriate court means the court which passed the decree or the court to which the decree is transferred for execution. No application, therefore, can directly be made to any other court, merely on the ground that that court holds asset, of the judgment-debtor. Too much importance cannot be attached to the article "the" in section 73. The words "the court" indicate that application has to be made to the appropriate court which passed the decree. The section merely sets out the prerequisite conditions before rateable distribution can be allowed. It does not, in terms, say that application for execution has to be made to the court where the assets are lying.[1998] On the other hand, the High Court of Madras has taken the view that section 73 cannot be read with section 63, that the application for execution in terms of section 73 must be filed in the court which has received and held the assets, and that this section cannot be construed so as to enable all the decree-holders, irrespective of their applications in different courts, to claim the benefit of rateable distribution. The reason is that the court which has received and held the assets may not know the number of applications in various courts.[1999] It is submitted that the Bombay and Punjab view is correct, first, because sections 73 and 63 must be read harmoniously and secondly, because the reason given in the Madras case cannot be sustained since the court receiving and holding the assets must know from the applications before it approves for execution in other courts. Besides, such a view is contrary to the primary principle that execution application must be lodged in the court which has passed the decree or to the court to which it is transferred for execution. An application to the court which passed the decree to issue a precept of attachment under section 46, to the court by which the assets are held is not sufficient.[2000] Nor is an application to a court in anticipation that the decree will be transferred to it for execution.[2001] But this was a decision of a single judge and has been overruled in *Ademma v Venkatasubbayya*,[2002] in which it was held that an application for execution may be entertained by the transferee court before the receipt of the decree. Where two decrees were passed against the same judgment-debtor in a small cause court and one of the decree, holders had his decree transferred to the original side and in execution thereof immovable properties were sold, it was held that the other decree-holder was not entitled to share in the distribution of the sale proceeds, as he had applied for execution only in the small cause court and had not got his decree transferred to the original side and applied there for execution.[2003]

The question is, where property of the same judgment-debtor is attached in execution of decrees of more courts than one and the property is sold by the court of the highest grade. whether the holders of decrees of inferior courts are bound, in order to have the benefit of rateable distribution, to have their decrees transferred to the court of the highest grade and make fresh applications for execution to that court? *A* obtains a decree against *B* in the court of a subordinate judge of the First Class. In execution of the decree, *B*'s property is attached by that court. *C* then obtains a decree against *B* in the court of a subordinate judge of the Second Class and applies to that court for execution of his decree by attachment and sale of the same property. The property is then sold by the First Class subordinate judge in execution of *A*'s

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1997. *Dhirendra Rao v Virbhadrappa*, AIR 1935 Bom 176 : (1935) 59 Bom 310.
1998. *Gurudial Kaur v Satindar Singh*, AIR 1965 P&H 412 : (1964)ILR 2 Punj 233 : 66 Punj LR 1032.
1999. *VTV Chettiar v PSP Chettiar*, AIR 1973 Mad 313 : (1973) 1 Mad LJ 316.
2000. *Kasiwar v Aswini*, AIR 1926 Cal 249.
2001. *Nanjunda v Nallakaruppan*, AIR 1928 Mad 496 : (1928) 55 Mad LJ 120.
2002. *Ademma v Venkatasubbayya*, AIR 1933 Mad 627 : (1933) 56 Mad 192.
2003. *Subbayamma v Bangaraju*, AIR 1961 AP 422, following *Sriramu v Ramudu*, AIR 1943 Mad 262 : (1943) 1 Mad LJ 57.

decree, and the sale-proceeds are received by that court. Here the court of the subordinate judge of the First Class is the court by which the assets are held. Is *C* entitled to rateable distribution? No, according to a previous decision of the High Court of Bombay, he not having applied to the court of the subordinate judge of the First Class for execution of the decree, that being the court by which the assets are held.[2004] But this was a decision under the old CPC and is not now the law in Bombay.[2005] Yes, according to the Calcutta,[2006] Allahabad,[2007] Rangoon[2008] and Madras[2009] High Courts the reason given being that under section 63 the court of the subordinate judge of the First Class is the court to determine all claims relating to the attached property and such claims include claims for rateable distribution. It is not necessary that the other decree-holders should get their decrees transferred or should file fresh execution applications. They need only apply to the court carrying out the execution proceedings, for they have a claim which it is the duty of the court under section 63 to determine.[2010]

[s 73.9] Before the Receipt of the Assets

An application for execution must have been made before the receipt of assets by the court[2011] and it must be subsisting and pending at the date of the order.[2012] Where the judgment-debtor had died at the date of receipt of assets and his legal representatives had not been brought on record, it was held that there was no execution application pending at the material rate and that the decree-holder could not claim rateable distribution.[2013] So also, where the execution petition had been dismissed before the receipt of the assets, it was held that the decree-holder was not entitled to relief under this section.[2014] An order dismissing an execution petition for non-joinder of a receiver, who was a necessary party, was held to disentitle the decree-holder to relief under this section.[2015] But an order of dismissal can bar the grant of relief under this section only when it is judicial and is tantamount to a denial of the right on the merits and not when it is administrative and made for statistical purposes.[2016] Thus, where a judgment-debtor was brought under arrest and was granted time for payment of the decree amount on his furnishing security, and on that being done, the execution petition was dismissed; it was held that this order did not take away the right of the decree-holder to get rateable distribution.[2017] Where a decree-holder had attached the equity of redemption in certain properties of the judgment-debtor and thereafter they were sold in execution of a decree on the mortgage and the execution petition was, in consequence, dismissed but the attachment continued, it was held that the dismissal did not preclude the decree-holder from claiming rateable distribution in

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2004. *Nimbaji v Vadia*, (1892) 16 Bom 683.
2005. *Dhirendra Rao v Virbhadrappa*, AIR 1935 Bom 176 : (1935) 59 Bom 310.
2006. *Clark v Alexander*, (1894) 21 Cal 200; *Hari Bhagat v Anandaram*, (1897) 2 Cal WN 126; *Bejoy v Hukum*, (1902) 29 Cal 773; *Girindra v Kedar Nath*, AIR 1925 Cal 966 : (1924) 29 Cal WN 575.
2007. *Sarju Ram v Partap Narain*, AIR 1933 All 563 : (1933) 55 All 622.
2008. *Kwai Tong Kee v Lim Chaung*, AIR 1928 Rang 157 : (1928) 6 Rang 131.
2009. *Narasimhachariar v Krishnamachariar*, (1914) 26 Mad LJ 406.
2010. *Gourgopal v Kamalkillika*, AIR 1934 Cal 559 : (1934) 61 Cal 240; *Balmokand Ram v Ram Saran*, AIR 1936 Lah 519.
2011. *RM Pandey v Mohd Kazim*, AIR 1939 Rang 20.
2012. *Vishnubhotla Ramiah v Sajja Namayya*, AIR 1943 Mad 165 : (1943) Mad 175; *NML Chettiar Firm v Official Assignee*, AIR 1935 Rang 135 : (1935) 13 Rang 514.
2013. *Rajalakshmi v Bonomali* supra.
2014. *Ramavatar v Sitaram*, AIR 1944 All 245 : (1944) All 321.
2015. *Varghese v Parvathi*, AIR 1953 TC 475 : (1952) TC 746.
2016. *Cherain v Achiamma*, (1961) Ker LJ 764 : (1961) Ker LT 531.
2017. *Ramanatha v Alagan*, AIR 1936 Mad 437 : 70 Mad LJ 68 : 43 LW 703 : (1936) Mad WN 223.

the mortgage decree-holder's sale.[2018] But where the application for execution was struck-off as infructuous, it was held that it could not be held to be pending merely because the attachment was ordered to continue for six months.[2019] In *Sunil Roy v Bishwanath*,[2020] a car belonging to the judgment-debtor and in the possession of a third party was attached on 8 August 1953 by *A* under O XXI, rule 46, in execution of his decree in the court of the second subordinate judge, Alipore. *B*, who had obtained a decree against the same judgment-debtor in the court of the subordinate judge, Alipore, attached the car on 21 September 1953 under O XXI, rule 43, and also applied for rateable distribution in the court of the second subordinate judge on 25 September 1953. The car was sold on 28 September 1953 and the sale proceeds deposited in the court. Thereafter, on the application of the judgment-debtor. The attachment in *B*'s suit was raised by an order of the subordinate judge on 5 January 1954 on the ground that the attachment on 21 September 1953 under O XXI, rule 43 was bad, the proper provision being held to be O XXI, rule 46. On 25 January 1954, the execution petition also was dismissed for non-prosecution. The application for rateable distribution was subsequently dismissed by the second subordinate judge on the ground that the attachment effected on 25 September 1953 under O XXI, rule 43, was bad. It was held by the Calcutta High Court, reversing this order, that the attachment though irregular was not a nullity, *B* had acquired on the date of receipt of assets, a right to get rateable distribution and that could not be defeated by the subsequent order dismissing the execution petition. It was also observed that the dismissal of the execution petition would not affect the rights of the decree-holder to get rateable distribution unless he had waived or abandoned his rights against the judgment-debtor.[2021]

The corresponding section 295 of the Code of Civil Procedure 1882 commenced as follows:

> Whenever assets are realised by sale or otherwise in execution of a decree, and more persons than one have prior to the realisation, applied to the court by which such assets are held.

The present section begins as follows:

> Where assets are held by a court and more persons than one have, before the receipt of such assets, made application to the court....
>
> The word "realisation" was rather obscure. Indeed it called for several decisions in which the courts had to define its precise meaning. The word "receipt" which is now substituted for 'realisation' is not likely to require any judicial interpretation. Cases of the character noted below which turned upon the word "realisation" are not likely to arise under the present section; so clear is the meaning of the word 'receipt'.

A, *B* and *C* held each a money-decree against the same judgment-debtor. In December 1892, *A* attached by a prohibitory order, funds of the judgment-debtor in the hands of *D*.[2022] In January 1893, *B* attached the same funds in execution of his decree. In February 1893, *D* paid the funds into court. On the same day, but after payment was made into court, *C* applied to attach the fund as property in the custody of the court (O XXI, rule 52, Code of Civil Procedure 1882, section 272). It was held under section 295 of the Code of Civil Procedure 1882 that the funds should be rateably distributed between *A* and *B*, and that *C* was not entitled to participate therein, as his application was made subsequent to the realisation of the

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2018. *Krishnaswami Iyengar v Vedavali*, AIR 1959 Mad 218 : 72 LW 19.
2019. *Gulab Chand v Dargamal*, AIR 1936 Ngp 277.
2020. *Sunil Roy v Bishwanath*, AIR 1956 Cal 373 : 60 Cal WN 624 : 97 Cal LJ 164.
2021. *Byomkesh Chakravarthi v Hemanth Kumar*, AIR 1915 Cal 16 : 18 Cal WN 1311; *Kamala v Dwarka*, AIR 1937 Pat 92.
2022. Code of Civil Procedure 1908, O XXI, rule 46; Code of Civil Procedure 1882, section 268.

assets by the court.[2023] The decision would be the same under the present section for it is quite clear that *C*'s application was made after the receipt of the assets by the court.

It was held under section 295 of the Code of Civil Procedure, 1882 that where property is sold in execution of a decree, the sale-proceeds are deemed to be realised not when the 25% is deposited by the purchaser into court under section 306 (now O XXI, rule 841), but when the balance of the purchase-money is paid.[2024] Hence, a decree-holder who applied for execution before the entire amount due from the purchaser had paid into court was held entitled to share in the rateable distribution though the application was made after deposit of the 25%. But, it was held that a decree-holder who applied for execution after the entire amount of the purchase-money had been paid into court, was not entitled to share in the rateable distribution, though his application was made before the sale was confirmed by the court under section 312 (now O XXI, rule 921); and the decision was put on the ground that the point of time when assets are realised is when the sale-proceeds are paid into court, and not when the sale becomes absolute.[2025] The result would be same under the present section if the word 'received' is substituted for the word "realised".[2026] Where the balance purchase money was deposited into court by the purchaser before the time specified in O XXI, rule 85, the assets must be held to have been realised on the date of actual deposit and not the date within which it could have been deposited.[2027]

Mere attachment of a fund in court does not amount to receipt of that amount by the executing court. Therefore, decree-holders who apply for execution before the assets are actually received are entitled to rateable distribution.[2028]

The Madras High Court held the view that where immovable property is sold inexecution, in separate parcels, the sale proceeds are not deemed to have been realised until the entire purchase money in respect of all the parcels is paid into the court.[2029] This view was followed at one time by the Calcutta High Court.[2030] But later on, the high court changed its view and held that where immovable property is sold in separate lots, the sale proceeds are deemed to have been realised on the several dates on which they are received by the court.[2031] As regards movables, the Lahore court had held that if the property consists exclusively of movables, and they are sold in separate lots on different dates, the sale-proceeds are deemed to be realised on the several dates on which they are received by the officer of the court and not on the date on which the last payment is received. Thus, if some of the movables are sold and the price thereof is received on January 5, and the rest are sold and the price thereof is received on January 10, a decree-holder who applies for rateable distribution on January 7 is entitled to rateable distribution of the sale-proceeds realised on January 10, but not of those realised on January 5.[2032] Assets in this section mean money. Where certain National Savings Certificates were

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2023. *Srinivasa v Seetharamayyar*, (1896) 19 Mad 72.
2024. *Hafez v Damodar*, (1891) 18 Cal 242.
2025. *Vishvanath v Virchand*, (1882) 6 Bom 16.
2026. *Maharaja of Burdwan v Apurba*, (1911) 14 Cal LJ 50; *Girindra Nath v Kedar Nath*, AIR 1925 Cal 966 : (1924) 29 Cal WN 575.
2027. *Subramanya Iyer v Sankaran Unni*, AIR 1953 Tr & Coch 213 : (1953) Tr & Coch 56 : 1953 Ker LT 149.
2028. *Venilal Rangildas v Gandha Bai*, AIR 1952 Bom 222 : 54 Bom LR 72; *Imperial Bank of India v Balasubramaniam*, AIR 1945 Mad 12 : (1945) 2 Mad LJ 49.
2029. *Ramanthan v Subramaniam*, (1903) 26 Mad 179.
2030. *Barendra Nath v Martin & Co.*, AIR 1921 Cal 801 : (1921) 33 Cal LJ 7.
2031. *Girindra Nath v Kedar Nath*, AIR 1925 Cal 966 : (1924) 29 Cal WN 575.
2032. *Surjan Singh v Prag Das*, (1918) PR No 33, p 128.

attached on 20 September 1950, and cashed on a creditor who had attached the certificates on 14 December 1950 he was held entitled to participate in the distribution.[2033]

Where property is sold in execution by a person appointed by the court under O XXI, rule 65, the receipt of purchase-money by such person is for the purposes of this section equivalent to receipt of assets by the court. The material date, therefore, is not the date on which the court receives the amount of the purchase-money from such person, but the date on which such person receives the purchase-money from the purchaser.[2034]

When property which is attached in execution of decrees of several courts is sold by a court of inferior grade and the sale-proceeds are transferred to the court of highest grade for rateable distribution, the date of receipt of assets is the date when the sale-proceeds are received by the latter court.[2035] If property is attached in execution of decrees of several courts and is sold by the court of superior grade, it is sufficient if execution applications to the inferior courts are made before the receipt of sale proceeds by the superior court and such applicants are entitled to rateable execution.[2036] *A* filed a suit in court *X* and attached before judgment, movables belonging to the defendant *B*. *C* filed a suit in court *X* against *B* and also attached the same movables before judgment. The movables being perishables were sold and the sale proceeds deposited in court *X*. Thereafter, both the suits were decreed. *A* applied for execution on 27 January 1948 and *C* on 7 February 1948. On 20 March 1948, the court ordered the payment of the entire amount to *A*. It was held by the High Court of Bombay, reversing this order that the assets must be taken to have been realised by the court only on 20 March 1948, when it passed an order for payment in the execution application and that in consequence, *C*, who had applied for execution earlier was entitled to rateable distribution.[2037] If court *A* attaches the proceeds of a sale held by the collector and directs the collector to send the sale-proceeds to itself, and the collector sends the proceeds not to court *A* but to court *B*, there is no constructive receipt of assets by court *A*.[2038]

When a decree-holder is given leave to bid and set-off at a court-sale, there is a receipt of assets when the sale takes place.[2039] In such a case, the decree-holder purchaser must share the proceeds of the sale rateably with the competing decree-holders.[2040] As set-off takes effect on the date of sale, it is only those decree-holders who had applied for execution before sale that would be entitled to share in distribution.[2041] Accordingly, where a decree-holder is permitted to bid and set-off and the amount of the bid is less than the decretal amount, the subsequent applicant, though applying immediately after the sale, is not entitled to the benefit of this section.[2042] The court, ordering rateable distribution, may make an order for the refund of the proportionate amount to be enforced by summary process in execution.[2043]

2033. *Venkatasubbama v Adinarayana*, AIR 1954 AP 44.
2034. *Gulstaun v Bonnerjee*, (1917) 44 Cal 789.
2035. *Melarkodi Bank v Damodaraswami Naidu*, AIR 1950 Mad 34; *Godavaribai v Deekappa*, AIR 1927 Bom 247 : (1927) 29 Bom LR 319.
2036. *Dhirendra Rao v Virbhadrappa*, AIR 1935 Bom 176 : (1935) 59 Bom 310.
2037. *Narain Ganesh v Fatima*, AIR 1952 Bom 70 : (1952) Bom 83 : 53 Bom LR 821.
2038. *Ramanathan v Chidambaram*, AIR 1933 Mad 342 : (1933) 65 Mad LJ 347.
2039. *Ballelal v Manoharlal Guru*, AIR 1944 Ngp 295 : (1944) ILR Nag 806; *Ganga Ram v Muktiram*, AIR 1931 Pat 405 : (1932) 11 Pat 250; *Navaj v Totaram*, AIR 1931 Bom 252 : (1931) 33 Bom LR 503; *Shrinivas v Radhabai*, (1882) 6 Bom 570.
2040. *Navaj v Totaram*, AIR 1931 Bom 252 : (1931) 33 Bom LR 503; *Murgappa v Ramaswamy*, AIR 1935 Mad 893.
2041. *Subramanya v Sankaran Unni*, AIR 1953 TC 213.
2042. *Thirumayee Ammal v Palaniappa Gounder*, AIR 1973 Mad 7 : (1972) Mad LJ 117.
2043. *Bindeshwari v Raja Kirtyanand*, AIR 1931 Pat 359 : (1931) 10 Pat 830.

Permission granted to decree-holder to bid for attached property in court auction sale and to set-off purchase money towards amount due under decree as provided under O XXI, rule 72 of the Code, is subject to provision of rateable distribution under section 73. The auction purchaser/decree-holder is liable to deposit portion of that purchase money for rateable distribution amongst other decree-holders.[2044]

Where the executing court and the custody court are the same, the money realised by a decree-holder even after application has been made for rateable distribution, must be distributed rateably.[2045] Where the executing court and the custody courts are the same, realisation takes place on the court passing an order directly or impliedly as custody court, transferring the amount to the credit of the decree under execution.[2046] And even when the court in which the money is in deposit and the court executing the decree are the same, until there is an order transferring the fund to the execution case, there is no receipt of assets and decree-holders who have applied for execution before the transfer are entitled to participate in the distribution.[2047]

[s 73.9.1] Sale by Collector

Where the sale is held by the collector, the application for execution must be made before the sale-proceeds are received by him, though he may send the sale-proceeds to the court under Sch III, clause 9, at a later date.[2048]

[s 73.9.2] Sale in Execution of Mortgage Decree

In the case of a sale in execution of a mortgage decree, the words "prior to the sale" in clause (c) show that the receipt of the assets is the date of the sale and not the date when the money is actually received.[2049]

[s 73.10] Assets Held by a Court

[s 73.10.1] Payment Out of court

Far more important than the change effected by the word "receipt" is the change introduced by the omission of the words "whenever assets are realised by sale or otherwise in execution of a decree", and the substitution therefor of the words "where assets are held by a court." The CPC contemplates the court receiving certain assets and then proceeding to hold them. The language of the section does not admit any limitation to the words "assets held by a court". Therefore, even where money is deposited in a court for the discharge and satisfaction of a particular decree, it is not that decree-holder alone who will be entitled to that money. Other decree-holders, whose applications for satisfaction of their money-decrees are pending before that court, have the right to share it.[2050] Money paid by a garnishee to the Sheriff are assets received and held by the court although the judgment-debtor obtains a stay order directing the money to remain in the Sheriff's hands.[2051] So also, money paid in court under the first proviso

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2044. *E.P. Abdul Latheef v K. Vinodan*, AIR 2007 Ker 171 : 2007 (1) Ker LT 960.
2045. *Chokkalingam v Muthuswami*, AIR 1934 Mad 426 : (1934) 58 Mad 59.
2046. *Imperial Bank of India v Balusubramania*, AIR 1945 Mad 412.
2047. *Ananda Rao v Motilal*, AIR 1962 MP 217.
2048. *Dattatraya v Pundlik*, (1920) 22 Bom LR 1001; *Narhar v Lahanu*, AIR 1937 Nag 16.
2049. *Jamnadas v Bai Soonabai*, AIR 1932 Bom 622 : (1932) 34 Bom LR 1405.
2050. *Vijay Raj v Lal Chand*, AIR 1966 Raj 194 : (1966) 16 Raj 427.
2051. *Mohant Murlidhar v Baijnath*, AIR 1930 Cal 623 : (1930) 57 Cal 736.

to O XXI, rule 83 is asset held by the court.[2052] The words "held by the court" coupled with the word "realisation" which occurs later on in the section, include, it is submitted, several kinds of assets which were held not liable to rateable distribution under section 295 of the Code of Civil Procedure, 1882. A right to rateable distribution is conditional upon there being assets in the hands of the court. Hence, where the decree-holder, who attaches the property of a judgment-debtor in execution of his decree, purchases the same by private treaty with the latter, in satisfaction of his decree before the sale of the property by the court, there are no assets held by the court.[2053] A decree, in favour of the judgment-debtor, which is liable to be extinguished by being set-off against a cross decree against the judgment-debtor cannot amount to assets held by the court within the meaning of this section if the right of set-off has been exercised.[2054] If a surety against whom execution has been taken out pays the amount out of court to the decree-holder, there is no receipt of any asset by the court.[2055]

[s 73.10.2] Payment by Cheque

Where, in the course of execution proceedings, a payment was made by a garnishee by cheque in favour of the court and the same was returned for correction and a fresh cheque was sent for the correct amount, there was a receipt of assets only when the new cheque was accepted.[2056]

[s 73.10.3] Assets Recovered from Surety

The liability of the surety is coextensive with that of the judgment-debtor. Hence, assets obtained in execution of a decree from the surety of the judgment-debtor cannot be rateably distributed to the holder of another decree against the judgment-debtor as the surety is not the judgment-debtor of such decree-holder and had not undertaken to stand surety for both the decrees.[2057] But according to the High Court of Rajasthan, although a surety of a judgment-debtor is not a judgment-debtor within the strict meaning of section 2(10), the liability sought to be enforced against him, by reason of the decree having been passed and his principal having failed to discharge it, is the same as that of his principal. Accordingly, the liability of the surety is not a distinct and separate liability and the surety of the judgment-debtor is not a different judgment-debtor to whom this section would not apply.[2058]

[s 73.10.4] Undivided Hindu Coparcenery: Rateable Distribution

Where the share of an undivided Hindu coparcener in the joint family is attached during his lifetime and sold in execution of a decree passed against him, the proceeds of such sale are available for rateable distribution under this section only among such creditors, who have attached the share of the coparcener during his lifetime in execution of their decrees against him.[2059]

2052. *Ramanath Panda v Damodar Sahu*, AIR 1950 Ori 230 : (1950) ILR Cut 208.
2053. *Kedarwati v Radhey Lal*, AIR 1937 Pat 609.
2054. *Mahalingam v Ramanathan*, AIR 1940 PC 173 : (1940) 42 Bom LR 1116 (PC).
2055. *Dinanath v Mathura Das*, AIR 1951 Raj 377 : (1951) Raj LW 353.
2056. Re *Frank Morton Fisk*, AIR 1956 Cal 656.
2057. *Sakharam v Mahadeo*, AIR 1940 Ngp 79.
2058. *Vijay Raj v Lal Chand*, AIR 1966 Raj 194 : (1966) 16 Raj 427.
2059. *Urban Corp Bank Ltd v Hanavar Havik. Co-op Bank Ltd*, AIR 1940 Bom 190 : 42 Bom LR 218.

[s 73.11] Assets Available for Rateable Distribution

Assets held available for rateable distribution under section 295 were:

(a) sale-proceeds of property sold in execution of a decree;[2060] and

(b) assets realised "otherwise in execution of a decree." These words were held to mean assets realised from the property of the judgment-debtor by such modes as those prescribed by section 291 (O XXI, rule 69), section 305 (O XXI, rule 83) and section 322 (Sch III, paras 2 and 7).[2061]

This was explained in decisions as meaning assets realised in one of the modes expressly prescribed by the sections of the Code.[2062] The following were held to be assets of this class:

(i) debts attached under section 268 (now O XXI, section 46 A) and paid into court by the garnishee;[2063]

(ii) rents of property under attachment realised by a receiver appointed under section 503 [now section 51, clause (d)] at the instance of the decree-holder.[2064] (The appointment of a receiver by the court in such a case is a "process of execution");

(iii) money in the custody of a public officer attached under section 272 (now O XXI, rule 52) and paid into court by that officer;[2065]

(iv) money realised in execution of a decree held by the judgment-debtor against another, where such decree is attached and realised under O XXI, rule 53 (Code of Civil Procedure, 1882, section 273);[2066]

(v) money paid under O XXI, rule 69, to the officer conducting the sale to stop the sale;[2067]

(vi) money raised by the judgment-debtor by private alienation under O XXI, rule 83, and paid into court;[2068]

(vii) the deposit of 25% paid by a defaulting execution purchaser which has not under O XXI, rule 86, been forfeited to government.[2069]

[s 73.12] Assets Not Available for Rateable Distribution

Assets not realised "by sale or otherwise in execution of "a decree" were not liable to rateable distribution under section 295". Following are instances of assets held not to be "realised by sale or otherwise in execution of a decree" within the meaning of section 295, and therefore not subject to rateable distribution.

2060. *Prosonnomoyi v Sreenath*, (1894) 21 Cal 809.
2061. *Purshotamdas v Surajbharthi*, (1882) 6 Bom 588; *Gopal Dai v Chunni*, (1886) 8 All 67; *Vibhudhapriya v Yusuf*, (1905) 28 Mad 380.
2062. *Sew Bux v Shib Chunder*, (1886) 13 Cal 225, 229; *Prosonnomoyi v Sreenath*, (1894) 21 Cal 809, 817; *Vibhudhapriya v Yusuf*, (1905) 28 Mad 381.
2063. *Sarabji v Govind*, (1892) 16 Bom 91.
2064. *Fink v Bahadoor Singh*, (1899) 26 Cal 722.
2065. *Manilal v Nanabhai*, (1904) 28 Bom 264; *Narsing Das v Gulab Rai*, AIR 1935 Pat 201.
2066. *Amara v Annamala*, (1908) 31 Mad 502.
2067. *Purshotamdas v Surajbharathi*, (1882) 6 Bom 588.
2068. *Purshotamdas v Surajbharthi supra*; *Thiraviyam v Lakshmana*, (1918) 41 Mad 616.
2069. *Sree Mahant Prayaga v Paja of Kalahasti*, AIR 1926 Mad 872 : (1926) 49 Mad 570.

In these cases, all decided under the present section,[2070] it was held that the moneys held by the court were not assets available for rateable distribution within the meaning of the section:

A—Sorabji v Kala.[2071]—Money paid into court by a judgment-debtor under O XXI, rule 55(a)[2072] for payment of the amount due to the decree-holder at whose instance the property was attached has been held not subject to rateable distribution under this section (this is the same as case *B* above). Sir Basil Scott CJ said:

> In the reference to the costs of realisation, we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into court under O XXI, Rule 55, was assets held by the court within the meaning of Section 73, we should be only nullifying the provisions of Rule 55; for, there would no inducement to any judgment-debtor to procure a payment into court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors.

This assumes that the word "realised" means realised by sale or other process of execution expressly prescribed by the CPC. It is submitted, with respect, that the words "sale or otherwise" which occurred in section 295 of the Code of Civil Procedure, 1882 having been omitted in the present section, the interpretation put upon those words in previous cases[2073] can no longer govern cases arising under the present Code. All that is necessary under the present CPCis that:

(i) there should be assets held by the court; and

(ii) that such assets should have been realised or obtained in execution proceedings.

It cannot possibly be said that moneys paid into court by a judgment-debtor under stress of execution under O XXI, rule 55 (a), are not assets obtained in execution proceedings. It is indeed difficult to see how this view of the section nullifies the provisions of O XXI, rule 55; for money paid into court under rule 55 may be held to be assets subject to rateable distribution, and yet full effect may be given to rule 55. There is no reason why because a particular payment may operate to release the person (see case *B*) or property of a judgment-debtor from attachment, that payment should be applied for the benefit exclusively of the decree-holder at whose instance the person or property of the judgment-debtor was attached. Moreover, the object of O XXI, rule 65, is not to afford any inducement to a judgment-debtor as supposed by the court in *Sorabji v Kala.* All that O XXI, rule 55, says is that the circumstances mentioned in clauses (a), (b) and (c) of that rule shall have the effect indicate in the rule. As to the argument based on the costs of realisation, it cannot, possibly, be said that no costs were incurred in obtaining the moneys from the judgment-debtor. The decision in *Sorabji v Kala* has been disapproved by the High Court of Madras.[2074] It has also been disapproved by Pratt J in a later Bombay case—*Nathmal v Maniram.*[2075] As to the first of the two grounds on which the decision in *Sorabji v Kala* was based, namely, that the money was not realised in process of execution, Pratt J said that it followed the cases decided on the words "sale or otherwise", which were held to mean sale or other process of execution expressly provided for in the CPC. but that it was too restrictive a construction under the amended section.[2076] As to the second

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2070. For cases under the Code of 1882, see the previous edition of this book.
2071. *Sorabji v Kala,* (1911) 36 Bom 156 : 12 IC 911.
2072. Section 275, Code of Civil Procedure 1882.
2073. *Purshotamdas v Surajbharthi,* (1882) 6 Bom 588; *Sew Buse v Shib Chander,* (1886) 13 Cal 225; *Prosonnomoji v Sreenath,* (1894) 21 Cal 809; *Vibhudhapriya v Yusuf,* (1905) 28 Mad 380.
2074. *Thiruvayam v Lakshmana,* (1918) 41 Mad 616; *Pratapa v M E Mission,* AIR 1926 Mad 307 : (1926) 49 Mad 38.
2075. *Nathmal v Maniram,* (1919) 21 Bom LR 975.
2076. *Harai Saha v Faizlur Rahman,* (1913) 40 Cal 619, 622.

ground, namely, that to allow rateable distribution of money paid into court under O XXI, rule 55 would be to nullify the provisions of rule 55, the learned judge said:

> I also venture to doubt the correctness of the second reason. Order XXI, rule 55, operates effectively where there is one decree-holder. If there are a number of decree-holders, there is no scope for the rule, for the judgment-debtor has no motive for paying off one judgment-creditor when the same property is liable to be re-attached by the others. To allow one decree-holder to be paid off in full when the property is insufficient to discharge other judgment debts might possibly be undue preference and defeat the object of the section which is equal distribution of all the moneys received in execution. Again, why should a judgment-creditor, whose attachment has been removed under Order XXI, rule 55, be in a better position than a judgment-creditor who has taken the trouble of bringing the property to sale. Lastly, if the money paid under Order XXI, rule 55, to remove an attachment is not available for rateable distribution, than *a fortiori* money paid to stop a sale under Order XXI, rule 83, would also not be so available. But even under the old section it was assumed by Sir Charles Sargent in *Purshottamdas*'s case that money paid to stop a sale is available for rateable distribution. So that the interpretation put upon the section in *Sorabji v Kala* makes the new section more restrictive than the old one, and this is not what the Legislature intended.

The decision in *Sorabji v Kala* has also been dissented from by the Calcutta High Court in *Noor Mahomed v Bilasiram*.[2077] In that case Rankin J said:

> The money, paid with whatever motive, if paid to the court, is paid upon terms of the Code whatever they may be. These terms, as I read section 73, have been laid down so that distinctions in the form in which execution has been had, in the precise extent to which execution has been allowed to run, in the exact source or genesis of the fund in court, are now no part of the definition of the assets that are subject to distribution rateably. The object of the new Code is to avoid anomaly. To introduce a distinction on the strength of the *voluntariness* of the payment or the purpose of the debtor, is I think to cut down the language and intention of the Code upon a principle which is inapplicable to the subject-matter and which if applicable is very difficult to imply.

The same view has been taken in later decisions of the same court.[2078] The view taken in *Sorabji*'s case has not been accepted by the Patna High Court.[2079] The Nagpur Court has held that money paid under coercive process is available for rateable distribution.[2080] In a later Bombay case,[2081] Mjrza J refused to follow the opinion of Scott CJ in *Sorabji v Kala* on the ground that it was *obiter*. However, in a later decision,[2082] Beaumont CJ relying on *Sorabji*'s case observed:

> It seems to be clear that if a court receives money on terms that it is to be applied for payment of debt of *A*, it cannot apply the money in payment of the debt of *B*. The court cannot commit what would be in substance a breach of trust. The general principle above mentioned was laid down by a Division Bench of this court in *Sorabji v Kala*. The actual decision has been dissented from in some other High Courts...but the general principle has not, I think, been dissented from.

In a Madras case referred above,[2083] it was held that moneys paid into court under O XXI, rule 83(2), were assets liable to be distributed rateably within the meaning of this section.

2077. *Noor Mahomed v Bilasiram*, (1920) 47 Cal 515.
2078. *Ghisulal v Todarmull*, AIR 1922 Cal 19 : (1921) 26 Cal WN 169; *Hari v Birendra*, AIR 1921 Cal 749 : (1922) 35 Cal LJ 327, (money voluntarily paid into court are "assets"); *Chittagone Urban Co-op Bank Ltd v Indo-Burmah Traders Bank Ltd*, AIR 1938 Cal 521.
2079. *Satnarain v Mahabir Prasad*, AIR 1939 Pat 392 : (1939) 18 Pat 404.
2080. *Nur Mahomed v Rajaram*, AIR 1934 Ngp 62; *Atmaram v Udey Raj*, AIR 1933 Ngp 347.
2081. *Indaji v Cooverji*, AIR 1926 Bom 242 : (1926) 28 Bom LR 237.
2082. *Lalchand v Ramdayal*, AIR 1939 Bom 112 : (1939) Bom 133; *Ningappa v Adiveppa*, AIR 1939 Bom 468 : (1939) 41 Bom LR 997.
2083. *Thiraviyam v Lakshmana*, (1918) 41 Mad 616.

In the course of the judgment, however, the learned judges went to the length of observing that the assets referred to in the present section need not be assets obtained in execution proceedings. This indeed is an extreme view and it was dissented from Pratt J the learned judge holding that the reference to the costs of realisation and the position of the section in the CPC at the end of Pt II on Execution led irresistibly to the conclusion that the assets to be available for rateable distribution must have been obtained in execution.[2084] The view taken by Pratt J is, it is submitted, correct. A year later Rankin J took much same view as Pratt J[2085] The learned judge said:

> If for example a defendant is made to pay into court the amount of the plaintiff's claim as a condition of getting an adjournment it does not follow from my reading of section 73 that other creditors could claim to share. Nor could they under Order 21, rule 52, where *funds in* court are themselves the subject matter of the execution.

B—Ebji Umersey v W&A Graham & Co[2086]—Money paid by a judgment-debtor under arrest under section 55, proviso 4, to the officer arresting him in order to secure his release is not an asset subject to rateable distribution. Justice Macleod J said:

> It appears that the section was only intended to apply to assets *realised by the sale of* property attached.

This view of the section, it is submitted, is not correct. If this view were correct, money paid to stop a sale under O XXI, rule 69, and money raised by private alienation under O XXI, rule 83, would not be assets subject to rateable distribution. But even under the old section 39A it was assumed by Sir Charles Sargent in *Purshotamdas*'s case that such moneys were available for rateable distribution. It cannot possibly be said that the present section is more restricted in its scope than the old section.[2087]

C—Nathmal v Maniram[2088]—A obtained a decree for money against *B* and in execution of the decree took out a warrant for attachment of the movable property of *B* under O XXI, rule 43. The bailiff entered *B*'s shop and showed the warrant to *B* and pointed out that if the money were not paid he would seize and keep in his custody the movable property in his shop. *B* then paid the decretal amount and costs of execution and Sheriff's poundage. Upon these facts, Pratt J expressed the opinion that the moneyhaving been paid under stress of the warrant[2089] and the warrant being a process of execution, the money was an asset available for rateable distribution within the meaning of the present section. The learned Judge, however, felt bound by the decision of the Appellate Court in *Sorabji v Kala*, and held that the money was not subject to rateable distribution.

D—Ghisulal v Todarmull.[2090]—In a money-suit by *A* against *B*, *B*'s property was attached before judgment, and then released on *C* standing security for the amount of the claim. The suit was ultimately decreed, and a applied for execution, whereupon *C* deposited the amount of the decree in court. On that very day, just before the deposit was made, *D*, another decree-holder, applied for execution of his decree. It was held that the moneys deposited by the surety were assets held by the court within the meaning of this section and D was entitled to rateable distribution.

2084. *Nathmal Ghamirmal v Maniram Radhakisson*, (1919) 21 Bom LR 975.
2085. *Noor Mahomed v Bilasiram*, (1920) 47 Cal 515; *Sednath v Tej Bahadur*, (1932) 54 All 516 : AIR 1932 All 411; *Suikeema v Hajee Mahomed*, (1913) 38 Mad 221.
2086. *Ebji Umersey v W&A Graham & Co*, (1917) 19 Bom LR 274 : 39 IC 623.
2087. See also the observations of Rankin J in *Noor Mahommed's* case cited in *Sorabji's* case above.
2088. *Nathmal v Maniram*, (1919) 21 Bom LR 975.
2089. *Bissicks v Bath Colliery Co*, (1878) 3 Ex D 174; *Bidhoo v Keshub*, (1868) 9 WR 642.
2090. *Ghisulal v Todarmull*, AIR 1922 Cal 19 : (1921) 26 Cal WN 169 : 70 IC 539.

E—For other cases see.—Order XXI, rule 52, notes: "Priority".

Order XXI, rule 72, notes: "Amount due on the decree".

Order XXI, rule 83, notes: "Rateable distribution."

Order XXI, rule 89, notes: "For payment to the decree-holder rateable distribution".

Order XXXVIII, rule 2, note: "Rateable distribution."

Compensation under Land Acquisition Act, 1894.—Compensation deposited by the collector in court under section 31 of the Land Acquisition Act, 1894, has been held to be "assets held by the court".[2091]

[s 73.13] Decrees for the Payment of Money

It is only the holders of decrees for the payment of money that are entitled to rateable distribution. The expression "decree for the payment of money" is illustrated by the following cases:

(i) A decree for the payment of mesne profits is a "decree for the payment of money" within the meaning of this section, notwithstanding that the amount of mesne-profits has not yet been ascertained. The holder of such a decree, who has applied for attachment under O XXI, rule 42 (Code of Civil Procedure, 1882, section 255), is entitled to a rateable distribution with other decree-holders under this section.[2092]

(ii) A decree upon a mortgage, which enables the mortgagee to realise the amount of the mortgage-debt 'from the mortgaged properties and from the defendants personally' was held to be a "decree for the payment of money" within the meaning of the old section by the High Court of Calcutta in *Hart v Tara Prasanna Mukherji.*[2093] In that case the court said:

> Every decree, by virtue of which money is payable, is to that extent a "decree for money" within the meaning of the section, even though other relief may be granted by the decree e.g., sale of mortgaged property; and the holder of such a decree is entitled to claim rateable distribution with holders of decree for money only.[2094]

Following these observations, the High Court of Madras held that where a decree upon a mortgage directs the mortgagor to pay the mortgage debt to the mortgagee within the period fixed by the court, and provides that in default the mortgaged property should be sold, and the balance (if any) should be recovered from the mortgagor, the decree was one "for the payment of money" within the meaning of the old section.[2095] In subsequent cases, however, which turned upon the meaning of the expression "decree for the payment of money" which occurred in section 230 of the Code of Civil Procedure, 1882 (now section 481), the High Court of Calcutta dissented from the Madras decision on the ground that the decree in that case was not

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2091. *(Sait) Siva Pratapa Bhattadu v AEL Mission And Ors*, AIR 1926 Mad 307 : (1926) 49 Mad 38.
2092. *Viraragava v Varada*, (1882) 5 Mad 123.
2093. *Hart v Tara Prasanna Mukherji*, (1885) 11 Cal 718; *Mukhram Agarwalla v Eshan Ahmad*, AIR 1934 Cal 764 (a decision under this Code).
2094. *Hart v Tara Prasanna Mukherji*, (1885) 11 Cal 718.
2095. *Kommachi Kather v Pakker*, (1897) 20 Mad 107, followed in *Abdulla Sahib v Oosman Sahib*, (1905) 28 Mad 224 (a case under section 230 of Code of Civil Procedure 1882, which contained the expression "decree for the payment of money", now section 48), and approved in *Vaidinadasamy Ayyar v Sommasundaram Pillai*, (1905) 28 Mad 473 (a case under section 258 of the Code of Civil Procedure 1882, now O XXI, rule 2).

similar to the decree in *Hart v Tara Prasanna Mukherji* the decree in the latter case containing a distinct order upon the mortgagor personally, to pay the amount of the mortgage-debt.[2096] The decree in those cases was similar to the decree in the Madras case, and it was held that the decree was not a "decree for the payment of money" within the meaning of section 230 of the Code of Civil Procedure, 1882. The decision, it seems, would have been the same if the court had been called upon to interpret the same expression in section 295 of the Code of Civil Procedure, 1882, and the observations in *Hart*'s case set out above would have been regarded as mere *obiter dicta*. The Allahabad decisions, bearing on the expression "decree for the payment of money" in section 230 of the Code of Civil Procedure, 1882, are also to the same effect.[2097] There is little doubt that if these High Courts were called upon to decide whether a decree of the character in the Madras case was a "decree for the payment of money" within the meaning of this section, they would hold that it was not. In any event, the Madras decision cannot be sustained under the CPC: see O XXI, rule 20. The High Court of Lahore had held that a mortgage decree passed under the provisions of O XXXIV, which directs that the amount due to the decree-holder shall first be paid out of the sale-proceeds of the mortgaged property, is not a personal decree in the first instance, even as regards costs which are directed to be recovered in the first instance from the mortgaged property.[2098]

(iii) A decree directing the payment under section 90 of the Transfer of Property Act, 1882 (now O XXXIV, rule 6) of the balance of the mortgage-debt remaining due after payment to the mortgagee of the net proceeds of the sale of the mortgaged property is a "decree for the payment of money" within the meaning of this section.[2099]

(iv) A decree directing the payment of money by a person does not cease to be a decree for the payment of money so far as that person is concerned. Merely because it directs, as against another person, the realisation of the money claim from mortgaged property. Thus, a decree against *A*, *B* and *C*, which, so far as *A* and *B* are concerned, is a decree for the enforcement of a mortgage by sale of their property, but which does not direct the sale of any specific property belonging to *C*, is as regards *C*, a decree for the payment of money.[2100]

(v) A judgment entered up under section 86 of the Insolvent Debtors Act, 1842 is a money-decree.[2101]

(vi) Under section 73 of the CPC, sharing in the sale proceed is permissible only if a person seeking such share has obtained a decree or an order of an adjudication from the tribunal and has also complied with other conditions laid down under section 73.[2102]

(vii) The question was whether the auction-purchaser was liable to meet the liability of old consumer of electricity to the premises which was purchased by him in the auction-sale from the State Financial Corporation under section 29(1) of the State Financial Corporation Act, 1951. The Hon'ble Supreme Court held that where premises come to be owned or occupied by the auction purchaser, when

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2096. *Fazil v Krishna*, (1898) 25 Cal 580; *Kartick v Juggernath*, (1900) 27 Cal 285.
2097. *Ram Chran v Sheobarat*, (1894) 16 All 418; *Pahalvan v Narain*, (1900) 22 All 401.
2098. *Allahabad Bank v Punjab National Bank*, AIR 1939 Lah 303.
2099. *Mallikarjunnadu v Lingamurti*, (1902) 25 Mad 244.
2100. *Delhi and London Bank v Uncovenanted Service Bank*, (1888) 10 All 35.
2101. *Re Bhagwandas*, (1884) 8 Bom 511.
2102. *Allahabad Bank v Canara Bank*, (2000) 2 LRI 207.

such purchaser seeks supply of electricity energy he cannot be called upon to clear the past arrears as a condition precedent to supply. There is no charge over the property.[2103]

[s 73.14] Same Judgment-debtor

The provisions of this section do not apply unless the judgment-debtor is the same. Where the holder of a decree against two or more persons applies for a rateable distribution of the assets realised from property belonging to one of such persons, the application is one for the execution of the decree against the same judgment-debtor.

ILLUSTRATION

X obtains a decree against *A*, and attaches *A*'s property in execution of the decree. *Y*, who holds a decree against *A* and *B*, applies for execution of his decree by attachment and sale of *A*'s property attached in execution of *X*'s decree. *Y* is entitled under this section to share in the proceeds of the sale of *A*'s property; it is immaterial that *Y*'s decree is against *B* also and that the decree might have been separately executed against B.[2104]

Similarly, where the holder of a decree against one person applies for a rateable distribution of the assets of that person realised from property belonging to that person and another, such application is an application for the execution of a decree against the same judgment-debtor.

ILLUSTRATION

X obtains a decree against *A*, *B* and *C*, and attaches in execution of the decree certain property belonging to *A*, *B* and *C* jointly. *Y* holds a decree against *A* alone. *Y* is entitled under the provisions of this section to a proportionate distribution of the assets realised by the sale of the joint property so far as they represent the share of *A* in that property. Similarly, if *Y* held a decree against *A* and *B*, he would be entitled to a rateable distribution of the assets so far as they represented the share of *A* and *B* in the property.[2105] These were decisions under section 295 of the Code of Civil Procedure 1882. They have been followed under the present Code of Civil Procedure.[2106] In *Balmer Lawrie & Co v Jadunath*,[2107] it was doubted whether the earlier decisions were affected by the introduction in the present section of the word 'passed' which did not occur in the Code of Civil Procedure 1882. In *Hoti Lal Chatura Prasad*,[2108] there is a discussion as to the result of the use of the word "passed".

[s 73.14.1] Decree against a Firm and its Partners Individually

The High Court of Calcutta has held that a decree passed against a firm, is in effect, a decree against the partners individually. The decree-holder under such a decree is entitled to apply for rateable distribution in execution proceedings started by another decree-holder against the partners individually.[2109] The High Court of Mysore has also taken the same view.[2110] A

2103. *Isha Marbels v BSEB*, (1995) 2 SCC 648.
2104. *Shumbhoo Nath v Lickynath*, (1883) 9 Cal 920; *Grant v Subramanian*, (1899) 22 Mad 241; *Delhi and London Bank v Uncovenanted Service Bank*, (1888) 10 All 35.
2105. *Ganesh v Shiva*, (1903) 30 Cal 583; *Gatti Lal v Bir Bahadur*, (1905) 27 All 158; *Ramanathan v Subramania*, (1903) 26 Mad 179; *Chhotalal v Nabibhai*, (1905) 29 Bom 528.
2106. *Hussein Saheb v Babaji*, AIR 1926 Bom 150 : (1926) 28 Bom LR 78 : 93 IC 222; *CRMA Chettyar v KRSV Chettyar*, AIR 1928 Rang 96 : (1927) 5 Rang 757 : 707 IC 169 and *Chaudhari Fateh Din v Diwan Chand*, AIR 1938 Lah 801.
2107. *Balmer Lawrie & Co. v Jadunath*, (1915) 42 Cal 1 : 27 IC 644.
2108. *Hoti Lal Chatura Prasad*, AIR 1941 All 110 (FB) : (1941) All LJ 187.
2109. *Pannaji Devichand Firm v Lakkaji Dalaji Firm*, AIR 1943 Bom 156, *Kritanta Kumar Guha v Pullin Krishna*, AIR 1938 Cal 316 : (1938) 42 Cal WN 310.
2110. *Lakkaji Dolaji & Co. v Md. Gous*, AIR 1963 Mys 16.

decree-holder who has obtained a decree against a partner individually served or had obtained leave under O XXI, rule 50(2) is entitled to rateable distribution with a decree-holder who had obtained a decree against him personally.[2111] It has been held by the High Court of Madras that a decree against the partners of a firm and a decree against the partners in their individual capacity are not decrees against the same judgment-debtor within this section.[2112] And that is also the view of the Punjab High Court which has held that for section 73 to apply, there must be not only identity of judgment-debtors but also identity of capacity or interest.[2113]

[s 73.14.2] Decree Against Legal Representatives of Judgment-debtors

The High Courts of Bombay, Rangoon and Calcutta have held that if a decree is obtained by *X* against *B* and by *Y* after *B*'s death against *B*'s legal representative, the judgment-debtor is not the same and the present section does not apply.[2114] That was also the view of the Madras High Court at one time.[2115] But a full bench of the same high court has subsequently taken the opposite view[2116] and the Allahabad High Court has recently agreed with the Madras Full Bench.[2117] Following the full bench ruling, the Madras High Court has held that a decree obtained against two persons [*eo nominee* as members of the family and as against family properties and another decree obtained against one of them as manager of the joint family are against the same judgment-debtor.[2118] It has been held by the Bombay High Court that the expression "same judgment-debtor" should be construed liberally and that:

(i) a decree obtained against *M*;

(ii) a decree passed against the legal representatives of *M* in a suit instituted against him; and

(iii) a decree obtained against the legal representatives of *M* in a suit instituted against them after his death were all against the same judgment-debtor.[2119]

A Full Bench of Bombay High Court has held that a decree-holder who had obtained a decree against a Hindu father (governed by the *Mitakshara* law) alone is entitled to rateable distribution in the entire assets realised in execution of a decree obtained against the father and his undivided sons.[2120] There is a dictum in a Calcutta case[2121] that a decree against a defendant personally and a decree against the same defendant in a representative-character are not decrees against the same person; but the observation was not intended as a considered decision. The High Court of Calcutta has subsequently held that if a decree is obtained against a person as

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2111. *Pannaji Devi Chand v Lakaji*, AIR 1943 Bom 156 : 45 Bom LR 181.
2112. *Sundara Iyer v Balusami Iyer*, AIR 1956 Mad 192 : (1955) 2 Mad LJ 276 : 1955 Mad WN 788.
2113. *Girdharilal v Munilal*, AIR 1963 Punj 43; *Saduram v Firm Danpat Rai Theruram*, AIR 1937 Lah 937 : (1937) ILR Lah 637.
2114. *Govind v Mohoniraj*, (1901) 25 Bom 494 : 3 Bom LR 407; *Chunilal v Broach Urban Co-op Bank Ltd.* AIR 1937 Bom 461 : (1937) ILR Bom 795; *Sarju v Rangidhar*, AIR 1940 Rang 243; *Jahar Lal v Lalita Sundari*, AIR 1930 Cal 454 : (1930) 34 Cal WN 294; *Hemalati Dasi v Bengal Coal Co. Ltd.* AIR 1935 Cal 738 : (1935) 40 Cal WN 26.
2115. *Shrinivas v Kanthimatri*, (1910) 33 Mad 465.
2116. *Ramakrishnan v Viswanathan*, AIR 1936 Mad 40 : (1936) 59 Mad 93; *Palaniappa v Palani*, AIR 1936 Mad 948.
2117. *Hoti Lal v Chatura Prasad*, AIR 1941 All 545 : (1941) All LJ 137.
2118. *Swaminatha v Saivu*, AIR 1936 Mad 123; *Kandula v Bangaru*, AIR 1937 Mad 504.
2119. *Dundappa v Annaji Vardaji*, AIR 1953 Bom 65 : (1953) ILR Bom 165 : 54 Bom LR 811; *Mool Chand v Siddappa*, AIR 1947 Bom 18 : 48 Bom LR 571.
2120. *Mulchand Kesaji v Shidappa*, AIR 1947 Bom 18 : (1947) ILR Bom 120 : 48 Bom LR 571 (FB); *P.S. Lakshmamma v A. Rajarao*, AIR 1972 AP 201.
2121. *Hart v Tara Prasanna Mukherji*, (1885) 11 Cal 718, 728.

heir of a deceased person and another decree is passed against him in his personal capacity, the two decrees are against the same judgment-debtor within the meaning of this section.[2122]

In *Lakshminarayana Devasthanam v Khande Rao*,[2123] it was held that a decree under which the judgment-debtor was personally liable and a decree under which properties inherited and possessed by him as heir and legal representative were liable were not against the same judgment-debtor as the character of the defendant in both the suits was different and that what was relevant for the application of the section was the nature of the decree and not the identity of the property liable under the decrees. It has been held by the Madras High Court that a decree against a widow as heir and one against her on a personal claim are both against the same judgment-debtor.[2124] In *Ramzan Khan v Hiralal*,[2125] it was observed that the stress was more on the identity of the properties than the identity of the judgment-debtor. *A* obtained a decree against *B* and in execution thereof attached cattle belonging to him. The attachment was raised on *C* executing a surety bond. *A* then started proceedings in execution against *C*. *D* obtained a decree against *B* and in execution of his decree, the cattle were attached and sold. It was held that *A* was entitled to rateable distribution as, though his execution was against the surety *C*, the liability of the latter was that of the judgment-debtor under the decree and not one independent of it.[2126]

[s 73.15] Clauses (A), (B) and (C)

The first paragraph of this section and clauses (a) and (b) have reference to sales in execution of simple money-decrees. Clause (a) declares the incompetence of the mortgagee of encumbrancer as such to share in any surplus proceeds when property is sold subject to his mortgage or charge. But the alternative is afforded to him by clause (h) of consenting to the property being sold free of his mortgage or charge, in which case the court may give him the same right against the sale-proceeds as he had against the property.[2127] Clause (c) has reference to a sale in execution enforcing an incumbrance; but in distributing the sale-proceeds the discharge of subsequent (and not prior) incumbrances is alone taken into account;[2128] but no payment can be made to a subsequent encumbrancer if the mortgagor challenges its existence or validity.[2129] Where there is a charge over a property in favour of the plaintiff for payment of the decretal amount which gives him liberty to apply for sale of that property for the discharge of the encumbrance is sold and its sale-proceeds are held by the court, such sale-proceeds must be applied in the first instance in discharging the amount due to the plaintiff and the balance left over distributed to other decree-holders applying for rateable distribution.[2130] Similarly, where a property is sold in execution of a decree in favour of a mortgagee, the next preference, if there is excess after satisfying that decree, should be in favour of a second mortgagee and the balance should be used for rateable distribution amongst simple money-decree-holders.[2131]

2122. *Hemendra Nath v East Bengal Commercial Bank*, AIR 1936 Cal 210 : (1936) 63 Cal 923; contra *Jamiyatram v Umiya Shankar*, AIR 1941 Bom 327 : (1941) ILR Bom 544 : 43 Bom LR 699.
2123. *Lakshminarayana Devasthanam v Khande Rao*, AIR 1954 Bom 446 : (1954) Bom 704 : 56 Bom LR 232.
2124. *Krishnaswami Iyengar v Vedavalli Ammal*, AIR 1959 Mad 218 : 72 LW 19.
2125. *Ramzan Khan v Hiralal*, AIR 1961 Raj 118 : (1960) ILR Raj 1510.
2126. *Peddi Reddi Ganga Raju v Kondalla Mangamma*, AIR 1958 AP 334; dissenting from *Sakharam v Mahadeo*, AIR 1940 Nag 79, and *Kegendranath v PC Roy*, AIR 1942 Oudh 791.
2127. See, for instance, *Brij Mohan v The Deputy Commr, Pratabgarh*, AIR 1937 Oudh 270.
2128. *Jagat Dhundhey*, (1883) 5 All 566; *Mithu v Kishan*, (1890) 12 All 546.
2129. *Lachmi v Mithu*, AIR 1927 All 467 : (1927) 49 All 936.
2130. *Abdul Jabbar v Venkata Sastri*, AIR 1969 SC 1147 : (1969) 1 SCC 573.
2131. *SV Palaniapa v VR. Chettiar*, AIR 1970 Mad 401 : (1970) 1 Mad LJ 458.

In cases coming under clause (c), the application for execution must be, made prior to the sale of the property.[2132]

A curious use was sought to be made of clause (b) in the following case:

B mortgaged property to *A*. *A* sued to enforce the mortgage, but the court holding that *B* had no title to the property granted *A* simple money-decree. *A* filed an application to execute the money-decree. During execution proceedings *B* became entitled to the property by succession. *A* believed that under section 43 of the Transfer of Property Act, 1882 the mortgage had become effective. He, therefore, withdrew his application and filed another application for execution by way of realisation of his supposed charge under section 43. This was, of course, disallowed as the decree was a simple money-decree. He then sought to treat his application as an application for attachment and sale of the property reserving a charge in the sale-proceeds under section 73(1)(b). This, the court disallowed as it was diverting the execution proceeding into an enforcement, not of a money-decree, but of a mortgage-decree.[2133] The court did not decide whether section 43 was at all applicable, but it may be noted that section 43 does not apply after the contract of transfer has merged in a decree.

Where properties are sold in execution of a mortgage-decree, the right of the decree-holder to be paid in full is not affected by the provision in the Madras Indebted Agriculturists (Repayment of Debts) Act, 1955, that the decree amount might be paid, in instalments.[2134] In *Ramgopal v Dhannalal*,[2135] the judgment-debtor in a mortgage suit effected a private alienation of the hypothecation with the permission of the court and with the consent of the decree-holder and deposited the decree amount into court. A claim for rateable distribution of this amount was made by holders of money-decree against the judgment-debtor on the ground that the mortgage decree-holder could not claim to be paid in full under section 73(1)[2136] as there was no sale in execution of the decree. It was held repelling this contention, that by consenting to the private alienation, the decree-holder had not abandoned his rights under the mortgage-decree and that section 73 had no application, as the question did not arise between holders of money-decrees.

[s 73.16] Claims for Rateable Distribution of Assets

These claims are claims enforceable under an attachment within the meaning of section 64.[2137]

[s 73.17] Attachment before Judgment

A decree-holder who caused property to be attached before judgment, is not entitled to share in a rateable distribution of the sale-proceeds of that property, unless he makes, after judgment, a fresh application for execution under O XXI, rule 11 (Code of Civil Procedure, 1882, section 235], O XXXVIII, rule 11 (Code of Civil Procedure 1882, section 490] does not touch the point (c). Where moneys are deposited in court for cancelling an attachment

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2132. *Dattatraya v Pundlik*, (1920) 22 Bom LR 1001 : Compare O XXXIV, rule 13.
2133. *Gowari Ambal v Ramanathan*, AIR 1930 Mad 138 : (1930) 53 Mad 670.
2134. *Vaithiam Nanjappa v Ramanathan Chetti*, (1958) 2 Mad LJ 566.
2135. *Ramgopal v Dhannalal*, AIR 1958 MP 201 : (1958) Jab LR 351.
2136. *Pallonji v Jordon*, (1888) 12 Bom 400; *Arunachellam v Haji Sheck Meera*, (1910) 34 Mad 25; *Moidin v Dakshayani*, AIR 1941 Mad 125 : (1940) 2 Mad LJ 844; *Commercial and Industrial Bank Ltd v Mir Sarfaraz Ali Khan*, AIR 1956 Hyd 65 (FB) : (1956) ILR Hyd 79.
2137. See notes to section 64, "Explanation to the section".

before judgment, decree-holders who attached it before decree is passed in the suit are entitled to rateable distribution.[2138]

[s 73.18] Sub-section (2): Suit for Refund

The scheme of this section is to enable the court, as a matter of administration, to distribute the assets according to what may seem at the time to be rights of parties without this distribution importing a conclusive adjudication as to those rights, which may be subsequently readjusted in a suit brought under the penultimate paragraph of the section.[2139] Such a suit is virtually a suit for money had and received, and the period of limitation is three years from the date of the receipt of the assets by the defendant.[2140] The suit being one for money had and received, it would be premature if it were brought before the moneys were actually paid to the defendant. A mere order for the payment of money under the section is not sufficient to found the action.[2141]

Suit by Subsequent Mortgagee to Recover Balance of Money Realised by Sale in a Prior Mortgage.—*X* mortgages his property to *A*. He then mortgages the same property to *B*. Subsequently he executes a further charge on the property in favour of *A*. *A* sues *X* on the first mortgage, joining *B* as a defendant, and obtains a decree on the mortgage. The property is sold in execution of the decree and a balance of Rs 12,000 which remains after satisfying *A*'s decree is deposited in court. *A* then obtains a decree for sale on further charge and in execution of the decree draws out the balance deposited in court. *B* is not joined as a party to this suit, nor is any notice given to him that *A* was drawing out of court, the balance of Rs 12,000. *B* then sues *A* to recover the amount drawn out by *A*, that is, Rs 12,000. Such a suit is not one under sub-section (2), and the period of limitation applicable to the suit is 12 years under Article 132 of the Limitation Act, 1963. The suit is really one to enforce payment of money charged upon immovable property within the meaning of that article.[2142]

[s 73.19] Declaratory Suit

Is a decree-holder claiming under this section entitled to file a suit for a declaration that another decree-holder is not entitled to rateable distribution, and for an injunction restraining him from receiving payment, before distribution of the assets by the court, or is he bound to wait until actual distribution is made and then sue for a refund? In a Madras case,[2143] Sadasiva Ayyar J expressed the opinion that he is entitled to sue for a declaration.

[s 73.20] Inquiry into Validity of Decree

The judgment of the Privy Council in *Shankar Sarup v Mejo Mal*,[2144] makes it clear that the court distributing the assets is acting in an administrative rather than a judicial capacity. The court, which is merely a distributive agency, cannot deal with the question whether any decree has been obtained by fraud or improper means as in an ordinary case of execution. The Courts

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2138. *Parvathi v Ganapathy*, AIR 1954 TC 6.
2139. *Shankar Sarup v Mejo Mal*, (1910) 23 All 313 : 28 IA 203.
2140. *Shankar Sarup v Mejo Mal*, (1910) 23 All 313 supra; *Brij Banke Lal v Ram Narain And Anr*, (1917) 39 All 322; *Baiznath v Ramadoss*, (1916) 39 Mad 62; Limitation Act, 1963, Article 62.
2141. *Hart v Tara Prasanna Mukherji*, (1885) 11 Cal 718.
2142. *Bharandeo v Tara Chand*, (1914) 41 Cal 654 : 41 IA 45.
2143. *Venkatarama v South Indian Bank Ltd*, (1920) 43 Mad 381.
2144. *Shankar Sarup v Mejo Mal*, 28 IA 202 : 23 All 313.

of Calcutta,[2145] Madras,[2146] Bombay[2147] and Patna[2148] are agreed on the point, overruling some earlier decisions. Nor can such court go into the question that the decree was invalid on the ground that the court passing it had no territorial jurisdiction.[2149]

[s 73.21] Rights of Government Not Affected

A judgment-debt due to the government is entitled to precedence in execution.[2150] here is no difference in this respect between income tax and any other tax like sales tax due to the state[2151] nor does it affect the right of the state to be paid in full, that it has not obtained a decree, because its claim rests on the well-established principle recognised in sub-section (3) that Crown Debts are entitled to priority.[2152] In *Builders Supply Corp v UOI*,[2153] the Supreme Court held that the Government of India was entitled to claim priority for arrears of income tax due to it from a citizen over debts from him to unsecured creditors and that the English Common Law doctrine of priority of Crown Debts has been given judicial recognition in the territory then known as British India prior to 1950. Thus, that doctrine having been incorporated in Indian law, it was a law in force in the territory of India and by virtue of Act 372(1) of the Constitution it continued to be in force until it was validly altered, repealed or amended.[2154] However, in the absence of proof that it is so incorporated in the law of the erstwhile Hyderabad State and such priority having been extended only to land revenue under section 104 of the Hyderabad Land Revenue Act, no such priority could be claimed in the case of arrears of sales tax due to that state prior to its incorporation into the Indian Republic.[2155] But this priority exists only so long as the assets remain the property of the judgment-debtor. When an order for rateable distribution is made, the title of the judgment-debtor to the fund in court is extinguished and with that the right of the government to proceed against it must cease, there being no question thereafter of priority. It was accordingly held that where an order for rateable distribution had been made, a claim made thereafter by the Certificate Officer under the Public Debts Recovery Act for payment out of the fund in court was not maintainable.[2156] An attachment by the collector in independent proceedings for the recovery of arrears permitted under section 46 of the Income Tax Act, (now sections 222 of the Income-tax Act, 1961) is not sufficient for the purpose of enforcing the priority before the

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2145. *Biswambar v Aprana*, AIR 1935 Cal 290 : (1935) 62 Cal 715.
2146. *Saravana v Arunachalam*, (1917) 40 Mad 841.
2147. *Dattatraya v Purshotam*, AIR 1922 Bom 21 (FB) : (1922) 46 Bom 635; *Shidappa v Gurusangaya*, (1913) 55 Bom 473 : AIR 1931 Bom 350.
2148. *Bibi Uma v Rasoodan*, AIR 1926 Pat 497 : (1926) 5 Pat 445; *Mst Annapurni v Ashutosh*, AIR 1934 Pat 545.
2149. *ML Abdul Jabbar Sahib vs HV Venkata Sastri & Sons*, AIR 1969 SC 1147 : (1969) 1 SCC 573.
2150. *Secretary of State v Bombay Landing Co*, (1868) 5 Bom HC 23; *Income-tax-Officer v Chandan Bai*, AIR 1957 Bom 91 : (1956) Bom 743 : 58 LR 564; *Gulam Mohammad v Ahmad Gulam Dar*, AIR 1960 J&K 45.
2151. *State of Uttar Pradesh v Santal*, AIR 1963 All 495.
2152. *Manickam Chettiar v Income-tax Officer, Madras*, AIR 1938 Mad 360 : (1938) ILR Mad 744 : (1938) 1 Mad LJ 351; *State of Kerala v EP Mathew*, AIR 1961 Ker 18 : (1960) 1 Ker LR 634 : (1960) Ker LJ 76; *Excise And Taxation Officer v Gauri Mal Butail Trust*, AIR 1961 P&H 292 : (1960) 1 Punj 809. But see *Oudh Commercial Bank Ltd v Secy of State*, AIR 1935 Lah 319; *Murli Tahilram v T Asomal & Co.*, AIR 1955 Cal 423 : 59 Cal WN 701, considered in *BS Corp v UOI*, AIR 1956 Cal 26 : 59 Cal WN 1119.
2153. *Builders Supply Corp v UOI*, AIR 1965 SC 1061 : (1956) 2 SCR 289 : (1956) 56 ITR 91.
2154. *Lakkamma v State*, AIR 1970 Mys 198; *Somasundaram Mills v UOI*, AIR 1970 Mad 190 : 74 ITR 668.
2155. *Collector of Aurangabad v Central Bank of India*, AIR 1967 SC 1831 : (1967) 3 SCR 855 : (1967) 70 Bom LR 146.
2156. *Basantkumar v Panchu Gopal*, AIR 1956 Cal 23 : 59 Cal WN 17.

executing court. It is necessary that the executing court should be moved by the government, while the assets are still in the custody of the court as the property of the judgment-debtor. But the government's claim for priority cannot be enforced against the amount paid over to the attaching decree-holder before government made its application.[2157] If the state does not make an application for payment before the other attaching creditor takes away the amount it cannot later ask for payment, since no amount would be left with the court for payment.[2158] The under mentioned cases may be referred to in connection with sub-section (3) of this section.[2159] Two proceedings were going on, one before the executing court at the instance of a creditor and the other before the insolvency court at the instance of some creditors. The executing court passed an order for rateable distribution of the amounts realised in auction sale of some immovable properties of the judgment-debtor. It was held that the order of the executing court would not, in any way, affect the proceedings of the insolvency court. All rights over the properties of the debtor vested in the insolvency court after the admission of the insolvency petition and so the question of applicability of principle of *res judicata* did not arise in the present state of facts, if the application of the judgment-debtor or by the auction receiver as filed before the executing court is rejected and they do not file any appeal or suit or proceedings against the order. These applications would not affect the jurisdiction and the powers of the insolvency court.[2160]

Executing court's order for rateable distribution does not affect proceedings in insolvency court.[2161] Debts due to the state are entitled to priority over all other debts. If a decree-holder brings a judgment-debtor property to sale and the sale proceeds are lying in deposit in court', the state may, even without prior attachment, exercise its right to priority by making an application to the executing court for payment. If, however, the state does not chose to apply to the court for payment of its dues from the amount lying in deposit in the court but allows the amount to be taken away by some other attaching decree-holder, the state cannot, thereafter, make an application for payment of its dues from the sale proceeds since there is no amount left with the court to be paid to the state. However, if the state had already effected an attachment of the property which was sold even before its sale, the state would be entitled to recover the sale proceeds from whomever has received the amount from the court from filing a suit. The prior attachment effected by the state, similarly, fastens itself to the sale proceeds taken away by the decree-holder. The state is, therefore, entitled to recover the amount from the decree-holder who has taken away the amount. Section 73(3) read with section 73(2) of the CPC contemplate such a relief being granted in a suit.[2162] As soon as the question of rateable distribution between the decree-holders and the state having statutory priority is determined, and the court passes an order as to how to appropriate the assets of the judgment-debtor, the rights of the parties become crystallised and the moneys in question cease to be the property of the judgment-debtor and become the property of the decree-holder, regardless of whether

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2157. *Somasundaram Mills Pvt Ltd v UOI*, AIR 1970 Mad 190 : 74 ITR 668.
2158. *UOI v Somasundaram Mills*, AIR 1985 SC 407 : (1985) 2 SCC 40; *Kotak & Co v State of Uttar Pradesh*, (1982) 1 SCC 438 : (1982) 1 SCJ 241.
2159. *Oudh Commercial Bank v Secretary of State*, AIR 1935 Lah 319; *Varadachari v Secretary of State*, AIR 1936 Mad 602 : (1936) 59 Mad 872; *Deputy Commr of Police, Madras v Vedantam*, AIR 1936 Mad 132 : (1936) 59 Mad 428; *Secretary of State v Ma Myien Me*, AIR 1937 Rang 380; *IN Soniram Rameshur v Mary Pinto*, (1934) 11 Rang 467 : AIR 1934 Rang 8; *Muni Lal v Diwan Chand*, AIR 1939 Lah 488.
2160. *Dharamveer Agarwal v Kailash Chand*, AIR 1989 Raj 17.
2161. *Ibid.*
2162. *UOI v Som Sunderam Mills Pvt Ltd*, (1985) 2 SCC 40.

or not actual payment pursuant to said order is made. The order partakes of the character of a judgment and decree passed by the court.[2163]

[s 73.22] Attorney's Lien

The section does not apply to a solicitor's common law lien for costs. That lien is not affected by the attachment of the decree.[2164] It has been held in *Commercial & Industrial Bank Ltd v Mir Zarfaraz Ali Khan's* case that the lien of an attorney or of a barrister for fees is not entitled to priority outside the Presidency Towns of Bombay, Calcutta and Madras.[2165]

[s 73.23] Rights Created by this Section not Affected by Insolvency

An order made under this section for rateable distribution is not affected by the insolvency of the judgment-debtor subsequent to the making of the order. But the order will be confined in its operation to the assets of the judgment-debtor realised up to the date of the order of adjudication; assets realised after the date of the order of adjudication will vest in the official assignee.[2166] Two proceedings were going on, one before the executing court at the instance of a creditor and the other, before the insolvency court at the instance of some other creditors. The executing court passed an order for rateable distribution of the amounts realised in an auction-sale of some immovable properties of the judgment-debtor. It was held that the order of the executing court would not, in any way affect the proceedings of the insolvency court after the admission of the insolvency petition. The question of applicability of the principle of *res judicata* did not arise in the present state of facts, if the application of the judgment-debtor or by the auction receivers (filed before the execution court) is rejected and if they do not file any appeal or suit or proceeding against the order. These applications would not affect the jurisdiction and the powers of the insolvency court.[2167]

A Division Bench of the Kerala High Court has held that where the creditor could be proceeded against under the Insolvency Act, a suit for administration is not maintainable before the civil court. The Insolvency Act provides for Administration of the property of the debtor. The court may appoint an interim receiver and/or a receiver. The Insolvency Act also provides for distribution of the property of the insolvent. The scheme of the Insolvency Act shows that it is a complete Code in itself. The remedy of the creditor is to initiate proceedings under the Insolvency Act and not through administration suit before the civil court.[2168]

[s 73.24] Subsequent Occupier not Liable for Previous Electricity Dues

Where the petitioner was *bona fide* purchaser of cold storage in an auction sale under section 29 of State Financial Corporation Act, and the electric supply to the cold storage was disconnected on account of arrears outstanding against previous owner, the petitioner was held not liable for the dues outstanding against previous owner.[2169]

2163. *Kotak & Co. v State of Uttar Pradesh*, (1987) 1 SCC 445.
2164. *Tyabji, Dayabhai And Co v Jetha Devji & Co*, (1927) 29 Bom LR 1196; *Tyabji v Jetha*, AIR 1927 Bom 542 : (1927) 51 Bom 855.
2165. *Commercial & Industrial Bank Ltd v Mir Zarfaraz Ali Khan*, AIR 1956 Hyd 65 : (1956) ILR Hyd 79.
2166. *WE Howatson v WF Durrant*, (1900) 27 Cal 351; *Official Receiver of Tanjore v Venkatamma*, AIR 1922 Mad 31 : (1922) 42 Mad LJ 361.
2167. *Dharamveer Agarwal v Kailash Chand*, AIR 1989 Raj 17.
2168. *K Vijayarajan v D.K. Kalavathy*, AIR 2007 Ker 25 : 2006 (2) Ker LJ 670 (DB).
2169. *Maa Mamta Cold Storage Pvt Ltd v B.S.E.*, AIR 2002 Pat 54 (DB).

[s 73.25] Appeal

Prior to the Amendment Act, 1976, the position as regards orders passed under this section was as follows:

An order made under this section is not appealable unless all the conditions enumerated in section 47 are present.[2170] However, an order which decides a matter covered by section 47(1) may, although it be passed ostensibly under this section, be the subject of appeal.[2171] One of those conditions is that the question decided by the court should be one which arose between the parties to the suit, that is, between the judgment-debtor on the one hand and the decree-holder on the other.[2172] Hence, an order made under this section determining a question between two rival decree-holders, in which the judgment-debtor had no interest does not fall within section 47 and no second appeal lies from such order.[2173] But if the question determined by the order arose not only between rival decree-holders, but also between the judgment-debtor on the one hand and the decree-holder on the other, the order would be within section 47, and would, therefore, be appealable.[2174] An order allowing or refusing a prayer for rateable distribution is a judgment within clause 15 of the Letters Patent and is appealable.[2175] An order under section 73 deciding a question between rival decree-holders in which the judgment-debtor has no interest, does not fall under section 47 and is not appealable.[2176]

But in view of the deletion of the words "within section 47" in section 2(2) by the Amendment Act, 1976 and the order under this section being one enumerated in O XLIII, an order under this section, even if it satisfies all the conditions of section 47, is not appealable.

[s 73.26] Revision

As to revision, see the under mentioned cases.[2177]

A revision is not possible, provided the conditions laid down in the amended section 115 are satisfied.

2170. *Musammat v Musammat*, AIR 1921 Pat 401 : (1920) 5 Pat LJ 415.
2171. *Shib Das v Bulakhi Mal & Sons*, AIR 1927 Lah 100; followed in *Bishan Das v Tulsi Shal*, (1935) 16 Lah 990 : AIR 1935 Lah 302.
2172. *Jagadish v Kripa Nath*, (1909) 36 Cal 130; *Dwarkadas v Jabab*, AIR 1924 Cal 801 : (1924) 51 Cal 761.
2173. *Balmer Lawrie & Co v Jadunath Banerjee*, (1914) 42 Cal 1; *Varada v Venkataratnam*, AIR 1922 Mad 99 : (1922) 42 Mad LJ 473; *Navaj Bhavdu Patil v Totaram Govind Patil*, AIR 1931 Bom 252 : (1931) 33 Bom LR 503; *Shidappa Laxmanna v Gurusangaya Akhandaya*, AIR 1931 Bom 350 : (1931) 55 Bom 473; *Than Mal v The Income Tax Officer*, AIR 1958 All 636.
2174. *Sorabji Coovarji v Kala Raghunath*, (1911) 13 Bom LR 1193 : 12 Ind Cas 911; *Sorabji v Kala*, (1912) 36 Bom 156; *Rajah of Karvetnagar v Venkata Reddi*, (1916) 39 Mad 570; *Lalchand Radhakisan v Ramdayal Ramnarayan*, AIR 1939 Bom 112 : (1939) Bom 133.
2175. *Satyendra Nath Bose v Bibhuti Bhusan Bhar*, AIR 1963 Cal 104.
2176. *Lakshminarayanan Devesthanmam v Khande Rao, supra.*
2177. *Dwarkadas Marwari v Jadab Chandra Ganguli*, AIR 1924 Cal 801: (1924) 51 Cal 761, allowed; *Hari v Birendra*, AIR 1921 Cal 749 : (1922) 35 Cal LJ 327 (refused); *Karpaga v Vania*, AIR 1925 Mad 587 : (1925) 48 Mad LJ 459 (allowed); *Musammat v Musammat*, AIR 1921 Pat 401 : (1920) 5 Pat LJ 415 (refused); *SAS Chettyar v SARA Firm*, AIR 1928 Rang 163 : (1928) 6 Rang 582 (allowed); *Har Narain v Bird & Co*, AIR 1936 Oudh 132; *Birendra Bikram Singh v T Basdeo*, AIR 1936 Oudh 185; *Lyallpur Bank Ltd v Ramji*, AIR 1940 Oudh 237; *Lalchand Radhakisan v Ramdayal Ramnarayan*, AIR 1939 Bom 112.

Resistance to Execution

[S 74] Resistance to execution.—Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

[s 74.1] High Court Amendment

Calcutta.—Omit the words "that the holder of a decree for the possession of immovable property or" after the words "Court is satisfied"; and the word "immovable" before "property"; insert the words "referred to in Section 28 of the Presidency Small Cause Courts Act, 1822"; after the word "property" and before the words "sold in execution" omit the words "decree-holder or" between the words "at the instance of the" and "purchaser"; omit the words "decree-holder or" between the words "direct that the" and "purchaser". *Vide* Cal Gaz Pt I, dated 20 April 1967.

PART III

INCIDENTAL PROCEEDINGS

Commissions

[S 75] Power of Court to issue Commissions.—Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts; or

(d) to make a partition;

[1][(e) to hold a scientific, technical, or expert investigation;

(f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the court pending the determination of the suit;

(g) to perform any ministerial act.]

SYNOPSIS

[s 75.1] Scope 971
[s 75.2] Appointment of Second Commissioner 972
[s 75.3] Appointment of Commissioner—Revision 972

[s 75.1] Scope

The general powers of courts in regard to commissions have been summarised in this section. The detailed provisions are set forth in O XXVI. This section having set out the purposes for which a commission can be issued, there is no question of the court invoking its inherent jurisdiction to issue a commission for any other purpose.[2] In a title suit for specific performance of contract, the plaintiff can adduce evidence relating to claim of delivery of possession of suit land and damages before trial court, deputation of Survey Knowing Commissioner would amount to collecting evidence on behalf of plaintiff, therefore, the order rejecting application of the plaintiff for deputing said Commissioner was found proper.[3] The Supreme Court issued a Commission for scientific investigation while observing that if scientific investigation of document facilitates ascertaining of truth, naturally it has to be order in the interest of justice.[4]

1. Inserted by the CPC (Amendment) Act, 1976 (104 of 1976), section 26 (w.e.f. 1-2-1977).
2. *Jaiswal Coal Co v Fatehganj Co-op Marketing Society Ltd*, AIR 1975 Cal 303.
3. *Madhu Sudan Pradhan v Santosh Kumar Das*, AIR 2004 Ori 86.
4. *Rama Avatar Soni v Laxmidhar Das*, AIR 2018 SC 5597 : (2019) 11 SCC 415 : (2019) 1 Supreme 738.

[s 75.2] Appointment of Second Commissioner

Where the report of the commissioner for local investigation substantially complied with the writ of commission issued to him, court should not order an appointment of a new commissioner, when there was no possibility that the new commissioner could do anything more, and there was nothing on record to show what the difficulty felt was.[5]

[s 75.3] Appointment of Commissioner — Revision

Where the order under Revision only directs the commissioner to propose a scheme for partition of the properties covered by the preliminary decree, no prejudice can be said to have been caused to the revision petitioner and the Andhra Pradesh High Court found no grounds to interfere with the order impugned.[6]

[S 76] Commission to another Court.—(1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a [State] other than the [State] in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

See O XXVI rule 4.

[S 77] Letter of request.—*In lieu* of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within [7][India].

[s 77.1] Scope

The section empowers the court to issue a letter of request to any person other than the court to examine witnesses residing at any place outside India. This power is not subject to any reciprocal agreement between governments. The power is discretionary and not to be interfered with an appeal on the mere ground that witnesses examined thus, on commission. cannot be effectively cross-examined or that their examination would entail heavy costs. These are matters which would be taken into account by the court while exercising its discretion.[8]

The letter of request must, however, be issued in accordance with the procedure laid down therefor.[9] The provisions of O XVI, especially O XVI, rule 19 have no application to witnesses residing out of India. They are applicable only to witnesses residing within India. Section 77 and O XXVI, rule 5 come into play where the witnesses are residing out of India. The court may issue a commission or letter of request for the examination of such witness. Therefore. the

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5. *Budhia Dhöbia v Nakhelal Mahto*, AIR 1991 NOC 64 (Cal).
6. *R Ramakrishna Reddy v M Kamala Devi*, AIR 2004 AP 484.
7. Substituted by CPC (Amendment) Act 2 of 1951 for "the States".
8. *Filmistan Pvt Ltd v Bhagwandas*, AIR 1971 SC 61 : (1970) 3 SCC 258.
9. *JG Insurance Co v Dhandhiya Jewellers*, AIR 1973 Raj 156.

question always is that of the exercise of discretion by the court.[10] An Indian court may issue a letter of request to a person other than a court at Kabul (Afghanistan) even if the local law of Afghanistan prohibits the examination of witnesses by consular authorities.[11]

[12][**[S 78] Commissions issued by foreign courts.**—Subject to such conditions and limitations as may be prescribed, the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by or at the instance of—

(a) Courts situate in any part of India to which the provisions of this Code do not extend; or

(b) Courts established or continued by authority of the Central Government outside India; or

(c) Courts of any State or country outside India.]

Neither the intervener nor the witnesses to whom the commission is sought to be issued in pursuance to the letter of request issued by the foreign court are even proper parties much less necessary parties to the proceedings and so the intervener has no right to object to the execution of the commission.[13]

[s 78.1] Alterations in the Section

This section has been substituted for the old section by section 11 of the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951).

The words "subject to—prescribed" and "or at the instances of" are to avoid any possible conflict between the section and rules 19 to 22 of O XXVI.

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10. *IC Corp v Daewoo Corp*, AIR 1990 Bom 152.
11. *Filmistan Pvt Ltd v Bhagwandas*, AIR 1971 SC 61 : (1970) 3 SCC 258.
12. Substituted by Act 2 of 1951, section 11.
13. *Wooster Products Inc v Magna Tek Inc*, AIR 1989 Del 6, 9.

PART IV

SUITS IN PARTICULAR CASES

Suits by or against the Government or public officers in their official capacity

[1][[S 79] **Suits by or against Government.**—In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

(*a*) in the case of a suit by or against the Central Government, the Union of India, and

(*b*) in the case of a suit by or against a State Government, the State.]

SYNOPSIS

[s 79.1]	Changes in the Section	975	[s 79.4]	Act of State	977
[s 79.2]	Scope of the Section	975	[s 79.5]	Jurisdiction	978
[s 79.3]	Disputes Between Union and State Governments and Their Departments—Parties to Abide by Decision of the Committee	976	[s 79.6]	Suits Against the Railway	978
			[s 79.7]	Part "C" State	979
			[s 79.8]	Mis-description in Naming the Authority	979

[s 79.1] Changes in the Section

The present section is the result of the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, as further adapted by the Adaptation of Laws Order 1950.

As to procedure in suits by or against the government or public officers in their official capacity, see O XXVII.

[s 79.2] Scope of the Section

This section does not enlarge or in any way affect the extent of the claims or liabilities, enforceable by or against the government which formerly depended on the provisions of the Government of India Act (section 65 of the Government of India Act, 1858, section 32 of the Government of India Act, 1915 and then section 176(1) of the Government of India Act, 1935) and in the 21st century, depends on Article 300 of the Constitution of India. This section gives no cause of action but only declares the mode of procedure when a cause of action has arisen.[2] Suit was filed against Government of Assam. Chief Secretary to the Government of Assam was impleaded as defendant in his capacity as representative of the State of Assam. It was held that the requirements of section 79 and O XXVII, rule 5A were fulfilled. Section 79 being a procedural section, substantial compliance with the requirements thereof is sufficient.[3]

1. Substituted by AO 1948 for section 79.
2. *Jehangir v Secretary of State*, (1903) 27 Bom 189.
3. *Ganesh Chandra Das v Chief Secretary to the State of Assam*, AIR 1990 Gau 74; *Sri Laxmi Paper Depot v SDM, Bangaun*, AIR 1998 Cal 195.

The Secretary of State or any other authority as provided for and in the 21st century, either the Union of India or a state, as the case may be, were held not to be a proper party to a suit under section 42 of the Specific Relief Act (1 of 1877) filed by an owner of land against a member of the public who claims use of such land as a public road and thereby endangers the title of the owner.[4] In case of a dispute as to tenure holder ship under section 176 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, between two rival parties, the state is not a necessary party.[5] But the state is a necessary party in a suit to set aside the sale ordered for realisation of government dues.[6]

[s 79.3] Disputes Between Union and State Governments and Their Departments—Parties to Abide by Decision of the Committee

Under the scheme of the Constitution of India, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two states of the Union of India or between one or more states and the Union of India. It was not contemplated by the framers of the Constitution of India or the Code of Civil Procedure, 1908 (Code of Civil Procedure) that two departments of a state or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a state or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the government are its limbs and, therefore, they must act in co-ordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the high court is not only against the propriety and polity, as it smacks of indiscipline, but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The states/Union of India must evolve a mechanism to set at rest all inter-departmental controversies at the level of the government and such matters should not be carried to a court of law for resolution of the controversy. In the case of disputes between public sector undertakings and Union of India, in *Oil and Natural Gas Commission v Collector of Central Excise*,[7] the Supreme Court called upon the Cabinet Secretary to handle such matters. Further in *Oil and Natural Gas Commission v Collector of Central Excise*,[8] the Supreme Court directed the Central Government to set up a committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor dispute between ministry, the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a tribunal without the matter having been first examined by the committee and its clearance for litigation. The government may include a representative of the ministry concerned in specific cases and one from the Ministry of Finance, in the committee. Senior officers only should be nominated so that the committee would function with status, control and discipline.[9]

Undoubtedly, the right to enforce a right in a court of law cannot be effaced. However, it must be remembered that courts are overburdened with a large number of cases. The majority

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4. *Chuni Lall v Ram Kishen*, (1888) 15 Cal 460.
5. *Ram Dass v Board of Revenue, Uttar Pradesh*, AIR 1967 All 481.
6. *Kishoresingh v Tej Singh*, AIR 1967 MP 120.
7. *Oil and Natural Gas Commission v Collector of Central Excise*, (1992) Supp 2 SCC 432.
8. *Oil and Natural Gas Commission v Collector of Central Excise*, (1995) Supp 4 SCC 541.
9. *Chief Conservator of Forests, Govt of Andhra Pradesh v Collector*, AIR 2003 SC 1805 : AIR 2003 SCW 1251 : (2003) 3 SCC 472 : 2003 2 SCR 180 : JT 2003 (5) SC 210.

of such cases pertain to government departments and/or public sector undertakings. As is stated in *Chief Conservator of Forests*' case,[10] it was not contemplated by the framers of the Constitution of India or Code of Civil Procedure that two departments of a state or Union of India and/or a department of the government and a public sector undertaking fight a litigation in a court of law. Such a course is detrimental to public interest as it entails avoidable wastage of public money and time. These are all limbs of the government and must act in co-ordination and not confrontation. The mechanism set up by the Supreme Court is not only to conciliate between the government departments but for purposes of ensuring that frivolous disputes do not come before courts without clearance from the High Powered Committee. If it can, the High Powered Committee will resolve the dispute. If the dispute is not resolved, the Committee would undoubtedly give clearance. However, there could also be frivolous litigation proposed by a department of the government or a public sector undertaking. This could be prevented by the High Powered Committee. In such cases, there is no question of resolving the dispute. The Committee only has to refuse permission to litigate. No right of the department/public sector undertaking is affected in such a case. The litigation being of a frivolous nature must not be brought to court. To be remembered that in almost all cases, one or the other party will not be happy with the decision of the High Powered Committee. The dissatisfied party will always claim that its rights are affected, when in fact, no right is affected. The Committee is constituted of highly placed officers of the government, who do not have an interest in the dispute; it is thus expected that their decision will be fair and honest. Even if the department/public sector undertaking finds the decision unpalatable, discipline requires that they abide by it. Otherwise, the whole purpose of this exercise will be lost and every party against whom the decision is given will claim that they have been wronged and that their rights are affected. This should not be allowed to be done.[11]

[s 79.4] Act of State

It was held in *Sarjerao v Government of the Province of Bombay*[12] that an act done by a state fell under three heads, namely:

(i) acts which are capable of being done by a private individual;

(ii) acts which only the supreme government can perform such as making treaties and declaring war; and

(iii) matters and questions which are solely in the hands of the government, and that the phrase "Act of State" would comprise of the last two heads but not the first.

The meaning of the phrase "Act of State" has as already stated,[13] undergone a change in modern times and has come to denote:

(i) an act done by the state in the exercise of its sovereign status in relation to another state or subjects of another state; and

(ii) governmental acts done in exercise of its executive power against its own subjects or foreigners resident within its territories.

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10. *Chief Conservator of Forests, Govt of Andhra Pradesh v Collector*, AIR 2003 SC 1805 : AIR 2003 SCW 1251 : (2003) 3 SCC 472 : 2003 2 SCR 180 : JT 2003 (5) SC 210.
11. *Mahanagar Telephone Nigam Ltd v Chairman, Central Board, Direct Taxes*, AIR 2004 SC 2434 : AIR 2004 SCW 2934.
12. *Sarjerao v Government of the Province of Bombay*, AIR 1943 Bom 427 : (1943) ILR Bom 534 : 45 Bom LR 810.
13. Note on Act of State under section 9.

The former are not justifiable but the latter are, within the limits recognised by the municipal law. This, and the following section, presupposes that the government is under a substantive liability capable of enforcement in the civil courts and lays down the procedure to be adopted with respect to those proceedings. The secretary of state under the old sections could only have been sued in respect of those matters for which the East India Company could have been sued, *viz*, matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there is express statutory provision. No suit could lie against the East India Company in respect of acts of state or acts of sovereignty, and, therefore, no suit in respect of such acts would have been competent.[14] The same rule will apply to suits against the Union of India or a State.[15] A Municipal Council being a body corporate can be sued in its corporate name. Wrong description cannot defeat the suit if the parties understand who are the real parties.[16]

The plaint reveals that the suit in respect of property is claimed by the state as its property and the relief sought is also on behalf of the state. However, the headmistress in her name has filed the suit. Further, court found that the headmistress of the school is not an authorised person by the state government and thus, the suit is rejected.[17]

[s 79.5] Jurisdiction

A suit against the government can only be brought in the court within the local limits of whose jurisdiction the cause of action arises. The words "dwell", or "reside", or "carry on business", or "personally work for gain", which occur in sections 16, 19 and 20 of the Code of Civil Procedure, 1908 (CPC) and clause 12 of the Letters Patent do not apply to the government.[18] But it has been held by the Supreme Court[19] that the government can, in relation to the administration of the railways, be said to carry on business and that it can therefore be sued where the head office of the railway is located.[20]

[s 79.6] Suits Against the Railway

It has been held that a suit to enforce a claim against the railway administration can properly be laid against the government or the state without impleading the railway[21] and conversely,

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14. *Secretary of State Rustom Khan*, AIR 1941 PC 64 : 68 IA 109; *P&O SN Co v Secretary of State*, (1861) 5 Bom HC App 1, approved in 40 IA 48, p 51; *Jehangir v Secretary of State*, (1903) 27 Bom 189 (damages for defamation); *Shivabhajan v Secretary of State*, (1904) 28 Bom 314; *Ross v Secretary of State*, (1916) 39 Mad 781; *McInerny v Secretary of State*, (1911) 38 Cal 797; *Secretary of State v Cockcraft*, (1916) 39 Mad 351 (damages of injury of person); *Dhakjee v East India Co*, (1843) 2 Morley's Digest 307; *Secretary of State v Hari*, (1882) 5 Mad 473; *Vijaya v Secretary of State*, (1884) 7 Mad 466; *Muhammad v Secretary of State*, AIR 1938 All 158 : (1938) All 114.
15. *Sew Kishendas v Dominion of India*, AIR 1957 Cal 617.
16. *Oscar v Barbil Municipality*, AIR 1990 Ori 207.
17. *Ganesh Choudhary v The Middle School*, 2019 (3) Pat LJR 544.
18. *Dominion of India v RVK Nath & Co*, AIR 1950 Cal 207; *Doya Narain v Secretary of State*, (1887) 14 Cal 256; *Rodricks v Secretary of State*, (1913) 40 Cal 308; *Govindarajulu v Secretary of State*, AIR 1927 Mad 689 : (1927) 50 Mad 449; *Anant Rai v Governor General in Council*, AIR 1955 Cal 331; *Azizuddin and Co v UOI*, AIR 1955 Mad 345 : (1955) 1 Mad LJ 316.
19. *UOI v Ladulal Jain*, AIR 1963 SC 1681 : (1964) SCJ 101.
20. See notes to section 20.
21. *Chandra Mohan v UOI*, AIR 1953 Assam 193 : (1953) 5 Assam 326; *Natwarlal Govardhan Das v UOI*, AIR 1957 MP 157 : (1957) Jab LJ 331; *State of Kerala v GHS Rly Madras*, AIR 1965 Ker 277 : (1965) 2 Ker 112 : (1965) 1 Ker LR 449.

a suit for recovery of freight for carrying goods on railways could be instituted by the Union of India.[22]

[s 79.7] Part "C" State

It has been held by the Supreme Court that a suit on a contract entered into by the Government of Vindhya Pradesh which was a Part "*C*" state could be filed against the State of Vindhya Pradesh and that it need not be against the Union of India.[23]

[s 79.8] Mis-description in Naming the Authority

See *Subedar Samundar v Secretary of State.*[24]

[S 80] Notice.—[25][(1)] [26][Save as otherwise provided in sub-section (2), no suit [shall be instituted][27] against the Government, (including the Government of the State of Jammu and Kashmir)] or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been [28][delivered to, or left at the office of—

(*a*) in the case of a suit against the Central Government, [29][except where it relates to a railway], a Secretary to that Government;

[30][[31][(*b*)] in the case of a suit against the Central Government where it relates to a railway, the General Manager of the railway;]

[32][(*bb*) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;]

(*c*) in the case of a suit against [33][any other State Government], a Secretary to that Government or the Collector of the district; [34][***]

(*d*) [35][***]

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

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22. *UOI v RC Jall*, AIR 1958 MP 425 : (1958) Jab LR 611.
23. *State of Vindhya Pradesh v Moula Bux*, AIR 1962 SC 145 : (1962) 2 SCR 794 : (1961) 2 SCJ 549; on appeal from *Moula Bux v State of Vindhya Pradesh*, AIR 1956 VP 1.
24. *Subedar Samundar v Secretary of State*, AIR 1939 Lah 298.
25. Section 80 re-numbered as sub-section (1) thereof by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), section 27 (w.e.f. 1-2-1977).
26. Substituted by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), section 27, for "No suit shall be instituted" (w.e.f. 1-2-1977).
27. Substituted by Act 26 of 1963, section 3 (w.e.f. 5-6-1964).
28. Substituted by AO 1937.
29. Inserted by Code of Civil Procedure (Amendment) Act, 1948 (6 of 1948), section 2.
30. Inserted as clause (*aa*) by Act 6 of 1948, section 2.
31. Clause (*aa*) re-lettered as clause (*b*) and former clause (*b*) omitted by IAO 1948.
32. Inserted by Act 26 of 1963, section 3 (w.e.f. 5-6-1964).
33. Substituted for "a State Government" by *ibid.*
34. The word "and" omitted by IAO 1948.
35. Clause (*d*) omitted by IAO 1948.

[36][(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, retain the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely reason of any error or defect in the notice referred to in sub-section (1), if in such notice—

(*a*) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and

(*b*) the cause of action and the relief claimed by the plaintiff had been substantially indicated.]

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[s 80.1] State Amendment

Madhya Pradesh.—The following amendment were made by Madhya Pradesh Act 29 of 1984, section 3, dated 14 August 1984.

In its application to the State of Madhya Pradesh,

(a) In section 80(1), for the words, brackets and figures "sub-section (2)" substitute "sub-section (2) or sub-section (4)".

(b) After sub-section (3) insert as under—

"(4) Where in a suit or proceeding referred to in rule 3B of Order 1, the State is joined as a defendant or non-applicant or where the Court orders joinder of the State as defendant or non-applicant in exercise of the powers under sub-rule (2) of Rule 10 of Order 1 such suit or proceeding shall not be dismissed by reason of omission of the plaintiff or applicant to issue notice under sub-section (1)".

[s 80.2] Changes in the Section

The original words will be seen from the text of the old section, before its adaptation in 1937 by the Government of India Adaptation of Indian Laws Order, 1937 which ran thus:

> 80. No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

By the Code of Civil Procedure (Amendment) Act, 1963 (26 of 1963).:

(1) the words 'including the Government of the State of Jammu and Kashmir';

(2) Clause (bb) was inserted; and

(3) in clause (c) the words "any other" were substituted for "*A*".

The Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) has renumbered the original section as sub-section (1). It has also inserted two new sub-sections (2) and (3) and in consequence has added the words "save as otherwise provided in sub-section (2)" in sub-section (1). For the effect of these changes, see the note under the new "sub-sections (2) and (3)". A recommendation for the repeal of section 80 has been made more than once by the Law Commission of India.[37]

[s 80.3] Application of the Section

The applicability of this section must be determined on the law as it stood on the date of the suit. If the CPC had no application on that date, its coming into force during the pendency

37. *Law Commission of India*, 14th Report, vol 1, p 475; 27th Report pp 21–22, 54.

of the action cannot affect its maintainability.[38] This section was not incorporated in the rules governing suits filed in the federal court and so, a suit instituted in that court under section 204 of the Government of India Act, 1935, is not bad for want of notice.[39] On the same principle, no notice is necessary if the defendant's interests devolve on government during the suit, as for example when a private railway company is taken over by the government; for then, the suit had already been instituted.[40] Likewise, a notice which complies with the requirements of the section as it stood on the date of the cause of action is not rendered invalid by reason of the subsequent amendment of the section.[41] A notice claiming damages against the Bengal Assam Railway filed before the partition of India in 1947 and decreed thereafter was held to be sufficient to sustain a second suit against the Union of India on the same cause of action.[42] But if the suit was instituted in a court which had no jurisdiction to try a suit against government and the devolution occurs after the plaint was returned for presentation to the proper court, notice is necessary.[43]

Giving a notice under this section does not preclude the party from taking proceedings, other than suit, if they are permissible under the law. Thus, an application under Article 226, complaining of infringement of right of the petitioner to certain properties as contravening Article 19 of the Constitution of India, is not barred on the ground that he had given a notice of suit with reference to the claim.[44] A statutory body—whether it be the Electricity Board or the Food Corporation or Union Development Corporation or any other category—may be an instrumentality of the state within the meaning of Article 12 of the Constitution of India. Nevertheless, it would not answer the description of "government" as it is understood in law and as it is understood in the context of section 80 of the Code of Civil Procedure.[45] Section 80 does not apply to election petitions under the Bengal Panchayat Act, 1957.[46] A notice under section 80 was sent by the plaintiff to the Bangalore Water Supply and Sewerage Board instead of notice under section 126 of the Bangalore Water Supply and Sewerage Act, 1964, and there was no reply at all from the defendant for the notice. It was held that the notice under section 80 must be deemed to have been issued in terms of section 126 of the Bangalore Water Supply and Sewerage Act, 1964, when all the details with regard to the claim, the amount due and the facts required to be incorporated in the suit were clearly given in the notice. And so, the suit for recovery of amount filed by the plaintiff against the Board after more than two months from the date when such notice was received by the defendant, was not liable to be dismissed on ground of absence of notice under section 126 of the Act.[47]

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38. *Manganiram v Government of India*, AIR 1953 Hyd 139 : (1952) ILR Hyd 983; *RL Singh v AA Singh*, AIR 1958 Mani 7.
39. *State of Seraikalla v UOI*, AIR 1951 SC 253 : (1951) SCR 474 : (1951) SCJ 425.
40. *GIP Rly v Mahadev*, AIR 1926 All 585 : 24 All LJ 726; *Velayudam v Governor General in Council*, AIR 1952 Mad 783 : (1952) ILR Mad 446; *UOI v Tej Narayan*, AIR 1957 MB 108; *Khirodimal v Haji Suleman*, AIR 1960 MP 136 (where the properties, were after the suit, declared evacuee property); *Commissioner of Hindu Religious Endowments v KVN Chatram*, AIR 1960 AP 535 (in which the previous Endowment Board had been dissolved, and a new Board constituted under a fresh legislation).
41. *UOI v Kedarnath*, AIR 1954 Assam 147 : (1953) ILR Assam 305.
42. *PC Mahanti v UOI*, AIR 1960 Cal 403 : 64 Cal WN 381.
43. *Hirachand v GIP Railway*, AIR 1928 Bom 421 : ILR 52 Bom 548.
44. *Shiv Dutt v State of Himachal Pradesh*, AIR 1953 HP 95.
45. *V Padmanathan Nair v Kerala State Electricity Board*, AIR 1989 Ker 86; *Minakshi Patra v Secy. Irrigation and Power, Court of Orissa*, AIR 1999 Ori 137.
46. *Anil Pahar v Subhas Mahato*, AIR 1985 Cal 169 (DB).
47. *Bangalore Water Supply and Sewerage Board v Sugesan & Co Pvt Ltd*, AIR 1999 Mad 49 (DB).

[s 80.4] Provisions of This Section Imperative

The section is a matter of civil procedure and cannot be said to be subject to section 65 of the Government of India Act, 1935, or of the corresponding section of the other Government of India Acts or the corresponding article of the Constitution of India.[48] As it stood before its amendment in 1976, it was held to be explicit and mandatory, admitting no implications or exceptions.[49] Its language being imperative, it was held that it debarred absolutely a court from entertaining a suit instituted without compliance of its provisions and had in that case to be rejected under O VII, rule 11(d).[50] The High Court of Bombay has held that the question of compliance of the requirements of sub-section (1) is a matter relating to the court's jurisdiction and therefore the question of waiver of the notice by the government or the public officer cannot arise.[51] The fact that the suit would be barred by limitation if the notice had to be given and two months' period had to lapse is no ground for not giving a notice. In fact, that period is eligible for exclusion while calculating the period of limitation.[52] The rigour of sub-section (1) is sought to be reduced by inserting in the section, sub-section (2) in cases where an urgent or immediate relief is sought to be obtained and leave of the court has been obtained.

This section applies to all suits against the government or a public officer whether the action relates to past or future acts[53] and is not limited to any particular relief which may be claimed in the plaint.[54] When the suit is against the state, it should be in the name of that state and not the Union of India and the notice must be served in the manner mentioned in sub-clause (c).[55] The burden of proving that the requirements of the section have been satisfied is on the plaintiff.[56]

The words "two months" in sub-section (1) do not necessarily mean 60 days. The period has to be calculated month wise.[57]

[s 80.5] Object of Notice

The object of the notice required under the section is to give the government or the public officer concerned, an opportunity to reconsider the legal position and to make amends or settle the claim, if so advised, without litigation.[58] When a statutory notice is issued to public authorities, they must take the notice in all seriousness and they should not sit over it and

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48. See note "Scope of the Section" under section 79.
49. *Bhagchand v Secretary of State*, AIR 1927 PC 176 : (1972) 54 IA 338 : 51 Bom 725; *Ramabrahma Chabri v Dominion of India*, AIR 1958 Cal 183.
50. *Government of the Province of Bombay v Pestonji Ardeshir Wadia*, AIR 1949 PC 143 : 76 IA 85 : (1949) 53 Cal WN 489; *Bachchu v Secretary of State*, (1902) 25 All 187; *Jagdishchandra v Debendraprasad*, AIR 1931 Cal 503 : (1931) 58 Cal 850.
51. *Ebrahimbhai v State*, AIR 1975 Bom 13 : 76 Bom LR 769 : (1974) Mah LJ 663. But see below under the heading "Waiver of Notice".
52. *UOI v Devangere Cotton Mills*, AIR 1976 Mad 20.
53. *State of Madras v Chittor Venkata Durga Prasada Rao*, AIR 1957 AP 675.
54. *Mohd Hasham v Hyderabad Municipal Corp*, AIR 1958 AP 102 : (1957) 2 Andh WR 20.
55. *Madho Prasad v Vindhya Prasad State*, AIR 1955 VP 1.
56. *Kishan Prasad v UOI*, AIR 1960 Cal 264 : 64 Cal WN 272.
57. *Lakshmi Narain v State*, AIR 1977 Pat 73 : (1976) 55 Pat 151.
58. *Raghunath Das v UOI*, AIR 1969 SC 674; *State of Punjab v Geeta Iron and Brass Works*, AIR 1978 SC 1608; *Province of Bihar v Kamakshya Narain Singh*, AIR 1950 Pat 366; *Secretary of State v Perumal*, (1901) 24 Mad 279; *Shahebzadee v Ferguson*, (1881) 7 Cal 499; *Munndra v Secretary of State v Perumal*, (1901) 24 Mad 279; *Shahebzadee v Ferguson*, (1881) 7 Cal 499; *Manindra v Secretary of State*, (1970) 5 Cal LJ 148; *Secretary of State v Gulam Rasul*, (1916) 40 Bom 392, p 396; *Secretary of State v Nagarao*, AIR 1938 Nag 415; *Bhuban Mohini v Biraj*, AIR 1940 Cal 1; *Kashi Nath v Nawab Alam*, AIR 1935 Bom 229 : (1935) 37 Bom LR 341; *Uttar Pradesh Government v Nanhoomal*, AIR 1960 All 420 : (1959) 2 All 561.

force the citizen to the vagaries of litigation. They are expected to let the claimant (who has given notice), know, what stand they take, within the statutory period, or, in any case before the plaintiff embarks upon litigation.[59] The whole object of serving a notice under section 80 is to give the government sufficient warning of the case proposed to be instituted, so that government (if it so wishes) can settle the claim without litigation or afford restitution without recourse to court of law.[60] The section has been enacted as a measure of public policy, with the object of ensuring that before a suit is instituted against the government or a public officer, the government or the officer concerned is afforded an opportunity to scrutinise the claim and if it be found a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person who has issued the notice to restitute the suit involving considerable expenditure and delay.[61] A suit against the government or a public officer, to which the requirement of a public notice under section 80 of the CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authority concerned in the manner prescribed for in the section and if filed before the expiry of said period, the suit has to be dismissed as not maintainable. The public purpose underlying the provisions of section 80 is advancement of justice and securing of public goods by avoidance of unnecessary litigation. The language of the section is express, explicit and mandatory and it admits no implication or exception. Therefore, it is the plain duty of the court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the legislature.[62] The whole object of serving a notice under section 80 is to give the government sufficient warning of the case which is going to be instituted against it and that the government, if it so wished, can settle the claim without litigation or afford restitution without records to a court of law. Though the terms of section 80 have to be strictly complied with, that does not mean that the notice should be scrutinised in a pedantic manner divorced from common sense. The point to be considered is whether the notice gives sufficient information as to the nature of the claim such as would enable the recipient to avert the litigation. If the notice substantially fulfils its work of intimating the parties concerned generally of the nature of the suit intended to be filed, it would be sufficient compliance of this section.[63]

[s 80.6] Notice: When to Be Given

A notice given before the cause of action has arisen is invalid.[64]

[s 80.7] Notice Given Prior to the Coming into Force of Government of India (Adaptation of Indian Laws) Order, 1937

Where for the purpose of instituting a suit against the secretary of state, a notice was served under section 80, prior to the coming into force of Government of India (Adaptation of Indian Laws) Order, 1937, but the suit was lodged after the aforesaid order came into force, the suit is saved by virtue of paras 9 and 11 of the Preamble to the aforesaid Order.[65]

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59. *New India Assurance Co Ltd v DDA*, AIR 1991 Del 298.
60. *Ghanshyam Dass v Dominion of India*, (1984) 3 SCC 46.
61. *Bihari Choudhary v State of Bihar*, AIR 1984 SC 1043 : (1984) 1 SCC 627.
62. *Bihari Choudhary v State of Bihar*, AIR 1984 SC 1043 : (1984) 1 SCC 627.
63. *Ghanshyam Dass v Dominion of India*, (1984) 3 SCC 46.
64. *Kessoram v Secretary of State*, AIR 1927 Cal 74 : (1928) 54 Cal 960; *Bhairabendra Narain Bhup v State of Assam*, AIR 1953 Assam 162; *Braham Dutt v East Punjab Province*, AIR 1958 Punj 351 : (1958) Punj 244; *Chunilal v State of Madras*, AIR 1958 AP 670.
65. *Thakur Das v Tulsi Ram*, AIR 1940 Lah 455.

[s 80.8] Sufficiency of Notice

In *Secretary of State v Perumal*,[66] the High Court of Madras took the view that a notice by two out of three plaintiffs was sufficient. Such a view is not correct in view of the subsequent Privy Council decision in *Bhagchand v Secretary of State*.[67] Later, the same high court changed its former view and held that a notice by one of two plaintiffs was not valid,[68] and this was approved by the Privy Council.[69] The principle deducible from these decisions is that there must be identity between the person who issues the notice and the person who brings the suit. Accordingly, when a person carries on business in a particular name and style but issues notice in his own name, the suit should also be instituted in his name.[70] Where the notice was issued in the name of the concern but the suit was instituted in another name as the proprietor of that concern, the notice was held to be bad.[71] But where notice was issued in the name of the firm before its dissolution and the suit was filed after such dissolution by one of the partners authorised to collect its outstandings, the notice was held to be valid.[72] Where notice was issued in the name of Koshikode Lime Centre but the suit was in the name of Koshikode Lime Centre, by proprietor, PP Abubaker, it was held that though there was difference in the names, there was no possibility of any confusion in the mind of the defendant as regards the identity of the party.[73] But where the notice was issued on behalf of Ramjilal Giriraj Prasad and the suit was filed in the name of Ramjilal, described as the manager of the joint family business and the notice did not clarify that Ramjilal was the proprietor, it was held that the identity of the person suing and the person giving the notice was not established.[74] Notice was issued in the name of the plaintiff's mother in respect of a property. On the basis of that notice, suit could not be filed after her death in the son's name when the son had, during his mother's life-time, assigned all his rights in that property in the name of a third party.[75] A notice in the name of the concern, by which name and style the plaintiff, its sole proprietor, is carrying on business is valid in respect of a suit by the plaintiff described as the sole proprietor of such concern.[76] If there is difference in the names of the person giving the notice and the person who institutes the suit, the fact that no objection is raised by the defendant in the pleadings as to the validity of the notices indicates that the defendant did not consider the person suing as being one different from the person who issued the notice.[77] A joint notice by plaintiffs in two different suits complies with the requirements of the section.[78]

If notice has been sent to the state, it is not further necessary that the concerned agency of the state must also be served with notice.[79] In a Madras case, the plaintiff undertook construction work for the defendant. Defendant cancelled the contract. Subsequently, the plaintiff continued construction work on the basis of revised estimates. Defendant finally terminated the contract.

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66. *Secretary of State v Perumal*, (1901) 24 Mad 279.
67. *Bhagchand v Secretary of State*, 54 IA 338 : 51 Bom 725.
68. *Appa Rao v Secretary of State*, AIR 1931 Mad 175 : 54 Mad 416 : 59 Mad LJ 923 : 32 LW 810; on appeal, AIR 1935 Mad 389 : 41 LW 59.
69. *Vellayan Chettiar v Province of Madras*, 74 IA 223 : (1947) 2 Mad LJ 209.
70. *SN Dutt v UOI*, AIR 1961 SC 1449; *Dominion of India v Purshottam Das*, AIR 1961 All 176; *Vellayan Chettiar v Province of Madras* 74 IA 223 : (1947) 2 Mad LJ 209.
71. *Naseema Textiles v UOI*, AIR 1971 Ker 192 : (1970) Ker LR 463.
72. *UOI v Mohd JH Ibrahim*, AIR 1971 Ori 221.
73. *PP Abubaker v UOI*, AIR 1972 Ker 103.
74. *Ramjilal v UOI*, AIR 1974 Raj 18.
75. *BT Pillai v S Iyer*, AIR 1974 Mad 282.
76. *UOI v Kuthari Trading Co*, AIR 1969 Assam & Nag 84 : (1969) ILR Assam 81.
77. *Raghunath Das v UOI*, AIR 1969 SC 674.
78. *Dhondoji Rao v Dominion of India*, AIR 1957 Mys 94 : (1954) ILR Mys 465.
79. *Gulam Rasool v State of Jammu & Kashmir*, (1983) 4 SCC 623.

Plaintiff gave notice to the defendant under section 80 with reference to the earlier termination of the contract, while the suit, as filed, was based on subsequent termination of the contract. Notice was held to be invalid.[80] The notice must enable its recipient to identify the claimant. There should be identity between person issuing the notice and person instituting the suit. Any other view would amount to admitting implications or exceptions to the section which is not permissible under the section as interpreted in *Vallayan Chettiar v Government of Province of Madras*.[81] From the contents of the notice given to the railway by the plaintiff (for damages for loss of goods carried by railway), it was clear that the railway had been put on notice of the claim on behalf of "Madras Heavy Chemicals", irrespective of whether it was a proprietary or partnership business. What is required is that the circumstances which give rise to the claim be mentioned in the notice. It is really unnecessary that the respondent be also informed about the nature and constitution of the business as such. Judgement contains strong observations as to hyper technical defences by government.[82] Plaintiff, who originally belonged to the Prisons Department was later absorbed in the Labour Department. But still later, he was reverted to the Prisons Department. He challenged the reversion by notice under section 80. The order of reversion was later replaced by another order which was a repetition of the earlier order. It was held that fresh notice was not required.[83]

A single judge of the Allahabad High Court held that the "cause of action" in section 80 means the reason which impels the plaintiff to seek a remedy or, in other words, that which, according to the plaintiff, gives him a right to sue the defendant. In the above case, the plaintiff who was a *Rakshak* in the Railway Protection Force, had been served with a chargesheet resulting ultimately in his dismissal from service and his departmental appeal against it was also dismissed. He then gave a notice to the General Manager of the Railway, challenging his removal from the Railway Security Force, para 2 of the notice was as under:

> That the plaintiff was removed from service by the order dated 30 August 1968 illegally and without giving reasonable opportunity of showing cause against the principles of article 311 of the Constitution.

It was held that the notice did not give sufficient facts about the cause of action. The court expressed itself as under:

> It was not clear as to whether the plaintiff wanted to say that he was dismissed by an authority who was subordinate to that by which he was appointed. It is also not clear as to whether he was challenging the order of dismissal on the ground that no charge-sheet was served on him or that no enquiry was made against him or that he was not given an opportunity of adducing his evidence, or cross-examining the witnesses produced against him, or making his submission or that he was not at all heard in person, or that no copies of the relevant documents were furnished to him, or that the evidence was taken behind his back. The plaint, no doubt, gives the details of those facts on which the order of dismissal was impugned. The notice was, however, silent on the point. As pointed out earlier, the object of Section 80 of the Code of Civil Procedure notice is to enable the Government of India to consider its position and decide for itself as to whether the claim of the plaintiff should be accepted or resisted; and this the Government could do only when it was informed of the nature of the suit proposed to be filed and the facts on which the claim of the plaintiff was founded.[84]

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80. *R Kamalam v State of Tamil Nadu*, AIR 1980 Mad 86.
81. *Ghanshyam Dass v Dominion of India*, AIR 1984 SC 1004 : (1984) 3 SCC 46.
82. *Jaswant Chand S Mehta v UOI*, AIR 1989 NOC 79 (Mad).
83. *Pratap Narain Sinha v State of Bihar*, AIR 1984 Pat 212.
84. *Qamaruddin v UOI*, AIR 1982 All 169.

With respect, this seems to be too technical a view of the matter. What the plaintiff has narrated in the notice seems to have been fairly sufficient to give an idea of the proposed suit. The mention of Article 311, made the notice intelligible enough, at least for the department for which it was meant.[85] The notice under section 80 was issued to the railways for non-delivery of consignment. The notice was neither signed by the party nor his advocate; however, the identity of the person who gave notice, particulars of his client, value of consignment undelivered and its intended legal actions clearly spelt out a notice. It was held that notice complied with the requirement of section 80 of the CPC.[86]

In a suit for possession filed by the landlord against government, notice under section 80 of the CPC is necessary. However, notice of termination of tenancy under section 106 of the Transfer of Property Act, 1882, is no substitute for notice under section 80. Since suit for possession cannot be filed unless the tenancy is validly terminated and since notice under section 80 should contain the cause of action, hence a quit notice under section 16 of the Transfer of Property Act, 1882, cannot be said to be a composite notice under both the provisions.[87]

The notice should state the names, descriptions and places of residence of all the plaintiffs. In a suit by 63 plaintiffs, notice contained the names, descriptions and places of residence of two of them only. The notice was held to be insufficient.[88] The notice must be such as to enable the addressee to identify the claimant.[89] A notice setting out the business address of a businessman need not give his residential address also.[90]

[s 80.9] Substantial Compliance

There are a large number of decisions laying down that a notice would be sufficient if it substantially fulfils its object in informing the concerned parties of the nature of the suit to be filed.[91] The Supreme Court, accordingly, has held that though the terms of the section have to be strictly complied with, that does not mean that the notice should be scrutinised in a pedantic manner divorced from common sense.[92] Nevertheless, the notice must convey to its recipient sufficient information to enable him to consider the claim.[93] A notice which states that the cause of action and reliefs are set out in the copy of the proposed plaint annexed to

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85. *Qamaruddin v UOI*, AIR 1982 All 169.
86. *Sha Jetmal v General Manager, Southern Railway*, AIR 1995 Kant 219.
87. *Ajara Urban Co-op Bank Ltd v State of Maharashtra*, 2009 (4) AIR Bom R 75 : 2009 (2) Mah LJ 814.
88. *Government of the Province of Bombay v Pestonji Ardeshir Wadia*, AIR 1949 PC 143 : 76 IA 85 : (1949) 53 Cal WN 489; *Bhola Nath v Secretary of State*, (1913) 40 Cal 503; *Secretary of State v Hargovandas*, AIR 1935 Bom 229 : (1935) 37 Bom LR 341.
89. *Bhattacharjee v UOI*, AIR 1957 Assam 159.
90. *Bhupal v Governor-General in Council*, 52 Cal WN 808.
91. *Secretary of State v Chimanlal*, AIR 1942 Bom 161 : (1942) ILR Bom 357 : 44 BLR 295; *Haji Mohamed v Province of Bengal*, AIR 1942 Cal 343 : (1942) 1 Cal 211 : (1941) 46 Cal WN 59; *Lady Dinbai Dinshaw Petit v Dominion of India*, AIR 1951 Bom 732; *Jehangir v Secretary of State*, (1903) 72 Bom 189; *Sankunni Menon v SI Railway*, (1951) 1 Mad LJ 463 : 64 LW 323; *State of Bombay v Advani*, AIR 1963 Bom 13 : (1962) ILR Bom 552.
92. *Dhian Singh Shoba Singh v UOI*, AIR 1958 SC 274 : (1958) SCR 781 : (1958) SCJ 303 : (1958) SCA 307; *UOI v Jeewan Ram*, AIR 1958 SC 905; *State of Madras v CP Agencies*, AIR 1960 SC 1309; *Amarnath v UOI*, AIR 1963 SC 424 : (1964) 1 SCR 657; *State v Ajit Kumar*, AIR 1977 Cal 273 : 81 Cal WN 168; *Ghanshyam Dass v Dominion of India*, (1984) 3 SCC 46.
93. *Surjit Singh v UOI*, AIR 1965 Cal 191; *Braham Dutt v East Punjab*, AIR 1958 Punj 351 : (1958) ILR Punj 244; *UOI v Sankar Stores*, AIR 1974 Ori 85.

it as forming part of it is sufficient.[94] The ingredients of the notice are the name, description, place of residence and the relief which is proposed to he claimed. An incorrect statement of fact inadvertently made in the body of the notice relating to a matter which makes no difference to the real issue does not render the notice invalid.[95] If the notice substantially sets out the nature of the suit and the grounds of complaint, splitting up of the claim in different suits does not render the suits bad only because a joint notice in respect of the claims in the suits subsequently filed was given.[96] The fact that some of the reliefs claimed in the notice were given up in the suit also does not matter,[97] nor the fact that the amount claimed in the suit is less than that claimed in the notice.[98] The omission in the notice of one of the grounds on which relief is sought in the plaint also does not mean non-compliance of the section,[99] nor the fact that the notice mentioned an incorrect number of the railway receipt,[100] nor the fact that in a representative suit against government a plaintiff, who had joined in the notice had not joined the other plaintiffs in applying for permission to file such a representative suit,[101] nor the fact that the notice was signed not by the plaintiff but by some other person but under his authority and on his behalf.[102] The notice does not have to state the section under which it is made so long as the ingredients of section 80(3) of the CPC have been substantially complied with.[103]

A notice addressed and delivered to the secretary to the government is not bad on the ground that it was not addressed to the government.[104] Where a notice which ought to have been addressed to the Secretary, Civil Supplies (Food Department), was addressed to the Secretary to the Commissioner of Civil Supplies and sent by the latter to the former, it was held that the section had been substantially complied with.[105] When a notice addressed to a wrong person is forwarded to the right person, the object of the section is achieved and the notice is valid.[106] A notice claiming damages for loss of goods consigned to a railway for carriage, which was addressed to the Member-in-Charge, Railway Board, and was forwarded by him to the General Manager of the concerned railway was held to be sufficient.[107] In respect of such a claim against the railway administration, the section requires a notice delivered or left at the office of the General Manager of the railway to which it relates. It is not necessary that it should be addressed to the Union of India, though the claim made is against it.[108] There is substantial compliance if the plaint sets out the correct number of a railway receipt, though the notice contains an incorrect number.[109] Mis-description of the addressee may be condoned if,

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94. *Province of Bihar v Kamakshya Narain Singh*, AIR 1950 Pat 366; *Secretary of State v Dhirendra Nath*, AIR 1934 Cal 187.
95. *UOI v Panipat Woolen and General Mills Co*, AIR 1967 P&H 469; *State of Andhra Pradesh v Suryanarayana*, AIR 1965 SC 11; *BR Sinha v State of Madhya Pradesh*, AIR 1969 SC 1256 : (1969) 1 SCC 798; *BC Narsimharao v State*, AIR 1972 AP 130.
96. *Kashi Nath v Nawab Alam*, AIR 1934 Pat 346.
97. *Sheik Mohamed Zia v United Provinces*, AIR 1943 All 345 : (1943) ILR All 845.
98. *Braham Dutt v East Punjab Province*, AIR 1958 Punj 351 : (1958) Punj 244.
99. *B Poornaish v UOI*, AIR 1967 AP 338.
100. *Firm, Deokishan v UOI*, AIR 1966 All 16.
101. *State of Andhra Pradesh v Suryanarayana*, AIR 1965 SC 11.
102. *Sahdul Mian v UOI*, AIR 1968 Pat 188.
103. *Y Savarimuthu v State of Tamil Nadu*, (2019) 13 SCC 142 : 2019 (8) Scale 104 : 2019 (4) All MR 482.
104. *State of Bombay v Advani*, AIR 1963 Bom 13 : (1962) ILR Bom 552.
105. *State of Madras v CP Agencies*, AIR 1954 Nag 342; confirmed on appeal in, AIR 1960 SC 1309.
106. *Governor-General in Council v Srimathi Bhanwari Devi*, AIR 1961 All 14; *UOI v Chaman Singh*, AIR 1955 Pepsu 51 : (1954) ILR Patiala 563.
107. *Governor-General in Council v Sankarappa*, AIR 1953 Mad 838.
108. *Harbansingh Ajitsingh v UOI*, AIR 1973 Bom 363 : (1973) 75 Bom LR 559.
109. *Bishwanath v NE Railway*, AIR 1978 Pat 223.

in fact, the government or the public officer has not been misled.[110] An averment in the plaint that "notice had been given" instead of "notice has been delivered" does not justify a dismissal of the suit.[111] No fresh notice is necessary if the public officer on whom the notice has already been served is succeeded by another officer though the latter has to be impleaded.[112] On the question of substantial compliance with this section, see the cases noted below.[113]

The words "cause of action" should be construed liberally in favour of the subject. The section does not preclude the plaintiff from putting forward fresh grounds in respect of the claim by reason of the fact that they had not been mentioned in the notice.[114]

If the sued public officer is a receiver appointed by the court, the application for leave to sue the receiver does not dispense with the necessity for notice.[115]

It is permissible to give a combined notice under section 80 of the Code of Civil Procedure and section 106 of the Transfer of Property Act, 1882.[116]

[s 80.10] Relief Claimed

The cause of action to be stated in the notice is the bundle of facts which go to make up the right in respect of which the plaintiff proposes to sue. It may be that before the suit can be brought, that bundle of facts will be added to or subtracted from. A notice will not be invalidated, therefore, if it refers to a possible additional claim, consequent upon the cause of action specified therein and states that if such, additional claim arises, the plaintiff will sue also in respect thereof.[117] A landlord served notice upon the State of Maharashtra on 3 October 1966, terminating the monthly tenancy in its favour as from 31 October 1966. The state contended that the notice under section 80 was not valid as one of the essential ingredients of the cause of action for possession, that is, the termination of tenancy, was not in existence at the date of notice. It was held that the contents of the notice were sufficient to enable the state to realise what the consequences would be if there was no compliance made in terms of the notice. The notice did set out on payment of rent for more than six months and also that if default was made in payment of arrears of rent, a suit for possession would be instituted.[118] Moreover, an alternative and a lesser claim which is not mentioned in the notice cannot derogate from the plaintiff's right to have the suit tried on the issue claimed in the notice.[119] If in the circumstances of a particular case it is open to the court to give relief to the plaintiff against an ordinary defendant on the basis of the pleading of such a defendant without amending the plaint, the mere fact that the defendant is a government or a public officer does not debar the court from granting the relief on the ground that such an alternative relief was

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110. *Ramabrahma Chabri v Dominion of India*, AIR 1958 Cal 183.
111. *Rekhchand v GG in Council*, AIR 1954 All 495.
112. *Metro General Traders v Calcutta Corp*, AIR 1965 Cal 442.
113. *Dominion of India v Eversharp Agency*, 50 Bom LR 532; *Madhav Prasad v Vindhya Pradesh State*, AIR 1955 VP 1; *Chunilal v State of Madras*, AIR 1958 AP 670; *Firm Sundarlal v UOI*, AIR 1958 Punj 149 : (1958) ILR Punj 467; *Walluram v UOI*, AIR 1961 Punj 329; *Salig Ram v Dominion of India*, AIR 1953 Punj 43.
114. *DD Petit v Dominion of India*, AIR 1951 Bom 72; *State of Madras v CP Agencies*, AIR 1954 Nag 342.
115. *Jagadischandra v Debendraprasad*, AIR 1931 Cal 503 : (1931) 58 Cal 850.
116. *Rawat Hardeo Singh v State of Rajasthan*, AIR 1981 Raj 280.
117. *Chandulal v Province*, AIR 1943 Bom 138 : (1943) Bom 188 : 45 Bom LR 497.
118. *Rayabai D Kabve v State of Maharashtra*, AIR 1973 Bom 59 : (1972) Mah LJ 706 : (1971) 74 Bom LR 501; *State v Rajkumar Jain*, AIR 1972 All 444.
119. *Chandulal Vadilal v Province of Bombay*, AIR 1943 Bom 138 : (1943) Bom 188 : 45 Bom LR 197; *Secretary of State v Nagorao*, AIR 1938 Nag 145.

not claimed in the notice.[120] Where a notice is served and on a subsequent discovery that a certain plot of land had been omitted from the notice, another notice adding the plot to the subject matter of the dispute is served, a suit filed more than two months after the first notice but within two months from the date of the second notice would not be bad so far as it relates to the plots mentioned in the first notice and relief as to those plots cannot be denied if the evidence justified that relief.[121] Where the railway administration made part payment in full settlement of a claim after service of notice and the plaintiff accepted the same under protest, if a new set of facts arises giving rise to a fresh cause of action, a fresh notice would be necessary in respect of such fresh cause of action.[122] Where there are several prayers in a plaint, the suit is good if the notice embodies only those reliefs which are claimed against the public officer.[123]

By the notice given under section 80, relief proposed to be claimed was for a declaration that the employee's resignation was invalid, on the ground that it was obtained by coercion and undue influence. In the suit, relief claimed was for a declaration that the order of acceptance of resignation was invalid. It was held that the notice was invalid, as relief claimed in the suit and cause of action of such relief were not specified in the notice. It was held that even if the acceptance of the plaintiff's resignation was bad on any such ground, the suit cannot yet succeed for want of a valid notice under section 80 of the Code of Civil Procedure. The reason was that the order cannot be declared to be illegal unless a declaration was claimed to that effect, and a declaration to that effect could not be claimed in the suit unless it was specified in the notice as one of the reliefs proposed to be claimed in the suit, and the ground on which the suit was to be filed or the cause of action of the same were duly specified in the notice.[124]

[s 80.11] Reply to Notice—Duty of Government

These provisions cast an implied duty on all concerned governments and states and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, directions were given to all concerned governments, central or state or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the court finds that either the notice has not been replied to or reply is evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy cost against the government and direct it to take appropriate action against the concerned officer including recovery of costs from him.[125]

[s 80.12] Rejection of Plaint

Non-compliance with the requisites of this section[126] or an omission of an averment in the plaint that notice required by this section has been served, will merit rejection of the plaint

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120. *State of ASI Kota Ltd*, AIR 1971 Raj 128.
121. *Secretary of State v District Board, Rangpur*, AIR 1939 Cal 758.
122. *Kothari Trading and Investment Co Ltd v UOI*, AIR 1972 Cal 466.
123. *Charu Chandra v Snigdhendu*, AIR 1948 Cal 150 : (1947) 52 Cal WN 212.
124. *Janaradan Misra v State of Uttar Pradesh*, AIR 1981 All 213.
125. *Salem Advocates Bar Association v UOI*, AIR 2005 SC 3353.
126. *RT Officer v NY Motor Service*, AIR 1973 Ker 219 : (1973) Ker LJ 608.

under O VII, rule 11.[127] But where the suit is against a public officer and a private individual and no notice is served on the public officer, the plaint is not to be rejected but the suit would be carried on with the name of the public officer struck off.[128] This would also be the position where the suit is against government and a private person.[129]

However, if notice has been served and a statement of service is not averred in the plaint, an amendment of the plaint in that respect should be allowed.[130]

[s 80.13] Government Formally Joined

It has been held that even in a case in which the secretary of state was a pro forma defendant (i.e., no relief had been asked against him), notice was necessary and that if no such notice was given, the name of the secretary of state would be expunged.[131] But such a course cannot be followed where such expunging is not possible without material change in the nature of the suit.[132]

[s 80.14] Waiver of Notice

There can be no dispute to the proposition that a notice under section 80 can be waived. But the question is whether merely because in the amended written statement such a plea is not taken, it amounts to waiver.[133] It is settled proposition of law that the provision under section 80, Code of Civil Procedure is mandatory but the right can be waived by the party for whose benefit it has been provided; and no suit can be instituted without service of notice because such service of notice either under section 80 of the CPC, or under the provisions of the relevant Act, for instance, the Municipality Act, 1872, in some cases, is required statutorily as a condition precedent.[134] It is competent for government to waive notice. The government may also be estopped from objecting to want of notice at a later stage of the trial on the ground that it must be taken to have been waived.[135] The right under section 80 may be waived by the party for whose benefit it is provided.[136] Thus, where the plea of want of notice was raised in the written statement but no issue was raised thereon in the courts below, the objection was not allowed to be raised for the first time in the second appeal. Such an objection was held to have been waived.[137]

The requirement of section 80 is a procedural one and does not go into the root of the jurisdiction. Further, if the plea of want of notice is not being raised by the government in the written statement or additional written statement filed in the suit, then it would be deemed to have been waived.[138]

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127. *Baldeo v Sukhi Singh*, AIR 1938 Pat 127; *Bakshi Ghulam v GN Sadiq*, AIR 1968 J&K 98; *Sawkat Ali v Supdt of Police, Sibsagar*, AIR 1972 Assam & Nag 29 : (1971) Assam 319; *Gangappa Gurupadappa Gugwad v Rachawwa*, AIR 1971 SC 442 : (1970) 3 SCC 716; *Muktarei Devi v State*, AIR 1978 Gau 17.
128. *Boyini Kanganna v Pedini Ramlingam*, AIR 1948 Pat 117.
129. *NG Tipnis v UOI*, AIR 1970 MP 5.
130. *Tipan Prasad v Secretary of State*, AIR 1935 Pat 86.
131. *Secretary of State v Amarnath*, AIR 1936 Pat 339 : (1936) 15 Pat 353.
132. *Baldeo v Sukhi Singh*, AIR 1938 Pat 127.
133. *Bishandayal & Sons v State of Orissa*, AIR 2001 SC 544 : AIR 2001 SCW 155.
134. *Dayanand v State*, AIR 2001 Raj 257.
135. *UOI v Tej Narain*, AIR 1957 MB 108.
136. *State of Bihar v Panchratna Devi*, AIR 1980 Pat 212.
137. *State v Bamadeb*, AIR 1971 Ori 227; *Munuswamy Chatty v Commissioner of HR&CE*, AIR 1993 Mad 144.
138. *Jai Luxmi Labour and Construction Co-op Society Ltd v Dev Singh Negi*, C.R. No. 104 of 2018, decided on 29 April 2019 (Himachal Pradesh High Court)..

It has been held by the Supreme Court that where the plea of want of notice under section 80 was not raised by the government in the written statement or additional written statement, such defect will be deemed to have been waived.[139] DK Jain, J, speaking for the bench in the above case observed as follows:

> Accordingly, we decline to interfere with the finding recorded by the High Court on this aspect of the matter. The High Court has held that having participated in the original proceedings, it is not now open to the Sate to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect at the earliest point of time. The High Court has also observed that knowing fully well about non-issue of notice under Section 80, CPC the State had not raised such a plea in the written statement or additional written statement filed in the suit, and therefore, deemed to have waived the objection. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on facts of each case and is liable to be tried by the Court, if raised, which, as noted above, is not the case here.[140]

Where the amended portion of the plaint was not set out in the notice but no issue or argument was raised about it in the trial court, nor was it made a ground of appeal it was held that there was waiver.[141] However, when notice given in respect of original plaint as it originally stood and amended plaint was filed on the basis of entirely new cause of action, the fresh notice regarding this new cause of action was not given, the suit was not maintainable for want of notice.[142] Likewise, though the state objected to the maintainability of the suit on the ground of want of notice but that objection was rejected by the lower appellate court and the state, though a party, did not raise the objection in the second appeal, it was held that the state was deemed to have waived the objection.[143] But the High Court of Bombay has held that a waiver is an intentional relinquishment of a known right and where it is sought to be relied on by a party it is for that party to establish the circumstances under which he wants an inference of either, express or implied waiver to be drawn. It has further held that the section contains a bar against filing suits without notice and to that extent the matter relates clearly to the jurisdiction of the court and consequently the question of waiver either by the state or by a public officer cannot arise.[144] The High Court of Orissa has also held that if the issue as to want of notice has been raised but not pressed in the trial court, the defendant state would not be estopped from raising it at the appellate stage since there is no estoppel against law.[145] It is submitted that these last two decisions require reconsideration. A majority of the high courts have taken a different view. Further, the section lays down only a condition on a plaintiff's right to maintain the suit. It does not restrict the jurisdiction of the courts, for, it does not say that no court shall entertain a suit where the notice has not been served. The notice is for the protection of the state and if, in a particular case it does not require that protection, it can lawfully waive its right thereto.[146] The Madras High Court has held that where the government waives notice under this section, such waiver is binding on all persons interested in the subject matter.[147] Thus, where the secretary of state took objection to the sufficiency of the notice in his written statement but raised no issue on the point and took no objection during the trial.

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139. *State of Andhra Pradesh v Pioneer Builders*, AIR 2007 SC 113 : (2006) 12 SCC 119.
140. *State of Andhra Pradesh v Pioneer Builders*, AIR 2007 SC 113, para 18, at p 118 : (2006) 12 SCC 119.
141. *UOI v Joytirmoyee*, AIR 1967 Cal 461.
142. *Bishandayal & Sons v State of Orissa*, AIR 2001 SC 544 : AIR 2001 SCW 155.
143. *K Karthiyani v Neelacanta*, AIR 1969 Ker 280 : (1969) Ker 440.
144. *Ebrahimbhai v State*, AIR 1975 Bom 13.
145. *UOI v Shankar Store*, AIR 1974 Ori 85 : 39 Cut LT 1043.
146. *State v Juwan Das*, AIR 1971 Pat 141; *Paleti Suvarna Krishnaiah v Executive Engineer*, AIR 1978 AP 389; *J Mandal v UOI*, AIR 1978 Pat 42.
147. *State of Madras v Sulaiha Beevi*, AIR 1960 Mad 81; *Raj Kumar v Vijayakumar*, AIR 1960 All 161.

it was held that another defendant could not raise this issue at a later stage as the secretary of state had waived notice.[148] If the defendant wants to rely on the invalidity of the notice, it is for him to raise a specific issue on the point.[149]

Section 80(2) of CPC was filed by the petitioner to seek the permission to institute suit without complying with the provisions of section 80 of the CPC, which was duly rejected. The hon'ble high court observed that the case is of urgent matter as is clear from the averments made in the suit and the application filed under section 80(2); thus, the requirement of notice was waived off.[150] In a case relating to claim under the Fatal Accidents Act, 1885, it was held by the Gauhati High Court that where maintainability of the claim application was challenged by the opposite party, but no specific ground was taken as to why the application was not maintainable and at no stage the State took the plea of non-service of notice under section 80 of the Code, the requirement of notice may be safely held to have been waived.[151]

In a suit against Government, where notice had been given to the concerned government department which was a necessary party, in a proper manner, the requirement of notice upon other parties like State Government and others may be waived. It was held that on account of such technical defect, the suit should not be allowed to be defeated.[152]

[s 80.15] Notice to Government

Where a suit is to be instituted against government, notice under this section must be given in all cases, whether the act in respect of which the suit is to be brought is purported to have been done in official capacity or not. This expression "in respect of any act purporting to be done by such public officer in his official capacity" refers to the public officer and not to government. This was made clear by the substitution of the words "by such public officer" for the words "by him" which occurred in the corresponding section 424 of the Code of Civil Procedure of 1882.

Where suit is filed for recovery of money from the state government on a matter relating to the health department, then a summons served on the Chief Secretary is not valid.[153] A state electricity board is not government and its assistant engineer is not a public officer.[154]

Uttar Pradesh State Handloom Corporation, Electricity Board or Food Corporation of India or any other statutory corporations are instrumentalities of the government and are "State" within the meaning of Article 12 of the Constitution of India. Nevertheless, they would not answer to the description of government as understood in law. Thus, the Uttar

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148. *Vellayan Chettiar v Prince of Madras*, AIR 1947 PC 197 : 75 IA 223 : (1948) ILR Mad 214; *Province of Bihar v Kamaksha Narain Singh*, AIR 1950 Pat 366; *Manindra v Secretary of State*, (1907) 5 Cal LJ 148; *Bholanath v Secretary of State*, (1912) 40 Cal 503; *Muralilal v EV David*, AIR 1925 All 241 : (1925) 47 All 291; (see however, observations at p 128 in *Baldeo v Sukhi Singh*, AIR 1938 Pat 127 and in *Gaekwar Baroda State Rly v Hafiz*, AIR 1938 PC 165 : (1938) 65 IA 182 : (1938) All 601); *District Board, Benares v Churhu Rai*, AIR 1956 All 680; *Lakshmi Narain Gauri v UOI*, AIR 1958 Pat 489 : ILR 37 Pat 442; *Kishore v Municipal Committee, Piparia*, AIR 1958 MP 393.
149. *Lalchand v UOI*, AIR 1960 Cal 270.
150. *Hemant Sharma v State of Himachal Pradesh*, CMPMO No. 305 of 2019, decided on 4 July, 2019 (Himachal Pradesh HC)..
151. *Maya Rani Ghosh v State of Tripura*, AIR 2007 Gau 76 : 2007 AIHC 2169 (DB).
152. *Manindra Ch Paul v State of Tripura*, AIR 2007 Gau 103 : 2007 (3) GLT 300 (Agartala Bench).
153. *State of Punjab v Tripta Rani*, AIR 1990 P&H 252.
154. *Padmanabhan Nair v Kerala State Electricity Board*, AIR 1989 Ker 86.

Pradesh State Handloom Corporation not being the State Government within the meaning of section 80 of the CPC, notice for institution of suit against it would not be mandatory.[155]

[s 80.16] Notice to Public Officer: Act Purporting to Be Done in Official Capacity

According to the Concise Oxford Dictionary, to "purport" in this context means to "be intended to seem". Applying this meaning, the words "any acts purporting to be done by such public officer in his official capacity" mean any act "intended to seem" to be done by him in his official capacity.[156] If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that, he was so acting, the act clearly "purports to be done in his official capacity" within the ordinary meaning of the term "purport".[157] Where in a suit against government for recovery of a sum of money, the allegation was that a postal clerk was guilty of negligence in that he paid the amount from the plaintiff's saving account to a wrong person. The postal clerk was a necessary party and failure to give him notice rendered the suit liable to dismissal.[158] A suit for compensation for medical negligence against the government hospital and the doctors working therein was filed, wherein a relief was also claimed against the doctor who attended to the patient. It was held that the doctor was discharging his duty as a public officer and separate notice to him under section 80 is necessary.[159] In a case where the official receiver of the Calcutta High Court was sued for negligence in that he failed to collect rents, Rankin CJ, held that the section applied to non-feasance as well as to misfeasance and referred to the definition of the word "act" in the General Clauses Act, 1897, as extending to illegal omissions.[160] In a suit for refund of excess payment of royalty under section 20, Coal Mines (Nationalisation) Act, 1973, notice was sent to the district mining officer who was the authorised agent of the state to realise the royalty. State was not prejudiced. It was held that the notice was not invalid on the ground that it was not addressed to a secretary to government.[161] A government servant sued individual government servants for damages, for pecuniary loss of position and prestige and mental agony, caused by the conduct of the defendants in creating false evidence, to implicate the plaintiff, resulting in the plaintiff's reversion. The defendants pleaded that the acts were done in their official capacity and, therefore notice under section 80 was necessary. Without deciding whether the act was connected with the official duties of the defendants, the trial court (and, on appeal the first appellate court), dismissed the suit, for want of notice. It was held by the high court, that the dismissal was illegal, as the judgements did not show how the acts alleged were connected with official duty. If the suit is filed against a public officer, then notice is mandatory only when the suit is in respect of an act purporting

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155. *Uttar Pradesh State Handloom Corp Ltd v Prem Sagar Jaiswal*, 2008 (6) All LJ 150 : 2008 (4) All WC 3523.
156. *Nand Kumar Sinha v Pasupati Ghosh*, AIR 1941 Pat 385 : (1940) Pat 417; *Koti Reddi v Subbiah*, (1918) 41 Mad 792.
157. *Nand Kumar Sinha v Pasupati Ghose*, AIR 1941 Pat 385 : (1940) Pat 417; *Abdul Rahim v Abdul Rahman*, AIR 1924 All 851 : (1924) 46 All 884.
158. *UOI v Chhattar Singh*, AIR 1973 P&H 339.
159. *A Sarangadharn v Dr Vijayan*, AIR 1999 Ker 310.
160. *Prasaddas v Bonnerjee*, AIR 1931 Cal 61 : (1939) 57 Cal 1127; *Amalgamated Electricity Co v Ajmer Municipality*, AIR 1969 SC 227; *State of Maharashtra v Chandrabhan*, AIR 1977 SC 145; *SV Swaminarayan v Lakshmi Hardware Stores*, AIR 1978 Kant 100.
161. *State of Bihar v Bera Colliery Co Pvt Ltd*, AIR 1991 Pat 178.

to be done in his official capacity.[162] Where a revenue officer is to be impleaded in a suit for an official act (alleged to be illegal), notice under section 80 is required.[163]

Where a public officer had not done any act in his official capacity, it was held by the Supreme Court that the suit could not be discussed for non-service of notice under section 80 of the Code on the said public officer, if notice has been served on the State.[164] In the above case, some lands had been transferred to the plaintiff in lieu of his acquired lands. The transfer was duly approved by the District Collector and mutation was allowed. Later on, the said order of approval was revoked and the land in possession of the plaintiff was delivered to District Education Officer. Explaining the requirement of notice under section 80 of the Code, Tarun Chatterjee J, speaking for the Supreme Court Bench observed as follows:

> The suit which is not in respect of any act done by the respondent No. 3, as a public officer, and in which no act of respondent No. 3 is either challenged or sought to be set aside is not a suit to which Section 80 of the CPC can very well apply. Therefore, in the facts and circumstances of the present case, the respondent No. 3 had not acted in his official capacity for which service of notice under Section 80 of the CPC was necessary. That apart, it is not in dispute that the respondent No. 2 was Administrator and overall in-charge including the Government Middle Schools (Students Institutions) in the District and the notice served on the State Government through District Collector of the District was sufficient compliance with the requirements of Section 80 of the CPC.[165]

Notice to government, as prescribed in the section, must be given in all cases whatever the nature of the suit.[166] But notice to a public officer is necessary in those cases only where the suit is "in respect of any act purporting to be done by such public officer in his official capacity". Therefore, if the suit does not relate to any act or omission purporting to be done by a public officer in his official capacity, this section will not apply.[167] It follows that notice to a public officer is not necessary where the act done by him is not within his sphere of duties. Thus, where a public officer took possession of property which he had no authority to seize and was sued for trespass, it was held that the suit was not against him in his official capacity but as a private individual, and therefore, no notice was necessary and for that purpose pleadings have to be examined.[168] So also, when an investigating police officer assaulted a witness,[169] or a sub-overseer was assaulted by his superior officer and the suit was for damages, the act complained of was not an act purporting to be done by the defendant in his official capacity, and, therefore, no notice was necessary.[170] No notice is necessary when the suit is not in respect of an act done by the public officer, although he is made a defendant, as when a collector is made a party defendant for the protection of the title of a minor;[171] or when the suit is against the official trustees for the determination of the rights of beneficiaries to trust funds in his hands;[172] or when the official assignee, as representing the estate of an insolvent, is made a party in a suit for declaration of title and no act of the official assignee is complained of except an objection to the entry of plaintiff's name on the record of the rights.[173] The relief asked for in

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162. *Bidhu Bhusan v SA Aziz*, AIR 1985 Pat 165.
163. *Shina Sundari Lekri v Palu Hemram*, AIR 1982 Cal 5.
164. *Ram Kumar v State of Rajasthan*, AIR 2009 SC 4 : (2008) 10 SCC 73.
165. *Ram Kumar v State of Rajasthan*, AIR 2009 SC 4, para 10, at p 8 : (2008) 10 SCC 73.
166. *Secretary of State v Kalekhan*, (1914) 37 Mad 113.
167. *Amalgamated Electricity Co v Ajmer Municipality*, AIR 1969 SC 227 : (1969) 1 SCR 430.
168. *Rameshwar Prasad Singh v Md Ayub*, AIR 1950 Pat 527; *Ganoda v Nalini*, (1909) 36 Cal 28.
169. *Dattatraya v Annappa*, AIR 1938 Bom 352 (FB) : (1928) 52 Bom 832.
170. *Mumtaz Hussain v Lewis*, (1910) 7 All LJ 301.
171. *Anantharaman v Ramasami*, (1888) 11 Mad 317.
172. *Shahebzadee v Fergussion*, (1881) 7 Cal 499.
173. *Damodar Govindji*, AIR 1923 Bom 392 : (1923) 25 Bom LR 378.

a suit for a change or cancellation of an entry made by the registrar under the Madhya Pradesh Public Trusts Act, 1951, is not one against the government or the registrar personally and hence no notice is necessary for such a suit.[174] No notice is necessary in a suit against the common manager under section 95 of the Bengal Tenancy Act, 1885, to enforce a mortgage executed by a former manager. Such a suit is not against the manager personally and his omission to pay off the debt is not an act purporting to be done by him in his official capacity.[175] So also, the mere setting up of a claim to property, for example, the debt due to insolvent on behalf of the estate which the official receiver represents, cannot be considered to be an act purporting to be done by a public officer in his official capacity.[176] In a suit against an official receiver of an estate for recovery of arrears of rent, notice is not necessary as the omission of the receiver to pay rent is not an act purporting to have been done by him in his official capacity.[177] In a suit for royalty of lands in the possession of the receiver, non-payment of the royalty cannot be said to be an official act done by the receiver. Hence, this section does not apply.[178] Orders passed by the deputy commissioner and the commissioner under sections 68 and 61 of the Hindu Religious and Charitable Endowments Act, 1959, are judicial orders and a right to sue to set them aside is provided by section 62. In such a suit, no notice is required as the commissioner is not sued in his capacity as a public officer but as a statutory body.[179] The Orissa High Court has, however, held that although section 43(3) of the Bihar and Orissa Public Demands Recovery Act, 1914, provides for a suit, in a suit against the Director of Industries by a certificate-debtor against the rejection of his objection, notice is necessary.[180]

The decisions are conflicting as to whether notice is necessary under this section when a public officer acts mala fide, that is, maliciously or dishonestly, it being held in some cases that it is not[181] while in others that it is[182] necessary. The former proceed on the ground that an act done mala fide by a public officer cannot be said to be an "act purporting to be done by such public officer in his official capacity". The latter proceed on the ground that the section makes no distinction between acts done bona fide and acts done mala fide and that notice is necessary in every case where a public officer purports to act in his official capacity. Thus, a suit against a police officer, for having searched the house of the plaintiff, dragged him to the *thana*, and detained and kept him in confinement for several hours maliciously and without cause, could be filed according to the former view without notice because the officer having acted illegally and in bad faith could not be said to have acted in his capacity as a public officer.[183] Similarly, in a suit against a district magistrate and two officers of police for conspiracy and malicious

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174. *Chandrakant G Deshmukh v State*, AIR 1970 Bom 301 (FB).
175. *Rebati Mohan v Jatindra Mohan*, AIR 1934 PC 96 : (1934) 61 IA 171 : 61 Cal 470; reversing 59 Cal 961.
176. *Narayanchandra v Surendranath*, AIR 1938 Nag 499.
177. *Debendra Nath v Official Receiver*, AIR 1938 Cal 191 : (1938) 65 Cal LJ 561.
178. *Raja v Samuel*, AIR 1940 Pat 516.
179. *Chenchuramaiah v Dy Commissioner*, AIR 1966 AP 123.
180. *Director of Industries v Janardan*, AIR 1969 Ori 58 : (1968) Cut 432.
181. *Shahebzadee v Fergussion*, (1881) 7 Cal 499 per CUNNINGHAM, J; *Muhammad v Panna Lal*, (1904) 26 All 220 per BANERJI, J; *Raghubans Sahai v Phool Kumari*, (1905) 32 Cal 1130 per MUKERJEE, J; *Peary Mohun Das v Weston*, (1906) 16 Cal WN 145 per FLETCHER, J (reversed on merits on appeal); *Ranchhod v Municipality of Dakor*, (1884) 8 Bom 421.
182. *Jogendra Nath Roy v Price*, (1897) 24 Cal 584; *Koti Reddi v Subbiah*, (1918) 41 Mad 792 (FB); *Wilson v Nathmull*, AIR 1930 Mad 458 : (1930) 59 Mad LJ 501; *Collector of Bihar v Mumtear*, (1880) 3 All 20; *Bakhtwar Mall v Abdul Latif*, (1907) 29 All 567; *Bachchu Singh v Jafar Beg*, (1915) 13 All LJ 788; *Jugal Kishore v Jugal Kishore*, (1911) 33 All 540; *Abdul Rahim v Abdul Rahman*, AIR 1924 All 851 : (1924) 46 All 884; *Cecil Gray v Cantonment Committee of Poona*, (1910) 34 Bom 583; *Chhaganlal v The Collector of Kaira*, (1911) 35 Bom 42 per Chandavarkar, J; *Dakshina v Omar Chand*, AIR 1924 Cal 145 : (1923) 50 Cal 992.
183. *Muhammad v Panna Lal*, (1904) 26 All 220.

arrest and search, it was held that the suit was one in which the public officer was sued in respect of an act done in bad faith and therefore no notice under this section was required.[184] On the other hand, in *Jogendra Nath Roy v Price*[185] where the plaintiff sued a district magistrate for damages for illegal and malicious arrest under a warrant, it was held that though the act was said to have been done maliciously, notice was necessary under this section. The court said:

> The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise.

Following the above decision, the High Court of Allahabad, in a suit against a police officer to recover certain books seized by him in a search, said that if he seized the books, which was denied, he did so in his capacity of police officer and that notice was necessary under this section.[186] In a case decided by a Full Bench of the Madras High Court,[187] *A* sued *B* and attached, before judgment, certain wood belonging to *B*. Thereafter, the village *munsiff* sold the wood for arrears of revenue due from *B* though there was no necessity to sell the whole and after retaining the amount due for arrears of revenue handed over the balance of the sale-proceeds to *B*, although he had knowledge of the attachment. Thereupon, *A* brought a suit against the village *munsiff* for damages, alleging that the *munsiff* had colluded with *B* and paid the balance to him. The court found that the *munsiff* was aware of the attachment and that he dishonestly and fraudulently paid over the balance of the sale-proceeds to *B*. On the question of notice under this section, the Full Bench held that the *munsiff* was entitled to notice under this section, although he acted mala fide in the discharge of his duties. The general trend is that notice is necessary even if the act is mala fide[188] or malicious.[189] Accordingly, it has been held that this section applies in respect of a suit for malicious prosecution against a police officer.[190]

[s 80.17] Suits on Contracts and Torts

The High Court of Bombay had held in a series of cases that the requirement of notice was limited to suits on tort and that no notice was necessary in suits founded on contract.[191] In *Prasaddas v Bannerjee*,[192] Rankin CJ, said:

> It is, no doubt, broadly speaking, true that such a section as this is not intended to apply to actions *ex contractu* and there are other classes of actions no doubt which do not come within the meaning of the expression "in respect of any act purporting to be done by such public officer in his official capacity."
>
> The learned Chief Justice then referred to the case of *Sharpington v Fulham Guardians*.[193] In that case, the guardians were under a public duty to supply a receiving house for poor children and had employed a builder to alter a mansion house so as to make it a receiving house for the children of paupers. The guardians were sued by the builder on the contract with him. Farewell, J, held that the guardians were not entitled to a special period of limitation provided by the Public Authorities Protection Act, 1893, because it was a breach of a private contract that was complained of and that it was not a complaint by a number of children or by a member of the public in respect of a public duty. In *Rebati Mohan v*

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184. *Peary Mohan Das v Weston*, (1906) 16 Cal WN 145.
185. *Jogendra Nath Roy v Price*, (1897) 24 Cal 584.
186. *Bakhtwar Mal v Abdul Latif*, (1907) 29 All 567.
187. *Koti Reddi v Subbiah*, (1918) 41 Mad 792.
188. *Bakshi Gulam v GM Sadiq*, AIR 1968 J&K 98; *State of Maharashtra v Chander Kant*, AIR 1977 SC 148.
189. *BL Shukla v Fatmabai*, AIR 1976 Guj 29.
190. *Muhammad Sharif v Nasir Ali*, AIR 1933 All 742 : (1931) 53 All 44.
191. *Rajmal v Hanmant*, (1896) 20 Bom 679; *Cecil Gray v Cantonment Committee of Poona*, (1910) 34 Bom 583; *Bhau v Nana*, (1889) 13 Bom 343; *Sardar Sangji v Ganpat*, (1890) 14 Bom 395.
192. *Prasaddas v Bannerjee*, AIR 1931 Cal 61 : (1930) 57 Cal 1127.
193. *Sharpington v Fulham Guardians*, (1904) 2 Ch 449.

Jatindra Mohan,[194] the Privy Council, however, held that the section applies to suits on contrast. This decision has the effect of overruling a series of cases in which the requirement of notice was limited to suits on tort.

[s 80.18] Declaratory Suits

The section applies to suits for declaration.[195]

[s 80.19] Suits for Injunction

There was, at one time, a conflict of decisions as to whether the section applied to suits for perpetual injunction. This conflict was resolved by the Privy Council in *Bhagchand v Secretary of State*[196] approving Calcutta, Madras and Allahabad decisions,[197] that this section and the corresponding section 424 of the previous Codes should be strictly complied with and that they applied to all forms of action and all kinds of relief. That decision overruled the Bombay decisions that no notice was necessary in a suit for injunction against a public officer or against the secretary of state even when the act to be restrained against might occasion serious or irreparable damage.[198] In delivering the judgment of the Board, Viscount Summer said:

> To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while Section 80 is a mere procedure, is fallacious, for Section 80 imposes a statutory and unqualified obligation upon the court. So, too, the contention that the "act purporting to be done by the collector in his official capacity, in respect a which" the suit was begun, was his threatened enforcement of payment is fallacious also, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. Hence, though the act to be restrained is something apprehended in the future, the act alone "in respect of which" the suit lies, if at all, is the order already completed and issued.

In a Bombay case, it was left open whether if with notice of a suit the intended defendant proceeded to act in such a way as to anticipate a hostile order of the court in the intended suit, the court could restore the status quo ante on an interlocutory application before the trial.[199] The section applies to all suits for injunction perpetual and prohibitory as well as mandatory.[200] The decision in *State of Bihar v Raghunandan Singh*[201] that the section has no application to future acts and that accordingly, no notice is necessary for a suit for permanent injunction restraining the government from settling the *ghat* in future is, it is submitted, not

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194. *Rebati Mohan v Jatindra Mohan*, AIR 1934 PC 96 : (1934) 61 IA 171 : 61 Cal 470.
195. *Chhaganlal v Collector of Kaira*, (1911) 35 Bom 42; *Bhagchand v Secretary of State*, AIR 1927 PC 176 : (1927) 54 IA 338 : ILR 51 Bom 725.
196. *Bhagchand v Secretary of State*, AIR 1927 PC 176 : (1927) 54 IA 338 : ILR 51 Bom 725; *Gobindachandra v Sub-Divisional Officer, Chandpur*, AIR 1932 Cal 163 : (1931) 58 Cal 1288.
197. *Secretary of State v Rajlucki*, (1898) 25 Cal 239; *Dakshina Ranjan v Omkar Chand*, AIR 1924 Cal 145 : (1924) 50 Cal 992; *Secretary of State v Kalekhan*, (1914) 37 Mad 113, *Koti Reddi v Subbiah*, (1918) 41 Mad 792; *Bachchu v Secretary of State*, (1902) 25 All 187; *Abdul Rahim v Abdul Rahman*, AIR 1924 All 851 : (1924) 46 All 884; *NW Railway Administration v NW Railway Union*, AIR 1933 Lah 302 : (1933) 14 Lah 330; *Arunachelam v David*, AIR 1937 Mad 166 : (1927) 50 Mad 239, must be taken to have been overruled by the Privy Council in *Bhagchand*'s case.
198. *Secretary of State v Gajanan*, (1911) 35 Bom 362; *Naginlal v Official Assignee*, (1912) 37 Bom 243; *Secretary of State v Gulam Rasul*, (1916) 40 Bom 392.
199. *Narayan v Secretary of State*, AIR 1927 Bom 649 : (1927) 29 Bom LR 1427.
200. *Babulal v State*, AIR 1955 MB 75; *Abida Begum v Rent Control and Eviction Officer*, AIR 1959 All 675; *Certificate Officer v Kasturi Chand*, AIR 1970 Ori 239; *UOI v Brij Nath*, AIR 1971 All 209 : (1970) All LJ 1114; *UOI v Baij Nath*, AIR 1970 Cal 56; *State of Bihar v Jiwan Das Arya*, AIR 1971 Pat 141, *Chandrama Singh v Y Singh*, AIR 1972 Pat 128, p 134.
201. *State of Bihar v Raghunandan Singh*, AIR 1960 Pat 530; *Arunachalam Chettiar v Official Assignee, Ramnad*, AIR 1927 Mad 166 : 50 Mad 239; *Rameswara Prasad v Mohd Ayub*, AIR 1950 Pat 527.

correct. A suit for injunction filed against the government seeking restrain on encashment of bank guarantee furnished by the plaintiff, the suit was filed without taking leave of the court and without serving notice to government under section 80. The court, before granting the injunction, ordered the notice to be issued to the government. The suit is not bad for want of notice under section 80.[202] An application for injunction in a pending arbitration proceeding under the Arbitration Act, 1940 being not a suit, the provisions of section 80 of the CPC will not be attracted. Section 41(a) of the Arbitration Act, 1940, makes procedural rules of the CPC applicable to the proceedings pending in the court only and, therefore, there is no necessity of service of notice under section 80.[203]

In a suit for grant of permanent injunction under the J&K Civil Procedure Code (Smvt. 1977), where no notice was issued to government and no leave was obtained from the court to institute the suit and service of notice had not been waived by the authorities, it was held that the court had no jurisdiction to grant interim relief when such interim relief had not even been prayed for.[204]

[s 80.20] Withdrawal of Suit

A plaintiff, who gives a notice under this section and institutes a suit before the expiry of the two months prescribed in the section and is permitted to withdraw that suit with liberty to institute a fresh suit, is entitled to institute a fresh suit without a fresh notice.[205] The Supreme Court has affirmed this position.[206] One of the grounds under which withdrawal be permitted with liberty to sue afresh is that a suit must fail by reason of some formal defect. Non-service of notice under section 80 of the CPC is a formal defect on the basis of which a suit has failed.[207]

[s 80.21] By What Name Public Officer to Be Sued

The suits referred to in this section are suits against the public officer personally in respect of acts done in his official capacity. The public officer cannot be sued by his official name unless he is a corporation sole.[208]

[s 80.22] Death of Complainant After Notice but Before Suit

In some decisions, a view was taken that when a claimant gave notice but died before filing a suit, the notice did not ensure for the benefit of his legal representatives and that a suit by them without a fresh notice was not maintainable.[209] But a different view was taken where one of the plaintiffs, who alone had served notice, died pending the suit. The suit was continued by his transferees who were on record as co-plaintiffs. It was held that the suit did not fail.[210] The question as to whether a notice under section 80 is valid or not is a question of judicial construction. Section 80 of the CPC is but a part of the Procedure Code passed to provide the

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202. *Basic Tele Services Ltd v UOI*, AIR 2000 Del 1.
203. *Sita Ram v District Abhiyanta Durasanchar, Raipur*, AIR 1994 MP 71.
204. *Three Star Enterprises v State of Jammu & Kashmir*, AIR 2009 J&K 45 : (2009) 2 JKJ 257.
205. *Vallabhram v Secretary of State*, AIR 1935 Bom 21 : (1934) 59 Bom 149.
206. *Amarnath Dogra v UOI*, AIR 1963 SC 424 : (1963) 1 SCR 657.
207. *Umesh Chandra Saxena v Administrator General Uttar Pradesh*, AIR 1999 All 109 (DB).
208. *Sheriff of Bombay v Hakmaji*, AIR 1927 Bom 521 : (1927) 51 Bom 749; *NW Railway Administration v NW Railway Union*, AIR 1933 Lah 203 : (1933) 14 Lah 330.
209. *Mahadev v Secretary of State*, AIR 1930 Bom 367 : 32 Bom LR 604; *Haribar Mohappa v Hari Otha*, AIR 1959 Ori 257; *Buchan v Secretary of State*, (1902) 25 All 187.
210. *Parma Sah v Union Provinces*; AIR 1939 Oudh 196.

regulation and machinery, by means of which the courts may do justice between the parties. It is, therefore, merely a part of the adjective law and deals with procedure alone and must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it. As far as possible, no proceedings in a court of law should be allowed to be defeated on mere technicalities. This is the principle on which our laws of procedure are based.[211]

[s 80.23] Amendment of Plaint

Where notice of a proposed suit is once given, it is not necessary to give a fresh notice of two months if the plaint has to be amended owing to discovery of facts not within the plaintiff's knowledge at the time of the institution of the suit,[212] or for adding further grounds for the cause of action already disclosed,[213] or when new facts have arisen subsequent to the suit.[214] No notice is necessary for an amendment which does not call for any new relief or introduce a new cause of action.[215] That would also be so when facts on which the amendment is proposed to be made, are already on record and therefore do not cause any surprise or prejudice to the other side.[216] But no amendment will be allowed if the effect of the amendment is to convert the suit into another of a different character, e.g., a suit based on negligence into one based on nuisance. In such a case, a fresh suit must be brought after giving fresh notice as required by this section.[217]

There can be no dispute to the proposition that a notice under section 80 can be waived. But the question is whether merely because in the amended written statement such a plea is not taken it amounts to waiver. Even otherwise when in the suit itself, Issue No 4 had been raised as to whether or not there was a valid and appropriate notice under section 80. Such a point having been taken in the original written statement and an issue having been raised, it was not necessary that in the amended written statement such a plea be again raised. If the original notice was only in respect of a claim under the plaint as it originally stood that claim was on the basis that there was a concluded contract and that the appellants had already acquired rights in the mill and the lands. Those reliefs were not maintainable and were given up before the appellate court. The amended plaint was on an entirely new cause of action. It was based on facts and events which took place after the filing of the original plaint. It was a fresh case. The claim was for specific performance of the agreement alleged to have been entered into on 29 December 1978. Admittedly, no notice under section 80, CPC was given for this case. As there was an issue pertaining to notice under section 80, the trial court should have dealt with this aspect. The trial court failed to do so. It was then pressed before the appellate court. The finding in the impugned judgement that the suit based on this claim was not maintainable is correct and requires no interference. If a new cause of action is being introduced, a fresh notice under section 80, CPC would be required to be given. The same not having been given, the suit on this cause of action was not maintainable.[218]

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211. *Ghanshyam Dass v Dominion of India*, (1984) 3 SCC 46.
212. *Ezra v Secretary of State*, (1903) 30 Cal 36, p 72.
213. *Lady Dinbai Dinshaw Petit v Dominion of India*, AIR 1951 Bom 72.
214. *Lal Chand v UOI*, AIR 1960 Cal 270.
215. *Gulam Mohiuddin v State of Jammu and Kashmir*, AIR 1961 J&K 6.
216. *Madanlal v UOI*, AIR 1968 Ori 234.
217. *Province of Madras v RB Poddar Firm*, AIR 1949 Mad 214; *Mc Inerny v Secretary of State*, (1911) 38 Cal 797.
218. *Bishandayal & Sons v State of Orissa*, AIR 2001 SC 544 : AIR 2001 SCW 155 : (2001) 1 SCC 555.

[s 80.24] Notice to Collector

A collector is entitled to notice under this section of a suit for damages in respect of an act done by him in his official capacity as agent of the court of wards, but he is not entitled to such notice if he is sued or joined as a party not by reason of any act purporting to be done by him in his official capacity, but merely for the protection of a minor's title.[219] This section does not apply to a suit to contest the legality of the collector's decision as to levy of assessment of land revenue, brought pursuant to an undertaking given under section 14 of the Bombay City Land Revenue Act II of 1876 within 30 days from the decision. The reason is, first, that there is a conflict between that Act which is a special Act and the provisions of this section (General Act), and, secondly, that the Act itself draws a distinction between suits brought on account of land revenue and suits brought on account of acts done in their official capacity by the collector or any of his assistants and section 80 refers to the latter class of suits and not to the former.[220]

[s 80.25] Notice to Cantonment Committee

Cantonment Committee constituted under the Indian Cantonments Act, 1889, is a "public officer" within the meaning of this section.[221]

[s 80.26] Notice to Coal Mines Provident Fund Commissioner

The Coal Mines Provident Fund Commissioner is not a public officer within the meaning of the term in section 2(17)(h) of the Code of Civil Procedure, 1908.[222]

[s 80.27] Municipal Council and Village Panchayat: Notice Not Necessary

A municipal council is not a public officer and no notice is necessary when a suit is filed against a municipality.[223] A village panchayat also is not a public officer.[224] The commissioner of a municipal corporation is a public officer[225] but not the port commissioners of Calcutta.[226] A suit against the director of municipal administration for restraining him from implementing a motion of non-confidence passed at a meeting alleged to be illegal necessitates a notice.[227]

It has been held by the Supreme Court [228] that a municipal council is not a public officer and no notice is necessary when a suit is filed against a municipality. Therefore, the question of sufficiency of notice under section 80 of the CPC does not arise at all.

[s 80.28] Notice to Official Assignee

The official assignee is a public officer, and he is entitled to notice under this section before a suit is filed against him in respect of any act purporting to be done by him in his official

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219. *Anantharaman v Ramasami*, (1888) 11 Mad 317; *Bhau v Nana*, (1889) 13 Bom 343.
220. *Collector of Bombay v Kamalavahooji*, AIR 1934 Bom 162 : (1934) 36 Bom LR 297.
221. *Cecil Gray v Cantonment Committee of Poona*, (1910) 34 Bom 583.
222. *Coal Mines Provident Fund Commissioner v Ramesh Chandra Jha*, (1990) 1 SCC 589.
223. *Municipal Council, Anantapur v Vasudeva*, AIR 1931 Mad 808 : (1932) 55 Mad 207.
224. *Makundarao v Durgaprasad*, AIR 1944 Nag 130 : (1944) ILR Nag 687.
225. *Siva Dhan v Corp of Calcutta*, 64 Cal WN 60.
226. *Moolji Doshi v Governor-General in Council*, AIR 1951 Cal 443.
227. *JR Sirsat v BN Karekar*, AIR 1973 Goa 1.
228. *City Municipal Council Bhalki v Gurappa*, AIR 2015 SC 3826 : (2016) 2 SCC 200.

capacity.[229] The same rule applies to a receiver appointed under the Provincial Insolvency Act, 1920.[230] But no notice is necessary when the official assignee or receiver is made a party to a suit to realise a charge on the property of the insolvent which has vested in him and no act or omission on the part of the receiver is alleged.[231] The Bombay High Court had held that no notice was necessary in a suit to restrain an official receiver from selling goods claimed by the plaintiff;[232] but as stated above, this case has been overruled by the Privy Council.[233] The Lahore High Court had accordingly held that in such a case, notice is necessary.[234] In a suit to set aside a sale by an official receiver, the receiver is a necessary party and notice must be served upon him under this section.[235] A suit against the official receiver by the wife of an insolvent, for a declaration that she is entitled to retain certain property as long as her claim for dower-debts is not satisfied is liable to be dismissed for want of notice to the official receiver under this section.[236]

[s 80.29] Notice to Receiver

A receiver appointed in a suit is a public officer and is entitled, even after his discharge to notice before a suit is filed against him for acts purporting to have been done in his official capacity.[237] But no notice is necessary where the complaint is in respect of an act not done by him in his official capacity,[238] or where no relief is claimed against the receiver, as for instance where the suit is for a declaration that a mortgage executed by him is not binding on the estate.[239] A manager appointed in an administration suit with power to collect rent and royalties is a public officer and so notice is necessary when his official acts are the subject matter of the suit.[240] But this section does not apply to a case where a suit for possession is brought against the owner of the estate in respect of which a receiver is appointed and which suit the receiver has to defend.[241]

[s 80.30] Notice to Official Liquidator

The official liquidator, under the Companies Act, 2013, is an officer of the court and is a public servant and is entitled to notice under the section.[242] But no notice is necessary if the act complained of, is not an act done by him in his official capacity.[243] Judicial opinion is divided on the question of whether a liquidator appointed by the registrar under section 42 of the

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229. *Joosub v Kemp*, (1902) 26 Bom 809; *Wilson v Nathmull*, AIR 1930 Mad 458 : (1930) 59 Mad LJ 501.
230. *De Silva v Govind*, (1920) 44 Bom 895; *Murari Lal v David*, AIR 1925 All 241 : (1924) 47 All 291; *Bishambarnath v Janaki Ballabh*, AIR 1952 All 402.
231. *Skipper & Co v David*, AIR 1927 All 132 : (1927) 48 All 821.
232. *Naginlal v Official Assignee*, (1912) 37 Bom 243.
233. *Bhagchand v Secretary of State*, AIR 1927 PC 176 : (1927) 54 IA 338 : 51 Bom 725.
234. *Duli Chand v Kalyan Singh*, AIR 1931 Lah 703 : (1931) 12 Lah 260.
235. *Haveli Ram v Jagan Nath*, AIR 1937 Lah 386.
236. *Asia Khatun v Amarendra*, AIR 1940 Cal 578.
237. *Jagadish Chandra Deo Dhabal v Debendra Prosad Bagchi*, (1930) 59 Cal 850; *Radharani v Purnachandra*, AIR 1930 Cal 737 : (1930) 34 Cal WN 671.
238. *Palanibala Debi v Katlipada*, (1950) 54 Cal WN 960.
239. *Annapurna Dasi v Sarat Chandra*, AIR 1942 Cal 394 : (1941) 46 Cal WN 355.
240. *Hira Lal Murarka v Mangtulal Bagaria*, AIR 1947 Cal 221 : (1944) 2 Cal 513 : 48 Cal WN 421.
241. *Bhuban Mohini v Biraj*, AIR 1940 Cal 1 : 44 Cal WN 74.
242. *Kathiawar and Ahmedabad Banking Corp v Ram Charam Lal*, AIR 1934 Oudh 458 : (1934) 9 Luck 577.
243. *Union Bank v Tatanagar Foundry*, AIR 1974 Cal 213.

Co-operative Societies Act, 1912, is a public officer within this section. Some decisions hold that he is,[244] while others that he is not.[245]

[s 80.31] Notice to Official Trustee

By section 16 of the Official Trustees Act, 1913 (2 of 1913), it is enacted that nothing in section 80 of the CPC shall apply to any suit against the official trustee in which no relief is claimed against him personally.

[s 80.32] Notice to Administrator-General

By section 41 of the Administrator General's Act, 1913 (3 of 1913), it is enacted that nothing in section 80 of the CPC shall apply to any suit against the Administrator-General in which no relief is claimed against him personally.

[s 80.33] Notice to Common Manager Appointed Under Section 95 of the Bengal Tenancy Act 8 of 1885

Such a manager is a public officer within the meaning of this section, and he is entitled to notice under this section.[246] This proposition was disputed before the Privy Council. Their Lordships did not decide whether the manager was, or was not, entitled to notice; but held that the omission of a manager to redeem a mortgage by a former manager was not an act purporting to be done in his official capacity so as to make notice necessary.[247]

[s 80.34] Limitation

In computing the period of limitation, prescribed for a suit under this section, the period of the notice should be excluded.[248]

[s 80.35] Place of Suing

Where a suit was filed by the Chairman of the Marine Products Export Development Authority, claiming that he was entitled to provident fund and gratuity, making the Union of India and the said authority as defendants, the suit filed after the expiry of two months' period from the date of issuing notice under section 80 of the CPC would not be barred by limitation on the mere ground that section 80 is not applicable to the Marine Products Export Development Authority.[249] Time spent in service of notice under section 80 is to be excluded in computation of limitation. If a Sunday intervenes, that also is to be excluded.[250]

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244. *SK Kalan Co-op Bank v Ayodhya Prasad Shamlal*, AIR 1939 All 232; *Abdul Ghouse v Anjuman Dehi Imdad*, AIR 1942 Lah 487; *Vasant v Khaddathar*, AIR 1949 Nag 25.
245. *Kuppu Govindan Chetty v Uthukottai Co-op Society*, AIR 1940 Mad 831 : (1940) ILR Mad 929; *Jhansi Co-op Mills v Lala Makanlal*, AIR 1957 All 492.
246. *Sukumari Gupta v Dhrendara Nath Roy Chowdhury*, AIR 1941 Cal 643 : 73 Cal LJ 356; *Beni Madhab v Deb Narayan*, AIR 1932 Cal 275 : (1919) 59 Cal 961.
247. *Rebatimohan v Jatindramohan*, AIR 1934 PC 96 : (1934) 61 IA 171 : 61 Cal 470.
248. Limitation Act, 1963, section 15(2); *Jai Chand Sawhney v UOI*, (1969) 3 SCC 642; *State v RD Singh*, AIR 1972 Raj 241; *North-Western Rly v Ram Dhanshib Lal*, (1917) PR No 52, p 187; *Mohd Quaramuddin v State of Andhra Pradesh*, (1994) 5 SCC 118.
249. *TPK Nair v UOI*, AIR 1991 Ker 80 (S Padmanabhan, J).
250. See section 15(2) of the Limitation Act, 1963. Also, see notes to section 79 above, "jurisdiction".

[s 80.36] Notice Not Part of the Cause of Action

Though a notice under this section is necessary before a suit can be filed, it is not part of the cause of action and consequently, a court which has otherwise no jurisdiction to entertain a suit does not get jurisdiction to entertain it on the ground that the notice was issued within its jurisdiction.[251]

[s 80.37] Suit Under O XXI, Rule 63

The High Court of Punjab took the view that no notice is necessary for a suit under O XXI, rule 63 as the government was a party to the claim proceedings and the suit was only a continuation thereof.[252] In consonance with this proposition, the Allahabad High Court also held that where on dismissal of an objection by the collector in proceedings for recovery of arrears of income tax, the objector files a suit under O XXI, rule 63, such a suit is in continuation of the claim proceedings under O XXI, rule 58 and hence no notice is necessary.[253] This is no longer good law, for the Supreme Court has rejected the proposition that a suit under O XXI, rule 63 is either a continuation of the objection proceedings under O XXI, rule 58 or is a form of appeal against the order passed in them and emphasised that these proceedings under O XXI, rule 63 were in the form of a suit and such a suit being against government required notice.[254] Rule 63 of O XXI has been deleted by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976); hence, these decisions have only academic value.

[s 80.38] Constitutionality of the Section

The provision as to notice is not repugnant to Article 14 of the Constitution of India.[255]

[s 80.39] Railways

Before the enactment of the Government of India Act, 1935, it had been held that if a railway was owned by government, a suit for a claim against the railway administration must be brought against the secretary of state after notice under this section.[256] Notice of a claim to the railway administration under section 77 of the Railway Act, 1890, does not dispense with the necessity for notice under this section to the secretary of state.[257] Omission by the defendant to reply to a notice under section 80 may, along with other facts, be relevant for assuming that the defendant was not ready and willing to go to arbitration.[258] The notice under section 80 was neither signed by the party or his advocate; however, the identity of the person who gave notice, particulars of his client, value of undelivered consignment and its intended legal actions clearly spelt out a notice. It was held that notice complied with the requirement of section 80 of the Code of Civil Procedure.[259] In a suit against the railways, the notice under section 80 was

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251. *Bata Shoe Co v UOI* 55 Bom LR 746; *Azizuddin v UOI*, AIR 1959 Cal 273; *Narayan v UOI*, AIR 1960 Cal 391 : 64 Cal WN 503; contra *PC Biswas v UOI*, AIR 1956 Assam 85; *UOI v Kedar Prasad*, AIR 1970 Pat 212. See notes under section 20.
252. *Ramasundari v Collector of Ludhiana*, (1959) ILR Punj 413.
253. *UOI v Parvati*, AIR 1965 All 154.
254. *Sawai Singhal v UOI*, AIR 1966 SC 1068.
255. *State of Madras v Chittor Venkata Durgg Prasad*, AIR 1957 AP 675.
256. *Shaik Elahi Baksh v East India Railway Administration*, AIR 1931 Pat 326 : (1931) 10 Pat 466.
257. *Ali Asmat v GIP Railway*, AIR 1931 All 476 : (1930) 52 All 837; *Himachand v GIP Railway*, (1928) 52 Bom : 1928 Bom 421; *Secretary of State v Firm Fazaluddin*, AIR 1933 All 54 : (1933) 55 All 121.
258. *State v Harsh Singh*, AIR 1986 All 169.
259. *Sha Jetmal v General Manager, Southern Railway*, AIR 1995 Kant 219.

sent to the Union of India as represented by the Chief Commercial Superintendent (Claims) and not to the General Manager of Railways, as provided by section 80. It was held that such a notice is no notice under that section; hence, it is to be regarded as there being no compliance with the requirement of section 80. It cannot be contended that a notice under section 78B of the Railways Act, 1890, was properly given, or that it would be tantamount to a notice under section 80. The scope of section 78B of the Railways Act, 1890, and section 80, are completely different from each other and one is not an alternative of the other.[260] Suit was filed against the Central Government relating to railway. Notice was left at the office of the General Manager. Notice so left at the office was held to have duly complied with the statutory requirement under section 80 of the Code of Civil Procedure. It was held that personal notice is not a condition precedent to the institution of the suit.[261] But as a result of the amendment of the section in 1948 in its present form, it is no longer necessary to send two notices, one to the government and another to the railway authorities. The two notices can be combined and sent to the authority named in the section.[262] A notice under this section would be treated as a combined notice both under this section as well as section 77 of the Railways Act, 1890.[263] There is a difference of opinion on the question as to whether when goods are carried by more railways than one, a notice should be given to all of them. One view is that for the purpose of this section, each railway must be regarded as a distinct legal entity and accordingly a claim must fail if no notice is given to the particular railway against which relief is claimed.[264] A notice to the general manager of the railway and copies thereof to the general manager of another railway is sufficient.[265] The contrary view is that as all the railways are owned by government, a notice as provided under section 80 is a notice to government which would consequently be liable and that it is not necessary that all the railways should have separate notices.[266] The submission is that the latter view is in consonance with the realities since all railways are owned by government. Besides, under the Railways Act, 1890, each railway has no legal entity and the railways are divided into different zones only for expediency. On the question of sufficiency of notice to railways administration, see the cases noted below.[267]

[s 80.40] Sub-section (2)

The requirement of notice under this section was condemned on several occasions—both in judicial pronouncements and otherwise. The ground for such condemnation was that it made an unjustified discrimination between suits against citizens and those against governments and public officers. There was considerable justification in the condemnation in view of the fact

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260. *UOI v BD Jhunjhunwala*, AIR 1988 Ori 267.
261. *UOI v TN Small Industries Corp*, AIR 1981 Mad 316.
262. *Moolji Bhai v Dominion of India*, AIR 1952 Nag 22; *UOI v Lakshmi Narain*, AIR 1954 Pat 424 : (1954) ILR Pat 214.
263. *DK Lakshmiah v UOI*, AIR 1969 AP 366.
264. *Dominion of India v Firm Kishan Prasad*, AIR 1950 Nag 85 : (1950) ILR Nag 212; *UOI v Durga Dutt*, AIR 1957 Cal 202 : 59 Cal WN 1064; *Sundarlal v UOI*, AIR 1959 Punj 149 : (1957) Punj 46; *UOI v Shamsuddin*, AIR 1958 Pat 575; *KP Cloth Stores v UOI*, AIR 1960 Ori 154 : (1960) ILR Cut 110; *Jagannath Chetram v UOI*, AIR 1956 Cal 540.
265. *DK Lakshmiah v UOI*, AIR 1969 AP 366.
266. *Narayanaswamy v UOI*, AIR 1960 Mad 58 : (1959) Mad 939 : (1959) 2 Mad LJ 479; *Dominion of India v Jagadish Prasad*, AIR 1949 Cal 622 : 87 Cal LJ 175; *Ramco Textiles v UOI*, AIR 1960 Ker 257 : (1960) ILR Ker 435; *Chandra Mohan v UOI*, AIR 1953 Assam 193 : (1953) ILR Assam 326; *Natwarlal Gowardhan Das v UOI*, AIR 1957 MP 157; *UOI v Kalinga Textiles Pvt Ltd*, AIR 1969 Bom 401 : 71 Bom LR 214 : (1969) Bom 864.
267. *Dominion of India v Ram Kumar*, AIR 1959 All 168; *Khudomal Madan Mohun v Dominion of India*, AIR 1963 All 276; *Sha Jetmal v General Manager, Southern Rly*, AIR 1995 Kant 219.

that in the 21st century, governments have ventured in a big way in ordinary commercial and trading activities and do no longer confine themselves to what are known as sovereign acts. In view of this criticism, it was proposed that the section should be omitted from the CPC; but the joint committee of Parliament, to which the Amendment Bill 1974 was referred, ruled that the proposed deletion would not be in public interest and might encourage some persons to file suits against government and obtain ex parte reliefs and thus, hinder the pace of developmental activities. The committee, accordingly, recommended the retention of the section but sought to reduce the rigour of it by proposing certain relaxations. These relaxations are subject to two conditions. Sub-section (2) of section 80 of the Code of Civil Procedure permits a suit to be filed without notice if:

(i) it is for obtaining an urgent or immediate relief; and

(ii) leave of the court is obtained thereof.

The sub-section further provides that the court shall not grant relief, including an interim relief, without giving an opportunity to the defendant government or public officer of being heard. The proviso to sub-section (2) of section 80 further makes it mandatory for the court to return the plaint for presentation to it after complying with the necessity of notice if it is satisfied after hearing the parties that no urgent or immediate relief need be granted. These restrictions have the effect of retaining the discriminatory character of the provision for notice which was complained of. The urgency for which an interim relief is intended to be prayed for might also in some cases lose much of its meaning where during the interval between the filing of the suit and giving opportunity for being heard, the court is faced with *fait accompli* especially in matters where possession of property is threatened. Courts have the power of vacating ex parte interim reliefs granted by them in suitable cases where a defendant makes such an application. Such a power is an adequate safeguard against interim orders unjustifiably obtained.

In *Sudhir Kumar Sharma*,[268] the Supreme Court examined the power of a court under section 80(2) in granting leave for exemption. In this case, a suit was filed by the respondent against the State in which an interlocutory application (IA) was instituted seeking leave of the court under section 80(2). The State on the other hand also filed an IA under O VII, rule 11 for non-compliance of section 80(1). The State's IA was heard and rejected by the trial court. The high court on appeal held that in view of the fact that the trial court had heard the State's IA even though the respondent's application under section 80(2) was pending for decision, it could be presumed that the application under section 80(2) was allowed and, hence, plaint was not liable to be rejected for non-compliance of section 80(1). The Supreme Court, however, reversed the view taken by the high court and held that a suit filed without complying with section 80(1) cannot be regularised simply by filing an application under section 80(2). When an IA under section 80(2) is filed, a court has to consider the facts and circumstances in which the leave was sought for filing the suit without issuance of notice under section 80(1).

[s 80.40.1] Two options

A plaintiff intending to institute a suit against the government has two options before him. He may file a suit after serving two months' notice under section 80 of the CPC or he may file a suit without serving a notice. But in the latter event, he may satisfy the court that an urgent

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268. *State of Kerala v Sudhir Kr Sharma*, (2013) 10 SCC 178 : 2013 (10) SCR 62 : JT 2013 (12) 1 : 2013 (11) Scale 107.

and immediate relief was required and he must also obtain previous leave of the court. In the event of the first course being adopted, the suit cannot be filed before the expiry of two months of giving of the notice. This explains the reason for using the word "shall" in sub-section (1) of section 80 by Parliament. However, in the second case, he has the choice to file the suit without giving the requisite notice, but only after obtaining leave of the court. It is for this purpose, the word "may" has been used in section 80(2).[269]

[s 80.40.2] "Urgent or Immediate Relief"

Sub-section (2) of section 80 of the Code of Civil Procedure, has been introduced in the amended Code of Civil Procedure with a view to mitigate the rigours of sub-section (1) of section 80 and to enable a person to seek urgent and immediate relief. It is in the nature of an exception to section 80(1) and enables the plaintiff to file a suit to obtain an urgent and immediate relief without serving any notice as required by sub-section (1), subject to the condition that such a suit has to be filed with the leave of the court. The most important condition envisaged under section 80(2) is relating to urgency in the matter. Where the court is satisfied that urgent and immediate relief is required and the plaintiff would not be in a position to wait for the period of notice to expire, leave may be granted to a plaintiff to file suit against the state without service of notice contemplated under section 80(1). Even in such cases where leave is granted, the court is enjoined not to grant relief in the suit, whether interim or otherwise, without giving the state reasonable opportunity of showing cause in respect of the relief sought for in this suit. As indicated in the proviso, if upon hearing the parties, the court is satisfied that no urgent or immediate relief need be granted, the court is to return the plaint for presentation after complying with the requirement regarding service of notice contemplated under section 80(1). It is thus clear that section 80(2) has been introduced with a view to entertain suits where urgent or immediate relief is required to be given.[270]

Sub-section (2) of section 80 of the Code mellows down the rigours of the requirement of service of notice for suits against government, by providing that the requirement can be dispensed with the leave of the court truly when urgent and immediate relief is to be granted. However, it has been laid down that before granting relief, opportunity should be given to the government to show cause.[271] DK Jain J, speaking for the Supreme Court Bench in the above case, observed as follows:

> 16. Thus, from a conjoint reading of sub-section (1) and (2) of s 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by the Court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the court. Leave of the court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though s 80(2) does not specify how the leave is to be sought for or given yet the order granting leave must indicate the ground (s) pleaded and the application of mind thereon.[272]

Where suit against government is instituted without notice under section 80 of the Code of Civil Procedure but after obtaining leave of the court, the judgment and decree cannot be interfered with or the ground that the suit was filed without notice under section 80 of the Code of Civil Procedure.[273]

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269. *Himachal Steel Rerollers and Fabrication v UOI*, AIR 1988 All 191.
270. *Prakash Industries Ltd v Maitri Shukla*, AIR 1998 Ori 45.
271. *State of Andhra Pradesh v Pioneer Builders*, AIR 2007 SC 113 : (2006) 12 SCC 119.
272. *State of Andhra Pradesh v Pioneer Builders*, AIR 2007 SC 113, para 16, at p 117 : (2006) 12 SCC 119.
273. *State of Uttar Pradesh v Jaman Singh*, AIR 2007 UP 10 : 2007 UC 558.

In a suit against a public officer, the court granted ex parte temporary injunction as an interim relief on the ground of urgency by invoking its inherent powers. Such an order could not be justified. Where there are provisions for dealing with certain matters in the CPC, resort to the inherent powers of the court overriding those provisions is prohibited. If an urgent or immediate relief has to be given to the plaintiff, the provisions of the CPC can be dispensed with under section 80(1). But if, after hearing both parties, the court comes to the finding that no urgent or immediate relief need be granted in the suit, the plaint will be returned for compliance with the requirements of section 80(1). Therefore, even in the matter of an urgent or immediate relief (interim or otherwise), the court cannot dispense with giving to the other party an opportunity of showing cause in respect of the relief prayed for in the suit.[274] For the purpose of section 80(2), what is material in the grant of leave is the urgency of the relief sought and not the merits of the case.[275] The Allahabad High Court has held that where the plaintiff wants a temporary injunction to restrain the government from holding an auction, service of notice under section 80 cannot be dispensed with. If the case is not urgent, this is the ordinary rule.[276] Leave under section 80(2) would be granted if the purpose of suit would be frustrated if notice was required to be served.[277]

In a suit against government, the leave to proceed without service of notice, as contemplated under sub-section (2) of section 80 was refused by the trial court. The plaint was returned to the plaintiff and there was no suit before the trial court. The high court in revision passed interim order directing the parties to maintain status quo. At the time of final disposal, the high court vacated the interim order and remitted the matter to the trial court on concession that the order of the trial court was a non-reasoned order. It was held by the Supreme Court that the trial court was bound to consider the question of grant of leave afresh.[278]

It was further held by the Supreme Court in the above case that in a suit against government, where leave to proceed without notice is refused by the trial court, superior courts can grant such leave, as otherwise, in an emergent situation, litigants may be left without remedy once such leave is refused and they may be required to wait out the statutory period of two months after giving notice under section 80 of the Code of Civil Procedure.[279]

However, where suit against government authorities is instituted without notice under section 80 of the Code and the application for grant of leave is refused by the trial court, there is no suit before the court and the court has no authority to grant interim relief.[280]

[s 80.40.3] Service of Notice

"Giving" of anything as ordinarily understood in the English language is not complete unless it has reached the hands of the person to whom it has to be given. In the eye of law, however, "giving" is complete in many matters where it has been offered to a person but not accepted by him. Tendering of a notice is in law, therefore, giving of a notice even though

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274. *State of Tripura v Sajal Kanti Sengupta*, AIR 1982 Gau 76.
275. *NV Ashar v State of Gujarat*, (1984) 2 GLR 333.
276. *Islamia Junior High School v State*, AIR 1986 All 92.
277. *Harish Chandra (India) Ltd. v Corpn Bank*, AIR 1992 Del 279.
278. *Bajaj Hindustan Sugar & Industries Ltd v Balrampur Chini Mills Ltd.*, AIR 2007 SC 1906 : (2007) 9 SCC 43.
279. *Bajaj Hindustan Sugar & Industries Ltd v Balrampur Chini Mills Ltd*, AIR 2007 SC 1906, at p 1911 : (2007) 9 SCC 43.
280. *Gyanajeet Moharana v Binodini Pattanaik*, 2009 (107) Cut LT 132 : 2008 (2) Ori LR 926.

the person to whom it is tendered refuses to accept it. We can find, however, no authority or principle for the proposition that as soon as the person with a legal duty to give the notice despatches the notice to the address of the person to whom it has to be given, the giving is complete.[281]

Therefore, mere despatch of notices to the address of the persons is not sufficient, and it must be actually either delivered or tendered to the person/s to whom they are required to be given under section 80(1) of the Code of Civil Procedure.[282]

In a suit against the railways, the notice under section 80 was sent to the Union of India as represented by the Chief Commercial Superintendent (Claims). It was not sent to the General Manager of Railways. It was held that there had been no compliance with the requirements of section 80 and the suit was bound to fail on such account. It cannot be argued that a notice under section 78B of the Indian Railways Act, 1989 was properly given, and would tantamount to a notice under section 80 of the CPC. The scope of section 78B of the Indian Railways Act and section 80 of the CPC are completely different from each other and one is not an alternative of the other.[283]

The removal of encroachment by demolition of plaintiff's hotel by defendant, by Administrator of Municipal Corporation, the act being done in official capacity, the statutory notice under section 401(2) of the Madhya Pradesh Municipal Corporation Act, 1956 (23 of 1956) was necessary prior to filing suit for recovery of damages against defendant. Service of notice by father of the plaintiff under section 80 of the CPC to defendant's father is not sufficient. Plaintiff being the aggrieved party himself ought to have served notice; therefore, the suit is not maintainable.[284]

[s 80.40.4] Specific Order

Where there is application by the plaintiff for leave, the court must pass a specific order thereon.[285]

Application was made by the plaintiff for leave to institute a suit without serving notice under section 80(1). It was held that the court must pass specific order on the application, considering the nature of the case and reaching conclusion as to whether or not immediate relief is required to be afforded.[286] Section 80(2) does not prescribe any form or manner in which leave of the court for institution of the suit under section 80(2), without notice under sub-section (1), has to be granted. Where a suit is instituted without notice, in expectation of leave under section 80(2), return of the plaint is permissible only if the court is satisfied that no urgent or immediate relief is needed.[287] Where a plaintiff files an application for leave under section 80(2), it is incumbent on the trial court to have passed a specific order. This could be done by taking into account the nature of the case, and also on reaching a conclusion as to whether or not immediate relief is required to be afforded to him. Trial court must apply its

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281. *K Narasimhiah v HC Singri Gowda*, AIR 1966 SC 330.
282. *State of Karnataka v M Muniraju*, AIR 2002 Kant 287.
283. *UOI v BD Jhunjhunwala*, AIR 1988 Ori 267.
284. *Manoj Kumar Shrivastava v Arvind Kumar Choubey*, AIR 2002 MP 152.
285. *KK Sharma v State of Punjab*, AIR 1989 P&H 7.
286. *KK Sharma v State of Punjab*, AIR 1989 P&H 7.
287. *KK Sharma v State of Punjab*, AIR 1989 P&H 7.

mind. No doubt, the trial court can return the plaint, but that can be done only if it is satisfied that no urgent or immediate relief need be granted in the suit.[288]

Dismissal of suit for want of notice under section 80 is wrong when application under section 80(2) is pending for grant of leave.[289]

[s 80.40.5] Implied Leave

Section 80 does not prescribe any form or manner in which leave of court for institution of the suit under section 80(2) without notice under sub-section (1) has to be granted. What it says is only "with the leave of the court, without serving any notice as required by sub-section (1). Leave need not be by a formal order. It can be implied also and could be gathered from what the court does. Proceeding with the suit after the objection, by considering any relief, could be a visible manifestation of an implied leave being granted. Section 80(2) does not specify how the leave is to be sought for, or given. In such cases, the mode or form of request or grant is not material. What is material is only the substance whether there was a proper request and whether it was considered and granted. Request with grounds, if any, must be there, and there need only be indications, as to whether the request is allowed or not. A reasoned order may be good and an application is also appreciable, but neither of these is mandatory.[290]

It appears from record that originally the suit was instituted without issuing notice, but on an objection taken by the office, an application was filed under section 80(2) of the Code of Civil Procedure to dispense with the issuance of notice on the ground of urgency, and the defendants in the suit had not chosen to file any counter and ultimately the said application was allowed and in view of the same even framing of issue on this point by the trial court may not be necessary and equally so even in appeal a point for consideration need not be framed.[291]

A perusal of sub-section (2) of section 80 of the CPC shows that no separate application and an express order are the essential requisites; such leave could be presumed; the leave need not be granted by passing a formal order. The leave under sub-section (2) of section 80 could be implied and could be gathered from what the court does. The prayer for leave could be in any form. From the reading of the plaint, it appears that the plaintiff has expressly prayed for leave to present the plaint under sub-section (2) of section 80 of the CPC and gave reasonable explanation in support of such prayers, the trial court has granted leave to the plaintiff to present the plaint in exercise of its power under sub-section (2) of section 80 of the CPC. The requirements of section 80(2) of the CPC were substantially complied with.[292]

[s 80.41] Sub-section (3)

Sub-section (3) is a relaxation, in that a suit is not to be dismissed for any technical error or defect, if, in the notice, there is sufficient material to identify the plaintiff and the cause of action and the relief claimed are substantially indicated. The sub-section is a legislative recognition of what the courts have been all along doing.[293]

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288. *KK Sharma v State of Punjab*, AIR 1989 P&H 7; *Inder Singh v State of HP*, AIR 2002 HP 23.
289. *Yashod Kumari v MCD*, AIR 2004 Del 225 (DB).
290. *TV Parangodan v District Collector Trichur*, AIR 1989 Ker 276.
291. *State of Andhra Pradesh v Singam Selty Yallananda*, AIR 2003 AP 182.
292. *Janak Raji Devi v Chandrabati Devi*, AIR 2002 Cal 11.
293. See notes under the heading "Substantive Compliance".

[S 81] Exemption from arrest and personal appearance.—In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

[s 81.1] Otherwise Than in Execution of a Decree

The object of clause (a) is to exempt a defendant who is a public officer from mesne arrest and his property from mesne attachment. (See O XXVII, rule 8.)

[S 82] Execution of decree.—[294][(1) Where in a suit by or against the Government, or by or against a public officer in respect of any act purporting to be done by him in his official capacity, a decree is passed against the Union of India or a State or, as the case may be, the public officer, such decree shall not be executed except in accordance with the provisions of sub-section (2)].

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of [295][such *decree*].

[296][(3) The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award—

(*a*) is passed or made against [297][the Union of India] or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority, and

(*b*) is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree].

SYNOPSIS

[s 82.1] Changes in the Section 1011
[s 82.2] Non-compliance with the Section..... 1012

[s 82.1] Changes in the Section

Leaving out the formal alteration made by the Adaptation of Laws Order, 1950, the words "where in a suit by or against the government, or by or against a public officer in respect of any such act as aforesaid, a decree is passed against the Dominion of India or a Province or, as the case may be, the public officer" were substituted by the Code of Civil Procedure (Amendment) Act, 1949, for the words "Where the decree is against the Dominion of India, or a Province or against a public officer in respect of any such act as aforesaid".

294. Substituted by Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), section 28 (w.e.f. 1-2-1977).
295. Substituted by *ibid* for "such report" (w.e.f. 1-2-1977).
296. Inserted by Act 32 of 1949.
297. Substituted by the A.O. 1950 for "the Dominion of India".

By the Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), the words "or within three months from the date of the decree where no time is specified" were inserted in sub-section (1).[298]

The Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) has modified sub-sections (1) and (2) with the object of simplifying the execution of decrees passed against the government or a public officer. As sub-sections (1) and (2) stood before this amendment, they ran as follows:

> (1) Where in a suit by or against the Government, or by or against a public officer in respect of any such act as aforesaid, a decree is passed against the Union of India or a State or, as the case may be, the public officer; a time shall be specified in the decree within which it shall be satisfied, and, if the decree is not satisfied within the time so specified, or within three months from the date of the decree where no time is specified, the court shall report the case for the orders of the State Government.
>
> (2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

The Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) does away with the cumbersomeness and time-consuming procedure by eliminating:

> (i) the requirement of time to be specified for execution,
>
> (ii) the requirement of a report by the court to the state government if the decree has not been satisfied within the time set out therein; and
>
> (iii) suspension of execution for a further period of three months after the date of the report.

Under the amended sub-section (2), the execution remains suspended for a period of three months only from the date of the decree.

[s 82.2] Non-compliance with the Section

Under the section, as it stood before its amendment, the decree could not be executed unless the three conditions set out above were complied with,[299] though the decree, for want of compliance, was not void.[300] In other words, the decree until such compliance was treated as inchoate and not in an executable stage, and therefore, the question of limitation which can be raised under section 47 could not arise.[301] The position then also was that if the decree did not specify any period for its satisfaction, the right to execute it could arise only after the expiry of three months from the date of the report, required to be made and the decree-holder had three years under Article 137 of the Limitation Act, 1963, to execute it from the date such decree became executable.[302] As a result of the amendment, the period of suspension of execution is only three months from the date of the decree. That period is provided to enable the government to move its machinery to satisfy the decree.

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298. *Prasada Singh v State of Bihar*, AIR 1961 Pat 271.
299. *Dominion of India v Gortha Behary Kundu*, AIR 1950 Cal 247; *Governor General v Pyarelal Marwari*, AIR 1948 Pat 179; *State of Andhra Pradesh v Somaraju*, AIR 1959 AP 165 : (1958) 2 Andh WR 513.
300. *Uttar Pradesh Government v Brij Mohan Lal*, AIR 1953 All 96.
301. *UOI v K Khandelwal*, AIR 1970 Ori 137.
302. *State of Kerala v Kesavan*, AIR 1966 Ker 104.

Where an order of court directed the defendant to withdraw an order suspending the plaintiff forthwith, it was held that failure by him to comply with it was not contempt of court until the period prescribed in the section expired and, as the section then stood, the procedure laid down therein was exhausted.[303]

[304][*Suits by Aliens and by or against Foreign Rulers, Ambassadors and Envoys*]

[305]**[S 83] When aliens may sue.**—Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any Court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court.

Explanation.—Every person residing in a foreign country, the Government of which is at war with India and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of this section, be deemed to be an alien enemy residing in a foreign country.

SYNOPSIS

[s 83.1] Changes in the Section 1013
[s 83.2] Alien Enemy 1013
[s 83.3] Alien Enemy Residing in India with Permission of the Central Government 1014
[s 83.4] Limitation 1014

[s 83.1] Changes in the Section

Section 12 of the Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), except for certain minor changes necessitated by the independence, practically reproduces the old section. So, the cases on different topics under the old section are retained and given below as providing helpful guidance on principles.

[s 83.2] Alien Enemy

As to who are alien enemies, see the undermentioned cases.[306] A person residing or carrying on business in a friendly country indefinitely occupied by the enemy is not hit by this section.[307] A resident of Pakistan who has come to this country on a casual visit is not an alien enemy and is entitled to file a suit for restitution of conjugal rights in the courts of this country.[308] Where suit is instituted after the close of the Indo-Pak conflict (1965) and after the Proclamation of Emergency has been revoked on 10 January 1968, there is no "enemy alien" and the suit is not barred by section 83 of the Code.[309] Where a suit is brought by a person residing in a foreign

303. *Dasarathi v Kirpal Singh*, AIR 1960 Cal 454.
304. Substituted for former heading and sections 83 to 87 by Act 2 of 1951, section 12.
305. Substituted by Act 2 of 1951, section 12, for section 83.
306. *Janson v Driefontein Consolidated Mines, Ltd.*, AIR 1902 Cal 484, at p 505; *Daimler Company, Ltd v Continental Tyre and Rubber Co Ltd*, (1916) 2 Cal 388; *Haji Ali v Abdul Jalil*, AIR 1944 All 97 : (1920) ILR All 188.
307. *Chem Abbheong v MA Packiri Mahomed Rowther*, AIR 1946 Mad 328 : (1946) Mad 786.
308. *Nizamuddin v Huseni*, AIR 1960 MP 212.
309. *Gyasuddin v Allah Tala Waqf Mansuma*, AIR 1986 All 39.

country, which was not an enemy country at that time, the maintainability of the suit is not affected by the fact that subsequently, that country became an enemy country.[310]

[s 83.3] Alien Enemy Residing in India with Permission of the Central Government

A filed a petition in the Allahabad High Court for judicial separation against her husband. The parties were Germans, and the petition was filed while England was at war with Germany. At the time of filing the petition, *A* was residing in Lucknow apparently with the permission of the Government of India, while her husband was in Germany. After filing the petition, *A* applied for an order directing the summons together with a copy of the petition to be sent to the Probate, Divorce and Admiralty Division of the High Court in England for transmission to the Foreign Office for service upon the respondent. The court granted the application.[311] In a decision, the Calcutta High Court held that where there was no bar to the institution of the suit against the plaintiff at its commencement, but during its pendency, the plaintiff became disqualified to prosecute it as a result of the declaration of emergency by India, the proper order by the court is to suspend the trial during the period of the plaintiff's disqualification and not to dismiss it.[312]

The words "may sue" are to be understood with reference to the point of time when the suit is instituted and not to any subsequent stage in the suit.[313]

[s 83.4] Limitation

Where the right of alien enemies to sue is suspended by an order of the government, the period during which the right is suspended will not be excluded from the time prescribed by the Limitation Act, 1963, for the suit.[314]

[S 84] When foreign States may sue.—A foreign State may sue in any competent court:

Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.

[s 84.1] Private Right Vested in the Head of a State

This section refers to those private rights of a state that must be enforced through a court of justice as distinguished from its political rights.[315] The expression "a private right" in the proviso means a private right vested in the head of the state or some public officer of such state and not the private right of its subject.[316]

[S 85] Persons specially appointed by Government to prosecute or defend on behalf of foreign Rulers.—(1) The Central Government may, at the request of the Ruler of a foreign State or at the request of any person competent in the opinion

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310. *SN Banerjee v Bhupati Charan*, AIR 1976 Cal 267.
311. *Anjelina v Joseph*, (1917) 39 All 377 : 39 IC 862.
312. *SN Banerjee v BC Chakraborty*, AIR 1976 Cal 267.
313. *Feroza Begam v Dewan Daulat Rai*, AIR 1975 Del 1.
314. *Deutsch Asiatiche Bank v Hira Lall*, (1919) 46 Cal 526.
315. *Hojon v Bur Singh*, (1885) 11 Cal 17.
316. *Mirza Ali Akbar Kashani v United Arab Republic*, AIR 1966 SC 230 : (1966) 1 SCR 319.

of the Central Government to act on behalf of such Ruler, by order, appoint any persons to prosecute or defend any suit on behalf of such Ruler, and any persons so appointed shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Ruler.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of such Ruler.

(3) A person appointed under this section may authorise or appoint any other persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

SYNOPSIS

[s 85.1] Recognised Agents Specially Appointed Under This Section 1015
[s 85.2] Discovery..... 1015

[s 85.1] Recognised Agents Specially Appointed Under This Section

This section is an enabling section. It enables a sovereign prince or a ruling chief to prosecute or defend suits through recognised agents specially appointed in that behalf; it does not prevent the institution of a suit by a sovereign prince in his own name or through a recognised agent appointed under O III rule 2 [Code of 1882, section 371].[317]

A plaint in a suit instituted on behalf of a ruling chief is signed by *AB*. At the time of signing the plaint, *AB* was not specially appointed to sue on behalf of the chief under this section. The plaint is nevertheless good if *AB* is subsequently appointed to sue on, behalf of the chief, and if the appointment is made before the expiration of the period of limitation prescribed for the suit.[318] In the undermentioned case, however, it was held that the provisions corresponding to this section, which are enacted for a privileged class of persons, must be strictly construed and that a subsequent authority obtained under this section for the first time after the presentation of the appeal against the dismissal of the suit cannot cure the defect.[319]

The section does not require that notice should be given to the opposite party before a certificate is granted. When the consent of the government is sought to sue a ruler, the latter can ask the government for permission to be represented by an agent in the action.[320] A certificate granted under this section is conclusive and not liable to be questioned in a court.[321]

The abovementioned cases though decided under the old section, express the principles underlying the present section.

[s 85.2] Discovery

In England, a foreign state is not considered exempt from having to give discovery.[322]

317. *Maharaja of Bharatpur v Kacheru*, (1897) 19 All 510; *Beer Chunder v Ishan Chunder*, (1884) 10 Cal 136; *Rameshchandra v Maharaja Birendra*, AIR 1925 Cal 513 : (1924) 29 Cal WN 287.
318. *Maharaja of Rewah v Swami Saran*, (1903) 25 All 635 distinguished in *Abdul Latif v Jawahar State*, AIR 1940 Bom 172 : (1940) 42 Bom LR 262.
319. *Abdul Latif v Jawhar State*, AIR 1940 Bom 172.
320. *N Ibohal Singh v Budh Chandra Singh*, AIR 1961 Mani 40.
321. *Mirza Akbar Kasini v United Arab Republic*, AIR 1960 Cal 768.
322. *United States of America v Wagner*, (1867) 2 Ch App 590; *Republic of Peru v Wagueline*, (1875) LR 20 Eq 140.

[[S 86] Suits against foreign Rulers, Ambassadors and Envoys.—(1) No [323][* * *] *foreign State* may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid [324][a foreign State] from whom he holds or claims to hold the property.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the [325][the foreign State] may be sued, but it shall not be given, unless it appears to the Central Government that [326][the foreign State]—

(*a*) has instituted a suit in the Court against the person desiring to sue [327][it], or

(*b*) by [328][itself] or another, trades within the local limits of the jurisdiction of the Court, or

(*c*) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(*d*) has expressly or impliedly waived the privilege accorded to [329][it] by this section.

[330][(3) Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.]

(4) The preceding provisions of this section shall apply in relation to—

[331][(*a*) any Ruler of a foreign State;]

[332][(*aa*)] any Ambassador or Envoy of a foreign State;

(*b*) any High Commissioner of a Commonwealth country; and

(*c*) any such member of the staff [333][of the foreign State or the staff or retinue of the Ambassador] or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf,

[as they apply in relation to a *foreign State*].

[334][(5) The following persons shall not be arrested under this Code, namely:—

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323. The words "Ruler of a" omitted by Act 104 of 1976, section 29 (w.e.f. 1-2-1977).
324. Substituted by Act 104 of 1976, section 29, for "a Ruler" (w.e.f. 1-2-1977).
325. Substituted for "the Ruler" by Act 104 of 1976, section 29 (w.e.f. 1-2-1977).
326. Substituted for "the Ruler" by Act 104 of 1976, section 29 (w.e.f. 1-2-1977).
327. Substituted for "him" by Act 104 of 1976, section 29 (w.e.f. 1-2-1977).
328. Substituted for "himself" by Act 14 of 1976, section 29 (w.e.f. 1-2-1977).
329. Substituted by Act 104 of 1976, section 29, for "himself" (w.e.f. 1-2-1977).
330. Substituted by Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), section 29, for sub-section 3 (w.e.f. 1-2-1977).
331. Inserted by *ibid* (w.e.f. 1-2-1977).
332. Clause (a) re-lettered as clause (aa) by Act 104 of 1976, section 29 (w.e.f. 1-2-1977).
333. Substituted by Act 104 of 1976, section 29 for certain words (w.e.f. 1-2-1977).
334. Inserted by Act 104 of 1976, section 29 (w.e.f. 1-2-1977).

(*a*) any Ruler of a foreign State;

(*b*) any Ambassador or Envoy of a foreign State;

(*c*) any High Commissioner of a Commonwealth country;

(*d*) any such member of the staff of the foreign State or the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country, as the Central Government may, by general or special order, specify in this behalf.

(6) Where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard].

SYNOPSIS

[s 86.1] Changes in the Section 1017
[s 86.2] Immunity of a Foreign State 1018
[s 86.3] Scope of the Section 1019
[s 86.4] Foreign State..... 1020
[s 86.5] Consent Shall Not Be Given "unless it appears, etc"..... 1020
[s 86.6] Consent Must Be Obtained Before Institution of Suit 1020
[s 86.7] Proceedings Under the Companies Act, 2013..... 1022
[s 86.8] Waiver of Want of Consent..... 1022
[s 86.9] Sub-section (4) 1023
[s 86.10] Immunity Against Arrest in Execution of a Decree..... 1023
[s 86.11] Limitation..... 1023

[s 86.1] Changes in the Section

The first changes in the section were carried out by section 12 of the Code of Civil Procedure (Amendment) Act, 1951 (II of 1951). It replaced the words "such Prince or Chief" by the words "Ruler of a foreign State". In all other respects otherwise, it reproduced the old section except two changes:

(i) it added a new clause, clause (d) to sub-section (2); and

(ii) it extended the provisions of the section to High Commissioners of the Commonwealth countries and specified members of the staff of diplomatic missions [vide sub-section 4, clauses (b) and (c)].

By section 29 of the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), several changes have been effected in the section. In sub-section (1), the words "Ruler of a" have been deleted. In the proviso to sub-section (1), the words "a Ruler" have been substituted by the words "a foreign State". Following upon these changes, the words "the Ruler" wherever they occurred in sub-section (2) were substituted by the words "the foreign State", and the words "him" and "himself" by the words "it" and "itself".

Sub-section (3) which barred the arrest of a ruler of a foreign state in execution of a decree and also execution of such decree except with the consent of the Central Government has been substituted by the present sub-section (3). In sub-clause 4, the original clause (a) has been renumbered as clause (aa) and a new clause (a), *viz*, "any Ruler of a foreign State" has been inserted. In clause (c) the words "of the foreign State or the staff or retinue of the Ambassador" have been substituted for the words "of the Ruler", etc. In the same clause, the words "as they apply in relation to a foreign state" have been substituted for the words "as they apply in relation to the Ruler of a foreign State".

Sub-sections 5 and 6 were inserted by the Code of Civil Procedure (Amendment) Act, 1976. For definition of the terms "Foreign State" and "Ruler" see section 87A.

[s 86.2] Immunity of a Foreign State

Sub-section (1) contains statutory provisions covering a field which otherwise would be covered by the doctrine of immunity of a foreign state under the Public International Law. This sub-section is contrary to what prevails in England where the jurisdiction of the courts to entertain an action against a foreign state is barred. But as our Supreme Court has observed, every sovereign state is competent to make its own laws in relation to the rights and liabilities of foreign states to be sued within its own municipal courts. Just as an independent sovereign state may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign states to sue and be sued in its municipal courts. The effect of sub-section (1), thus, is to modify to this extent the doctrine of immunity recognised by the international law. When, therefore, a suit is filed with the consent of the Central Government, it would not be open to the foreign state to rely on the doctrine of immunity as the municipal courts are bound by the statutory provisions such as sub-section (1) of this section. The sub-section is not merely procedural, but is in a sense a counterpart of section 84 which confers on a foreign state, the right to sue.[335]

Immunity under section 86 cannot be claimed by a company owned by the Government of Sri Lanka and incorporated under Sri Lanka statute. It cannot be equated with the Government of Sri Lanka.[336] Kenya Airways was considered to be a "Foreign state" within the meaning of section 86, as the entire shares of the company were held by the Government of Kenya and the transfer of company shares to public, though, was permissible, but no such transfer was effected.[337] Suit against an organ of a foreign state, DSR Lines of the erstwhile German Democratic Republic, is not barred by section 86. But if the plea is taken that the defendant would be entitled to sovereign immunity in international law, the plea would be decided as a preliminary issue.[338] In a Delhi case, it was pointed out that certain developments had taken place in regard to sovereign immunity and the following observations of the court are of considerable interest.[339]

It is interesting to note that there have been instances where repairs have been done to the property of sovereign states which have not been paid for by the sovereign states, which led to the filings of proceedings for recovery of such monies. One such instance is reported in[340] *Planmount Ltd v Republic of Zaire*, in which the plaintiff sought to recover money on account of repairs done to the property belonging to the Republic of Zaire. Plea was taken that being a sovereign state Republic of Zaire could not be sued. The single judge dealing with the matter noted several judgements on similar issues which had arisen in various jurisdictions in different countries including England and Germany. The judge noted that there has been a change in the international law regarding such liabilities of foreign states, and that distinction has been made in the interenational law regarding liability arising out of commercial activity of sovereign

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335. *Mirza Ali Akbar Kashani v United Arab Republic*, AIR 1966 SC 230 : (1966) 1 SCR 319; *Chandulal Kushalji v Awad*, (1897) 21 Bom 351; *GDR v Dynamic Industrial Undertaking*, AIR 1972 Bom 27 : (1972) ILR Bom 731 : 73 Bom LR 183.
336. *Capstan Shipping Enterprises v Ceylon Shipping Lines*, AIR 1989 NOC 175 (Cal).
337. *Kenya Airways v Jinibai B Kheshwala*, AIR 1998 Bom 287(DB).
338. *New Central Jute Mills v VEB Deutr-Frachit Seerederai Rostock*, AIR 1983 Cal 225 (DB).
339. *Century Twenty-One Pvt Ltd v UOI*, AIR 1987 Del 124; *Harbhajan Singh v UOI*, AIR 1987 SC 9, commented upon in *Indian Journal of International Law*, Vol 27, No 4, 1987, pp 483–86.
340. *Planmount Ltd v Republic of Zaire*, (1981) 1 All ER 1110.

states. The single judge, in that case, held that contract for repairs of a building has to be regarded as an act of transaction of private or commercial nature and not as a governmental act done by a sovereign government. The single judge has relied upon judgement of the court of appeal in the case *Trendtex Trading Corp Ltd v Central Bank of Nigeria.*[341] In that case, the applicable international law was reviewed, and the change in the international law which has come into being in America and England noted.

In another case, refusal to give permission to sue the Government of Algeria for charges was claimed by the applicant for permission. In respect of building, maintenance, etc, work done at the embassy premises in New Delhi was found to be unjustified. In reply to the application, the Ministry had stated that permission could not be given on political grounds.

The court found apparent contradiction in what was stated in the refusal to give permission to sue and what was stated in the affidavit of the government. The court held that it was not for the government to decide whether there was a *prima facie* case or not; that was for the judiciary to adjudicate.

In the above judgement, certain other important observations were made which are of great relevance as under:

> In this case, the petitioner had a right to carry on the work of maintenance and repairs in this country. This right is granted to him under the Constitution and he trades within the local limits of the courts in India and the foreign State which he wants to sue his immovable property in India within the limits of this country. There is a dispute about the petitioner's claim. That dispute has not been judicially determined. It has not been held that the claim of the petitioner is frivolous. In that view of the matter, it appears to us that a foreign State in this country if it fulfils the conditions stipulated in sub-section (2) of Section 86 of the Code would be liable to be sued in this country. That would be in conformity with the principles of international law as recognised as part of our domestic law and in accordance with our Constitution and human rights.

[s 86.3] Scope of the Section

The words "sue", "be sued" and "suits" used in sub-sections (1) and (2) indicate that the section applies only to suits. A proceeding which does not commence with a plaint is not a suit. It has been held that since an insolvency proceeding is started not with the presentation of a plaint but with the presentation of a petition it does not attract this section even if read with section 141 merely by reason of the fact that a ruler is one of the creditor.[342] For the same reason, the section cannot apply to probate proceedings,[343] nor to proceedings taken under the Industrial Disputes Act, 1947.[344] The observation in *Mirza Akbar Kasini*'s case that the section contemplates a suit against a natural and not an artificial person is no longer applicable in view of the omission of the word "Ruler" in sub-sections (1) and (2) and the substitution of the words "foreign state" in its place. Principles underlying the earlier decisions in cases where the rulers and chiefs of the former Indian states were sued are, except to the limited extent set out in section 87B, also no longer relevant in view of the deletion of Article 362 of the Constitution and their ceasing to be recognised as rulers under Article 363A by the Constitution (Twenty-Sixth Amendment) Act, 1971, which came into force with effect from 28 December 1971.

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341. *Trendtex Trading Corp Ltd v Central Bank of Nigeria*, (1977) 1 All ER 881 : [1977] 1 QB 529.
342. *Madan Lal v HH The Nawab Saiyed Raza Ali Khan*, AIR 1940 Cal 244.
343. *Indrajit Singh v Rajendra Singhji*, AIR 1956 Bom 45 : (1955) Bom 912.
344. *Bhagwat Singh v Rajasthan*, AIR 1963 Raj 22 : (1962) ILR Raj 571.

[s 86.4] Foreign State

The by-laws show that the Deputy Prime Minister and the Minister of Defence and Aviation have to implement the decree of the Council of Minister. The Saudi Arabian Airlines Corporation is a public and independent organisation. It is attached to the Ministry of Defence and Aviation. It is managed by a board which is presided by the Minister of Defence and Aviation and comprises of nine members appointed by the resolution of Council of Ministers on nomination by Minister of Defence and Aviation. It clearly shows that the control over the defendant airlines corporation is with the state. Merely because it is carrying on an independent work will not take it away from the purview of sub-section (1) to section 86. It will still be a foreign state because of the nature of the by-laws and the control which is almost complete with the state and its functionaries. Consequently, before the suit could be filed, the consent of the Central Government certified in writing by the secretary to the government was necessary.[345]

[s 86.5] Consent Shall Not Be Given "unless it appears, etc"

The words "it appears to the Central Government", which is the consenting authority, make it clear that the decision granting the consent is final and not open to question by the court.[346] The earlier decisions which assumed to the contrary are not sustainable.[347] It is also not open to the court to question the propriety of an order granting or refusing the consent.[348]

Suit was proposed to be filed against foreign consulate general—consent of the Central Government was refused. The refusal was on "political grounds". The order did not state what political considerations necessitated the refusal. It was held that the refusal was liable to be quashed. The matter was remitted to the Central Government for decision according to law.[349]

[s 86.6] Consent Must Be Obtained Before Institution of Suit

Provisions of section 86(1) are not impliedly superseded by provisions of Carriage by Air Act, 1972.[350]

The consent by the Central Government must be obtained before the institution of the suit. Consent obtained after the institution of the suit is not sufficient. If the consent has not been obtained before the institution of the suit, the proper course is to dismiss the suit or perhaps allow the plaintiff to withdraw it with liberty to bring a fresh suit under O XXIII, rule 1 (Code of 1882, section 373).[351] Once consent has been obtained for the institution of the suit, it is consent also for the continuation of that suit.[352]

In a consumer dispute, a foreign airline approached the Supreme Court on the ground that a foreign State or its instrumentality cannot be proceeded against under the Consumer

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345. *Mansoor Mumtaz v Saudi Arabian Airlines Corp*, AIR 2002 Del 103.
346. *Govindram v State of Gondal*, AIR 1950 PC 99 : 77 IA 156 : (1950) 54 Cal WN 419 (PC).
347. *Beer Chunder v Raj Coomer Nobadeep Chunder*, (1883) 9 Cal 535; *Maharaja of Jaipur v Lalji Sahai*, (1907) 29 All 379.
348. *Govindram v State of Gondal*, AIR 1950 PC 99; *Mohammad Raza v Kapurthala Estate*, AIR 1955 Oudh 164.
349. *Shanti Prasad Agarwalla v UOI*, AIR 1991 SC 814 : (1991) Supp 2 SCC 296; *Harbhan Singh Bhalla v UOI*, (1986) 4 SCC 678.
350. *Mansoor Mumtaz v Saudi Arabian Airlines Corp*, AIR 2002 Del 103.
351. *Mirza Ali Akbar v UAR*, AIR 1966 SC 230; *Chandulal v Awad Bin Umar*, (1897) 21 Bom 351, at pp 355–358; *Maharana Sir Nripendra v Maharaja Manindra*, (1912) 17 Cal WN 1942.
352. *BM Ghorpade v SB Padaki*, AIR 1976 Kant 164.

Protection Act, 1986, without obtaining prior permission from Central Government. It was contended that a foreign State or its instrumentality can legitimately claim sovereign immunity from being proceeded against under the Act in respect of a civil claim. It was held by the Supreme Court that the proceedings before the consumer redressal fora fall within the definition of "suit" as they are proceedings in which consumers may pursue the remedies afforded to them by the Consumer Protection Act, 1986, and other laws and where the rights of the parties are fully litigated by an organ of justice. It was further held by the Supreme Court that the Code of Civil Procedure itself does not claim to make Section 86 applicable to proceedings before the Consumer Forum. Instead, the Code of Civil Procedure includes a saving clause, providing that "in the absence of any specific provision to the contrary, nothing in [CPC] shall be deemed to limit or otherwise affect any special … law … or any special form of procedure prescribed, by or under any other law…" In addition, Section 86 only applies to a "suit in any court". This term should be understood differently than the term "court" because CPC refers exclusively to the civil courts. In particular, CPC specifically refers to the District Courts, the High Courts, and the Supreme Court and makes little, if any, reference to other, quasi-judicial fora like the consumer redressal bodies at issue here. It was further held that Section 86 of CPC is inapplicable because the legislative intent is deemed to exclude older and more general statutes by more recent and special statutes, eg, the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972 and under these Acts, Ethiopian Airlines is not entitled to sovereign immunity in a suit such as the one at issue. Thus, it was held that the consent of Central Government was not required to subject Ethiopian Airlines to suit in an Indian court, let alone in a consumer redressal forum. Speaking for the Court, Dr. Dalveer Bhandari, J, observed as under[353]:

> 83. On a careful analysis of the American, English and Indian cases, it is abundantly clear that the appellant Ethiopian Airlines must be held accountable for the contractual and commercial activities and obligations that it undertakes in India.
>
> 84. It may be pertinent to mention that Parliament has recognised this fact while passing the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. Section 86 was itself, a modification and restriction of the principle of foreign sovereign immunity and thus, by limiting Section 86's applicability, Parliament through these Acts, further narrowed a party's ability to successfully plead foreign sovereign immunity.
>
> 85. In the modern era, where there is close interconnection between different countries as far as trade, commerce and business are concerned, the principle of sovereign immunity can no longer be absolute in the way that it much earlier was. Countries who participate in trade, commerce and business with different countries ought to be subjected to normal rules of the market. If State-owned entities would be able to operate with impunity, the rule of law would be degraded and international trade, commerce and business will come to a grinding halt.
>
> 86. Therefore, we have no hesitation in coming to the conclusion that the appellant cannot claim sovereign immunity. The preliminary objection raised by the appellant before the court is devoid of any merit and must be rejected.

For seeking permission under section 86, a letter in the following form was held to be sufficient:

> Kindly permit me to hand over this matter to my legal adviser for taking legal recourse for ejectment. I would like to take this recourse only upon your permission.[354]

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353. *Ethiopian Airlines v Ganesh Narain Saboo*, (2011) 8 SCC 539.
354. *Century Twenty One Pvt Ltd v UOI*, AIR 1987 Del 124.

[s 86.7] Proceedings Under the Companies Act, 2013

The Allahabad High Court held that this section did not apply to proceedings under section 184 of the Companies Act, 2013, as the latter section imposes a statutory obligation upon the court to settle the list of contributories but that this section applied to all proceedings under sections 186 and 187 of the Companies Act, 2013. Hence, no order could be made to make calls on or order payment by a shareholder who was a ruling chief (after the amendment, a ruler of a foreign state).[355] The position would be the same under the Companies Act, 1956 and therefore this section will not apply to proceedings under section 467, but will govern proceedings under sections 469 and 470.

[s 86.8] Waiver of Want of Consent

The short question which can be considered is as to whether if such a defence of bar under section 80(1) is not taken, it would tantamount to waiver the plea that was available to the defendant. It must be stated at the outset that waiver is a conscious abandonment of a right. It has to be seen in the facts and circumstances of each case as to whether that right has been waiver or not.[356]

It is well-settled that where a court has no jurisdiction at all to entertain a suit, objection to its jurisdiction can be taken at any stage of the suit even though the defendant might have, at one stage, waived the objection, for a defect in jurisdiction cannot be cured by waiver. But if the case is one of irregular exercise of jurisdiction, the defect may be cured by waiver on the part of the defendant (see notes under section 21). The High Court of Bombay, after an exhaustive review of authorities held under the old section that if a suit was entertained against a sovereign prince without the consent of the Governor-General in Council having been obtained, the case would be one of irregular exercise of jurisdiction and if the defendant had not objected until the suit was ripe for hearing, he would be deemed to have waived the objection to jurisdiction.[357] This view was dissented from by the High Court of Madras on the ground that "the recognition of cases of waiver, as excepted from the ordinary provisions of International Law as understood in England, cannot be imported into the clear language of the Indian Code".[358] The Patna High Court went to the length of holding that even applications for adjournment made on behalf of a ruling chief amounted to a waiver of his privilege and debarred him from objecting to the court's jurisdiction.[359] The Privy Council, however, in a later case, held that this and the next section related to an important matter of public policy in India, that the provisions contained therein were imperative and had to be observed and that having regard to the public purposes which they served, they could not be waived.[360] The effect of the Privy Council's decision was to overrule the decisions of the Bombay and Patna High Courts. In a later case, the Bombay High Court following *Gackwar Rly* case, held that there could be no waiver of want of notice under this section.[361] It has also been held that the rule as to consent in this section is not merely a rule of procedure.[362] The plea of bar of section

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355. *Official Liquidators, DDM Electric Tramways Co v President Council of Regency, Nabha State*, AIR 1936 All 826 : (1936) 58 All 742 (FB).
356. *Mansoor Mumtaz v Saudi Arabian, Airlines Corp*, AIR 2002 Del 103.
357. *Chandulal v Awad Bin Umar*, (1897) 21 Bom 351.
358. *Narayappa v The Cochin Sircar*, (1918) 39 Mad 881.
359. *Maharaj Bahadur v Siva Saran*, AIR 1921 Pat 23 : (1921) 6 Pat LJ 185.
360. *Gackwar Baroda State Rly v Hafiz*, AIR 1938 PC 165 : (1938) 65 IA 182; reversing the decision, the High Court of Allahabad reported in AIR 1934 All 749; *Madanlal v HH The Nawab Sayed Reza Ali Khan*, AIR 1940 Cal 244.
361. *Thakore Sahib Kanji Keshari v Gulam Rasul*, AIR 1955 Bom 449 : 57 Bom LR 824.
362. *Madan Lal v HH The Nawab Sayad Reza Ali Khab*, AIR 1940 Cal 244.

86 was pleaded for the first time after almost 16 years of the filing of the suit after submitting themselves to the jurisdiction of the court. Foreign Airline has filed their appearances and appeared in the proceedings. Foreign Airline had given undertaking and made statements thereby avoiding appointment of court receiver. Foreign Airline has filed their respective statement wherein this plea has not been raised. Having submitted to the jurisdiction of the court, Foreign Airline would be deemed to have waived their rights, if any, under section 86 of the Code. Foreign Airline cannot, therefore, be permitted to raise the plea in respect of maintainability of this suit under section 86 of the Code.[363]

But suit filed against Saudi Arabian Airlines Corporation, which was attached to Ministry of Defence and Aviation of Saudi Arabia, control over same being with the state, would be termed as foreign state. Consequently, before suit could be filed, consent of Central Government certified in writing by Secretary to Government would be necessary.[364]

[s 86.9] Sub-section (4)

Though the amendment omitted the words "Ruler of a" from sub-section 1, it has provided the protection of the section to rulers of foreign states, by adding to sub-section 4 a new clause (a). The protection of the section is extended to four categories of persons enumerated in clauses (a), (aa), (b) and (c). The privilege of notice under this section enjoyed by the ex-rulers of Indian states no longer exists, since as a result of the deletion of Article 362 of the Constitution and the new Article 363A, they have ceased to be recognised as such rulers. The old cases pertaining to them have therefore ceased to have any relevance. The principle laid down in the earlier cases relating to the ex-rulers of the Indian states that the provisions of this section applied to them even when they were sued in their private capacity,[365] it is submitted, holds good when a suit is filed against a ruler of a foreign state.

[s 86.10] Immunity Against Arrest in Execution of a Decree

Sub-section 5 is new. It furnishes immunity against arrest in execution of a decree to the categories of persons there set out including rulers of foreign states.

[s 86.11] Limitation

In computing the period of limitation, a plaintiff in a suit to which this section applies, is not entitled to deduct the time spent in obtaining the consent.[366] Section 15(5) of the Limitation Act, 1963, provides that in computing the period of limitation for any suit the time during which the defendant has been absent from India shall be excluded. The Calcutta view was that the time must be excluded even if the defendant was carrying on business in what then was called British India through an authorised agent during his absence.[367] The Bombay High Court, on the other hand, held that section 13 of the Limitation Act, 1908 (section 15 of the Limitation Act, 1963) must be read with sections 85, 86 and 87 (as they then stood) of the Code so far as a sovereign prince or a ruling chief was concerned; and that such a prince or chief must be treated as residing in British India for purposes of the Limitation Act,

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363. *Kenya Airways v Jinibai B Kheshwala*, AIR 1998 Bom 287(DB).
364. *Mansoor Mumtaz v Saudi Arabian Airlines Corp*, AIR 2002 Del 103.
365. *Narayanan v The Cochin Sircar*, ILR 38 Mad 635, affirmed in (1966) 39 Mad 681; *Rewa Shankar v Narasinghji*, AIR 1957 HP 16.
366. *Shrimant Sayaji Maharaj v Madhavrao*, AIR 1929 Bom 14 : (1929) 53 Bom 12.
367. *Pooma Chunder v Sasson*, (1998) 25 Cal 496 (FB).

1908, in so far as he carried on business through his representatives.[368] It is submitted that the Bombay view is correct. Before refusing sanction, natural justice must be observed. Besides this, the decision must be expressed in such a manner that reasons can be spelt out from such a decision.[369]

[370][**[S 87] Style of foreign Rulers as parties to suits.**—The Ruler of a foreign State may sue, and shall be sued, in the name of his State:

Provided that in giving the consent referred to in section 86, the Central Government may direct that the Ruler may be sued in the name of an agent or in any other name].

[s 87.1] High Court Amendment

Calcutta.—Omit the words "and shall be sued", after the words "Ruling Chief may sue" and before the words "in the name of"; omit the proviso Calcutta Gazette pt I, dated 20 April 20 1967.

This section does not apply to rulers of former Indian states.[371]

[372][**[S 87A] Definitions of "foreign State" and "Ruler".**—(1) In this Part,—

(*a*) "foreign State" means any State outside India which has been recognised by the Central Government; and

(*b*) "Ruler", in relation to a foreign State, means the person who is for the time being recognized by the Central Government to be the head of that State.

(2) Every court shall take judicial notice of the fact—

(*a*) that a State has or has not been recognized by the Central Government;

(*b*) that a person has or has not been recognized by the Central Government to be the head of the State].

The word "Ruler" in clause (b) takes in rulers of all foreign states, whatever their forms of government, for the time being, and is recognised by the Central Government to be the head of the state.[373]

Suits Against Rulers of Former Indian States

[S 87B] Application of sections 85 and 86 to Rulers of Former Indian States—[374][(1) In the case of any suit by or against the Ruler of any former Indian State which is based wholly or in part upon a cause of action which arose before the commencement of the Constitution or any proceeding arising out of such suit, the provisions of section 85 and sub-sections (1) and (3) of section 86 shall apply in relation to such Ruler as they apply in relation to the Ruler of a foreign State.]

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368. *Shrimant Sayaji Maharaj v Madhavrao*, AIR 1929 Bom 14 : (1929) 53 Bom 12.
369. *Harbhajan Singh v UOI*, AIR 1987 SC 9 : 1986 (4) SCC 678 : 1987 (1) SCR 114 : (1986) JT 765 : (1987) 1 SCJ 318.
370. Substituted for former sections 83 to 87 by Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), section 12.
371. *N Ibohal Singh v Budh Chandra Singh*, AIR 1961 Mani 40.
372. Substituted for former sections 83 to 87 by Code of Civil Procedure (Amendment) Act, 1951 (2 of 1951), section 12.
373. *Mirza Ali Akbar Kashani v Union Arab Republic*, AIR 1966 SC 230 : (1966) 1 SCR 319.
374. Substituted by Act 54 of 1972, section 3 for sub-section (1).

(2) In this section—

(a) "former Indian State" means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purposes of this section; [375][* * *]

[376][(b) "commencement of the Constitution" means the 26th day of January, 1950; and

(c) "Ruler" in relation to a former Indian State, has the same meaning as in Article 363 of the Constitution].

SYNOPSIS

[s 87B.1] Scope 1025
[s 87B.2] Constitutionality 1026

[s 87B.1] Scope

This section was substituted for the one which stood prior to the enactment of the Rulers of Indian States (Abolition of Privileges) Act, 1972 (54 of 1972). As the section stood till then the word "Ruler" in relation to a former Indian State was defined by clause (b) of sub-section (2) to mean the person who, for the time being, was recognised by the president as the ruler of the state for the purposes of the Constitution. Act 54 of 1972 was the sequel of the Constitution (Twenty Sixth Amendment) Act, 1971 which came into force with effect from 28 December 1971 and which inserted a new article, Article 363A, which provided that:

> Notwithstanding anything in this Constitution or in any law for the time being in force—
>
> (a) the Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty Sixth Amendment) Act, 1971 was recognised by the President as the Ruler of an Indian state or any person who, at any time before such commencement, was recognised by the President, as the successor of such Ruler shall, on and from such commencement, cease to be recognised as such Ruler or the successor of such Ruler.

The result of this Constitution Amendment Act is that the former rulers who were entitled to claim protection under this section, can no longer do so by reason of the fact that with effect from 28 December 1971, they ceased to be recognised as such rulers—thus nullifying section 87B as it then stood. Act 54 of 1972 saves protection earlier enjoyed by such rulers in a very limited way which is for all practical purposes academic, in that it is confined only to suits based wholly or in part on a cause of action which arose before the commencement of the Constitution, i.e., 26 January 1950 and proceedings arising out of such suits.

The immunity under the section is personal to the rulers.[377]

As the section formerly stood, it was held that it had no application to suits filed by ex-rulers and that consequently any claim by them for exemption from personal appearance would have to be dealt with under the ordinary law.[378] This is no longer correct, as the section to the extent, it affords immunity applies to suits by and against the ex-rulers.

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375. The word "and" omitted by Act 54 of 1972, section 3.
376. Substituted by Act 54 of 1972, section 3, for clause (b).
377. *Bhagwan Pandia v Nayan Kunvarba*, AIR 1953 Sau 53.
378. *Darbar Saheb v New India Assurance Co Ltd*, (1955) Bom LR 236.

[s 87B.2] Constitutionality

A conjoint reading of the provisions contained in section 87B of the Code of Civil Procedure, Articles 366(22) and 363- of the Constitution of India demonstrates that the rulers of Indian states form a class by themselves and the special treatment given to them by section 87B of the Code of Civil Procedure cannot be said to be based on unconstitutional discrimination. There is, of course, discrimination between the ex-rulers and the rest of the citizens of India, but that discrimination is justified having regard to the historical and legislative background.[379]

The section has been held not to be repugnant to Article 14 of the Constitution as it is based on a valid classification.[380]

Interpleader

[S 88] Where interpleader-suit may be instituted.—Where two or more persons claim adversely to another the same debts, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

See O XXXV.

SYNOPSIS

[s 88.1]	Changes in the Section	1026	[s 88.4]	Amendment of Plaint in an Interpleader Suit 1028
[s 88.2]	What Is an Interpleader Suit	1026		
[s 88.3]	Who Claims No Interest Other Than for Charges or Costs	1027		

[s 88.1] Changes in the Section

This section corresponds with section 470 of the Code of 1882 except in the following particulars:

(i) The words, "the same debt, sum of money or other property, movable or immovable", have been substituted for the words, "the same payment or property".

(ii) The words, "who claims no interest therein other than for charges or costs", have been borrowed from RSC, O LVII, rule 2, and have been substituted for the words, "whose only interest therein is that of a mere stakeholder".

[s 88.2] What Is an Interpleader Suit

An interpleader suit is one in which the real dispute is between the defendants only and the defendants interplead, that is to say plead against each other instead of pleading against

379. *Narendra Singh Rajawat v Thakur Mohan Singh Kanota*, AIR 2002 Raj 218.
380. *Mohan Lal v Sawai Mansinghji*, AIR 1962 SC 73 : (1962) 1 SCR 702.

the plaintiff as in an ordinary suit. In every interpleader suit, there must be some debt or sum of money or other property in dispute between the defendants only, and the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to such of the defendants as may be declared by the court to be entitled to it. Thus, suppose certain property is claimed by *A* as well as by *B*, and *X* is in possession of that property and claims no interest in the property himself and is ready and willing to deliver it to such party as may be declared by the court to be the rightful owner of it, *X* as plaintiff may institute an interpleader suit against *A* and *B* as defendants. In such a case, *X* will, as a rule, be dismissed from the suit at the first hearing after his costs are provided for, and *A* and *B* will be left to interplead and to fight the matter out between themselves as if one of them was plaintiff and the other was defendant (O XXXV rule 4). But before the plaintiff is dismissed from the suit, he must deposit the property in dispute in court (O XXXV, rule 2). *X* can even move the court for an order to get his name removed from the suit.[381] It would appear that in such a suit it is not necessary that the plaintiff must admit the claim against him in its entirety. To the extent he admits his liability, he may ask the rival claimants to interplead. Thus, where the plaintiff mortgagors claimed that they were agriculturists and as such were entitled to have the mortgage debt scaled down under Tamil Nadu Agriculturists Relief Act, 1938 (Act 4 of 1938) and when so scaled down, the debt would only be Rs 30,000 and the defendants asserted their rival claims to the debt and while doing so denied that the plaintiffs were agriculturists or that the debt was liable to be scaled down it was held that to the extent of the admitted liability for Rs 30,000, the suit was maintainable as an interpleader suit.[382]

[s 88.3] Who Claims No Interest Other Than for Charges or Costs

These words indicate that the plaintiff in an interpleader suit must be in a real position of impartiality.[383] A railway company which claims no interest in goods in its possession other than a lien on the goods for wharfage, demurrage and freight, may institute an interpleader suit where the goods are claimed by two persons adversely to each other.[384]

A holds in his hands a sum of Rs 5,000 which is claimed by *B* and *C* adversely to each other. *A* institutes an interpleader suit against *B* and *C*. It is found at the hearing that *A* had entered into an agreement with *B* before the institution of the suit that if *B* succeeded in the suit he should accept from *A* Rs 4,000 only in full satisfaction of his claim. Here *A* has, by virtue of the agreement, an interest in the subject matter of the suit, and he is not, therefore, entitled to institute an interpleader suit. The suit must be dismissed.[385]

A party who has taken an indemnity from one of the claimants is not entitled to file an interpleader suit.[386]

A suit is not necessarily an interpleader suit and subject to the provisions of this section, merely because one of the reliefs claimed by the plaintiff requires the defendants to interplead

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381. *National Insurance Co Ltd v Dhirendra Nath*, AIR 1938 Cal 287 : (1939) 1 Cal 53.
382. *Inuganti Sobhanadrirao v M Jaggayya*, AIR 1966 AP 92.
383. *Sambiah v Subba Reddiar*, (1951) 1 Mad LJ 353.
384. *Bombay Baroda Rly Co v Sasoon*, (1894) 18 Bom 231; *Allenborough v St Katharine's Docks*, (1878) 3 CPD 450.
385. *Murrietta v South American Co*, (1893) 62 LJQB 396.
386. *Hari Karmakar v Robin*, AIR 1927 Rang 91 : (1927) 4 Rang 465.

together concerning certain claims. The court must have regard to all the prayers of the plaint to determine the exact nature of the suit.[387]

[s 88.4] Amendment of Plaint in an Interpleader Suit

A plaint in an interpleader suit can be amended by inclusion of new properties and joinder of new parties.[388]

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387. *Juggannath v Tulka Kera*, (1908) 32 Bom 592.
388. *Raja Bhagwati Baksh Singh v Civil Judge*, AIR 1961 All 599.

PART V

SPECIAL PROCEEDINGS

[1][**[S 89] Settlement of disputes outside the Court.**—(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for—

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred—

(a) for arbitration or conciliation, the provisions of the Arbitration an Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.]

SYNOPSIS

[s 89.1] Alterations in the Section 1030
[s 89.2] "shall formulate the terms of settlement" 1033
[s 89.3] Element of Compromise—Discretion of the Court 1033
[s 89.4] Can Parties by Agreement Appoint Court as Arbitrator 1034

1. Inserted by Act 46 of 1999, section 7 (w.e.f. 1-7-2002). Earlier section 89 (relating to Arbitration) was repealsed by Act 10 of 1940, section 49 and Sch II.

[s 89.5] Reference to Arbitration or Conciliation 1035
[s 89.6] Reference to Mediation..... 1036
[s 89.7] Expenses..... 1037
[s 89.8] Panel..... 1037
[s 89.9] Family Court..... 1037
[s 89.10] Model Case Flow Management Rules 1038
[s 89.11] This Section and Section 8, Arbitration and Conciliation Act, 26 of 1996 1038
[s 89.12] *Lok Adalat*—Refund of Court Fee..... 1039
[s 89.13] This Section and O X, rules 1A, 1B and 1C..... 1040

[s 89.1] Alterations in the Section

The earlier section 89 given below as regards Arbitration as also section 104, clauses (a)–(f) and the Second Schedule to the Code of Civil Procedure, 1908 (CPC) have been annulled by the Arbitration Act, X of 1940 (now replaced by Arbitration and Conciliation Act, 1996).

The Amending Act of 1999 has inserted section 89 in the CPC. The amended Act comes into effect from 1-7-2002. The provisions of section 89 of the CPC shall not effect any suit in which an issue has been settled before the commencement of the present section; and every such suit shall be dealt with as if the present section 89 had not come into force. Corresponding amendments have also been made in rules 1A, 1B and 1C of O X of the CPC.

The "Notes on Clauses" of the CPC (Amendment) Bill, 1997 stated the following with regard to this provision.

> Clause 7 provides for the settlement of disputes outside the court. The provisions of clause 7 are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that the court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate dispute resolution methods that the suit could proceed further. In view of the above, clause 7 seeks to insert a new section 89 in the Code in order to provide for alternate dispute resolution.

A new section 16 was inserted in the Court-fees Act, 1870 by the same CPC (Amendment) Act, 1999, which reads as follows:

> Where the Court refers the parties to the suit to any one of the mode of settlement of dispute referred to in section 89 of the Code of Civil Procedure, 1908 (5 of 1908) the plaintiff shall be entitled to a certificate from the Court authorising him to receive back from the collector, the full amount of the fee paid in respect of such plaint.

Where a matter referred to a Lok Adalat in terms of section 89(2) CPC read with section 20(1) of the Legal Services Authorities Act, 1987 is settled, the refund of the court-fee is governed by section 16 of the Court-fees Act, 1870 read with section 21 of the Legal Services Authorities Act, 1987 and the plaintiff is entitled to the refund of the whole of the court-fee paid on the plaint.

Section 89 of the CPC was earlier repealed by the Arbitration Act of 1940. Section 89 was later on inserted again by the Amending Act of 1999.

The amended section 89 provides that where it appears to the court that there exists elements of settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the

observations of the parties, the court may reformulate the terms of possible settlement and refer the same for:

(i) arbitration;

(ii) conciliation;

(iii) judicial settlement including settlement through *Lok Adalat;*

(iv) mediation.

Where a dispute has been referred for Arbitration or Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the Act.

Where the court has referred the dispute for judicial settlement, it shall refer the same to a suitable institution or person and such institution and such person or institution shall be deemed to be a *Lok Adalat* and all the provisions of Legal Services Authorities Act, 1987 shall apply.

Further, where the dispute is referred for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Section 20 of the Legal Services Authorities Act, 1987 provides that a matter can be referred to *Lok Adalat*: (i) with the consent of the parties, (ii) on an application of one of the parties, (iii) where the court is satisfied that the matter is an appropriate one to be taken cognisance of by the *Lok Adalat*. However, no case shall be referred to the *Lok Adalat*, on an application of one of the parties, by the court, without giving a reasonable opportunity of being heard to the parties. The Legal Services Authorities Act, 1987 is amended by the Act 37 of 2002 which comes into effect from 1-06-2002, consequent to which sections 22A–22E have been inserted. The inserted sections deal with pre-litigation conciliation and settlement. It would be interesting to see how the amendments in this Act affect section 89 of the CPC.

Alongwith the insertion of section 89, the Legislature has also amended O X of the CPC, by inserting rules 1A, 1B and 1C. The said rules provide that after recording the admissions and denials, the courts shall direct the parties to the suit to opt for either mode of settlements outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authorities as may be opted by the parties. It is mandatory for the parties to appear before the designated forum or authority, for conciliation of the suit. Further, where the presiding officer of the forum or the authority is satisfied that it will not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter once again to the court and direct the parties to appear before the court on the date fixed by it.

Reading the amended section 89, and the insertions in O X, it appears that the following conditions should be satisfied before matter could be referred to an Alternate Dispute Redressal:

(i) existence of elements of settlement in the opinion of the court;

(ii) the parties must share the opinion of the court;

(iii) formulation of the terms of settlement by the court;

(iv) the court should invite the observation of the parties on the terms of settlement;

(v) observations of the parties must be received by the court;

(vi) if need be, reformulate the terms of settlement and refer the same for Alternate Dispute Redressal contemplated under section 89.

In the opinion of the authors, the court should not be asked to entertain the exercise contemplated to formulating and reformulating the terms of settlement by sub-section (1) of section 89. It is possible that while formulating the terms of settlement or while reformulating the terms of the settlement after receiving the observations of the parties, that the court may be obliged to express some opinion on a particular aspect of the dispute which may not be liked by one of the parties. Besides, doing so would invite comments and suspicion upon the neutrality of the court as an impartial arbiter.

The judicial settlement contemplated in clause (c) of sub-section (2) may be effectively implemented in cities and big towns where a number of senior lawyers, institutions, and retired judges are available. There may be difficulties in implementing the same in smaller towns where there is only one court, and there are not enough senior lawyers or retired judicial offices of high integrity. Any amendment to be effective should be such which can be implemented throughout the length and breadth of the entire country with equal ease as it can be implemented in some parts of the country.

The Law Commission in its 163rd report was of the opinion that the proposed section 89 (as it then was) may be suitably modified to provide as under:

(i) After the settlement of issues in every suit (when both the parties would have also filed their basic documents as required by the proposed provisions relating to the filing of documents alongwith the pleadings), the suit shall be referred to a board of conciliators to explore whether there existed elements of settlement which were acceptable to the parties and if it appeared to the board that such elements of settlement did exist, they shall refer the suit for arbitration, judicial settlement or settlement through *Lok Adalat*. The method of conciliation could be tried by the board itself if found feasible. Such reference could be made either after reformulating the terms of possible settlement, if the board found the same feasible and advisable or without such reformulation, as the case may be.

(ii) The presiding officer of the principal civil court in every city and town shall constitute, in consultation with his senior colleagues, a board of conciliators consisting of retired judicial officers and senior lawyers of known integrity and competence.

(iii) A time-limit should be prescribed within which the board of conciliators shall complete its work that is either refer the suit to arbitration/judicial settlement or settlement through *Lok Adalat* — or bring about a settlement through conciliation — if it finds that such a course was advisable or report to the court that it could not find any elements of settlement which might be acceptable to the parties and that, therefore, any reference of the suit to arbitration/ conciliation/judicial settlement or settlement through *Lok Adalat* was not warranted or advisable. This period could range between four months to one year, as may be specified by each court.

(iv) To delete the alternative mode of mediation mentioned under clause (2) of sub-section 1 of the proposed section 89. Mediation by a court could be resorted to at any stage of the proceedings and it should not be stipulated as a matter of law either at the stage of the issues or at any subsequent stage. Such a course is always open to the court and there is no reason to define or codify it. Accordingly, clause (d) in sub-section 2 of section 89 might be deleted.

It would have been appropriate if the recommendations of the Law Commission were adhered to and Act was amended accordingly.

[s 89.2] "shall formulate the terms of settlement"

As can be seen from section 89, its first part uses the word "shall" when it stipulates that the "court shall formulate terms of settlement". The use of the word "may" in the later part of section 89 only relates to the aspect of re-formulating the terms of a possible settlement. The intention of the legislature behind enacting section 89 is that where it appears to the court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four alternative dispute resolution methods mentioned in the section, and if the parties do not agree, the court shall refer them to one or other of the said modes. Section 89 uses both the word "shall" and "may" whereas O X, rule 1A uses the word "shall" but on harmonious reading of these provisions it becomes clear that the use of the word "may" in section 89 only governs the aspect of re-formulation of the terms of a possible settlement and its reference to one of the alternative dispute resolution methods. There is no conflict. It is evident that what is referred to one of the alternative dispute resolution modes is the dispute which is summarised in the terms of settlement formulated or re-formulated in terms of section 89.[2]

In the case, the petitioner was represented by its counsel who, without the permission of the petitioner, accepted the amount deposited by the other party before the court and withdrew the suit. The petitioner being aggrieved, preferred the civil revision petition and contended that the court failed to follow the mandate of section 89, CPC. The petitioner contended that it was the duty of the court to inform the parties of the terms of the settlement and give them time to respond. The court accepted the contentions made by the petitioner and held that the impugned order is bad in law and liable to be set aside.[3]

[s 89.3] Element of Compromise—Discretion of the Court

If a defendant appears in a suit and offers to compromise the claim raised by the plaintiff, one can say that an element of compromise exists; but if the plaintiff, reacting to such offer, right away rejects the offer of compromise and if he wants a decision in the suit on merit, the element of compromise can no longer be said to exist/survive. In such a situation, if the court makes no further efforts to make the parties reach an amicable settlement of their dispute, the court cannot be said to have failed to exercise its jurisdiction under section 89. In a situation of this kind, the court, which is *in seisin* of the matter, is the best judge of the matter, and even if the revisional court happens to think that the trial court should have pursued the offer of compromise, notwithstanding the resistance offered, the revisional court will be slow to interfere, for, it is trite that if two equally reasonable views are possible, the revisional court will be slow to substitute its views in place of the views of the trial court.[4]

However, no court can compel any unwilling party to submit to the jurisdiction of the arbitration and to get their dispute settled through arbitration as per section 89 of the CPC. It is only when all the parties agree to get their dispute settled and express their intention in this regard before the civil court that the civil court can formulate the terms of settlement and refer the dispute to arbitration.[5]

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2. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : JT 2005 (6) 486.
3. *Housing & Urban Development Corp Ltd v Ahongsangbam Inao Singh*, AIR 2019 Manipur 17.
4. *West Bengal State Electricity Board v Shanti Conductors Pvt Ltd*, AIR 2004 Gau 70.
5. *BOC India Ltd v Instant Sales Pvt Ltd*, AIR 2007 Cal 275 : 2007 (2) Cal LJ 385.

The issue involved herein was "whether the parties who resolve their matter outside the modes mentioned under section 89 of CPC are entitled to receive refund of full court fees or not"? The court said that as per section 69A of Tamil Nadu Court-Fees and Suits Valuation Act, 1955, the party can seek refund of the court fees when the matter is resolved by any of the methods mentioned under section 89 of CPC. Further, the court said that those parties who do not seek court's interference to reach a settlement are not given the refund of full court fees then such an interpretation would lead to absurd outcome. Hence, the Hon'ble Apex Court made an observation that the parties who privately agree to settle their dispute outside the modes contemplated under section 89 of CPC are also entitled to refund of court fees.[6]

A Division Bench of the Kerala High Court in a suit for partition of properties within family, held that for settlement of dispute outside court, it is open for court to identify and segregate issues which can be settled in Alternative Dispute Resolution Mechanisms (ADRs) and which are to be adjudicated by the court. Those segregated issues can be referred for settlement in one of the ADR mechanisms. Even if there is no agreement among defendants on all the issues referred for ADR by settlement, some of the defendants may satisfy the plaintiff and thus enter a compromise.[7]

As per the decision in *Afcons Infrastructure Ltd v Cherian Varkey Construction Pvt Ltd*,[8] a judicial settlement under section 89(2)(d) would be where "the court shall effects a compromise between the parties". The court found that proposals were exchanged between the parties, and due to the efforts of the counsels, the settlement was arrived at by the parties. Thus, the court said that this is a compromise which took place in court as per O XXIII rule 3 of CPC, and would be regarded as a judicial settlement as laid down in *Afcons* case. Henceforth, relying on the provision of the Court Fees Act, the court held that the petitioner is liable to get full refund of the court fees paid.[9]

Family disputes and business disputes should be resolved through mediation/ arbitration. Lawyers should advise their clients accordingly.[10]

[s 89.4] Can Parties by Agreement Appoint Court as Arbitrator

The government, or for that matter any party, cannot compel or obligate a civil court to arbitrate the matters between the parties on the strength of an agreement entered into between the parties. The fact that the government is one of the parties to the arbitration agreement makes no difference. Courts are created or established by law in this country and function in accordance with the jurisdiction conferred on them by the enactments which confer a jurisdiction and function in accordance with the procedural law that regulates the proceedings of the court. Even section 89 of the CPC does not obligate the court to conduct arbitration, but enables the court wherever it is satisfied with reference to the dispute in a pending suit that there is a possibility of settlement either by way of arbitration or conciliation to refer the same to arbitration or conciliation.[11]

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6. *The High Court of Judicature at Madras v MC Subramaniam*, (2021) 3 SCC 560.
7. *Aravammal Parkum AB v Panangadan Vachali Subhadra*, 2008 (3) Ker LT 233 : (2008) 2 Ker LJ 508 (DB).
8. *Afcons Infrastructure Ltd v Cherian Varkey Construction Co Pvt Ltd*, (2010) 8 SCC 24.
9. *Munish Kalra v Kiran Madan*, (2019) 198 AIC 622.
10. *BS Krishna Murthy v BS Nagraj*, AIR 2011 SC 794 : (2011) 15 SCC 464 : (2011) 1 SCR 387.
11. *K Venkulu v State of AP*, AIR 2004 AP 85 (DB).

[s 89.5] Reference to Arbitration or Conciliation

One of the modes to which the dispute can be referred is "arbitration". Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of 1996 Act. Section 8 of the Arbitration and Conciliation Act, 1996 deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P Anand Gajapathi Raju v PVG Raju*,[12] the Arbitration and Conciliation Act, 1996 governs a case where arbitration is agreed upon before or pending a suit by all the parties. The Arbitration and Conciliation Act, 1996, however, does not contemplate a situation as in section 89 of the CPC where the court asks the parties to choose one or other alternative dispute resolution methods including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration. Section 82 of the Arbitration and Conciliation Act, 1996 enables the high court to make rules consistent with this Act as to all proceedings before the court under the Arbitration and Conciliation Act, 1996. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to arbitration among four alternative dispute resolution methods is not contemplated by the Arbitration and Conciliation Act, 1996, and, therefore, section 82 or 84 has no applicability where parties agree to go for arbitration under section 89 of the CPC. As already noticed, for the purposes of section 89 and O X, rules 1A, 1B and 1C, the relevant sections in Part X of the CPC enable the high court to frame rules. If reference is made to arbitration under section 89 of the CPC, the Arbitration and Conciliation Act, 1996 would apply only from the stage after reference and not before the stage of reference when options under section 89 are given by the court and chosen by the parties. On the same analogy, the Arbitration and Conciliation Act, 1996 in relation to conciliation would apply only after the stage of reference to conciliation. The Arbitration and Conciliation Act, 1996 does not deal with a situation where after suit is filed, the court requires a party to choose one or other alternative dispute resolution methods including conciliation. Thus, for conciliation as well rules can be made under Part X of the CPC for purposes of procedure for opting for "conciliation" and up to the stage of reference to conciliation. Thus, there is no impediment in the ADR rules being framed in relation to civil court as contemplated in section 89 up to the stage of reference to alternative dispute resolution. The Arbitration and Conciliation Act, 1996 comes into play only after the stage of reference up to the award. Applying the same analogy, the Legal Services Authority Act, 1987 or the rules framed thereunder by the state governments cannot act as impediment in the high court making rules under Part X of the CPC covering the manner in which option to *Lok Adalat* can be made, being one of the modes provided in section 89. The Legal Services Authority Act, 1987 also does not deal with the aspect of exercising option to one of the four alternative dispute resolution methods mentioned in section 89. Section 89 makes applicable the Arbitration and Conciliation Act, 1996 and the Legal Services Authority Act, 1987 from the stage after exercise of options and making of reference.[13]

It has been held that under section 89 for settlement of disputes outside court through arbitration where parties agree to such reference of disputes and differences between them

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12. *P Anand Gajapathi Raju v PVG Raju*, AIR 2000 SC 1886 : AIR 2000 SCW 1489 : (2000) 4 SCC 539 : (2000) 3 Scale 330.
13. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : JT 2005 (6) 486.

in a pending suit, inclusion of additional issues which were not part of *lis* in civil suit are permissible.[14]

The language of section 89 unmistakably conveys that the Legislature has reckoned arbitration also as one of the four methods of ADR available to the Courts. The language of section 89 also disabuse any confusion as to whether it is a method of settlement. Taking note of the language on section 89, it can be seen to convey that all the four methods are ADR methods contemplated by the provision and they are methods of settlement.[15]

Depending on the nature of the case, its facts, the contentions and the possible resolution, it is open to the court to come to the conclusion that even if the parties do not agree, they can be referred to one or the other modes of the said modes of dispute resolution. One of the modes undoubtedly is arbitration. What applies to the goose must apply to the gander also. If section 89 can be read to conclude that compulsory reference for mediation, conciliation and judicial settlement is possible without the consent of the parties, nothing can stand in the way of the court adopting an interpretation that arbitration is not beyond the ken of section 89.[16]

Where there was no clause with regard to appointment of arbitrator in the agreement between parties to a dispute, it was held by the Uttrakhand High Court that resort can be taken to alternative dispute resolution mechanism as contemplated by section 89 of the CPC. Consequently the matter was referred to a retired judge for deciding the dispute.[17]

In a case from Madhya Pradesh, a decree for restitution of suit properties in terms of the arbitral award was passed. During the pendency of a writ petition challenging the decree of restitution, the parties agreed to settle their dispute and the Court appointed a Conciliator. It was held by the Division Bench of the high court that since the parties have entered into a settlement in terms of the provision as contained in O XXIII of the CPC, while invoking the provisions contained in section 89 of CPC, providing for Special Proceedings and have finally resolved their dispute amicably, it would be in the interest of justice to affirm the terms of the Settlement arrived at amongst the parties.[18]

[s 89.6] Reference to Mediation

The question of clause (d) of section 89 (2) of the CPC is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, arbitration, conciliation, judicial settlement including settlement through *Lok Adalat* and mediation are meant to be the actions of persons or institutions outside the court and not before the court. Order X, rule 1C speaks of the "conciliation forum" referring back the dispute to the court. In fact, the court is now involved in the actual mediation/conciliation. Clause (d) of section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court, and the court, after giving notice and hearing the parties, "effect" the compromise, and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the court which refers the matter to mediation/conciliation being debarred

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14. *UOI v Titagarh Capital Pvt Ltd*, (2015) 16 SCC 143.
15. *Afcons Infrastructure Ltd v Cherian Varkey Construction Pvt Ltd*, 2007 (1) Ker LT 196 : 2007 (1) Ker LJ 333.
16. *Afcons Infrastructure Ltd v Cherian Varkey Construction Pvt Ltd*, 2007 (1) Ker LT 196 : 2007 (1) Ker LJ 333.
17. *Ramola Construction Co v Executive Officer, Nagar Panchayat, Muni-ki-Reti*, (2007) 1 UC 345 : 2006 (64) All LR 341.
18. *Ashok Kumar Bansal v Sushila Devi Bansal*, AIR 2010 MP 145 : (2010) 1 MPLJ 612 (DB) (Gwalior Bench).

from hearing the matter where settlement is not arrived at. The judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards if no settlement is arrived at between the parties.[19]

[s 89.7] Expenses

The question also is about the payment made and expenses to be incurred where the court compulsorily refers a matter for conciliation/mediation. Considering the large number of responses received by the committee to the draft rules, it has been suggested that in the event of such compulsory reference to conciliation/mediation procedures, if expenditure on conciliation/mediation is borne by the government, it may encourage parties to come forward and make attempts at conciliation/mediation. On the other hand, if the parties feel that they have to incur extra expenditure for resorting to such alternative dispute resolution modes, it is likely to act as a deterrent for adopting these methods. The suggestion was found laudable. The Central Government was directed by Supreme Court to examine it and it agreed to make a request to the Planning Commission and Finance Commission to make specific financial allocation for the judiciary for including the expenses involved for mediation/conciliation under section 89 of the CPC. In case the Central Government has any reservations, the same were directed to be placed before the court within four months. In such event, the Government was directed to consider provisionally releasing adequate funds for these purposes also having regard to what Supreme Court had earlier noticed about many statutes that are being administered and litigations pending in the courts in various states are central legislations concerning the subjects in List I and List III of such VII to the Constitution of India.[20]

[s 89.8] Panel

With a view to enable the court to refer the parties to conciliation/mediation, where parties are unable to reach a consensus on an agreed name, there should be a panel of well-trained conciliation/mediation to which it may be possible for the court to make a reference. It would be necessary for the high courts and district courts to take appropriate steps in the direction of preparing the requisite panels.[21]

In a case involving dispute between two government owned corporations, the Supreme Court found that the permanent machinery of arbitration, put in place in March 1989 was outside the statutory scheme of the Arbitration Act, 1940 and continued to be outside the purview of the Arbitration and Conciliation Act, 1996 as well. To resolve the dispute, therefore, the matter was referred to arbitration under section 89 and retired CJI KG Balakrishnan was appointed as the sole arbitrator.[22]

[s 89.9] Family Court

A doubt was expressed about the applicability of ADR rules for disputes arising under the Family Courts Act, 1984 since that Act also contemplates rules to be made. It is, however, to be

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19. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : JT 2005 (6) 486.
20. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : JT 2005 (6) 486.
21. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : JT 2005 (6) 486.
22. *Northern Coalfields Ltd v Heavy Engineering Corp Ltd*, AIR 2016 SC 3715 : (2016) 8 SCC 685 : JT 2016 (7) SC 437 : (2016) 6 Scale 820.

borne in mind that the Family Courts Act, 1984 applies to the CPC for all proceedings before it. In this view, ADR rules made under the CPC can be applied to supplement the rules made under the Family Courts Act, 1984 and provide for alternative dispute resolution insofar as conciliation/mediation is concerned.[23]

A matrimonial dispute in Kerala generated eleven litigations within a period of one year before various *fora*. It was held by the Kerala High Court that attempt for alternative redressal is not only the statutory obligation of the court but it is also their duty to public. Being judicial officers, they have expertise in peace making. It was observed that one case settled is ten cases avoided because in settlement, peace is purchased and both parties part as friends.[24]

[s 89.10] Model Case Flow Management Rules

Model case flow management rules have been separately dealt with for trial courts and first appellate subordinate courts and for high courts. These draft rules extensively deal with the various stages of the litigation. The high courts can examine these rules, discuss the matter and consider the question of adopting or making case law management and model rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice.[25]

[s 89.11] This Section and Section 8, Arbitration and Conciliation Act, 26 of 1996

Section 89 of the CPC cannot be resorted to for interpreting section 8 of the Arbitration and Conciliation Act, 26 of 1996 as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under section 89 of the CPC and even if the application under section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section.[26]

Where in a matter, there was no arbitration agreement, but parties had agreed to resolve dispute *vide* arbitration, the high court was found to be correct by the Supreme Court in appointing a substitute arbitrator namely Radhakrishnan J, in place of Sujata Manohar J, to resolve the dispute.[27] Speaking for the bench, Sikri J, in his supplementing opinion held that the purpose for enacting section 89 is to encourage the parties to the dispute to settle their dispute by adopting one of the four methods provided therein. Sikri J, further observed that not only does it result in lessening the burden of the court; many cases which come to the court can be resolved more suitably and with better outcomes if the methods of ADR prescribed in section 89 are resorted to. Therefore, once an arbitration agreement was entered into between the parties, that too in a pending suit, it can be deduced that the intention of the parties was to settle the matter through arbitration and not to come back to the court again for the decision of the same dispute by the court adjudicatory process.

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23. *Northern Coalfields Ltd v Heavy Engineering Corp Ltd*, AIR 2016 SC 3715 : (2016) 8 SCC 685 : JT 2016 (7) SC 437 : (2016) 6 Scale 820.
24. *T Vineed v Manju S Nair*, 2008 (1) Ker LJ 525 : 2008 (65) All Ind Cas 327 (DB) : ILR (2008) 1 Ker 646.
25. *T Vineed v Manju S Nair*, 2008 (1) Ker LJ 525 : 2008 (65) All Ind Cas 327 (DB) : ILR (2008) 1 Ker 646.
26. *Sukanya Holdings Pvt Ltd v Jayesh H Pandya*, AIR 2003 SC 2252 : (2003) 5 SCC 531.
27. *Shailesh Dhairyawan v Mohan Balkrishna Lulla*, (2016) 3 SCC 619.

In relation to ADR method, arbitration contemplated under section 89 (1) and 89 (2) is not a reference under section 8 of the Arbitration and Conciliation Act, 1996 and hence the words "as if" has been used in section 89(2)(a).[28]

Sections 89 (1)(a) and 89 (2)(a) do refer to reference of a dispute for arbitration and does not specifically refer to any reference to Arbitrator. Going strictly by the language of sections 89 (1)(a) and 89 (2)(a) of the CPC, a doubt arises whether this means and implies that reference can be made for arbitration as indicated in section 8 of the Arbitration and Conciliation Act, 1996. But an interpretation cannot be resorted to that is divorced of the context and the purpose which has to be served under section 89. If the high court were to make a reference only for arbitration without specifying any Arbitrator, it would necessarily involve a dispute obliging the parties to go before the Chief Justice under section 11 of the Act to get the Arbitrator appointed. Such a procedure instead of contributing to expedition in the disposal of case and settlement of dispute would contribute to further unnecessary delay and protraction. Therefore, the power for reference for arbitration and conciliation which appears in section 89 (1)(a) and (b) and 89 (2)(a) must certainly be interpreted to inhere in it the power and the jurisdiction of the court to refer to a specified Arbitrator.[29]

[s 89.12] *Lok Adalat*—Refund of Court Fee

On a careful reading of the provisions it can be seen that when a matter is referred to *Lok Adalat* by a civil court, the provisions contained in the Legal Services Authorities Act, 1987 shall govern the parties in the matter of resolving the dispute and also in the matter of refund of the court fees. There is a specific provision in the Legal Services Authorities Act, 1987 which provides for refund of the court fee when the matter is settled by the *Lok Adalat* and as per section 16 of the Court-fees Act, 1870 the entire court fee paid on the plaint is liable to be refunded and the court which has referred the matter shall issue a certificate to the plaintiff to receive the amount from the collector.[30]

In the Code of Civil Procedure (Amendment) Act, 2002, there is no such provision directing refund of court-fee. Even in the Code of Civil Procedure (Amendment) Act, 1999, section 34 inserted a new section 16 in the Court Fees Act, 1870, in which the refund of court-fee is provided only in a case where the court refers the parties to the suit to any one of the mode of settlement of disputes referred to in section 89 of the Code of Civil Procedure 1908 the plaintiff shall be entitled to a certificate from the court authorising him to receive back from the collector, the full amount of the fee paid in respect of such plaint, but no such provision has been made when the appeal is held to be not maintainable. In the circumstances, the provision of the Court Fees Act, 1870 can be seen. The refund of court fee is envisaged in sections 13, 14 and 15 of the Court Fees Act, 1870. Under section 13 of the Court Fees Act, 1870, the refund of court fees of Memorandum of Appeal can be ordered in the circumstances when an appeal or plaint, which has been rejected by the lower court on any of the grounds mentioned in the CPC, is ordered to be received or if a suit is remanded in appeal, on any of the grounds mentioned in section 35 (now O XLI, rule 23 of the CPC) of the same CPC, for a second decision by the lower court, the appellate court is authorised to grant the appellant a certificate for refund. Section 14 provides refund of court fee on an application for review of judgment and section 15 provides for refund of court fee where the court reverses or modifies

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28. *Afcons Infrastructure Ltd v Cherian Varkey Construction Pvt Ltd*, 2007 (1) Ker LT 196 : 2007 (1) Ker LJ 333.
29. *Afcons Infrastructure Ltd v Cherian Varkey Construction Pvt Ltd*, 2007 (1) Ker LT 196 : 2007 (1) Ker LJ 333.
30. *Vasudevan v State of Kerala*, AIR 2004 Ker 43.

its former decision on the ground of mistake. But, in the present case, the right of appeal which was available prior to 1 July 2002 has been taken away by the Code of Civil Procedure (Amendment) Act, 2002 without making any such provision of refund of court fee.[31]

[s 89.13] This Section and O X, rules 1A, 1B and 1C

Order X, rules 1-A to 1-C do not specifically refer to the manner in which the powers of the court under section 89 to refer any of the four methods of ADR is to be exercised. But it cannot detract against the power of the court to invoke the jurisdiction under section 89 of the CPC. If the substantive provision in the CPC confers a power in the courts to make a reference, it would be improper and impermissible to argue against such provision in the statute with the help of the rules framed or not framed.[32]

A careful reading of rules 1-A to 1-C of O X must leave one with the unmistakable impression that the rule making authority had not considered the possibility of parties not agreeing for any one of the four methods available under section 89. The rules do not contemplate the procedure that is to be followed by the courts in the event of disagreement between parties. O X, rules 1-A to 1-C do not cover the entire gamut of possibilities, which may arise under section 89. It would, therefore, be myopic to come to any conclusion on the basis of O X, rules 1-A to 1-C about the power of the court to make a reference in the latter eventuality where the parties do not agree for any of the four courses.[33]

Special Case

[S 90] Power to state case for opinion of Court.—Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

See O XXXVI.

SYNOPSIS

[s 90.1]	Reopening of a Case..... 1040	[s 90.3]	Jurisdiction..... 1041
[s 90.2]	Separate Agreement for Court's Opinion—Should be Registered as Separate Suit..... 1040		

[s 90.1] Reopening of a Case

Where a special case is stated by consent, it can be re-opened only by mutual consent.[34]

[s 90.2] Separate Agreement for Court's Opinion—Should be Registered as Separate Suit

In the lower court record as many as 13 written agreements are available executed by 13 individuals separately and each agreement contains the land of different descriptions with

31. *Food Corp of India v Munnilal Singh*, AIR 2003 MP 66.
32. *Afcons Infrastructure Ltd v Cherian Varkey Construction Pvt Ltd*, 2007 (1) Ker LT 196 : 2007 (1) Ker LJ 383
33. *Afcons Infrastructure Ltd v Cherian Varkey Construction Pvt Ltd*, 2007 (1) Ker LT 196 : 2007 (1) Ker LJ 383
34. *PW Monie v The Rev Robert Scott*, AIR 1918 Bom 88 : ILR (1919) 43 Bom 281, p 298.

different quantums belonging to the 13 individual persons and as such it cannot be held that there was one written agreement seeking reference of the dispute for the opinion of the court as contemplated under section 90 of the CPC. Every agreement should have been *treated as individual* case seeking reference and the learned trial court should have registered individual agreement as a separate reference case, notwithstanding for convenience sake, trial could have been held analogously. Since the agreements appear to be separate with reference to separate land belonging to the individuals, the revision petition filed by present petitioner without having arrayed the other 12 individuals is maintainable. The petitioner is interested and concerned with his own land described in the agreement seeking reference and he has no way been concerned with the other land described in the other agreements relating to other 12 persons.[35]

[s 90.3] Jurisdiction

On perusal of the agreement entered into in writing by the petitioner and the respondent it appears that no estimated value of the property described in the agreement and thus the requirement O XXXVI, rule 2 appears to be lacking. In that view of the legal position, the learned trial court should not have assumed jurisdiction.

The object of putting the estimated value as has been required under rule 2 is very much purposeful as it is manifestly revealed from rule 3, because rule 3 says that estimated value put in the agreement would decide the pecuniary jurisdiction of the court, so judgment and decree of the trial court are without jurisdiction.[36]

[37] *[Public nuisances and other wrongful acts affecting the public]*

[S 91] Public nuisances and other wrongful acts affecting the public.—[38][(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,—

(*a*) by the Advocate-General, or

(*b*) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.]

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

SYNOPSIS

[s 91.1]	Changes in the Section 1042	[s 91.6]	Declaration 1046
[s 91.2]	Application of the Section 1042	[s 91.7]	Other Relief 1046
[s 91.3]	Remedies for a Public Nuisance 1042	[s 91.8]	Sub-section (2) of Section 91 1046
[s 91.4]	Nature of Proceeding Under this Section 1044	[s 91.9]	Instances of Public Nuisance 1047
[s 91.5]	Injunction 1045	[s 91.10]	Representative Suit by Limited Class of Villagers 1048

35. *Ramdhan Sinha v Notified Area Authority, Kailashahar*, AIR 2001 Gau 149.
36. *Ramdhan Sinha v Notified Area Authority, Kailashahar*, AIR 2001 Gau 149.
37. Substituted by Act 104 of 1976, section 30, for the former heading (w.e.f. 1-2-1977).
38. Substituted by Act 104 of 1976, section 30, for sub-section (1) (w.e.f. 1-2-1977).

[s 91.1] Changes in the Section

The Amendment Act, 1976 has altered the marginal note and sub-section (1) whereas sub-section (2) remains as before. Before the Amendment Act, the marginal note to the section was "public nuisances". Sub-section (1) before its amendment authorised suits in respect of a public nuisance either by the Advocate-General or by two or more persons who had obtained his consent in writing. Before its amendment, sub-section (1) was as follows:

> (1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

Under the amended sub-section (1), a suit under this section is permissible both in the case of a public nuisance and of other wrongful acts affecting or likely to affect the public. Where a suit is filed not by the Advocate-General but by two or more persons, they have to obtain leave of the court and not the written consent of the Advocate General.

[s 91.2] Application of the Section

The section creates a right of action where there was none before. But it does not take away a pre-existing right.[39] It applies to public nuisances which affect public rights, such as a public highway. To attract the section there must be obstruction to a public highway and that obstruction must amount to a public nuisance.[40] There is a distinction between a highway which is dedicated to the public at large, and one which is intended to be used by particular classes or limited sections of the public.[41] The section does not apply where the right of way is not in respect of a highway but is a right of way claimed by only certain classes of persons.[42] A blind pathway not used by the public generally, but only by the residents of a few houses only, is not a public road. In an action for removing a nuisance therefrom by such residents, the consent of the Advocate-General (now leave of the court) is not necessary.[43] The section, as amended, also applies to other wrongful acts affecting or likely to affect the public. Setting of an oil expeller cannot be stopped by interim order on the ground that it makes noise. But it can certainly be restrained after 9.00 pm and on weekly holidays.[44] Private nuisance, involving special damage is neither alleged nor proved in this case; therefore, the provisions postulated under sub-section (2) of section 91 of the CPC are not attracted.[45]

[s 91.3] Remedies for a Public Nuisance

Nuisances are of two kinds—public and private.

A public nuisance is an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the

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39. *Hakim Mahmud Hasan v L Amba Prasad*, AIR 1934 All 941; *Choudhury Bibhuti Narayan Singh v Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur*, AIR 1940 Pat 449.
40. *Parameshwarappa v Krishnachari*, (1958) Andh LT 814.
41. *Ramabrahma Sastri v Lakshmi Narasimham*, AIR 1957 AP 44 : (1956) 2 Andh WR 578.
42. *Dalgobinda Mahata v Khatu Mahatha*, AIR 1948 Pat 183; *Governor-General in Council v Awadhoo Balwant Rao*, AIR 1946 Nag 228 : (1946) ILR Nag 246; *Ram Kali v Munna Lal*, AIR 1939 All 586 : (1939) ILR All 754; *Bandaru Venkayya v Lakshmi Narasayya*, AIR 1957 AP 975.
43. *Brajabandhu Mohapatra v Gopal Chandra Mohapatra*, AIR 1973 Ori 189 : (1972) ILR Cut 1407 : (1972) 38 CLT 1309.
44. *Sunil Kumar Verma v Sri Raghubir Singh*, AIR 1991 All 209.
45. *Kanti v UIT Bikaner*, AIR 1998 Raj 108.

vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right [Indian Penal Code, 1860, section 268].

Where a person commits a public nuisance—

(i) he is liable to criminal prosecution under the Indian Penal Code, 1860;

(ii) he may be proceeded against under this section;

(iii) he is liable to damages in a suit at the instance of a private individual who suffers special damage by reason of the nuisance, that is, damage beyond what is suffered by him in common with other persons affected by the nuisance.[46] Where a number of persons have suffered special damage, a representative suit under O X, rule 8 can be brought, and the consent of the Advocate-General is not necessary.[47]

These remedies, it is conceived, are concurrent. The institution of a criminal prosecution does not bar a suit under this section,[48] nor does the institution of a suit under this section bar a criminal prosecution, though cases may occur where the court may, in its discretion, refuse leave where a criminal prosecution is pending in respect of the same act or omission.

ILLUSTRATIONS

A keeps his horses and wagons standing for an unreasonable time in the highway.

(a) This is a public nuisance for which a criminal prosecution may be instituted against *A*.

(b) Further, a suit may be instituted against *A* under this section by the Advocate-General or by two or more persons with the leave of the court, though no special damage has been caused, for an order requiring *A* to abate the nuisance and for an injunction restraining him from continuing the nuisance. If the nuisance is repeated or continued, notwithstanding the injunction, he is liable for contempt where the decree granting the injunction is passed by a High Court,[49] or, he may be proceeded against under O XXXI, rule 32, below, or he may be prosecuted and punished with imprisonment or fine or both, under section 291 of the Indian Penal Code, 1860.

(c) If the horses and wagons are kept standing opposite a man's house, so that the access of customers is obstructed, the house is darkened, and the people in it are annoyed by bad smells, a suit may be brought against *A* by the occupiers for damages, the damage so caused being sufficiently special to entitle them to maintain the action.[50] The mere fact that a suit has been instituted under this section against *A* by the Advocate-General at the relation of the occupiers, or by the occupiers themselves as plaintiffs, with the consent of the Advocate-General, will not preclude the occupiers from maintaining a private action against *A* for the special damage caused to them. *Quaere* whether they can claim damages for the special damage in a suit brought under this section? It is conceived they cannot. It is submitted that the words "such other relief as may be appropriate" do not include such damages. In England, however, persons who have suffered special damage from a public nuisance, may join the Attorney-General as co-plaintiffs in a suit brought by the Attorney-General at their relation and the Attorney-General may claim an injunction, and the persons specially damnified by the nuisance, may claim damages.[51] It is debatable

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46. *Surendra Kumar Basu v District Board, Nadia*, AIR 1942 Cal 360 : (1942) ILR 1 Cal 533 : (1941) 46 Cal WN 261 : (1942) 75 Cal LJ 157; *Hubert v Groves*, (1794) 1 Esp 148; *Winterbottom v Lord Derby*, (1867) LR 2 Ex 316; *Satku Valad Kadir Sausare v Ibrahim Aga Valad Mirza Aga*, (1878) ILR 2 Bom 457; *Bhawan Singh v Narottam Singh*, (1909) ILR 31 All 444; *Muhammad Raza Khan v Muhammad Askari*, AIR 1924 All 599 : (1924) ILR 46 All 470; *Manilal Jibhai v Ishvarbhai Samalbhai*, AIR 1925 Bom 367 : (1925) 27 Bom LR 421; *Ardeshir Jivanji Mistri v Aimai Kuvarji*, AIR 1929 Bom 94 : (1929) ILR 53 Bom 187.
47. *SK Murugesa Mudaly v Baruda Arunagiri Mudaly*, AIR 1951 Mad 498.
48. Cf *AG v Proprietor of the Bradford Canal*, (1866) LR 2 Eq 71.
49. *Kochappa v Sachi Devi*, (1902) ILR 26 Mad 494.
50. *Benjamin v Storr*, (1874) LR 9 CP 400; *Poorobashi Pal v Bhoobun Chunder Dev*, (1874) 21 WR 408.
51. For instance, *AG v Logan*, [1891] 2 QB 100.

> whether such a procedure is permissible under the present section. But it is submitted that the mere fact that the section finds its place in Pt v headed "Special Proceedings" under the division "public nuisances and other wrongful acts affecting the public" ought not to be a reason for driving the relators to another suit and thus causing avoidable multiplicity of suits. It is allowed in England, even though the action in the name of the Attorney-General is one which relates to public matters. Even when the relators are allowed to be joined as co-plaintiffs and seek special damages, the action, in substance, remains one relating to public matters. Is there, in such a case, misjoinder of parties or causes of action? It is not so considered by the courts in England.[52]

The Madhya Pradesh High Court has rendered a Full Bench Judgment which goes a long way in clarifying several questions relating to remedies against public nuisance. It has been held that besides the provisions contained in section 91 of the CPC for taking action against public nuisance, there are other remedies which stand independently.[53] Explaining the point of law, AK Patnaik, CJ, (as he then was), speaking for the Full Bench, observed as follows:

> Sub-section (1) of section 91, Civil Procedure Code provides that in case of public nuisance or other wrongful act affecting or likely to affect the public, a suit for declaration and injunction or for such other relief as may be appropriated in the circumstances may be instituted and sub-section (2) of section 91 of Civil Procedure Code states that nothing in the section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. Thus, it is clear that section 91(1) of the Civil Procedure Code is not exhaustive of the remedies that are available to a party even in case of a public nuisance or other wrongful act affecting or likely to affect the public. The remedy of the Corporation and any other person under sub-section (5) of section 307 of the Act of 1956 is independent of the provisions of section 91 of Civil Procedure Code and not only the Corporation but any other person can apply to the District Court for injunction for removal or alteration of a building on the ground that the provisions of the Act of 1956 or the bye-laws made thereunder have been contravened.[54]

Explaining the *locus standi* of a person other than Municipal Corporation for taking action under section 307 (5) of the Madhya Pradesh Municipal Corporation Act, 1956 for removal or alteration of any building, the Full Bench further observed that the right under section 307 (5) of the Act is not restricted to a person affected by violation complained of but encompassed all persons resident within the area to which the Act applies.[55]

[s 91.4] Nature of Proceeding Under this Section

Proceedings for a public nuisance in England were formerly commenced by an information filed by the Attorney-General in the High Court of Chancery. They are now instituted by action in the High Court of Justice (see RSC, O I, rule 1). The action may be brought like the Information—

(i) by the Attorney-General acting *ex-officio*; or

(ii) by the Attorney-General at the relation of a private individual.

Under the present section, a suit for a public nuisance may be instituted—

(i) by the Advocate-General acting *ex-officio*; or

(ii) by the Advocate-General at the instance of relators; or

(iii) by two or more persons having obtained leave of the court.

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52. *AG v Logan*, [1891] 2 QB 100.
53. *Dilip Kaushal v State of MP*, AIR 2008 MP 324 (FB) (Indore Bench).
54. *Dilip Kaushal v State of MP*, AIR 2008 MP 324, para 9 at p 327 (FB) (Indore Bench).
55. *Dilip Kaushal v State of MP*, AIR 2008 MP 324, para 7 at pp 326–27 (FB) (Indore Bench).

(a) Difference Between Suit by Advocate-General Acting Ex-officio and Suit by him as the Relation of a Private Individual.—Except for the purposes of costs, there is no difference between an *ex-officio* suit and a suit at the relation of private individuals. In both cases the sovereign, as *parens patriae*, sues by the Advocate-General.[56]

When the Attorney-General proceeds at the relation of a private person or a corporation, he takes the proceeding as representing the Crown, and the Crown, through the Attorney General, is really a party to the litigation. It is quite true that when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as the relator, and to make him responsible for the costs, but I do not think that this practice, in any sense, makes the relator a party to the proceedings, although he is responsible for the costs, any more than (to take a converse case) an infant who brings an action is responsible for the costs of it. If I am right, it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown.[57]

When once the matter is in the hands of the Attorney-General, it becomes substantially a public proceeding, in which the Attorney-General, if there be no relator, becomes as prosecutor responsible for the costs, while if a relator is introduced, the responsibility for costs is upon the latter.[58]

(b) Relator's Interest in the Suit.—A relator need not have any personal interest in the matter, except as one of the public; he need not, in fact, be himself damaged at all.[59]

(c) Interest of Persons Suing with Leave of the Court.—Persons suing in respect of a public nuisance with leave of the court under this section need not have any personal interest in the matter of the suit, except as members of the public. They are entitled to sue, though no special damage has been caused to them. In other words they need not have a cause of action in themselves. Obstruction to village pathways falls within the definition of public nuisance under section 268 of the Indian Penal Code, 1860 and therefore a suit for removal of such obstruction with the court's leave would be permissible in the absence of any special damage.[60] This principle would equally apply to cases of other wrongful acts affecting or likely to affect the public.

[s 91.5] Injunction

The following are some of the leading principles by which the courts are guided in granting injunctions:

(i) The injury complained of must be either irreparable or continuous.[61] The remedy by way of injunction is therefore not appropriate for damage which is, in its nature, temporary and intermittent,[62] or is accidental and occasional,[63] or for an interference with legal rights which is trifling in amount and effect.[64]

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56. *AG v Cockermouth Local Board*, (1874) LR 18 Eq 172 per Jessel MR.
57. *AG v Logan*, [1891] 2 QB 100.
58. *AG v Logan*, [1891] 2 QB 100.
59. *AG v Logan*, [1891] 2 QB 100.
60. *Chandrawati Devi v Rameshwar Kaviraj*, AIR 1968 Pat 422 : (1968) ILR 47 Pat 326 : (1968) 1 PJLR 449.
61. *AG v Cambridge Gas Consumers Co*, (1868) LR 4 Ch App 71, p 81.
62. *AG v Sheffield Gas Consumers Co*, (1853) 3 DMG 304; *AG v Cambridge Gas Consumers Co*, (1868) LR 4 Ch App 71.
63. *Cooke v Forbes*, (1867–1868) LR 5 Eq 166.
64. *Gaunt v Fynney*, (1872) LR 8 Ch App 8; *Llanduano Urban District Council v Woods*, (1899) 2 Ch 705.

(ii) Apprehension of future mischief from something in itself lawful and capable of being done without creating a nuisance is no ground for an injunction.[65] "There must, if no actual damage is proved, be proof of imminent danger, and there must also he proof that the apprehended damage will, if it comes, be very substantial".[66]

(iii) Though no substantial damage is proved, the court may grant an injunction if the defendants claim the right to continue doing that which the court has held they are not entitled to do.[67]

(iv) Where an illegal act is committed which in its nature tends to the injury of the public, an injunction will be granted to restrain the act without proof of actual injury to the public.[68]

(v) Where the plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the court to enquire, in what way, the defendant can best remove it; the plaintiff is entitled to an injunction at once, and it is the duty of the defendant to find his own way out of the difficulty whatever inconvenience or expense it may put him to. But where the difficulty of removing the nuisance is considerable, the court may suspend the operation of the injunction for a time.[69]

(vi) No length of time can legalise a public nuisance. Though twelve-years-user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance apart from the length of time for which it may have continued.[70]

(vii) A public nuisance is not excused on the ground that it causes some convenience or advantage (Indian Penal Code, 1860, section 268).

[s 91.6] Declaration

A suit may be instituted under this section by two or more Mohammedans for a declaration that they are entitled to carry *tabuts* in procession along a public road for immersion in the sea against persons who obstruct them in doing so and for an injunction restraining interference in the exercise of this right.[71]

[s 91.7] Other Relief

The removal of a public nuisance, e.g., encroachment on a public street, may be directed by the court under this part of the section.[72]

[s 91.8] Sub-section (2) of Section 91

Section 91, clause (2) of the CPC makes it clear that this section would not limit or otherwise affect any right of suit which may exist independently of its provisions, thereby

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65. *AG v Corp of Manchester*, (1893) 2 Ch 87.
66. *Fletcher v Bealey*, (1884) 28 Ch D 688.
67. *AG v Action Local Board*, (1882) 22 Ch D 221.
68. *AG v Shrewsbury Bridge Co*, (1882) 21 CD 752.
69. *AG v Colney Hatch Lunatic Asylum*, (1868) LR 4 Ch 146.
70. *Municipal Commr of the Suburbs of Calcutta v Mahomed Ali*, (1871) 7 Beng LR 499; *Weld v Hornby*, (1806) 7 East 195.
71. *Satku Valad Kadir Sausare v Ibrahim Aga Valad Mirza Aga*, (1878) ILR 2 Bom 457; *Kandaswamy Mudal v Sabraya Mudali*, (1909) ILR 32 Mad 478. See section 9, note headed "Religious processions".
72. *Manilal Jibhai v Ishvarbhai Samalbhai*, AIR 1925 Bom 367 : (1925) 27 Bom LR 421.

meaning that if any individual gets affected by such public nuisance being caused, he or she, would have the same right to file a suit for declaration and injunction and for mandatory injunction. Section 91 of the CPC does not create a bar on any individual from resorting to the court for relief in such matters.[73]

The Code of Criminal Procedure, 1973 contains provisions for the removal of a public nuisance by summary proceedings before a magistrate.[74] The High Court of Calcutta has held that where special damage is caused to a private individual by a public nuisance, he has a right of suit against the person causing the nuisance for a removal of the nuisance, and a civil court may pass a decree to that effect, notwithstanding that an order for the like purpose might be made by a magistrate.[75] This right is saved by sub-section (2). There is a difference of opinion as to whether a member of the public can maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proof of special damage. The preponderance of authority is in favour of the view that such a suit is maintainable; and that the rule of England Law *contra* has no application to this country.[76] But there are also decisions which have taken a different view.[77]

[s 91.9] Instances of Public Nuisance

> A nuisance which inflicts damage, injury or inconvenience on the public or a class of the public which comes within its sphere of operation, constitutes an indictable misdemeanour known as common or public nuisance which may also, in many cases, be dealt with summarily; but if a private individual can show that he has suffered some particular direct and substantial damage to person or property over and above that sustained by the community at large, he has a right of action in tort for that nuisance.[78]

Building over any part of a public street or closing a thoroughfare existing from time immemorial[79] or the keeping of a regular, though temporary, heap of rubbish on a thoroughfare at a busy and frequented part of the town,[80] is a public nuisance, for, such act must necessarily cause obstruction to persons who may have occasion to use their public right over the part encroached upon. The public is entitled to the full width of the public street, however wide it may be, and whoever appropriates any part of the street by building over it, infringes the

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73. *Perumal Naicker v Rathina Naicker*, AIR 2004 Mad 492.
74. As to conditional orders by magistrates for the removal of nuisances, see sections 133–143 of the Code of Criminal Procedure; as to power of a magistrate to issue orders in urgent cases where a speedy remedy is desirable, see section 144 of the Code of Criminal Procedure.
75. *Sahebzada Roy v Raj Koomar Singh*, (1878) ILR 3 Cal 20; *Jina Ranchod v Jodha Ghella*, (1863) 1 BHC 1 (AC), which appears to be imperfectly reported.
76. *Mandakini Debee v Basantkumaree Dabee*, AIR 1933 Cal 884 : (1933) ILR 60 Cal 1003; *Municipal Committee, Delhi v Mohammad Ibrahim*, AIR 1935 Lah 196 : (1935) ILR 16 Lah 517; *Munusami Chetti v Periya Kuppusami Chetti*, AIR 1939 Mad 691 : (1939) ILR Mad 870 : (1939) 1 Mad LJ 392; *Kodavalur Subbamma v Lota Narayanamurti*, AIR 1949 Mad 634; *Somu Nagiroddi v Gouru-gari Lingareddi*, AIR 1956 AP 235; *Thangavelu Nadar v Sudalaimada Nadar*, AIR 1962 Mad 431 : (1962) 2 Mad LJ 202; *Moolchand v Chhoga*, AIR 1963 Raj 25 : (1961) ILR Raj 836; *Sri Ram Singh v Patti*, AIR 1968 All 18; *Perumal Naicker v Rathina Naicker*, AIR 2004 Mad 492.
77. *Kella Peda Appayya v Lanka Narasimhalu*, AIR 1938 Mad 338; *Surendra Kumar Basu v District Board, Nadia*, AIR 1942 Cal 360; *Choudhury Bibhuti Narayan Singh v Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur*, AIR 1940 Pat 449 : (1940) ILR 19 Pat 208; *Bhuloganathan Pillai v Rajagopala Pillai*, AIR 1941 Mad 669; *Kanti v UIT, Bikaner*, AIR 1998 Raj 108.
78. *Halsbury's Laws of England*, 3rd Edn, vol 37, LexisNexis, p 122, para 210; *Choudhury Bibhuti Narayan Singh v Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur*, AIR 1940 Pat 449.
79. *Mehr Mohammad Khan v Jamadar Adalat Khan*, AIR 1937 Lah 425 : (1937) ILR 18 Lah 629.
80. *Municipal Board, Lucknow v Mt Ram Devi*, AIR 1941 Oudh 52 at p 54 col 2.

right of the public road and the part built over.[81] An obstruction is not the less a nuisance, because it is on a part of the street not commonly used, or otherwise leaves room enough for the ordinary amount of traffic.[82] On the other hand, the High Court of Calcutta has held that as regards tidal navigable rivers, a slight encroachment does not necessarily constitute a public nuisance. "It seems to us rather", the court said, "that there must be some evidence that such encroachment causes one of the results specified in Section 268" of the Indian Penal Code, 1860.[83]

A finding regarding public nuisance should be based on evidence. An interim order of injunction to stop the working of commercial establishment, would result in its closure. Such an order should not be passed on a mere allegation that it creates noise etc. Full evidence should be required.[84]

Where sale deed was executed by member of a co-operative society and the property purchased was enclosed with a plan to provide amenities to members of the Society, it was held by the Madras High Court that mere conversion of certain areas earmarked for amenities by co-operative society cannot be termed as public nuisance.[85]

Acts which merely offend the sentiments of a class do not amount to a public nuisance. In India, it must often happen that acts are done by the followers of one creed which must be offensive to the sentiments of those who follow other creeds. Upon this principle, it has been held that the placing of a Mahommedan symbol in the neighbourhood of a Hindu temple is not a public nuisance, though likely to cause annoyance to Hindus.[86] Similarly, it is not a public nuisance, to expose on the verandah of a house, meat cut up for a dinner, though it may annoy the feelings of Jains, frequenting a temple close by the house.[87] But wilfully slaughtering cattle in a public street so that the groans and blood of the animals could be heard and seen by the passers-by is a public nuisance, for, it must necessarily cause annoyance to every one of the passers-by-Hindu, European, Mahommedan or other, who was not utterly devoid, not merely of refinement, but also of all proper feelings.[88]

[s 91.10] Representative Suit by Limited Class of Villagers

As a general rule, the consent of the Advocate-General, now, the leave of the court, would be necessary for a suit with regard to a public right. But an action brought by a particular section is an exception to the general rule. Hence, a representative suit brought by a limited class of villagers for rite of passage regarding a *rasta* is maintainable without such consent or leave and without proof of special damage.[89] Order I, rule 8, is only an enabling provision.

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81. *Queen-Empress v Virappa Chetti*, (1897) ILR 20 Mad 433.
82. *Turner v Ringwood Highway Board*, (1870) LR 9 Eq 418.
83. *Jugal Das Dalal v Queen-Empress*, (1893) ILR 20 Cal 665; dissenting from *dicta* to the contrary in *Re Umesh Chandra Kar*, (1887) ILR 14 Cal 656.
84. *Sunil Kumar Verma v Sri Raghubir Singh*, AIR 1991 All 209.
85. *A Sarangan v S Vadivelu Mudaliar*, 2009 (3) Mad LJ 463 : 2009 (2) Mad LW 532.
86. *Muttumira v Queen-Empress*, (1883) ILR 7 Mad 590; *Surendra Kumar Basu v District Board, Nadia*, AIR 1942 Cal 360 : (1942) 1 ILR Cal 533 : (1941) 46 Cal WN 261 : (1942) 75 Cal LJ 157.
87. *Queen-Empress v Byramji Edalji*, (1888) ILR 12 Bom 437.
88. *Queen-Empress v Zakhiruddin*, (1888) ILR 10 All 44.
89. *Faqir Chand v Sooraj Singh*, AIR 1949 All 467; *Governor General in Council v Awadhoo Balwant Rai*, AIR 1946 Nag 228 : (1946) ILR Nag 246; *Ramdahin Pande v Parmeshwar Singh*, AIR 1940 Pat 160; *Pakkle v P Arunasami Ganapathi*, AIR 1969 Mad 351 : (1969) ILR 1 Mad 603 : (1969) 1 Mad LJ 638.

It does not compel one to represent many if his action is maintainable without the joinder of other persons.[90]

If special damage is proved or presumed, then, in spite of the fact that it is a case falling under public nuisance, a suit by one who suffers or is presumed to have suffered such damage, is maintainable and no consent of the Advocate-General (now leave of the court) would be necessary.[91] For instance, a person whose right to pass along a highway is obstructed or interfered with can sue in respect of a public nuisance without having to prove special damage.[92] In such a case, he is deemed to have suffered loss without proof either of the mode or quantum of such loss.[93] Accordingly, where a plaintiff, who, as a member of a class vitally affected by a public nuisance, sues on his own behalf, alleging special damage to himself need not follow the procedure laid down either in this section or O I, rule 8.[94]

[95][**S 92] Public charities.**—(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the [96][leave of the Court] may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

[97][(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;]

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

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90. *Surendra Kumar Basu v District Board, Nadia*, AIR 1942 Cal 360; *Ramghulam Khatik v Ramkhelawan Ram*, AIR 1937 Pat 481 : (1936) ILR 16 Pat 190.
91. *Sanker Dayal Agarwala v State of UP*, AIR 1973 All 310.
92. *Firm Pyarelal Satpal v Santlal*, AIR 1972 Raj 103.
93. *Brajabandhu Mohapatra v Gopal Chandra Mohapatra*, AIR 1973 Ori 189 : (1972) ILR Cut 1407 : (1972) 38 CLT 1309.
94. *Kadarbhai Mahomedbhai v Haribhai Ranchhodbhai Desai*, AIR 1974 Guj 120 : (1973) 14 Guj LR 245.
95. Section 92 shall not apply to any religious trust in Bihar, *See* Bihar Act of 1951.
96. Substituted by Act 104 of 1976, sectioni 31 for "consent in writing of the Advocate-General" (w.e.f. 1-2-1977).
97. Inserted by Act 66 of 1956, section 9 (w.e.f. 1-1-1957).

(2) Save as provided by the Religious Endowments Act, 1863, [98][or by any corresponding law in force in [99][the territories which, immediately before the 1st November, 1956, were comprised in Part B States]], no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

[100][(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied *cypres* in one or more of the following circumstances, namely:—

(a) where the original purposes of the trust, in whole or in part,—

(i) have been, as far as may be, fulfilled; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down,—

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, or

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.]

SYNOPSIS

[s 92.1] State Amendment 1051
[s 92.2] Changes in the Section..... 1051
[s 92.3] Romilly's Act 1052
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98. Inserted by Act 2 of 1951, section 13 (w.e.f. 1-4-1951).
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100. Inserted by Act 104 of 1976, section 31 (w.e.f. 1-2-1977).

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[s 92.1] State Amendment

Uttar Pradesh.—The following amendment were made by Uttar Pradesh Act 24 of 1954, section 2 and Schedule, Item 5, entry 5, dated 30-11-1954.

In section 92, in sub-section (1), after clause (b), the following shall be added as a new clause (bb):—

"(bb) for delivery of possession of any trust property against a person, who has ceased to be trustee or has been removed".

[s 92.2] Changes in the Section

The section corresponds with section 539 of the Code of Civil Procedure, 1883. It was changed in 1908 in the following particulars:

(i) The words "public purposes of a charitable or religious purposes" were substituted for the words "public, charitable or religious purposes" to remove the misconception that the word "public" was merely to coordinate with "charitable" or "religious".

(ii) The words "whether contentious or not" were added to give effect to a Calcutta decision. See note "whether contentious or not" below.

(iii) The words "in the principal Civil court of original jurisdiction" were substituted for the words "in the High Court or the District court".

(iv) The words "or any other court empowered in that behalf by the Local Government" (now State Government) were added in order to invest courts subordinate to the district courts with power to try cases under this section.

(v) Clause (a) was added to supersede a Madras decision and to give effect to the decisions of Calcutta, Bombay and Allahabad High Courts cited in the note:

"clause (a): removing any trustee" below.

(vi) Clause (d) was added to give legislative recognition to a Bombay decision cited in the note "clause (d): directing accounts and inquiries" below.

(vii) Sub-section (2) was added to give effect to the view taken by the Bombay High Court that the section is mandatory and to supersede the decisions of the other high courts to the contrary. See note "sub-section (2): this section is mandatory' below.

(viii) By section 13 of the Code of Civil Procedure (Amendment) Act, 1951, the words "or by any corresponding law in force in a Pt B State" were inserted after the figures "1863".

(ix) The words "the territories which, immediately before the l November 1956 were comprised in Pt B States" were substituted for the words "a Pt B State" by the Adaptation of Laws (No 2) Order, 1956.

(x) The words "leave of the court" have been substituted for the words "the consent in writing of the Advocate-General" by the Amendment Act, 1976.

(xi) Sub-section (3) is new and has been added by the Amendment Act, 1976.

[s 92.3] Romilly's Act

The present section has been borrowed in part from 52 Geo 3 c 101, called Romilly's Act. As to the applicability of decisions under that statute, to case under the present section, see the undermentioned case.[101]

[s 92.4] Object of the Section

> The real object of the special provisions of Section 539 seems to us to be clear. Persons interested in any trust were, if they could all join, always competent to maintain a suit against any trustee for his removal for breach of trust; but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate-General or of the Collector of the District; and this condition was imposed to prevent an indefinite

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101. *Rangasami Naickan v Varadappa Naicken*, (1894) ILR 17 Mad 462.

> number of reckless and harassing suits being brought against trustees by different persons interested in the trust.[102]

The main purpose of the section is thus, to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits can either be filed by the Advocate-General or by two persons having an interest in the trust with the written consent of the Advocate-General (now with leave of the court). Before the Advocate General files the suit or gives his consent, he has to satisfy himself that there is a *prima facie* case of either a breach of trust or of the necessity of obtaining directions from the court.[103] One of the objects which led to the enactment of section 92 was to enable two or more persons interested in any trust created for a public purpose of a charitable or religious nature should be enabled to file a suit for the release set out in that section without having to join all the beneficiary since it would be highly inconvenient and impracticable for all the beneficiaries to join in the suit; hence any two or more of them were given the right to institute a suit for the relief mentioned in the said section 92 of the CPC. However, it was considered desirable to prevent a public trust from being harassed or put to legal expenses by reckless or frivolous suits being brought against the trustees and hence, a provision was made for leave of the court having to be obtained before the suit is instituted.[104] Where, in proceedings emanating from a suit under section 92, the trial court on consideration of relevant documents concluded that the temple in question was a private temple, the high court was found to be wrong by the Supreme Court in remanding the matter back for *de novo* consideration when the plaintiffs had not let sufficient evidence to establish their case.[105]

[s 92.5] Essential Conditions

A bare perusal of the said section would show that a suit can be instituted in respect of a public trust by the Advocate-General or two or more persons having an interest in the trust after obtaining leave of the court in the principal civil court of original jurisdiction. An analysis of these provisions will show that the provisions of section 92 of the CPC can be invoked only when the following conditions are satisfied:

(a) It should be with regard to a public trust to obtain a decree for the purposes mentioned in the said provision.

(b) Suit should be on behalf of the Advocate-General or two or more persons having an interest in the trust.

(c) Leave of the court has to be obtained for instituting the suit.

From the above, it is clear that before granting leave to institute the suit, proceedings for granting leave have to be held in court. In these proceedings the court has to be satisfied that the trust is a public trust and the persons who want to institute the suit are interested in the trust. It is only on the satisfaction of the aforesaid conditions that the permission to institute the suit can be granted by the court for the relief mentioned in the said section 92 of the CPC.[106]

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102. *Narendrasingji Ranjitsingji v Udesinghji*, AIR 1947 Bom 451 : (1947) 49 Bom LR 318; *Managing Committee of Syed Salar Endowment v Hakim Mohd Ahsan*, AIR 1947 Oudh 22 : (1947) ILR 21 Luck 222; *Gour Mohun Das Baishnav v Sajedur Raja Ghowdhuri*, (1897) ILR 24 Cal 418, 425; *Budree Das Mukim v Chooni Lal Johurry*, (1906) ILR 33 Cal 789; *D'Cruz v D'Silva*, (1909) ILR 32 Mad 131.
103. *Chairman Madappa v MN Mahanthadevaru*, AIR 1966 SC 878.
104. *RM Narayana Chettiar v N Lakshmanan Chettiar*, (1991) 1 SCC 48.
105. *Sree Panimoola Devi Temple v Bhuvanachandran Pillai*, (2015) 12 SCC 698 : 2014 (13) Scale 485.
106. *Baba Bhoot Nath Dharmart Nyas v Tajander Singh*, AIR 2003 All 160.

Where the memorandum of association of the institution showed the properties in the name of President and Secretary with power to sell them, it was held that it clearly indicated that the institution was not a trust and as such suit under section 92 was not maintained.[107]

[s 92.6] Application of the Section and Legislative Intervention

This section has no application unless three conditions are fulfilled: the suit relates to a public, charitable or religious trust; it is founded on an allegation of breach of trust or the direction of the court is required for administration of the trust and the reliefs claimed are those which are mentioned in the section.[108] Such a suit is one of a special nature and therefore, if the allegation of breach of trust is not substantial, or if the plaintiff fails to make out a case for a direction for proper administration, the very foundation of the suit would fail.[109] Where there is no scheme in existence, the court cannot be approached merely on the ground that the trustees had become old in age. The plaint must show why under the existing arrangement, steps cannot be taken to secure proper management. Such a suit does not disclose any necessity to issue directions regarding scheme.[110] A suit for obtaining an injunction to restrain a person from unauthorised use of the property of the deity by calling himself "*Pujari*", is not covered by section 92.[111] Where the trustee's power to sell property is at issue, the suit should be under section 34 Indian Trusts Act, 1882 and not under section 92 of the CPC.[112] Where the relief claimed does not fall under section 92, a suit filed without complying with the requirements of the section is not maintainable.[113] It being a special remedy, where resort could be had to it, the general remedy of an ordinary suit is impliedly barred.[114] And whether the suit falls within the section, must be decided on the allegations in the plaint as on the date of its institution.[115] The fact that the defendant does not admit that the trust is a public charitable or religious trust, will not take out the case from the ambit of this section.[116]

Once a competent court has exercised a jurisdiction, the decision cannot be interfered with or nullified by the Legislature. The legal proposition forming the basis of judicial-decision can be modified (even retrospectively). But the rights flowing from the decision cannot be interfered with by legislation.[117] In a Madras case, it was held that the legislature, in deciding that:

(i) the Board of Trustees of Pachiappa's Trust had committed irregularities in the management of the charities and institutions and properties under its control; and

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107. *K Rajaranickam v Periyar Self Respect Propaganda Institution, Tiruchirapalli*, AIR 2007 Mad 25.
108. *Ranchhoddas Kalidas v Goswami Mahalaxmi Vahuji*, AIR 1963 Bom 153 : (1953) ILR Bom 271; *Sarat Kumar Mitra v Hem Chandra Dey*, AIR 1960 Cal 558; *Gheevarghese Koshy v Chacko Thomas of Pallimadyil*, AIR 1963 Ker 191 : (1962) ILR 2 Ker 343 : (1962) Ker LT 662; *Bishwanath v Thakur Radhaballabhji*, AIR 1967 SC 1044 : (1967) 2 SCR 618 : (1967) 69 Punj LR 761; *Association of Radhaswami Dera Baba Bagga Singh v Gurnam Singh*, AIR 1972 Raj 263 : (1972) Raj LW 182; *Harendra Nath Bhattacharya v Kalivam Das*, AIR 1972 SC 246.
109. *Swami Paramatmanand Saraswati v Ramji Tripathi*, AIR 1974 SC 2141 : (1974) 2 SCC 695.
110. *S Guhan v Rukmini Devi Arundale*, AIR 1988 Mad 1.
111. *Shiv Nand v Shri Shankerji Maharaj Birajman Mandir*, AIR 1984 All 55.
112. *Nilima Ghosh v Prakriti Bhushan Mitter*, AIR 1982 Cal 14 (DB).
113. *Vidya Sagar Sharma v Anand Swarup Dublish*, AIR 1981 All 106.
114. *Jathedar Sadhu Singh v Charan Singh*, AIR 1972 P&H 347.
115. *Annappa Ramachandra Pai v Krishna Narayan Prasad*, AIR 1936 Bom 412 : (1936) 38 Bom LR 808; *Gheevarghese Koshy v Chacko Thomas of Pallimadyil*, AIR 1963 Ker 191 : (1962) ILR 2 Ker 343 : (1962) Ker LT 662.
116. *Association of Radhaswami Dera Baba Bagga Singh v Gurnam Singh*, AIR 1972 Raj 263 : (1972) Raj LW 182.
117. *Arcot N Veeraswami v MG Ramachandran*, AIR 1988 Mad 192.

(ii) that the members of the Board of Trustees had also committed irregularities in the management of the charities, had certainly usurped a judicial function, which could properly be exercised only by a court of law. Equally, in modifying a scheme decree passed by the court in the manner provided by the Act, and in directing the government (or committee appointed by the government) to discharge certain functions the legislature had clearly purported to exercise a judicial power of amending the decree of the court, which power is not vested in it. Thus, the Act suffered from want of legislative competence and was therefore ultra vires and void.[118]

Suit under section 92 was filed, alleging mismanagement of the trust property by the members of the trust committee. The trust was situated in the State of Uttar Pradesh. The civil court in State of Madhya Pradesh would have no territorial jurisdiction under section 92 merely on the ground that there was an allegation against the trustees about mismanagement of a property situated in the State of Madhya Pradesh which was purchased by the founder from income derived from trust property situated in the State of Uttar Pradesh. Meaning of "subject matter of the trust" occurring in section 92 is that matter, thing or person, which is the foundation of the trust and was the object of creating a trust, dedication or endowment. The situation or *situs* of properties or the trust are relevant for the purpose of determining jurisdiction of the court under section 92 of the CPC, only if such property or properties constitute foundation of the trust; but mere properties of the trust are not necessarily its subject matter. The existence of an item of the trust property, subsequently acquired from the trust income, should not be deemed to be the subject matter of the trust, so as to confer jurisdiction on the court in the State of Madhya Pradesh.[119] A suit by the deity for declaration of title to land, against a person claiming an interest adverse to the deity, does not fall within section 92.[120] An objection of non-application of section 92 was not raised in the written statement or in the reply to injunction application. It cannot be permitted to be raised to the first time during the hearing of the appeal.[121]

[s 92.7] Representative Suit and *Res Judicata*

The suit contemplated by this section is a representative suit, that is, a suit which is prosecuted by individuals not for their own interest, but as representatives of the general public,[122] in order to secure a proper administration of a public trust.[123] A suit under section 92 is for the vindication of public rights. The named plaintiff really represents the public at large. The suit is a representative one and the decree binds all persons interested in the trust, as provided in Explanation VI to section 11.[124] A decree in a suit under this section will,

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118. *Arcot N Veeraswami v MG Ramachandran*, AIR 1988 Mad 192.
119. *Shri Venkatesh Mandir Trust Committee of Ayodhya, Faizabad v Janki Prasad Choudha*, AIR 1990 MP 287.
120. *Manaharmayum Tolen Sharma v Sakhi Gopal Devta*, AIR 1980 Gau 16.
121. *Guru Nanak Education Trust, Model Town, Ludhiana v Balbir Singh*, AIR 1995 P&H 290.
122. *Anjuman Islamia v Latafat Ali*, AIR 1950 All 109; *Raja Anand Rao v Ramdas Daduram*, AIR 1921 PC 123 : (1921) ILR 48 Cal 493 : 48 IA 12, p 16; *Gopu v Rajammal*, AIR 1922 Mad 394 : (1922) 43 Mad LJ 488; *Sugra Bibi v Hazi Kummu Mia*, AIR 1969 SC 884 : (1969) 3 SCR 83 : (1969) SCJ 365.
123. *Shah Jahan Begum v Ibn Ali*, AIR 1945 All 69 : (1944) ILR 66 All 561; *Bapugonda Yadgouda Patil v Vinayak Sadashiv Kulkarni*, AIR 1941 Bom 317 : (1941) ILR Bom 556 : (1941) 43 Bom LR 706; *Indu Bhusan Sen v Kiron Chandra Sen*, AIR 1940 Cal 376.
124. *R Venugopala Naidu v Venkatarayula Naidu Charities*, AIR 1990 SC 444 : (1989) Supp 2 SCC 356; *Shiromani Gurdwara Prabhandhak Committee v Harnam Singh*, AIR 2003 SC 3349 : (2003) 11 SCC 377.

therefore, operate as *res judicata* under Explanation VI to section 11 of the CPC.[125] In *Sunni Central Board of Wakf, UP v Sirajul Haq*,[126] the Allahabad High Court held that a decision in a suit under this section that a particular endowment was public with a scheme framed therefor, was a judgment *in rem* and not a judgment *in personam.* This observation, though expressed in general terms, was made with reference to the facts of the case and in the light of the contention of the managing committee that the *wakf* in dispute did not come within the purview of the Muslim Wakfs Act, 1936 although in earlier suits including a suit filed with the consent of the Advocate-General, it was held that the property in dispute was *wakf* and a scheme was framed. The scope of the rule that such a judgment is a judgment in rem can be properly understood from the Supreme Court judgment in *Ahmed Adam Sait* v *ME Makhri.*[127] There a suit had been filed on behalf of the Cutchi Memons of Bangalore for framing a scheme for a mosque on the allegation that it belonged to them and that they had exclusive right to manage it and a scheme was framed on that basis. Subsequently, Sunni Muslims of the locality filed another suit claiming that they were also beneficiaries of the mosque and that a fresh scheme should be framed. The suit was resisted on the ground that the prior decision operated as *res judicata*. In repelling this contention, the Supreme Court observed that a decree in a suit under section 92 would operate as *res judicata* on all persons who have the same interest as the plaintiffs but that when the plaintiffs claimed right in a limited class to the exclusion of others, they cannot be held to represent those others and the decision in the suit would not operate as *res judicata* on the rights of those others.

[s 92.8] Issue Estoppel

In a case,[128] the Supreme Court held that in terms of the requirement of section 16(2), the onus to prove that the institution is a Sikh gurdwara lies on the person who asserts the same. That being the position, the committee which asserted that the Institution was a Sikh gurdwara has to prove the same. The high court has therefore rightly held that the tribunal wrongly placed the burden of proof on the respondents herein. Judgments to the contrary rendered and relied upon by the appellants are no longer good law in view of the last noted decision. Similarly, the Supreme Court in a case[129] came to the conclusion that *Nirmalas* are *Sadhus* who cannot be regarded as Sikhs and consequently in the mere capacity of followers of Sikh religion residing in the concerned village cannot be held to have an interest as to entitle them to institute a suit under section 92 of the CPC. In other words, there was a categorical finding that *Nirmalas* are not Sikhs. It was held that the *Dera* was maintained for an entirely distinct sect known as *Nirmalas Sadhus* who cannot be regarded as Sikhs. It was also held that mere fact that at some stage there was a *Guru Granth Sahib* in the *Dera* cannot lead to any conclusion that the institution was meant for or belonged to the followers of Sikh religion. These findings were rendered in a suit filed under section 92 of the CPC. Decisions taking the contrary view that *Nirmalas* are Sikhs per se lose significance. The factual findings relating to the nature and character of the institutions, specifically found on an elaborate review of the

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125. *Abdur Rahim v Syed Abu Mahomed Barkat Ali Shah*, AIR 1928 PC 16 : (1928) ILR 55 Cal 519 : 55 IA 96 : (1928) 30 Bom LR 774; *Dinsha v Jamsetji*, (1909) ILR 33 Bom 509; *Chhaganlal Ramachandra Loyalka v Life Insurance Corp of India*, AIR 1959 Bom 396 : (1959) ILR Bom 140.
126. *Sunni Central Board of Wakf, UP v Sirajul Haq Khan*, AIR 1954 All 88 : (1953) All LJ 587 : (1953) 23 AWR 527.
127. *Ahmed Adam Sait* v *ME Makhri*, AIR 1964 SC 107.
128. *SGP Committee v MP Das Chela*, AIR 1998 SC 1978 : AIR 1998 SCW 1826 : (1998) 5 SCC 157 : (1998) 3 Scale 351.
129. *Harnam Singh v Gurdial Singh*, AIR 1967 SC 1415.

governing legal principles as well, and which have reached finality cannot be re-agitated and the same is precluded on the principle of "Issue estoppel" also.[130]

[s 92.9] Jurisdiction

The words "within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situated" apply both to the principal civil court of original jurisdiction and to the court empowered in that behalf. The section, therefore, overrides clause 12 of the Letters Patent.[131] But if the trust fund is deposited with a firm at Madras and has a place of business at Calcutta, the Calcutta High Court has jurisdiction as the trustees could require payment at Calcutta.[132] Where the trustees and the trust fund are within the jurisdiction of a court, but the charity is to be founded in a territory outside the jurisdiction, the court has jurisdiction to pass a decree, declaring the trusts upon which the fund is to be held, but it cannot go further in the way of settling a scheme, and it will leave it to the court of the place in which the charity is to be carried out to settle the scheme.[133] Nor can a court apply the *cypres doctrine extra territorium.*[134] Likewise, where the trust is in a foreign country and is administered there and the trustees are also residing there but properties belonging to the trust are situated within jurisdiction, the court can act under this section for protecting the properties within its jurisdiction, though it may not be competent to grant reliefs which interfere with the administration of the trust in the foreign country, such as framing of a scheme, removing the trustees and appointing new trustees.[135] Empowerment of a judicial officer for the purpose of section 92, can be by entry in the gradation list and notification is not necessary.[136]

In a case from Tamil Nadu, the Supreme Court has held that for suits relating to Public Trust, the jurisdiction of the district court "or" other court notified by the state government under the Tamil Nadu Civil Courts Act, 1873 does not oust the jurisdiction of the district court. It has been observed that the use of the word "or" in section 92 denotes an alternative, giving a choice to the plaintiff. Even if the state government notifies any other court, the jurisdiction of the district court does not stand substituted.[137]

While overruling the judgment of the Madras High Court, Raveendran, J, speaking for the Supreme Court Bench explained the law in these words:

> 8. Assuming that there was any need for applying the principles of interpretation, let us next consider whether the word 'or' was used in Section 92 of the Code in a substitutive sense. It is clear from Section 92 of the Code that the legislature did not want to go by the general rule contained in Section 15 of the Code that every suit shall be instituted in the court of the lowest grade competent to try it, in regard to suits relating to public Trusts. The intention of the law makers was that such suits should be tried by the District Court. At the same time, the law makers contemplated that if there was heavy work load on the District Court, the State Government should be enabled to empower any other court (within the local limits of whose jurisdiction, the whole or any part of the subject-matter is situate), also to entertain such suits. Therefore, the word "or" is used in the ordinary and

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130. *Shiromani Gurdwara Prabhandhak Committee v Harnam Singh*, AIR 2003 SC 3349: (2003) 11 SCC 377.
131. *Padampat Singhanya v Narayandas Jhunjhunwalla*, AIR 1932 Cal 444 : (1932) ILR 59 Cal 357.
132. *Padampat Singhanya v Narayandas Jhunjhunwalla*, AIR 1932 Cal 444 : (1932) ILR 59 Cal 357.
133. *AG v Punjabai*, (1894) ILR 8 Bom 551, p 561; *Ramlal Hargopal v Kisanchand*, AIR 1924 PC 95 : (1924) ILR 51 Cal 361 : 51 IA 72, p 81–82.
134. *Kanji v AG*, (1916) 18 Bom LR 60; *Fazlehusain Haiderbhoy Buxamusa v Yusufally Adamji*, AIR 1955 Bom 55 : (1954) 56 Bom LR 955.
135. *Fazlehusain Haiderbhoy Buxamusa v Yusufally Adamji*, AIR 1955 Bom 55 : (1954) 56 Bom LR 955.
136. *Prithipal Singh v Magh Singh*, AIR 1982 P&H 137.
137. *Sri Jeyaram Educational Trust v AG Syed Mohideen*, AIR 2010 SC 671 : (2010) 2 SCC 513.

> normal sense, that is to denote an alternative, giving a choice. The provisions of Section 92 do not give room for interpreting the word "or" as a substitutive, so as to lead to an interpretation that when the Government notified any other court, such notified court alone will have jurisdiction and not the District Court.[138]

In para 9 of the above judgment the Supreme Court Bench further went on to explain as follows:

> 9. The provisions of Section 12 of the Civil Courts Act specifying the pecuniary limits of District Courts and Sub-ordinate Courts, is subject to the provisions of the Code of Civil Procedure. In view of the express provisions of Section 92 specifying the courts which will have jurisdiction to entertain suits under that section, neither the provisions of Section 15 to 20 of the Code nor the provisions of Section 12 of the Civil Courts Act will apply to such suits. Section 92 is a self contained provision, and conferment of jurisdiction in regard to suits under that section does not depend upon the value of the subject matter of the suit. Therefore, insofar as the suits under Section 92(1) are concerned, the District Courts and Sub-ordinate Courts will have concurrent jurisdiction without reference to any pecuniary limits. We find that the learned District Judge had held that he had jurisdiction because the value of the subject matter was Rs. 10 lakhs, apparently keeping in view, Section 12 of the Civil Courts Act. We make it clear that the pecuniary limits mentioned in Section 12 of the Civil Courts Act, do not apply to suits under Section 92(1) of the Code.[139]

[s 92.10] Who May Sue Under This Section

A suit under this section may be brought—

(i) by the Advocate-General, and outside the presidency-towns by the collector or by such officer as the state government may appoint in that behalf (section 93); or

(ii) by two or more persons having an interest in the trust and having obtained the leave of the court.

All persons to whom leave has been granted must sue. It has been held that a suit by only some of the persons to whom consent of the Advocate-General (now leave of the court) was given would not lie.[140] Such an authority is joint and must be acted upon by all jointly.[141] But where sanction under the section has been obtained by several persons and one of them dies before the institution of the suit, the suit instituted by the rest was held to be valid.[142] This view has been dissented from by the Supreme Court in *Narain v Sunderlal Tholia*,[143] and therefore, is not correct. A suit relating to administration of a temple can be filed by the idol, represented by the next friend. Further, the registration of a trust under the Societies Registration Act, 1860, does not render section 92 inapplicable.[144]

As for appeal, one of several plaintiffs can appeal on the same terms and conditions as are applicable to suits in general.[145] An heir of the original creator of a trust has an interest in the

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138. *Sri Jeyaram Educational Trust v AG Syed Mohideen*, AIR 2010 SC 671, at pp 674–675 : (2010) 2 SCC 513.
139. *Sri Jeyaram Educational Trust v AG Syed Mohideen*, AIR 2010 SC 671, at p 675 : (2010) 2 SCC 513.
140. *Davular Pitchayya v Divi Venkatakrishnamacharlu*, AIR 1930 Mad 129 : (1930) ILR 53 Mad 223; *Venkatesha Malia v B Ramya Hegade*, (1915) ILR 38 Mad 1192; *Ali Begam v Badr-ul-Islam Ali Khan*, AIR 1938 PC 184.
141. *Narain Lal v Sunder Lal*, AIR 1967 SC 1540; *Prag Narain v Brahmadatt*, AIR 1976 All 25.
142. *Sheo Ram v Ram Chand*, AIR 1940 Lah 356.
143. *Narain Lal v Sunder Lal*, AIR 1967 SC 1540.
144. *Sukumaran v Akalnala Sree Dharma Sastha Idol*, AIR 1992 Ker 406.
145. *Ali Begam v Badr-ul-Islam Ali Khan*, AIR 1938 PC 184 : (1938) ILR Lah 383 : 65 IA 198.

trust and can sue under section 92. So, can a person who, under the instrument of trust, has the right to reside in the premises of the endowed property.[146]

[s 92.11] Interest in the Trust

When a suit under this section is not instituted by the Advocate-General, it must be brought by at least two persons, and such persons must have "an interest" in the trust. Section 539 of the Code of Civil Procedure, 1877 contained the words "a direct interest". Those words seem to have been taken from the judgment of Lord Eldon in *Re the Bedford Charity*.[147] Those words also occurred in section 539 of the Code of Civil Procedure, 1882. That section was amended by section 44 of Act 7 of 1888, and the words "an interest" were substituted for the words "a direct interest". It must have appeared to the Legislature that the limitation of a "direct" interest was not expedient in India, and hence the section must have been amended.[148] The effect of the amendment has been to widen the class of persons who are entitled to institute a suit under this section.[149] However, the interest must not be purely hypothetical or in the nature of a bare possibility, but must be subsisting, though it may not be direct or substantial.[150]

Where the plaintiff sues under section 92 for framing a scheme in respect of a choultry, the interest should be real, substantial and existing though it need not be direct. The following types of interest are not enough:

(i) that the plaintiff is residing in the place where the choultry is situated; or

(ii) that the plaintiff might have belonged to the family entitled to hereditary trusteeship.[151]

Thus, a Mahommedan zamindar creating a "*wakf*" for the upkeep of a Hindu temple and a *Dharmashala* for the benefit of his tenants has an interest in the trust.[152] Persons entitled to worship in a temple have such an interest in the trust as to enable them to institute a suit under this section against the trustees of the temple.[153] Successors of the executant of a trust and all members of the Hindu public and other relatives of the estate were given right of stay in the temple (the trust property). It was held that persons having any concern with the dedicated property had right to seek remedy in the proper manner, if difficulty arose in its management and if the maintenance thereof was not being done according to the wishes of the executant.[154] Persons who not only made contributions or offerings but devoted their time and energy for the preservation of the trust property are persons interested in such trust.[155] So also persons who are not only interested in the preservation of trust property but are actual users thereof.[156] In an Allahabad case, a suit was filed against a religious trust. Allegation was that the defendant was *Sarbarakar* of the temple, i.e., person managing the temple, but was posing himself as the owner and was selling away the trust property. It was held that the *pujari* of the temple and

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146. *Ambrish Kumar Singh v Raja Abhushan Bran Brahmshah*, AIR 1989 All 194.
147. *Re the Bedford Charity*, (1819) 2 Swans 518.
148. *Vaidyanatha Ayyar v Swaminatha Ayyar*, AIR 1924 PC 221 : (1924) ILR 47 Mad 884 : 51 IA 282, p 288.
149. *Shailainananda v Umeshanunda*, (1905) 2 Cal LJ 460.
150. *Shavax A Lal v Syed Masood Hosain*, AIR 1965 AP 143.
151. *P Sivagurunatha Pillai v P Mani Pillai*, AIR 1984 Mad 328 (DB).
152. *Ratan Sen v Suraj Bhan*, AIR 1944 All 1 : (1944) ILR 66 All 20.
153. *Gour Mohun Das Baishnav v Sajedur Raja Ghowdhuri*, (1897) ILR 24 Cal 418; *Jugalkishore v Lakshmandas*, (1896) ILR 23 Bom 659; *Chintaman v Dhondo*, (1888) ILR 15 Bom 612; *Ram Churn v Protab*, (1905) Cal LJ 448.
154. *Ambrish Kumar Singh v Raja Abhushan Bran Bramhshah*, AIR 1989 All 194.
155. *Mangilal v Durga Devi*, AIR 1968 Raj 314.
156. *Suraj Narain v Mangilal*, AIR 1972 Raj 172.

other devotees can file a suit under section 92, for saving the said trust property. Purchasers of the property can also be made defendants for getting relief under section 92 of the CPC.[157] Similarly, persons residing in a village, whose business it was to conduct pilgrims to a shrine and perform the worship of the idol on their behalf, were held to have a sufficient interest to entitle them to sue the *shevaks* or ministers of the idol under this section.[158] Likewise, worshippers at a mosque have "an interest" within the meaning of this section in the trusts of the mosque.[159] A worshipper of a deity in a temple can sue as next friend without prior approval of court for appointment of next friend.[160] Individual rights cannot be litigated in a suit under section 92. If plaintiff challenges the rights of persons acting as trustees to function in that office but make no allegations of misconduct etc., then the suit does not lie under section 92.[161] A Shia resident of the locality where the *wakf* properties are situated who takes part in its functions is a person interested within this section.[162]

In a case, where leave was sought to institute a suit against Public Trust, by persons whose activities were not for protection of the interest of the trust, it was held by the Madras High Court that leave cannot be granted.[163]

It is not necessary for sustaining a suit under this section that the plaintiffs should be interested in all the items of properties comprised in the trust.[164] A lessee of trust property who has averted its sale in court auction is a person interested in the trust.[165] If the persons suing have an interest in the trust, it is not necessary that they should have been personally affected by any act done by the person sued.[166] It is, clear that simply because the plaintiffs are respectable persons of the locality and they have taken part in social activities, they are not sufficient to come within the category of "persons interested" in the trust as contemplated under section 92 of the CPC.[167] But the interest must be an existing interest and not a mere contingency; the mere possibility of succession to the managership of trust properties in respect of which the suit is brought is not sufficient to give a right to sue.[168] The "interest" contemplated by the section must be a present and substantial interest and not remote or sentimental. Thus, public Hindu temples are *prima facie* taken to be dedicated for the use of all Hindus resorting to them. But the bare possibility, however remote, that a Hindu of another place might desire to visit a temple does not give him "an interest" sufficient to entitle him to sue under this section. Hence, where a suit was brought under this section by a Hindu residing in Madras and another residing in Tellicherry in respect of a temple situated in Tellicherry, and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry, it was held that though he had a right, as a Hindu, to worship in the temple, he had not such an interest in the trust, as to

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157. *Gyan Prakash Chaurasia v Bans Narain Rai*, AIR 1991 All 266.
158. *Manohar Ganesh Tambekar v Lakhmiram Govindram*, (1888) ILR 12 Bom 247.
159. *Jawahar v Akbar Hussain*, (1885) ILR 7 All 178; *Vaidyanatha Ayyar v Swaminatha Ayyar*, AIR 1924 PC 221 : (1924) ILR 47 Mad 884, p 891 : 51 IA 282.
160. *Sushma Roy v Atul Krishna Roy*, AIR 1955 Cal 624, dissented from *Bhaguati Prasad Khetan v Laxminath Maharaj*, AIR 1985 All 228.
161. *Kabul Singh v Ram Singh*, AIR 1986 ILR All 75.
162. *Farman Ali Khan v Mohd Raza Khan*, AIR 1950 All 52 : (1950) ILR All 985.
163. *Anikadavu Madamanai Lathekarar, Kulam Sri Venkatesa Perumal Thirukovil Arakkattalai v K Thandapani*, 2009 (4) Mad LJ 251 : 2009 (1) Mad LW 564 : (2009) 1 CTC 416.
164. *Ananda Theartha v Kumaraswami*, AIR 1952 TravCo 134 : (1952) ILR TC 83.
165. *Ramaswami Chettiar v Karumuthu Sivalingam Chettiar*, AIR 1957 Mad 597.
166. *KRM Sinnaram Chettiar v K Srinivasa Aiyangar*, AIR 1927 Mad 462 : (1927) ILR 50 Mad 726.
167. *LM Menezes v Arul Das Jamas*, AIR 2003 Mad 241.
168. *Mohiuddin v Sayiduddin*, (1893) ILR 20 Cal 810.

entitle him to sue under this section.[169] Where the only interest which the plaintiffs claimed to have in the trust property was that they were members of the community to which the author of the trust belonged and were residents of the town in which a small part of his property was situated and the property was excluded from the trust, the interest of the plaintiffs (if any at all) was held to be merely sentimental and too remote.[170] The Lahore High Court has held that a right of worship constitutes an interest under the section,[171] but that a bare possibility of resort for worship does not give the plaintiffs a *locus standi*.[172] It has been held by the judicial committee that descendants of the founder of a public Hindu *chattiram*, although only in the female line, are "persons having an interest in the trust", and consequently they are entitled to maintain a suit under this section, even though they might never themselves make use of the *chattiram*.[173] A resident of the locality, who has some nexus or connection with the trust i.e., he has interest in the well-being or prosperity of the trust, or resident, of the locality where a temple is situated and who visits and participates in its rituals and religious functions or an old student of a public school, residing in the locality is presumed to have interest within the meaning of sub-section (1).[174]

A suit against a public trust under section 92 of the CPC is not like an ordinary suit where there is a *lis* between two parties and objection could be raised by either of the parties to suit with regard to impleadment of third party in the proceedings. Suit under section 92 being representative in character, all those interested in the trust could be considered as parties to the suit and can be impleaded.[175]

In the undermentioned Supreme Court case, the question whether a Muslim could claim to be interested in a particular trust was raised but not decided. However, it was pointed out that the trust in question, besides having religious objects, had also certain charitable objects such as provision of drinking water.[176]

[s 92.12] Leave of the Court

It may be noted that by Code of Civil Procedure (Amendment) Act (104 of 1976) the consent of Advocate General is no longer required. The following text pertaining to the consent of Advocate General is retained to indicate the judicial opinions prevalent prior to said amendments and the same may be useful and relevant to the "leave of the court" which is now required to be taken after the said amendment.

Before the subsequent amendment of the section when sub-section (1), as it then stood, required the consent in writing of the Advocate-General, it was held that such consent had

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169. *Shadi Ram v Ram Kissan*, AIR 1948 EP 49; *Forman Ali Khan v Mohd Raza Khan*, AIR 1950 All 62; *TR Ramachandra Iyer v Ponniath Akathuthu Parameshwaram Mumbu*, (1919) ILR 42 Mad 360; referred to, it seems, with approval in *R Vaidyanatha Ayyar v Swaminatha Ayyar*, AIR 1924 PC 241 : (1947) ILR 47 Mad 884 : 51 IA 282 : (1924) 26 BomLR 1121.
170. *Mitchla v Mitchla*, AIR 1938 Rang 339.
171. *Narinjan Singh v Kirpal Singh*, AIR 1925 Lah 189 : (1924) ILR 5 Lah 455.
172. *Kirpa Singh v Ajaipal Singh*, AIR 1930 Lah 1 : (1930) ILR 11 Lah 142.
173. *R Vaidyanatha Ayyar v Swaminatha Ayyar*, AIR 1924 PC 241 : (1947) ILR 47 Mad 884 : 51 IA 282 : (1924) 26 BomLR 1121; affirming, *Vaithinatha Aiyar v S Tyagaraja Aiyar*, AIR 1921 Mad 563 : (1921) 41 Mad LJ 20.
174. *Kumudavalli v PN Purshotham*, AIR 1978 Mad 205.
175. *Sri Vir Digambar Jain Dharmashala and Sri Mahavir Jain Dharmarth Aushadhalai (Trust) v Pramod Kumar Jain*, 2009 (6) All LJ 152 : 2009 AIHC 339 : (2008) 72 All LR 237 : (2008) 6 ADJ 654.
176. *R Venugopal Naidu v Venkatarayulu Naidu Charities*, AIR 1990 SC 444 : (1989) 2 Supp SCC 356 : (1989) 1 SCR 760 : (1989) 2 Scale 902.

to be a specific permission given to one applicant by name and "another" was not a sufficient compliance with the terms of the sub-section.[177] Accordingly, the Bombay High Court held that a suit brought under this section by only one plaintiff, with the consent of the Advocate-General, was bad at its institution and that such a plaint could not be amended so as to add a second plaintiff, even if the Advocate-General were to consent to such amendment since the section nowhere spoke of the Advocate-General's consent to such an amendment. Such a suit, bad at its inception, could not be bettered by an amendment.[178] The Madras view, on the other hand, was that persons interested in the trust could be added as parties to the suit with the consent of the Advocate-General under O I, rule 10. Therefore, if a suit was brought by *A* alone[179] or by *A* and *B*, of whom *B* had no interest in the trust,[180] the plaint could be amended by adding *C*, a person interested, as the party plaintiff in either case with the Advocate-General's consent. The Madras High Court also took the view that if a suit had been brought by *A* and *B*, neither of whom had an interest, the plaint could be amended by adding the Advocate-General as a plaintiff on his application.[181] The Calcutta High Court also has held that once the consent of the Advocate-General or the collector had been obtained and the suit filed, any other party interested, may come in and carry on the suit without any further consent.[182] This difference of opinion would no longer be of any relevance since the authority granting the leave and the amendment is the court itself, and the court's power to grant amendment is wide, whenever the interest of justice requires it.

The court interpreted section 92 and observed that the leave of the court is a condition precedent for the institution of a suit against a public trust and if such a suit is instituted without leave of the court, the suit would not be maintainable. Further, the court said that as per the language of section 92 and as a rule of caution; the court should not grant leave till the notice is issued to the other party however, this condition is not a mandate.[183]

Another principle laid down was that the consent required by the section was a condition precedent to the institution of the suit to which such consent relates. No special form for such consent was necessary and such consent need not specify the reliefs for which it was granted.[184] Therefore, if no valid consent was obtained before the institution of the suit, the suit was liable to be dismissed or the plaintiff had to withdraw the suit with liberty to file a fresh suit. But the defect could not be rectified after the institution of the suit.[185] The Supreme Court held that where consent given by the Advocate-General was to several persons, such consent was a joint authority and had to be acted upon by all of them jointly. Therefore, a suit by some of them was not in compliance with the provisions of the section and a fresh consent would be necessary where it was granted to four persons and one of them died before the suit was filed.[186] Even when consent had been obtained, the suit had to be confined to the matters included in such consent and it was not competent to the court to grant reliefs other than those

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177. *Amardas Mangaldas Sadhu v Harmanbhai Jethabhai Patel*, AIR 1942 Bom 291 : (1942) 44 Bom LR 643; *Gopal Devi v Kanno Dei*, (1903) ILR 26 All 162.
178. *Darves Haji Mahamad Sidik v Jainudin Haji Badrudin*, (1906) ILR 30 Bom 603 : (1906) 8 Bom LR 751.
179. *Ramayyanagar v Krishnayyangar*, (1887) ILR 10 Mad 185.
180. *Jekkam Reddi Seshadri Reddi v S Subramania Aiyar*, (1920) ILR 43 Mad 720.
181. *Jessingbhai Jagjivandas v Jivatlal Pratapsi*, AIR 1947 Bom 487 : (1947) 49 Bom LR 428; *Ambalavana v The AG*, (1920) 43 Mad 707.
182. *Faizunnessa Bibi v Gholam Rabbani*, (1935) ILR 62 Cal 1132 : (1935) 39 Cal WN 951.
183. *Bhupinder Singh v Joginder Singh*, (2020) 139 All LR 671.
184. *Managing Committee of Syed Salar Endowment v Hakim Mohd Ahsan*, AIR 1947 Oudh 22 : (1947) ILR 21 Luck 222.
185. *Trieumdass v Khimji*, (1892) ILR 16 Bom 626; *Gopal Dei v Kanno Dei*, (1904) ILR 26 All 162.
186. *Narain Lal v Sunder Lal*, AIR 1967 SC 1540.

included in the terms of the consent.[187] Further, the suit could not be amended without the Advocate-General's sanction. Accordingly, the court must dismiss the suit where a new party was added as a defendant without the Advocate-General's sanction and possession of trust property is claimed from him.[188] The previous sanction of the Advocate-General was held to be necessary for adding such a new defendant.[189] The reason given was that the suit under this section was of a special nature and while deciding to give his consent, the Advocate-General had to have a host of considerations to take into account including the reliefs for which a decree would be prayed for.[190] But the High Court of Madras has held that where a suit is filed against the secretary of a charitable trust registered under the Societies Registration Act, 1860 and, an amendment is sought to join the society, the application is valid and no sanction of the Advocate-General is necessary, as the society sought to be added is a necessary party.[191] It is submitted that the better reason for so holding is that the society, through its secretary, was already represented and joining the society was merely formal.

In a later case, the Bombay High Court held that where amendments do not substantially change the character of the suit or enlarge the scope of the suit they can be made by the court itself without the sanction of the Advocate-General or the collector. Amendments which enlarge the scope of the suit, for instance, by allowing further reliefs without substantially changing its character may be made with the sanction of the Advocate-General or the collector. But amendments which substantially change the character of the suit would not be permissible even with the sanction of the Advocate-General or the collector.[192] However, where an amendment was formal and did not alter the nature of the suit, it was ordered.[193] Now that the court is the authority which would grant the leave as also the amendment, many of the difficulties which arose while considering applications for amendments would not arise, unless the amendment in question is such as to substantially change the character of the suit or enlarge its scope.

It was well-recognised that while giving his consent, the Advocate-General had to exercise his judgment in the matter and see not only whether the persons suing were persons who had an interest in the trust, but also, whether the trust was a public trust of the character defined in the section and whether there were prima facie grounds for thinking that there had been a breach of trust.[194] However, even if the consent given by the Advocate-General showed *ex facie* that he had not exercised his judgment, it was held not to be a fatal defect but a mere irregularity falling within the scope of section 99 and the decree passed in such suit was not liable to be interfered within appeal, unless the irregularity was such as affected the decision on merits.[195] These principles would, it is submitted, apply to the court while it is called upon to grant leave.

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187. *Sayad Hussein v Collector of Kaira*, (1897) ILR 21 Bom 257; *Nizam-ul-Haq v Muhammad*, (1919) PR No 144 p 370 : (1919) ILR 16 All 1 ; *Srinivasa v Venkata*, (1888) ILR 11 Mad 148; *Davular Pitchayya v Divi Venkatakrishnamacharlu*, AIR 1930 Mad 129 : (1930) ILR 53 Mad 223.
188. *Gobinda Chandra Ghosh v Abdul Majid Ostagar*, AIR 1944 Cal 163 : (1944) ILR 1 Cal 329; *VM Abdul Rehman v DK Cassam and Sons*, (1912) ILR 36 Bom 168 : (1933) 35 BomLR 331; *Bara Hanuman Temple Durgain v Gurbux Lal Malhotra*, AIR 1978 P&H 192.
189. *Kidar Nath Dutt v Krishna Das Bairagi*, AIR 1957 Punj 106 : (1957) ILR Punj 1019.
190. *Uma Shankar v Salig Ram*, AIR 1975 All 36.
191. *CR Neelakantan v Saidapet Annadhana Samajam*, AIR 1967 Mad 303 : (1967) 1 Mad LJ 29.
192. *Bapugouda Yadgouda Patil v Vinayak Sadashiv Kulkarni*, AIR 1941 Bom 317 : (1941) ILR Bom 556 : (1914) 43 Bom LR 706.
193. *RN Selvam Mudaliar v PA Raju Mudaliar*, AIR 1953 Mad 816 : (1952) 2 Mad LJ 653 : (1952) Mad WN 808.
194. *Gour Mohun Das Baishnav v Sajedur Raja Ghowdhuri*, (1897) ILR 24 Cal 418, p 428.
195. *Gour Mohun Das Baishnav v Sajedur Raja Ghowdhuri*, (1897) ILR 24 Cal 418.

The Allahabad High Court has held that when an order has been made against the trustee of a charity under section 5(5) of the Charitable and Religious Trusts Act, 1920, and the trustee, without reasonable cause, fails to comply with it, he is deemed to have committed breach of trust affording ground for a suit under this section. Such a suit, so far as it is based on such failure, does not require the previous sanction of the Advocate-General and in such a suit, the court may pass a decree removing such trustee.[196] It is not necessary that such a suit should be filed by the party who secured the order under the Charitable and Religious Trusts Act, 1920, but the reliefs claimed must be such as arise from the failure to produce accounts.[197]

Even though the consent of the Advocate-General has been obtained for filing the suit under this section his consent has been held not to be necessary for compromising the suit.[198] But the court would scrutinise the terms of the compromise and reject them if they are such as to jeopardise the interest of the trust.[199] This would also be the position under the amended section where the court has granted the leave.

Suit after Leave.—A suit for the removal of trustees, seeking accounts and settlement of a scheme etc was filed, and months thereafter, an application for the above was filed and granted. It was held that institution of the suit prior to the grant of leave was without justification and therefore *non est.* As a suit can be instituted immediately after the grant of leave, there was nothing wrong in treating the suit to have been instituted on the date on which leave was obtained. The real test for the applicability of section 92 is to see whether the suit is fundamentally on behalf of the public for the vindication of a public right.[200] Permission under section 92 can be a tacit one.[201] Under section 92, leave of the court is a pre-condition or a condition precedent for the institution of a suit against a public trust. Having in mind the objective underlining section 92 and the language thereof, as a rule of caution, the court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendant before granting leave under section 92, to institute a suit. The defendants could bring to the notice of the court, for instances, that the allegations made in the plaint are frivolous or reckless. They could also, in a given case, point out that the persons who were applying for leave under section 92 are doing so merely with a view to harass the trust or have such antecedents that it would be undesirable to grant leave to such persons. The desirability of such notice being given to the defendants however, cannot be regarded as a statutory requirement to be complied with before leave under section 92 can be granted as that would leave to unnecessary delay, and in a given case, cause considerable loss to the public trust. If a suit is instituted on the basis of such leave, granted without notice to the defendants, the suit would not, thereby, be rendered bad in law or not maintainable. The grant of leave cannot be regarded defeating or even seriously prejudicing any right of the proposed defendant, because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law.[202]

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196. *Umrao Singh v Har Prasad*, AIR 1930 All 582 : (1930) ILR 52 All 863.
197. *Kalavacherla Bapiraju v Ramchandradas Bavajee*, AIR 1933 Mad 854 : (1933) 65 Mad LJ 690.
198. *Mohamad Idris Haider v Mohammad Habiber Rahman*, AIR 1948 Pat 97 : (1946) ILR 26 Pat 83.
199. *K Meenakshi Ammal v Commr, Hindu Religious and Charitable Endowments Act*, AIR 1966 Mad 475.
200. *Kintali China Jaganadham v K Laxmi Naidu*, AIR 1988 Ori 100.
201. *Prithipal Singh v Magh Singh*, AIR 1982 P&H 137; *RM Narayana Chettiar v N Lakshman Chettiar*, AIR 1991 SC 221 : (1991) 1 SCC 48 : (1991) 43 Del LT 1 (SC).
202. *RM Narayana Chettiar v N Lakshman Chettiar*, AIR 1991 SC 221 : (1991) 1 SCC 48.

[s 92.13] Nature of the Order Granting Leave by the Court

Under the section, as it stood before its amendment,[203] and when what was required was the consent of the Advocate-General, there was some divergence of opinion on the question whether the proceedings for consent before the Advocate-General were quasi-judicial in character, and if they were open to challenge in writ proceedings under Article 226 of the Constitution of India. In *Abu Backer v AG*[204] the High Court of Travancore-Cochin held that such proceedings were quasi-judicial and that view was shared by the Pepsu High Court.[205] But a contrary view was taken by the High Courts of Rajasthan,[206] Allahabad,[207] Madras[208] and Jammu and Kashmir.[209] A full bench of the Kerala High Court later on reconsidered the position and held reversing *Abu Backer*'s case supra that the proceedings before the Advocate-General were only administrative.[210] Further, it has also been held that the function of the Advocate General not being a judicial one, notice by him to the trust or its trustees was not obligatory and that the absence of such notice did not invalidate the consent given by him. All that was required of him at that stage, was to satisfy himself that it was worthwhile to institute the suit.[211] Notice to the defendants before granting leave is not mandatory. The Supreme Court has now so held. Although as a rule of caution, such notice should be given, leave granted without notice is not bad in law. The proposed defendants can always apply for revocation of leave already granted.[212] The mere fact that the amended section now requires leave of the court in place of consent by the Advocate-General, does not seem to change the nature of the order of leave made by the court. In making such an order, the court, like the Advocate-General earlier, would no doubt have to apply its mind but that is only to satisfy itself whether the persons asking leave have interest in the trust, whether the trust is a public trust specified in the section and whether there are prima facie grounds for thinking that there has been a breach of the trust. At that stage the court would not have, before it, all the parties to the proposed suit nor the evidence from which it would be called upon to adjudicate any issue. All that it would have to see is whether it is in the interest of the trust to file the suit for which leave is sought.

An order passed under section 92 of the CPC either granting or refusing leave to institute a suit in respect of Pubic Trust, is administrative in nature and no notice is required to be issued to the other party. But it is incumbent upon the court to give reasons for its decision either granting or refusing leave. There can be no implied permission and the court has to pass a formal order though without notice to the defendant.[213]

On the question whether revision against an order granting leave to institute a suit against a public trust would be maintainable or not, the Madras High Court has held that granting leave by court under section 92 of the CPC is neither judicial nor quasi-judicial function, rather it

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203. By Code of Civil Procedure (Amendment) Act (104 of 1976).
204. *Abu Backer Adam Sait v AG, Travancore Cochin State*, AIR 1954 TC 331 : (1954) ILR TC 369.
205. *Sadhu Singh Sunder Singh v Mangalgir amd Mohatmim Dera*, AIR 1956 Pepsu 65.
206. *Shririmali Lal Kasliwal v AG*, AIR 1955 Raj 166 : (1955) ILR Raj 324.
207. *Swami Shantanand Sarswati v AG, UP, Allahabad*, AIR 1955 All 372.
208. *Raju v AG, Madras*, AIR 1962 Mad 320 : (1962) ILR Mad 722; *KM Abdul Kasim v PMN Mohamed Dawood*, AIR 1961 Mad 244 : (1961) ILR Mad 493.
209. *Desraj v Deputy Commr, Jammu and Kashmir*, AIR 1962 J&K 86.
210. *AK Bhaskar v AG*, AIR 1962 Ker 90 : (1961) ILR 2 Ker 500(FB) : (1961) Ker LJ 1068.
211. *Shavax A Lal v Syed Masood Hosain*, AIR 1965 AP 143; *SS Bhagat v NS Ahluwalia*, AIR 1978 Del 14.
212. *RM Narayana Chettiar v N Lakshman Chettiar*, AIR 1991 SC 221 : (1991) 1 SCC 48; *BS Adityan v BS Ramachandran Adityan*, AIR 2004 SC 3448 : (2004) 9 SCC 720 : (2004) Supp 1 SCR 216 : 2004 (5) Scale 43; *Govindan v Koovalasseri SMK Trust*, AIR 2002 Ker 47.
213. *Sushil Kumar Bansal v Surinder Pal Sharma*, 2007 (2) CCC 244 : 2007 (1) RCR (Civil) 167.

is an administrative function. Therefore, neither section 151 of the CPC nor Article 227 of the Constitution could be invoked against such order. However, the aggrieved person may approach the same court to revoke the leave granted. But a revision against the said order is not maintainable.[214]

[s 92.14] Rejection of plaint after grant of leave—validity

Once leave was granted after hearing of the parties the question of rejecting the plaint under O VII, rule 11 did not arise. An application for rejection of the plaint should have been made prior to the leave having been granted or at the time when the appellants opposed grant of leave. Having lost in their opposition to grant of leave it was not open to the appellants to then apply for rejection of the plaint under O VII, rule 11 of the CPC.[215]

[s 92.15] Interlocutory Orders Pending Application for Leave—Validity

Even though leave to sue under section 92 of the CPC can be granted by the court on the prima facie satisfaction regarding the allegations made against the respondents either without giving notice to the respondents or after giving notice to the respondents and hearing them, there will be no properly instituted suit under law before formal leave is granted by the court under section 92 of the CPC and no interlocutory order in the proceedings can be passed by the court before granting permission to institute the suit under section 92(1) of the CPC.

Therefore, it the order passed by the lower court in the interlocutory application filed under Order XI, rule 14 and sections 141 and 151 of the CPC before granting leave to sue and proper institution of the suit is absolutely illegal and unsustainable.[216]

However, it has been held by Allahabad High Court that pending application seeking permission to file suit against public trust, the inherent powers of the high court can be invoked for passing suitable orders appointing receiver to prevent trust property from being wasted or destroyed.[217]

[s 92.16] Public Purposes

This section relates to those charities only in which the public are interested. The endowment must be for a public purpose of a charitable nature and the beneficial interest must be vested in the public in general or considerable sections thereof.[218] Section 92 does not apply to private trusts.[219] As to what are public and private endowments, see the undermentioned case.[220]

The distinction between a private and a public trust is, observed the Supreme Court in *Deoki Nandan v Murlidhar*:[221]

> ...that whereas in the former the beneficiaries as specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who

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214. *Kulam Sri Venkatesa Perumal Thirukovil Arakkattalai v K Thandapani*, 2009 (4) Mad LJ 251 : 2009 (1) Mad LW 564 : (2009) 1 CTC 416.
215. *Sudhir G Angur v M Sanjeev*, AIR 2006 SC 351 : (2006) 1 SCC 141 : JT (2005) 10 SC 324.
216. *Govindan v Koovalasseri SMK Trust*, AIR 2002 Ker 47.
217. *Sri Vir Digambar Jain Dharmashala and Sri Mahavir Jain Dharmarth Aushadhalai (Trust) v Pramod Kumar Jain*, 2009 (6) All LJ 152 : 2009 AIHC 339 : (2008) 72 All LR 237 : (2008) 6 ADJ 654.
218. *M Vannia Perumal v M Sivasubramania Pillai*, AIR 1952 TC 323 : (1951) ILRTC 543.
219. *Dhirendra Singh v Dhanai*, AIR 1983 All 216.
220. *Deoki Nandan v Murlidhar*, AIR 1957 SC 133 : (1956) 1 SCR 756 : (1956) SCJ 75 : (1975) 5 BILR 355.
221. *Deoki Nandan v Murlidhar*, AIR 1957 SC 133 : (1956) 1 SCR 756 : (1956) SCJ 75 : (1975) 5 BILR 355.

> are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment.

Where there is a deed of endowment, the decision whether the trust is public or private must turn on the construction of the deed, aided by such considerations, as are admissible in law. But where there is no deed[222] or where the origin of the trust cannot be determined, regard must be had to repute, the user of the trust property and the mode of its management and other circumstances.[223]

Existence of a public trust is essential for invoking section 92. The mere use of a *Dharmashala* by the public does not establish the creation of a public trust, in the absence of evidence of dedication of the property for public or charitable purpose. Hence, a suit in respect of the *Dharmashala* under section 92 is incompetent, if there is no evidence that the owners divested themselves or dedicated the property to a public or religious trust at any time. Thus, keeping in view the various circumstances, and the treatment of the property by the owners, the owners never dedicated the disputed property for a public or a charitable purpose and no public trust was created.[224] Where a school is established under a local Act (St Thomas School Act, Bengal Act 12 of 1923) which does not make the school a charitable trust, a suit regarding the school cannot be filed under section 92.[225]

The word "trust" is used in this section, not in any technical sense and would include Hindu or Mahommedan religious endowments.[226] A trust for a public Hindu temple is a trust for a public purpose of a religious nature within the meaning of this section.[227] Even where the property is dedicated to an idol and such idol being a juristic person is capable of holding such property, if the major portion of its income is used for doing *pooja* and services of the idol and towards management of *melas* wherein Hindus of the locality in general participate, the true beneficiaries of the trust are not the idols but the worshippers.[228] A permanent bequest by a Parsi for the purpose of *muktad* ceremonies is a trust for public purposes of a religious nature for such ceremonies include prayers for the spiritual welfare of all Zoroastrians and tend to the advancement of the Zoroastrian religion.[229] A Mahommedan *wakf* is a trust for public purposes of a charitable and religious nature,[230] and the trust may be for the sale of a property in India to provide funds for the establishment of a boarding house for Hajis at Mecca.[231] If the reliefs specified in the section are claimed with reference to a *wakf*, the section applies.[232] A *muth*, that is otherwise private, does not become public simply because some persons are fed when *gurupuja* is performed and a water *pandal* is maintained in the mutt during the hot season.[233] The real test is whether the user by the public is as of right.[234] An institution for imparting

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222. *Nallamotu Sivaramabrahman v Vanipurapu Satyanarayana*, AIR 1967 AP 181.
223. *Mangilal v Durga Devi*, AIR 1968 Raj 314.
224. *AG, Govt of Himachal Pradesh v Leela Devi*, AIR 1984 NOC 273 (HP) : (1984) ILR 13 HP 139.
225. *Board of Governors St Thomas School v AK George*, AIR 1984 Cal 208.
226. *Saratchandra v Rabindranath*, (1857) AC 11; *Nallamotu Sivaramabrahman v Vanipurapu Satyanarayana*, AIR 1967 AP 181.
227. *Manohar Ganesh Tambekar v Lakhmiram Govindram*, (1888) ILR 12 Bom 247.
228. *Thakur Radha Krishnaji Maharaj v Ram Prasad Pandey*, AIR 1975 All 268.
229. *Dinshaw Manockji Petit v Jamsetji Jeejeebhoy*, (1909) ILR 33 Bom 509 : (1909) 2 Ind Cas 701.
230. *Syed Shah Muhammad Kazim Syed v Ali Saghir*, AIR 1933 Pat 33 : (1932) ILR 11 Pat 288 : (1932) 136 Ind Cas 417.
231. *Muhammad Yusuf v Muhammad Sadiq*, AIR 1933 Lah 501 : (1933) ILR 14 Lah 431.
232. *Abdul Rahim v Mohamed Barkat Ali*, AIR 1926 PC 16 : (1928) ILR 55 Cal 519 : (1927) LR 55 IA 96 : (1928) 54 MLJ 609.
233. *Sathappayyar v Perisami*, (1891) ILR 14 Mad 1.
234. *Radha Krishna v Lakshmi Narain*, AIR 1948 Cal 203; *Khub Narain Missir v Ramchandra Narain Dass*, AIR 1951 Pat 340 : (1950) ILR 28 Pat 890.

education is a trust and when it is established, with funds subscribed by public, it is a public trust.[235] But where a member of the public had always used a temple to which a *dharmashala* was attached and the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart*, it was held that the intention of the founder was to devote the property to public purposes of a religious and charitable nature.[236] It was observed by the Supreme Court in *Deokinandan v Murlidhar*, that in the case of a temple, the beneficiaries are the worshippers and that therefore, whether the temple is public or private, must depend on whether the right to worship therein has been given to individuals or to the public at large. A trust is not the less a trust for a public purpose because the main object of the trust is the support of *fakirs* of a particular sect and the propagation of the tenets of that sect.[237] A scheme for loans for education to the poor and deserving persons of a specified community is one of a charitable nature though interest may be charged on the loans.[238] When the fund is intended to be used by the villagers for the purpose connected with the village community as a whole, or a substantial part of it, it is a public charity falling within the section whatever the nature of the purpose.[239] Where by the will of a person, considerable property is dedicated to public charitable purposes, a provision made therein for the right of private residence, in the property, of a near relative of the testator and the heirs of the relative, who are his descendants, will not render the dedication illusory.[240] But where a testator's intention is to benefit only the members of his family who are poor, there is no trust for a public purpose of a charitable character. However, where charity for public purposes is the expressed object of the settler, the purposes are not in any way defeated by an expression of the testator's wish that members of his family, as members of the general public, are eligible to benefit with other members of the public.[241]

A trust for political purposes is not one for a charitable purpose.[242] Where there is a public trust, section 92 does not become inapplicable by reason of some of the provisions in the endowment being private in character.[243] If there is a trust created by the public for a public charitable purpose, namely, for establishing and maintaining a school, the fact that a society therefore is registered would not change the character of the properties, which had already been impressed with the trust. Any addition to such properties would also have the same

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235. *Edupuganti Raghavendra Rao Memorial High School Committee v Potluri Atchayya*, AIR 1957 AP 10 : (1956) Andh WR 354.
236. *Jugalkishore v Lakshmandas*, (1889) ILR 23 Bom 659; *Laxmanrao Umajirao v Govindrao Madhorao*, AIR 1950 Nag 215.
237. *Darshan Das v Mahant Puran Atal*, (1912) ILR 34 All 468.
238. *Edward HM Bower v AMV Hesterlow*, (1940) ILR Mad 300.
239. *Kamarusu Kasi Viswanadhan v Rudra Viranna*, AIR 1953 Mad 220 : (1952) 2 Mad LJ 443.
240. *Saiyed Mohammad Raza v Badr-Ul-Islam Ali Khan*, (1938) 40 Bom LR 835; *Sugra Bibi v Haji Kummu Mia*, AIR 1969 SC 884.
241. *Loke Nath Mukerjee v Abani Nath Mukherjee*, AIR 1941 Cal 68 : (1940) 72 Cal LJ 362; *Farman Ali Khan v Mohd Raza Khan*, AIR 1950 All 62; *Taw Chew Kean v Taw Kock Tyon*, AIR 1939 Rang 203 : (1939) Rang 520. For discussion as to what are public and what are private trusts, see the following decisions: *Panna Lal v Puj Harsh Rishi*, AIR 1952 P&H 361; *Bala Krishna Kar v Ganesh Prasad Bhagat*, AIR 1952 Ori 203 : (1952) ILR Cut 81; *Anand Tirtha v Kumaraswami*, AIR 1952 TC 134; *Mati lal v Baldeo Das*, AIR 1952 VP 36; *Imdad Ali Khan v Sardar Khan*, AIR 1954 Ori 15; *Padmavati v Navalal P Dalal*, AIR 1956 Bom 81; *Jawaharbeg Umraobeg Musalman v Abdul Aziz Bhondumiya Musalman*, AIR 1956 Nag 257; *Bhagavan Sitaram v Namdeo Narayan*, AIR 1957 Bom 168; *Wazir Shah v Sani Shah*, AIR 1961 J&K 42.
242. *Laxman Balwant v Charity Commrs, Bombay*, AIR 1962 SC 1589 : (1963) SCA 170; *Ghevergheese Koshy v Chacko Thomas of Pallimadyil*, AIR 1963 Ker 191 : (1962) ILR 2 Ker 343 : (1962) Ker LJ 662.
243. *Sarat Kumar Misra v Hem Chandra Dey*, AIR 1960 Cal 558.

character.[244] A settlement in favour of a *Samadhi*, i.e., a tomb of the ancestors of the settlers is not one for a public purpose.[245]

[s 92.17] Any Alleged Breach of Trust

These words are not equivalent to "any alleged breach of any admitted trust". It is not, therefore, a condition precedent to the applicability of the section that the trust alleged by the plaintiffs is admitted by the defendants.[246] As this section is not confined to the case of admitted trusts, in a suit under this section, the court can determine whether the suit property is a *wakf*.[247] Public user of a temple for a long period without objection is strong evidence of the temple being a public temple.[248] The fact that income of certain properties of an institution has all along been applied to religious and charitable purposes is strong evidence for holding that those purposes are purposes for which the institution exists.[249]

In suit filed under section 92 claiming relief of removal of trustee and for framing of scheme of administration of the trust, it was held that the relief claimed in the suit is covered under section 92 (1) of the CPC and as such the suit was maintainable.[250]

[s 92.18] Where the Direction of the Court is Deemed Necessary for the Administration of any Such Trust

To bring a suit within this section, there must either be a breach of trust or the directions of the court must be necessary for the administration of the trust. 'The directions, which we referred to in this section, are such as are necessary for the carrying out of the trust and as are given to a trustee, either the existing trustee where there is one, or the new trustee, where one is to be appointed. The nature of the reliefs expressly mentioned shows what is meant by the words 'deemed necessary for administration of any such trust'.[251] The mere appointment of a *Mutawalli* is not a direction within the meaning of this section.[252]

[s 92.19] Whether Contentious or Not

These words were introduced to give effect to the decisions of the Calcutta[253] and Madras[254] High Courts that the section was not confined to non-contentious proceedings and that it applied to contentious proceedings also.

[s 92.20] Court Should Consider Evidence

The district judge, in exercise of power under section 92 of the CPC must act judiciously. If objections are filed before or after the Order under section 92 of the CPC is passed, granting or

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244. *K Panicker v Damodara*, AIR 1976 Ker 86.
245. *Nagu Reddiar v Banu Reddia*, AIR 1978 SC 1174 : (1978) 2 SCC 591 : (1978) 3 SCR 770.
246. *Jafar Khan v Daud Shah*, (1911) 13 Bom LR 49, 53.
247. *Saiyad Maher v Haji Alimahomed*, AIR 1934 Bom 257 : (1934) 36 Bom LR 526.
248. *Dharibhai v Pragdasji*, AIR 1938 Bom 471 : (1938) 40 Bom LR 1041.
249. *Keshao Das v Amar Dasji*, AIR 1935 Pat 111 : (1934) ILR Pat 379.
250. *Triloki Nath v Umesh Chandra*, 2007 (4) All LJ 759.
251. Per Woodroffe J, in *Budree Das v Chooni Lal*, (1906) ILR 33 Cal 789; but see *Amritram v Ramji*, (1908) 10 Bom LR 87.
252. *Abdul Alim Abed v Abir Jan Bibi*, AIR 1928 Cal 368 : (1928) ILR 55 Cal 1284.
253. *Mohiudin v Sayidudin*, (1893) ILR 20 Cal 810.
254. *Subbayya v Krishna*, (1891) ILR 14 Mad 186.

refusing the leave to file a suit, he is bound to take into consideration the documentary or oral evidence on record and examine the same critically and thereafter pass the Order.[255]

[s 92.21] Who May Be Sued Under This Section

It is not necessary that the defendant should be either a *de jure* or *de facto* trustee, otherwise no suit can be brought under this section in a case in which all trustees are dead or refuse to act.[256] It is not necessary to maintain a suit under this section that there should be a trustee. When there is a public trust, a suit can be filed against a person in possession of trust properties for framing a scheme.[257] A suit may be brought under this section against persons in possession of the trust property who claim adversely to the trust, that is, claim to be the owners of the property,[258] or against persons who deny the validity of the trust.[259] But a suit against one who is merely a servant for misappropriation of the trust property does not fall under this section.[260]

[s 92.22] Order for Security for Costs Against Defendant Trustee

Section 10 of the Charitable and Religious Trusts Act, 1920, provides that in any suit instituted under the present section, the court trying such suit may, if, on the application for the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, is satisfied that such an order is necessary in the public interest, direct the defendant, either to furnish security for any expenditure incurred, or likely to be incurred, by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates, such sum as such court considers sufficient to meet such expenditure in whole or in part, and that when any money has been so deposited, the court may make over to the plaintiff, the whole or any part of such sum for the conduct of the suit, but that before making over any sum to the plaintiff, the court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the court.

[s 92.23] Clause (a): Removing any Trustee

Though this clause did not occur in the corresponding section 539 of the Code of Civil Procedure, 1882, it was held by the High Courts of Calcutta, Bombay and Allahabad,[261] following an earlier decision of the Madras High Court,[262] that a suit for the removal of a trustee of a public trust and for the appointment of a new trustee, came under that section, though the removal of a trustee was not one of the reliefs specified in that section. Such a relief, it was said, was either covered by the words "such further or other relief as the nature of the case

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255. *Prabhu Dayal Tiwari v Lakhan Singh*, AIR 2001 All 60.
256. *Venkatanarasimha v Subba Rao*, AIR 1923 Mad 376 : (1923) ILR 46 Mad 300, 318, p 321.
257. *Perla Annapuornamma Gara v Collector of Vizag*, AIR 1953 Mad 908.
258. *Raghvendra Pratap Singh v Ramlal Das*, AIR 1948 Oudh 31 : (1946) ILR 22 Luck 151; *Raghubar v Keshe*, (1889) ILR 11 All 18 (FB); *Budhsingh v Niradbaran*, (1905) 2 Cal LJ 431; *Chintaman v Dhondo*, (1891) ILR 15 Bom 612; *Jafarkhan v Daudshah*, (1911) 13 Bom LR 49; *Deo Saran v Doeki*, AIR 1924 Pat 657 : (1924) ILR 3 Pat 842; *Alimiya v Sayed Mohomed*, AIR 1968 Guj 257 : (1968) 9 Guj LR 1002.
259. *Gadicherla Venkatanarasimha Rao Garu v Nyapathy Subba Rao Pantulu Garu*, AIR 1923 Mad 376 : (1923) ILR 46 Mad 300 (trust created by a will — heir in possession and denying validity of the trust).
260. *Baldeo v Gopalji*, AIR 1923 All 247 : (1923) 21 All LJ 310. See notes, below, "Trustee" and "Suits for possession of trust property, etc.".
261. *Gour Mohun Das Baishnav v Sajedur Raja Ghowdhury*, (1897) ILR 24 Cal 418; *Sayed v Collector of Kaira*, (1897) ILR 21 Bom 48; *Husen Begam v Collector of Moradabad*, (1898) ILR 20 All 46; *Girdhari Lal v Ram Lal*, (1899) ILR 21 All 200.
262. *Subbayya v Krishna*, (1891) ILR 14 Mad 186.

may require", or it was implied in the clause providing for the appointment of new trustees. On the other hand, the Madras High Court held, in a later case, that such a suit did not come under that section.[263] Sub-section (1), clause (a), of the present section gives effect to the Calcutta, Bombay and Allahabad decisions. A suit for the removal of a trustee must, therefore, be instituted in conformity with the provisions of this section. The High Court of Madras has held that a suit by the trustees of a temple for a declaration that the appointment by the *devasthanam committee* of the defendant as a trustee in place of a deceased trustee is invalid and for an injunction to restrain him from interfering with the management of the temple, is in effect, a suit for the removal of the defendant from the office of trustee, and that it cannot be instituted without the sanction required by this or the next section.[264] A similar view has been taken by the Patna High Court.[265] This view has been dissented from by the High Court of Bombay on the ground that to bring a suit within this section, there must either be an alleged breach of trust or the direction of the court must be deemed necessary for the administration of the trust and that neither of these conditions was present in the Madras case. The Bombay case was similar to the Madras case, and it was held that the case did not fall within this section.[266] The Madras case, though not overruled, was dissented from, in a later Full Bench case[267] and the Madras High Court has since held that a suit by a trustee to establish his right as hereditary trustee and for consequential relief, as the Temple Committee had appointed another person as sole trustee, did not fall within the section.[268] The section applies even when the plaintiff's prayer is for removal of a trustee *de son tort* or of a person wrongly appointed as trustee but even so, the suit is maintainable only if there is a breach of trust alleged or the direction of the court is sought.[269] Thus, a trustee making a gift in favour of his wife acts in breach of the trust.

Where leave to file a suit for removal of a trustee on ground alleged breach of trust is sought, the court is not required to embark upon a detailed examination of the material before it as if it is examining the evidence. The court has merely to see the existence of a *prima facie* case. The maintainability of the suit depends upon the allegations in the plaint. Thus, where there is specific allegation that a trustee created mortgage by subjecting the entire trust property into mortgage without taking necessary permission of the court, it was held that *prima facie* case was made out and as such leave can be granted.[270]

If after the death of such a trustee during the pendency of the suit, for his removal, his legal representatives are found to have been supporting the gift, they cannot be allowed to continue as trustees.[271]

In a suit under this section by two trustees of a temple, against a co-trustee, for his removal, the court has the power to investigate charges of misconduct made by the defendant against the plaintiffs and even to remove them.[272]

In framing a scheme of management under this section [see clause (g)], it is desirable to include a provision for the removal of trustees for breach of trust, for, where such a provision is included, the removal of a defaulting trustee may be obtained by an application in execution

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263. *Rangasami v Vardappa*, (1894) ILR 17 Mad 462; *Narayana v Kumarsami*, (1900) ILR 23 Mad 537.
264. *Subramania v Krishnaswamy*, (1919) ILR 42 Mad 668.
265. *Syed v Bibi*, AIR 1935 Pat 544 : (1925) ILR 4 Pat 741.
266. *Nilkanth v Ramkrishna*, AIR 1923 Bom 67 : (1922) ILR 46 Bom 101.
267. *Appanna v Narasinga*, AIR 1922 Mad 17 : (1922) ILR 45 Mad 113 (FB).
268. *Vythilinga v Temple Committee*, AIR 1931 Mad 801 : (1931) ILR 54 Mad 1011.
269. *Sarat Kumar Mitra v Hem Chandra Dey*, AIR 1960 Cal 558.
270. *Prof MS Padmarajaiah v Commr, Bangalore Mahanagara Palike*, 2007 (6) AIR Kar R1 : 2008 AIHC 236.
271. *Suroj Narain v Mangilal*, AIR 1972 Raj 172.
272. *Balkrishna v Jagannada*, AIR 1925 Mad 820 : (1925) 48 Mad LJ 534.

of the decree and the costs and trouble of a regular suit which would otherwise be probably necessary, may thus be avoided.[273] The procedure is necessary to avoid multiplicity of suits.[274] But where the scheme contains no such provision, it has been held that the trustees can be removed only in a suit, and not on an application under this section.[275]

As regards the removal of a trustee, the High Court of Bombay held that a mere lax and improvident management on the part of a manager of a shrine, fostered by the belief that he was entitled to manage the trust property free from control and very much as if he was its absolute owner, is not a sufficient ground for his removal.[276] The High Court of Allahabad also held that want of strict compliance with the objects of a *wakf* coupled with the absence of complaint from the beneficiaries, is not a good ground for removal of a *mutawali*.[277] The High Court of Bombay, in a later case, also said that there is no hard and fast rule that because the manager of a shrine has abrogated to himself the position of an owner, he should be removed from the office of a trustee and that each case must be decided with reference to its circumstances.[278] The Calcutta High Court has doubted this case and held that it applies only if there has been merely a misunderstanding and not a wilful default.[279] Accordingly, the Lahore High Court held that the *Mujawar* of a *Khankah* is an unfit person to continue in office if he denies the *wakf* character of the property and sets up an adverse claim to it.[280] A dictum of the privy council would suggest that the Bombay decisions are too indulgent. Lord Blanesburgh said that the standard of rectitude and accuracy expected from every trustee of charitable funds is of the highest, and that the standard must, in all circumstances, be maintained by the courts if the safety of property held upon such trust is not to be imperilled throughout British India.[281] In another case, the privy council held that the true rule is that if it be found by the court that the *Mahant* of a public religious and charitable endowment, in the exercise of his duties, has put himself in a position in which the court thinks that the obligations of his office in connection with the endowment, can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both the secular and religious offices held by him.[282]

The Patna High Court removed a *Sajjadanashin* from the management of a *wakf* for gross mismanagement, but allowed him to retain the spiritual office of *Sajjadanashin*.[283]

Where the secular and religious duties of a *Mahant* were interdependent and inseparably blended and have always been performed by the *Mahants*, the jurisdiction of the civil court under this section is not limited to the dealing with the *Mahant in* his capacity as Trustee and Manager of the properties and temporal affairs of the temple and deity but extends also to passing orders affecting his spiritual position as *Shebait* of the deity or his control over the spiritual affairs of the deity or endowment. The civil court, thus, has the power to remove him from his duties as well as to deprive him of the trusteeship and management of the temporal

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273. *Damodarbhat v Bhogilal* (1900) ILR 24 Bom 45.
274. *Chandraprasad v Jinabharthi*, AIR 1931 Bom 391 : (1931) ILR 55 Bom 414; *Lal Mukund v Raza Ali Khan* (1959) ILR Raj 1191.
275. *Aswini Kumar v Gaya Prasad*, AIR 1952 Assam 176.
276. *Annaji v Narayan* (1897) ILR 21 Bom 556.
277. *Forman Ali Khan v Mohd Raza Khan*, AIR 1950 All 62.
278. *Damodar Bhatji v Bhat Bhogilal* (1898) ILR 22 Bom 493; *Jawahar Beg v Abdul Aziz*, AIR 1956 Nag 257 : (1956) ILR Nag 659.
279. *Shilajananda v Umeshanunda* (1905) 2 Cal LJ 460.
280. *Fazla v Zainulab*, AIR 1932 Lah 359 : (1932) ILR 13 Lah 162.
281. *Gulzari Lal v Collector of Etah*, AIR 1931 PC 121 : (1931) ILR 53 All 910 : 58 IA 460.
282. *Satish Chandra v Dharanidhar*, AIR 1940 PC 24 : (1940) ILR 1 Cal 266 : 67 IA 32.
283. *Syed Shah Mahomed Kazim v Syed Ali Saghir*, AIR 1932 Pat 33 : (1932) ILR 11 Pat 288.

affairs of the endowment.[284] The Nagpur High Court has gone further and has held that the court can remove him from his secular and spiritual office.[285]

[s 92.24] Trustee

A person appointed trustee by the court, though his appointment may be impeached as being illegal, is a trustee within the meaning of clause (b), and not a trespasser so long as his appointment is not set aside.[286] A *de facto* trustee is also a trustee for the purpose of this section.[287] So is a trustee *de son tort*, that is, a person who has not been appointed trustee, but who takes charge of the trust property and purports to manage it as trust property.[288] A *mahant* or a *shebait*, who has accepted the office, or acknowledged himself as such, is incapable of asserting any hostile title against a trustee, such disability being implicit in any person who holds a fiduciary position in relation to another.[289] However, a suit against a mere trespasser does not fall within the ambit of this section. A trespasser is different from a trustee *de son tort* in that a trespasser claims adversely to the trust and so cannot be deemed to be trustee while a trustee *de son tort* does not claim adversely though his title to act as a trustee is defective.[290] The *Acharya* of a temple is a "constructive" trustee within the meaning of this section and he may be sued as such.[291] And so is the head of a *mutt*.[292] When there is a public trust or charity, the jurisdiction of the court to take action with respect to it under section 92 is not ousted by reason of the management being vested in a committee registered under section 25 of the Companies Act, 1956. It makes no difference in the application of the section whether the trustee is an individual or a company.[293] A *mutawalli* empowered by the scheme to appoint his own successor, cannot appoint his successor's successor and so on.[294]

[s 92.25] Clause (b): Appointing New Trustee

A suit for the appointment of new trustees of a temple on the ground that the defendants are not lawful trustees and that the office of trustees is therefore vacant, is a suit under clause (b) of this section.[295]

Under this section, the court, in sanctioning a scheme, may provide for the appointment of additional or new trustees though such appointment may not be in conformity with the

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284. *Satishchandra Giri v Dharanidhar*, (1940) ILR 1 Cal 266 : 67 IA 32 : (1940) 44 Cal WN 177.
285. *Laxmanrao v Govindrao*, AIR 1950 Nag 215 : (1950) ILR Nag 1.
286. *Anjuman Ismalia v Latapat Ali*, AIR 1950 All 109; *Saiyid Ali v Ali Jan*, (1913) ILR 35 All 98.
287. *Satya Charan Sarkar v Rudrananda*, AIR 1953 Cal 716.
288. *Munshi Abdur Rahim Khan v Fakir Md. Shah*, AIR 1946 Nag 401 : (1946) ILR Nag 518; *Jugal Kishore v Lakshmandass*, (1899) ILR 23 Bom 659; *Budree Das v Chooni Lal*, (1906) ILR 33 Cal 789, p 805–06; *Ram Bilas v Nityanand*, AIR 1922 All 542 : (1922) ILR 44 All 652; *Bihari Lal v Shiva*, AIR 1924 All 884 : (1925) ILR 47 All 17; *Ramdas v Krishna Prasad*, AIR 1940 Pat 425.
289. *Bhagwan Dass v Jairam Dass*, AIR 1965 Punj 260 : (1964) 66 Punj LR 1050.
290. *Association of Radhaswami Dera Baba Bagga Singh v Gurnam Singh*, AIR 1972 Raj 263 : (1972) Raj LW 182.
291. *Shripatiprasad v Lakshmidas*, AIR 1924 Bom 193 : (1923) 25 Bom LR 747.
292. *Nelliappa v Punnaivanam*, AIR 1927 Mad 614 : (1927) ILR 50 Mad 567; *Keshao Das v Amar*, AIR 1935 Pat 111 : (1934) ILR14 Pat 379; *Sudindhra Tirtha v Commr of Hindu Religious and Charitable Endowments*, AIR 1956 Mad 491 : (1956) 1 Mad LJ 532.
293. *Gomathinayagan Pillai v Sri Manthramurthi High School*, (1963) 2 Mad LJ 56.
294. *Amjadulla Siddique v Mirza Nizamuddin Baig*, AIR 1982 AP 342 (DB).
295. *Neti Rama v Venkatacharulu*, (1903) ILR 26 Mad 450; *Mitchla v Mitchla*, AIR 1938 Rang 339 : (1938) ILR Rang 276.

original constitution of the trust or with the rules in force in respect to it.[296] New trustees, appointed under a scheme, have the right to execute the decree.[297]

A suit for an injunction against the defendants, permanently restraining them from obstructing the plaintiff in the enjoyment of the property attached to a temple according to the turn of the plaintiff, falls under this section.[298] In a suit for the removal of trustees and appointment of new trustees, the court can, in a proper case, appoint an interim receiver.[299]

In a suit for appointment of trustee, there was nothing to show that anybody either from the plaintiffs or from the general public contributed for renovation, reconstruction of the suit property and the conduct of the plaintiff and general public also indicated that the suit property was never dedicated or meant for public charitable purposes, rather it continued to be the exclusive property of the successors of an individual. It was held by the Himachal Pradesh High Court that suit for appointment of trustee was not maintainable, more so when successors at no point of time divested their ownership of the suit property.[300]

[s 92.26] Application for Appointment of New Trustees

Section 92 mandates that where any direction is sought from the court for administration of any trust, two or more persons having an interest in the trust may institute a suit with the leave of the court. Even for appointing a new trustee, the preconditions mentioned in section 92 have to be complied. The application of the petitioner dated was made solely by the petitioner and it was not moved by "two or more persons" and neither was the application made by "leave of the court". The power in the aforesaid application was for appointing a new trustee. The application of the petitioner under section 151 of the CPC was referable to section 92 of the CPC and since the preconditions of section 92 of the CPC had not been complied with the application was not maintainable.[301]

Where certain persons apply for being appointed trustees of a certain *wakf* without specifically praying for the removal of the existing trustees, the purpose of the application is nothing but the removal of the trustees and the relief sought for, falls within the purview of section 92(1). In such a case, though this section does not expressly bar such an application, it does so by necessary implication and the court has no jurisdiction to entertain such an application.[302]

[s 92.27] Clause (cc): Direction to Deliver Possession

This clause was inserted by the Civil Procedure Code Amendment Act, 1956. Before the enactment of this clause, there was some controversy whether a decree under this section directing the removal of a trustee could also provide for delivery of possession of the trust properties by him, to the persons entitled to it. The object of the clause is not to enlarge the

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296. *Gumnatharudhaswami v Bhimappa*, AIR 1948 PC 214; *Prayag Doss v Tirumala*, (1905) ILR 28 Mad 319.
297. *Varadaiah v Narasimhulu*, AIR 1932 Mad 41 : (1931) ILR 54 Mad 345.
298. *Chhaganlal v Sobhram*, AIR 1934 Bom 26 : (1933) 35 Bom LR 1119.
299. *Institute of Indo Portuguese v Dr Borges*, AIR 1959 Bom 275 : (1958) ILR Bom 1055 : (1958) 60 Bom LR 660.
300. *Kamla Devi v Surindra*, 200(1) Shim LC 218.
301. *Jagannath Singh v District Judge, Varanasi*, AIR 2003 All 226.
302. *Saadat Husain v Mazir Husain*, AIR 1942 Oudh 135 : (1941) ILR 17 Luck 391; *Nawab Mirza v Hakim Mirza Jafar*, AIR 1937 Oudh 381.

existing powers of the court. It was added as and by way of abundant caution and to dispel any doubt that the court had the power to give such a direction.[303]

[s 92.28] Clause (d): Directing Accounts and Inquiries

Under the corresponding section 539 of the Code of Civil Procedure, 1882, the High Court of Bombay held that a suit to remove the trustees of a public charity, and to compel them to account, and to make good the losses sustained by the charity, by reason of default on the part of the trustees, and for the appointment of new trustees, was a suit within that section, though a relief for accounts was not one of the reliefs specifically mentioned in that section. Such a relief, it was said, was covered by the words "further or other relief".[304] The present clause gives legislative recognition to the above decision.[305] A relief against a defendant trustee for such amount, as may be found due on accounts being taken, cannot be claimed under this section.[306] Likewise, back accounting cannot be ordered in the absence of diversion of funds such as would amount to misappropriation, malversation or breach of trust.[307]

[s 92.29] Clause (e): Apportionment of Income

A suit for a declaration as to what proportion of the trust property (e.g., offerings placed by devotees before an idol) should be allocated to the *pujaris* (officiating priests) and what to the *guravs* (temple servants), relates to a relief covered by clause (e) of the section.[308]

[s 92.30] Clause (f): Authorising Trust Property To Be Let

This clause enables a trustee to obtain the sanction of the court for letting, selling, mortgaging or exchanging the whole or any part of the trust property. The clause is an enabling provision and should not be understood as circumscribing the powers of trustees of ordinary administration of trust property, which would include letting, selling, etc for the benefit of the trust. The clause was put in the section *inter alia* to authorise the court to permit alienation of trust property where, for example, there is a prohibition in this regard in the trust deed.[309] An application for this purpose is not a suit under this section.[310]

[s 92.31] Clause (g): Settling a Scheme

This section vests a very wide discretion in the court, as regards directions to be given for the administration of public trusts. In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution and the way in which the management is carried on in conjunction with other existing conditions that may have grown up since its foundation.[311] While framing a

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303. *Rustam Khan v Ahmad Bux*, AIR 1966 All 163 : (1966) All LJ 588.
304. *Syad v Collector of Kaira*, (1897) ILR 21 Bom 48; *Amritram v Ramji*, (1908) 10 Bom LR 87.
305. *Balakrishna Chettiar v Krishnamurthi Aiyar*, AIR 1927 Mad 416 : (1927) 52 Mad LJ 182.
306. *P Gayaprasad v SS Bhargao*, AIR 1934 Nag 48; *MMJ Kermani v Kirmani*, AIR 1978 Mad 121.
307. *Collector of Tiruchirapalli v Velan Chettiar*, (1960) 1 Mad LJ 364.
308. *Sakharam v Ganu*, AIR 1921 Bom 297 : (1921) ILR 45 Bom 683; *Chhaganlal v Sobharam*, AIR 1934 Bom 26 : (1933) 35 Bom LR 1119.
309. *Madappa v Mahathadevaru*, AIR 1966 SC 878.
310. *Fakrunnessa v District Judge*, (1920) 47 Cal 529; *Re Dhanalal*, AIR 1975 Cal 67.
311. *Mahomed Ismail v Ahmed*, (1916) 43 IA 127, p. 135 : (1916) ILR 43 Cal 1085, pp 1101–02.

scheme, the district court or the high court in appeal may provide that powers with regard to certain matters which may arise in course of administration, may be reserved to the district court. Such a provision does not mean enlargement of jurisdiction. It only means that the district court, which has framed the scheme, is empowered to implement or work out the scheme.[312] The court can also consider the claims, moral if not legal, of the *archakas* and make provision for protecting them.[313] When a *Mahant* was appointed as manager of a temple by the appropriate authorities, the fact that after him the office of trustee was held by his heirs in succession would not confer on them a right to hereditary trusteeship.[314] The court may refuse to frame a scheme where no mismanagement is proved.[315] But when trust property had been diverted and the object of the trust had not been carried out and the trustee had not accounted for income received, the court can frame a scheme. The Madras High Court has said that a scheme decree, if general, is, by its very nature, a declaratory decree; but that if particular provisions provide for enforcement of parts of the scheme, such portions of the scheme decree are executable;[316] and in one case the same high court enforced a scheme by the appointment in execution of a receiver of properties which the scheme had placed under the control of a temple trustee.[317] But when there is no trust — public or private — as for example, when co-owners appoint a manager for management of their common properties, there can be no question of the court framing a scheme. The remedy of the co-owner who is aggrieved, is to file a suit for partition.[318]

A scheme framed by the court may be varied, if good cause is shown.[319] Such a variation can be prayed for by an application under section 151.[320] A decision on such an application made under section 57(9) of the Madras Hindu Religious Endowments Act, 1926 amounts to a decree within the meaning of section 2(2) of the CPC.[321] But where a scheme is once settled, it precludes a suit to establish a private right to manage the property (e.g., hereditary trusteeship) which, if established, would interfere with the scheme settled by court.[322]

The court has power under this section to frame a scheme in respect of a public temple, though it is under the control of a Temple Committee constituted under the Religious Endowments Act 20 of 1863.[323] But where a trust is a private trust, e.g., for a family idol, the settlement of a scheme under this section is inappropriate.[324] However, in the case of a debutter, where the deity is the legal owner of the property, the assistance of the court may be invoked for the settlement of a scheme of management where all the parties interested are impleaded

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312. *Jagmohandas v Jamnadas*, AIR 1965 Guj 181.
313. *Periaswamy v Sundaresa Ayyar*, AIR 1965 SC 516 : (1965) 1 Mad LJ 119.
314. *Mahant Narayan v State of Andhra Pradesh*, AIR 1959 AP 471.
315. *AG v Yusufalli*, AIR 1921 Bom 338 : (1922) 24 Bom LR 1060.
316. *Thiagarajaswami v Belayee*, AIR 1928 Mad 61; *Narayan Krishnaji v Anjuman E Islamia*, AIR 1952 Mys 14.
317. *Vythilinga v Temple Committee*, AIR 1931 Mad 801 : (1931) ILR 54 Mad 1101.
318. *Ramakrishna Pillai v Varadarajaswami*, AIR 1957 Mad 735.
319. *Prayag Doss v Tirumala*, (1905) ILR 28 Mad 319; *Ramados v Hanumantha*, (1913) II R 36 Mad 364.
320. *Kailash Chandra v Addl-District Judge*, AIR 1966 All 509.
321. *Rama Rao v Board of Commr*, AIR 1965 SC 231 : (1964) 5 SCR 270.
322. *Suraj Giri v Bramh Narain*, AIR 1946 All 148 : (1946) ILR All 107; *Ramados v Hanumantha*, (1913) II R 36 Mad 364; *Sakharam v Ganu*, AIR 1921 Bom 297 : (1921) ILR 45 Bom 683.
323. *Sitharama v Subramania Iyer*, (1916) ILR 39 Mad 700.
324. *Gopal Lal v Purna Chandra*, AIR 1922 PC 253 : (1922) ILR 49 Cal 459 : 49 IA 100.

and the deity is represented by a disinterested third party.[325] The court has jurisdiction even apart from this section to frame a scheme for a private trust in appropriate cases.[326]

In decrees passed under this section, liberty is generally reserved to the parties to apply to the court as occasion arises; (as to the effect, of such a clause, see the undermentioned case.)[327] The Madras High Court has held that liberty may be reserved to parties to apply to the court to fill any vacancy in the office of a trustee appointed under a scheme;[328] but the same high court has also held that liberty to apply for a modification of the scheme or for a relief coming under section 92 is *ultra vires*,[329] and that a clause in a scheme settled by court which has the effect of investing the court with wide and general powers and duties of superintendence is *ultra vires*,[330] and the Rangoon High Court has followed these decisions.[331] But such clauses have appeared in schemes approved by the Privy Council;[332] and the Bombay High Court holds that the original consent of the Advocate-General is sufficient to give the court seizing of the case and the court is competent to entertain applications, for liberty to apply is reserved in order to avoid multiplicity of actions.[333] But if the court in the exercise of powers reserved in a scheme of management of a *wakf* appoints a *mutawalli*, a disappointed candidate for the office of *Mutawalli* has no *locus standi* to appeal.[334] The Allahabad and the Calcutta High Courts have held that a court settling a scheme has jurisdiction to include a provision in the scheme reserving to itself, the power to modify the scheme in future *suo motu* or otherwise, and that the power of the court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision which makes the scheme alterable by the court, if it is found necessary in future.[335] The question is now concluded by the decision of the Supreme Court in *Raje Ananda Rao v Sham Rao*[336] in which it has been held overruling the decision in *Viraraghavachari v AG of Madras*[337] that a suit under this section is analogous to an administrative action and that a provision in the scheme giving opportunity to the parties to move for modification thereof by application in the suit is *intra vires* but while such a clause is valid, the power reserved should not be used so as to substitute a new scheme[338] and should be

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325. *Doongarsee Syamji Joshi v Tribhubandas*, AIR 1947 All 375 : (1947) ILR All 263; *Bimal Krishna v Sree Iswar Radha*, AIR 1937 Cal 338; *Manohar Moorkerjee v Pearey Mohan*, (1920) 24 Cal WN 478.
326. *Sri Mahadeo Jew v Balakrishna*, AIR 1952 Cal 763; *Narayanan v Balasundara*, AIR 1953 Mad 750 : (1952) 1 Mad LJ 437; *Chellam Pillai v Chatham Pillai*, AIR 1953 TC 198 : (1953) ILR TC 610; *Asha Bibi v Nabissa Sahib*, AIR 1957 Mad 583; *Ramasami v Ayyasami*, AIR 1960 Mad 467; *Thenappa Chettiar v Karuppan Chettiar*, AIR 1968 SC 915; *Ramchand v Janki Ballabhji*, AIR 1970 SC 532 : (1970) 1 SCR 634; *Brindaban v Ram Lakhan*, AIR 1975 All 255 : (1974) ILR 2 All 7.
327. *Manadananda v Taraknanda*, AIR 1924 Cal 330 : (1923) 37 Cal LJ 281; *Narayanamurthi v Achayya*, AIR 1925 Mad 411 : (1924) 47 Mad LJ 714.
328. *Sivram v Rajagopala*, AIR 1930 Mad 918 : (1930) ILR 54 Mad 315.
329. *Abdul Hakim v Mahomed Burrammudin*, AIR 1926 Mad 559 : (1926) ILR 49 Mad 580; *Brahamayya v Venkatasuryanarayanamurthy*, AIR 1926 Mad 557 : (1926) 50 Mad LJ 409; *Veeraraghavachariar v AG*, AIR 1927 Mad 1073 : (1927) ILR 51 Mad 31(FB).
330. *Narsinha Pai v Chanda*, AIR 1935 Mad 474.
331. *U Po Maung v U Jun Pe*, AIR 1929 Rang 20 : (1928) ILR 6 Rang 594.
332. *Prayagdossjivaru v T Srirangacharla Varu*, (1907) ILR 30 Mad 138 (PC); *Jeranchod v Dakore Temple Committee*, AIR 1925 PC 155 : (1925) 27 Bom LR 872.
333. *Chandraparasad v Jinabharthi*, AIR 1931 Bom 391 : (1931) ILR 55 Bom 414.
334. *Shah Zahirul v Syed Rashid*, AIR 1935 Pat 261 : (1935) ILR 14 Pat 236.
335. *Ram Nath v Goverdhan*, AIR 1936 All 97 : (1936) ILR 58 All 538; *Srijib Najayathirtha v Dandy Swami Jagannath Asram*, AIR 1941 Cal 618 : (1941) 73 Cal LJ 532.
336. *Raje Ananda Rao v Sham Rao*, AIR 1961 SC 1206 : (1961) 3 SCR 930 : (1962) 1 SCJ 584; *Sree Kalimata Thakurani v RC Chatterjee*, AIR 1970 Cal 373 : (1971) 75 Cal WN 1.
337. *Viraraghavachari v AG of Madras*, AIR 1927 Mad 1073 : (1928) ILR 51 Mad 31 (FB).
338. *Abdul Khan v Nazir Hoossain*, AIR 1960 Cal 631; *Rangaswami Raju v Rajapalayan Municipality*, AIR 1977 Mad 287 : (1976) ILR 3 Mad 341.

exercised only for substantial reasons and for the benefit of the trust.[339] But where the court has settled a scheme reserving the right to the existing trustees to make an application for filling in a vacancy of a trustee, a beneficiary under the trust cannot apply to the court for that purpose. His remedy is by way of a suit.[340]

Where it is quite clear that a public trust has been properly constituted by will, it is not necessary that a suit for the administration of the estate of the testator should precede a suit under this section. But, it is otherwise, where it is doubtful whether there would be funds sufficient for the charitable bequest. In the latter case, an administration suit may become necessary before any scheme can he framed under this section.[341] Where the trust funds are not ascertained and the defendants are accountable for the management of the trust property, the proper course is to take the accounts before a scheme is framed.[342]

In a suit brought under this section in respect of a public religious trust, the court has jurisdiction to frame a scheme regulative of the conduct of the institution as the owner of moneys and property which it possesses, even in cases where the *acharya*, as the head of its spiritual and temporal affairs, is worshipped by the members of the sect as the representative of the God. In drawing up the scheme, however, the court must not encroach upon the rights and prerogatives of the *acharya* as a religious preceptor of the community, but while the institutional trust must be respected, the sect and body of worshippers for whose benefit it was set up have the protection of the court against their property being the subject of abuse, speculation and waste.[343]

There has been a divergence of opinion on the question whether a provision in a scheme decree is executable. There is a large body of decisions which hold that it is not executable — whether directory or mandatory.[344] But the contrary view has also been taken in some decisions.[345] If it is purely declaratory, it cannot be executed.[346] A direction made in accordance with the new clause (cc) is clearly executable.

Where provision is made in a scheme for an application being made to the court for the purposes mentioned in it, and an order is made on the application, the order is not one in execution, and no appeal lies from it.[347] The appeal can, however, be treated as an application for revision, if the applicant has challenged the jurisdiction of the court to make an amendment in the scheme.[348]

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339. *Srinivas v Purshotham*, AIR 1953 Bom 393.
340. *Chameli Bibi v Kanhaiya Lal*, AIR 1973 Cal 328.
341. *Venkatanarasimha v Subba Rao*, AIR 1923 Mad 376 : (1923) ILR 46 Mad 300.
342. *Chotalal v Manohar*, (1900) ILR 24 Bom 50 : 26 IA 199.
343. *Sripatiprasadji v Laxmidas*, AIR 1929 PC 27 : (1929) 31 Bom LR 243.
344. *Vaidyalinga v Board of Control, Thyagarajaswami Devasthanam*, AIR 1927 Mad 1073; *Ramanathan Chettiar v Mathurai Meenakshisundareswarar Devasthanam*, (1937) 2 Mad LJ 887 : 46 LW 701; *Achyutha Rama Rao v Salasa Bapayya*, (1943) 1 Mad LJ 504 : 55 LW 627; *Atul Krishna Roy v Manmatha Nath*, AIR 1949 Cal 215 : (1949) 83 Cal LJ 48; *Subba Rao v Venkatanarasimha*, AIR 1951 Mad 736.
345. *Damodar Bhat v Bhogilal Karsandas*, (1900) ILR 24 Bom 45; *Thyagarajaswami Devasthanam v Balayya*, AIR 1928 Mad 61; *BS Mahadev Singh v Nandgopal Das*, AIR 1960 AP 423.
346. *Ishwar Sridhar Jew v Gnanendra*, AIR 1960 Cal 718 : (1959) Cal LJ 237.
347. *Jeranchod v Dakore Temple Committee*, AIR 1925 PC 155 : 87 IC 313 : (1925) 27 Bom LR 872; *Abdul Hakim Baig v Burrammudin*, AIR 1926 Mad 559 : (1926) ILR 49 Mad 580 : 95 IC 720; *Sivram v Rajagopala*, AIR 1930 Mad 918 : (1930) ILR 54 Mad 315 : 128 IC 515.
348. *M Faiyaz Ali v Mian Saifullah*, AIR 1940 Oudh 421. See note below under the heading "Appeal".

[s 92.32] Clause (h): Further or Other Relief

"The words "granting such further or other relief as the nature of the case may require", must be read with what has preceded as referring to further relief to which the party may be entitled which arises out of the existence of the trust in respect of which the suit has been brought." Therefore, where the only relief claimed in a suit is for a declaration that certain property is *wakf* property, the suit does not come within the purview of this section. Such a relief does not come within the words "further or other relief".[349] 'The general clause dealing with "further or other relief..." ought to be read with the five preceding specific clauses, and nature of the reliefs, which may be properly granted under it, is of the same character as the reliefs which may be granted under the preceding clauses. The five specific clauses are not merely illustrative, but furnish an indication of the nature of the relief, which may be granted in a suit under this section'.[350] In section 92 (1)(h), the words "further or other relief" do not authorise change of character of the original trust onto a different one or alteration of its objects. A suit cannot be filed to convert a trust for providing food into a trust for educational purposes.[351]

The question as to the precise scope of clause (h) is of great importance, for, if the words "such further or other relief as the nature of the case may require" mean relief of the same nature as clauses (a)–(g), a relief in a suit against strangers to a trust, for a declaration that property in their possession is trust property, would be outside the scope of this section as it would not be of the same nature as clauses (a)–(g) and the suit could be maintained without the consent of the Advocate-General. This question arose in *Abdul Rahim v Abu Mahomed Barkat Ali*,[352] where the Privy Council held that a suit for a declaration that property belongs to a *wakf* can be maintained by Mahommedan interested in the *wakf* without the consent of the Advocate-General. It was argued in that case on behalf of the defendants that the words "further or other relief" must be taken, not in connection with the previous clauses (a)–(g), but in connection with the nature of the suit namely, any relief other than (a)–(g), that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case, and that a breach of trust having been alleged the suit came under this section and it could not be maintained without the consent of the Advocate-General. But this argument was not accepted and it was held that the words "further or other relief" in clause (h) must, on general principles, be taken to mean relief of the same nature as clauses (a)–(g), and that, as the relief for a declaration that the property belonged to the *wakf* was not of that nature, the suit was outside the scope of the section. Their Lordships said that the construction suggested on behalf of the defendants would cut down substantive rights which existed before the enactment of the Code of 1908, and a Code regulating procedure should not be construed as having that effect in the absence of express words. Before the enactment of that Code, a person interested in a public trust had the right to maintain a suit for such a declaration as the above without the consent of the Advocate-General, and this is the substantive right referred to above. It follows that when a suit is brought for some of the reliefs mentioned in this section with the consent of the Advocate-General, and a prayer for a declaration is afterwards added

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349. *Lokenath v Abani Nath*, AIR 1941 Cal 68 : 194 IC 874 : (1940) 72 Cal LJ 362; *Jamaluddin v Mujtaba Husain*, (1903) ILR 25 All 631; *Salig Ram v Bassao Mal*, (1919) 1 Lah LJ 150 : 67 IC 320.
350. *Budree Das v Chooni Lal*, (1906) ILR 33 Cal 789.
351. *Melur Panchayat Union v I Sundararajan*, AIR 1982 Mad 278.
352. *Abdul Rahim v Abu Mahomed Barkat Ali*, AIR 1928 PC 16 : (1928) ILR 55 Cal 519 : 108 IC 361 : 55 IA 96; *Gafuralli v Mohiddin*, AIR 1932 Bom 65 : 135 IC 806 : (1931) 33 Bom LR 1575; *Bachint Singh v Ganpat Rai*, AIR 1937 Lah 660 : 172 IC 319; *Shadi Ram v Ram Kishen*, AIR 1948 EP 49; *Lingam Ramaseshayya v Myneni Ramayya*, AIR 1957 AP 964.

and strangers to the trust are joined as defendants, the suit ceases to that extent to be one under section 92 or of a representative character.

The Nagpur court has held that possession can be taken by a decree under this section from the manager of the property, if he has taken possession wrongfully and has been mismanaging the property and that such a relief in the decree will fall under this clause.[353]

There is a conflict of opinion as to whether a prayer that a deed of trust may be construed by the court and that the true scope and object of the trust fund may be determined by the court comes within the words 'further or other relief'.[354]

[s 92.33] Suits Outside the Scope of the Section

This section does not apply unless—

(i) there is a trust created for public purposes of a charitable or religious nature;

(ii) there is a breach alleged of such trust, or the direction of the court is deemed necessary for the administration of such trust; and

(iii) the relief claimed is one or other of the reliefs mentioned in the section.[355]

If all the three conditions mentioned above are fulfilled, the suit must be instituted in conformity with the provisions of this section, that is to say, it must be instituted either by the Advocate-General or by two or more persons interested in the trust with the consent of the Advocate-General[356] now with the leave of the court; if it is not so instituted, if must be dismissed. The applicability of the section is to be determined on the allegations made in the plaint and irrespective of the written statement.[357] But if any one of the three conditions is absent, the suit is outside the scope of this section, and it may be instituted in the ordinary manner.[358] The bar enacted by this section would apply even if some of the reliefs claimed fall within the section.[359] The mere fact that a suit relates to a public charitable or religious trust, or that it relates to property held on such trust is not sufficient to bring it within the scope of this section.[360] At the same time a suit which is clearly within the scope of this section cannot be treated as one outside its scope, because in addition to reliefs under this section, it claims reliefs not allowed by the section.[361] The Punjab & Haryana High Court, relying upon *Saraswati v Ramji Tripathi*,[362] held that every suit claiming the relief specified in section 92 cannot be brought under section 92 because section 92 envisages suits of a special nature which pre-supposes the existence of a public trust of religious or charitable character. Such a suit can proceed only on the allegation that there is a breach of such trust or that the directions of the court is necessary for the administration of the trust. Furthermore, the plaintiff must pray for

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353. *Gayyaprasad v SS Bhargao*, AIR 1934 Nag 48 : 144 IC 506.
354. *Dinsha Petti v Jamsetji*, (1909) ILR 33 Bom 509. See note below "suits only for a declaration of trust".
355. The judgment of Woodroffe J, in *Budree Das v Chooni Lal*, (1906) ILR 33 Cal 789; *Ramdas v Krishna Prasad*, AIR 1940 Pat 425. See note below "sub-section (2)".
356. *Janaki Bai v Triruchitrambala*, AIR 1935 Mad 825 : (1935) ILR 58 Mad 988(FB). See notes above "Leave of the court".
357. *Abdul Razak Sahib v Abdul Hamid Said*, AIR 1951 Mad 406.
358. *Madhavrao v Shri Omkareshwar Ghat*, AIR 1929 Bom 153 : (1929) 31 Bom LR 192.
359. *Ranchhoddas Kalidas v Goswami Mahalaxmi Vahuji*, AIR 1963 Bom 153 : (1953) ILR Bom 271.
360. See notes below "Suits to enforce private rights" and "Suits for a declaration and possession of trust property against third persons, etc".
361. See notes below "Suits for removal of trustees, etc" and "Where some of the reliefs are outside the scope of this section".
362. *Parmatmanand Saraswati v Ramji Tripathi*, AIR 1974 SC 2141 : (1974) 2 SCC 695 : (1975) 1 SCR 790

anyone or more of the relief that are mentioned in the section. If the allegation of breach of trust is not substantiated or if the plaintiff has not made out a case for any direction by the court for proper administration of the trust, the very foundation of the suit under section 92 would fall.[363] The court under section 92 is not competent to appoint a Special Officer for framing schemes for management of *Math* property.[364] In the absence of any material placed before the court to show that there had been a creation of endowment—either religious or charitable, it cannot be assumed that the property did not cease to be a property of creator, irrespective of the fact that the people at large do come to the temple to offer prayers and to sing *bhajans* and come to stay in *Dharmashala*.[365] Section 52(1) of Bombay Public Trusts Act, 1950 makes section 92 and section 93 of the CPC inapplicable to public trust registered under the Act.[366]

[s 92.34] Suits to Enforce Private Rights

The suit contemplated by this section is a representative suit.[367] Suits brought, not to vindicate or establish the right of the public in respect of a public trust, but to remedy an infringement of an individual right or to vindicate a private right, do not fall within this section.[368] The mere fact that a suit claims relief specified in the section does not bring the suit under it. It must be brought by individuals as representatives of the public for vindication of public rights. In deciding whether a suit falls within this section, the court must have regard to the capacity in which the plaintiffs are suing and the purpose for which it is brought. Where the right to the office of a trustee is asserted or denied the suit is outside the section.[369] Such suits are instituted in the ordinary manner and not under this section. The following are instances of suits of this character:

(i) A suit by a person claiming to be a co-trustee of a certain *tiara* and entitled as such to a share with the defendant trustee in the management and profits thereof: *Miya Vali Ulla v Sayad Bava*.[370] A suit by a person claiming to be a trustee against a rival claimant for management of the institution as such trustee: *Jamiat Dawat v Mohamad Sharif*.[371]

(ii) A suit by the trustees of a fire temple for the vindication of the right of management which was vested in and actually being exercised by them at the date of the obstruction by the defendants: *Navroji v Dastur Kharshedji*.[372]

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363. *Gurunanak Education Trust v Shri Balbir Singh*, AIR 1995 P&H 290.
364. *Samit Pani Brahmachary v Mayapur Chaitanya Math*, AIR 1999 Cal 132 (DB).
365. *Shri Satyanaranji Maharaj Virajman Mandir v Rajendra Prasad Aggarwal*, AIR 1997 All 413.
366. *Shree Gollaleshwar Dev v Gangawwa kom Shantayya Math*, (1985) 4 SCC 393.
367. See note above "Representative suit and *res judicata*".
368. *Tirumalai Devasthanams v Krishnayya Shanbhaga*, (1943) Mad 619 : AIR 1943 Mad 466 (FB); *Radha Krishna v Lachmi Narain*, AIR 1948 Oudh 203; per Davar J, in *Dinsha Petit v Jamsetji*, (1909) ILR 33 Bom 509; *Parmatmanand Saraswati v VR Tripathi*, AIR 1974 SC 2141 : (1974) 2 SCC 695 : (1975) 1 SCR 790.
369. *Parmatmanand Saraswati v VR Tripathi*, AIR 1974 SC 2141 : (1974) 2 SCC 695 : (1975) 1 SCR 790.
370. *Miya Vali Ulla v Sayad Bava*, (1898) ILR 22 Bom 496; *Visalakshi v Veerayya*, AIR 1965 Mad 531 : (1965) 2 Mad LJ 231.
371. *Jamiat Dawat v Mohamad Sharif*, AIR 1938 Lah 869; *Balakishendas v Parameshwar Das*, AIR 1952 Punj 31; *Sri Ramulu Naidu v Sathi Naidu*, (1954) 2 Mad LJ 552 : 67 LW 571; see also *MMB Catholicos v MP Athanasius*, AIR 1954 SC 526 : (1955) SCR 520 : (1955) SCJ 736 : (1955) SCA 1354.
372. *Navroji v Dastur Kharshedji*, (1904) ILR 28 Bom 20, p 54.

(iii) A suit between two individuals, each claiming certain rights as *Mutawali* over *wakf* property: *Manijan v Khadem Hossein.*[373]

(iv) A suit between two persons as to which of them is the lawful trustee of a charity: *Budree Das v Chooni Lal.*[374] The High Court of Bombay has held that where the defendant is in management of the trust property and the plaint also contains a relief for accounts against him, the suit is one under this section; *Narayan v Vasudeo.*[375] But this view conflicts with the Madras view.

(v) It has been held by the High Court of Allahabad that the right of a Mahommedan to use a mosque is not a public but a private right. It is like the right to use a private road; anyone who has the right may maintain a suit in respect of it.[376] To such a suit, the provisions of this section do not apply. Thus, it has been held that any Mahommedan entitled to frequent a mosque may, if property belonging to the mosque is sold by the manager of the mosque for his private debts, maintain a suit for a declaration that the property is, *wakf* property, and to set aside the sale and evict the purchaser; *Zafaryag Ali v Baktawar Singh.*[377] Similarly, if land attached to a mosque is encroached upon, *any* Mahommedan entitled to use the mosque may sue to evict the trespasser. And if the mosque be in a dilapidated condition and a Mahommedan frequenting the mosque, or one looking after it, is desirous of repairing it, but is obstructed by a third person, he may maintain a suit to establish his right to repair the mosque (*Jawahar v Akbar Hussain*).[378] The contrary, however, has been held by the High Court of Calcutta in *Jan Ali v Ram Nath.*[379] According to these decisions, the right sought to be established in suits, such as the above, is not a private but a public right, and it can only be enforced by a suit brought in conformity with the provisions of this section. But in a later Calcutta case (*Mohiuddin v Saviduddin*),[380] it was pointed out that the reasoning of the Allahabad cases, showing that the right of worship of each worshipper in a Mahommedan mosque or religious endowment was an independent right wholly irrespective of the rights of the other worshippers, was correct. The view taken in the earlier Calcutta decisions is, it is submitted, not correct,[381] and it cannot be sustained since the decision of the Privy Council in *Abdur Rahim v Mahomed Barkat Ali.*[382]

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373. *Manijan v Khadem Hossein,* (1905) ILR 32 Cal 273.
374. *Budree Das v Chooni Lal,* (1906) ILR 33 Cal 789, p. 808; *Muhammad v Ahmed,* (1913) ILR 35 All 459 : 20 IC 37; *Niamat Ali v Ali Reza* (1914) ILR 37 All 86: 26 IC 778; *Puttu Lal v Dayanand,* AIR 1922 All 499 : (1922) ILR 44 All 721 : 68 IC 786; *Ayatunnessa v Kulfu,* (1914) ILR 41 Cal 749 : 22 IC 677; *Giyana v Kandusami,* (1887) ILR 10 Mad 375; *Kashinath v Gangubai,* AIR 1929 Bom 193 : 117 IC 523 : (1929) 31 Bom LR 349; *Khalifa Ganny v Mohamed Ebrahim,* AIR 1931 Rang 322 : (1931) ILR 9 Rang 459 : 135 IC 332.
375. *Narayan v Vasudeo,* AIR 1924 Bom 518 : (1924) 26 Bom LR 950 : 86 IC 490; *Chhaganlal v Sobhavam,* AIR 1934 Bom 26 : (1933) 35 Bom LR 1119. See, *Appanna Poricha v Narasinga Poricha,* AIR 22 Mad 17 : (1922) 45 Mad 113 : 69 IC 304, cited in illustration (6) below.
376. *Jawahar v Akbar Hussain,* (1885) 7 All 178.
377. *Zafaryag Ali v Baktawar Singh,* (1883) 5 All 497. *Periaguruswamy v Mahalingam,* AIR 1971 Mad 278; *Amin Bi v Management, Nilsandra Mosque,* AIR 1969 Mys 193 : (1968) 2 Mys LJ 410.
378. *Jawahar v Akbar Hussain,* (1885) 7 All 178.
379. *Jan Ali v Ram Nath,* (1882) ILR 8 Cal 32, and *Lutifunnissa Bibi v Nazirun Bibi,* (1885) 11 Cal 33.
380. *Mohiuddin v Saviduddin,* (1893) ILR 20 Cal 810.
381. *Vaidyanatha v Swaminatha,* AIR 1924 PC 221 : (1924) ILR 47 Mad 884, 891 : 51 IA 282, 288.
382. *Abdur Rahim v Mahomed Barkat Ali,* AIR 1928 PC 16 : (1928) ILR 55 Cal 519 : 55 IA 96; *Biswanath v Radha Ballabhji,* AIR 1967 SC 1044 : (1958) 60 Punj LR 761.

(vi) A suit by a trustee against a co-trustee for accounts: *Appanna v Narasinga*,[383] a suit for account against the trustee *de son tort*. *Dharam Narain v Suraj Narain*.[384] But a suit for account against a trustee will fall within this section, even though the plaintiff also claims to be a trustee and that is disputed, and he does not ask for a declaration of his status as trustee: *Madhavan Pillai Vanniaperumal v Muthiah Pillai Sivasubramaniam*.[385]

(vii) A suit by an idol as a juristic person against persons who interfere unlawfully with the property of the idol or the income thereof. This was held in *Darshan Lal v Shibji*.[386] When an alienation is made by the *Shebait* acting adversely to the interest of the idol, a worshipper can file a suit, the reason being that the idol is in the position of a minor and when the person managing its property puts it in jeopardy a worshipper of such an idol is clothed with an *ad hoc* power of representation. This was held in *Bishwanath v Radha Ballabhji*.[387]

(viii) A suit for a declaration that the plaintiff is entitled to appoint *Mutawallis: Rugghan Prasad v Dhanno*.[388]

(ix) A suit to establish a right of hereditary management of a mosque: *Kunji Meethyan v Kunjan Marackor*.[389]

(x) A suit by a *de facto* trustee in the usual course of management for the protection of the interest of a public trust: *Vikrama Das v Daulat Ram*.[390] But no declaration can be granted in such a suit that he has the right to continue in management as *de facto trustee: Gopal v Muhammad Jaffar*.[391]

(xi) A person who has made substantial contributions for the upkeep of a temple has sufficient interest to maintain, on behalf of the deity, a suit for possession of the temple and its properties against *the pujari* or manager to save the temple properties from mismanagement or misappropriation: *Ramchand v Janki Ballabhji*.[392]

In a suit filed against a Public Trust, where it was projected as one for vindicating public rights, the Supreme Court held that the emphasis in the suit was on certain purely private and personal disputes and as such the leave granted to file the suit was not legal.[393]

Dr. Pasayat, J, speaking for the Bench in the above case observed as follows:

> To put it differently, it is not every suit claiming reliefs specified in Section 92 that can be brought under the Section; but only the suits which besides claiming any of the reliefs are brought by individuals as representatives of the public for vindication of public rights. As a

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383. *Appanna v Narasinga*, AIR 1922 Mad 17 : (1922) ILR 45 Mad 113 : 69 IC 304(FB); *Bapuji v Govindlal*, (1916) ILR 40 Bom 439 : 34 IC 167; *Shanmukham v Govinda*, AIR 1938 Mad 92 : (1938) ILR Mad 39 : 176 IC 26; *Shri Ram Pershad v Chhano Devi*, AIR 1969 Del 75.
384. *Dharam Narain v Suraj Narain*, AIR 1941 All 1 : (1940) All LJ 705; *Balkishendas v Parameshwari Dass*, AIR 1952 Punj 386; *Thirugnana Sambhandam v Ramchandran*, (1953) 1 Mad LJ 486.
385. *Madhavan Pillai Vanniaperumal v Muthiah Pillai Sivasubramaniam*, AIR 1952 TC 323 : (1951) ILR TC 543.
386. *Darshan Lal v Shibji*, AIR 1923 All 120 : (1923) ILR 45 All 215 : 71 IC 420; *Madhavrao v Shri Omkareshvar Ghat*, AIR 1929 Bom 153 : 119 IC 775 : (1929) 31 Bom LR 192.
387. *Bishwanath v Radha Ballabhji*, AIR 1967 SC 1044. *Murti Chaturbhujji v Govindlal*, 1965 MP 3; *Virbasavaradhya v Devotees of Lingadagudi*, AIR 1973 Mys 280.
388. *Rugghan Prasad v Dhanno*, AIR 1927 All 257 : (1927) ILR 49 All 435 : 99 IC 1045.
389. *Kunji Meethyan v Kunjan Marackor*, AIR 1954 TC 51; *Sher Ali v Nasirkhan*, AIR 1974 Raj 150.
390. *Vikrama Das v Daulat Ram*, AIR 1956 SC 382.
391. *Gopal v Muhammad Jaffar*, AIR 1954 SC 5.
392. *Ramchand v Janki Ballabhji*, AIR 1970 SC 532 : (1970) 1 SCR 634.
393. *Vidyodaya Trust v Mohan Prasad*, AIR 2008 SC 1633 : (2008) 4 SCC 115.

> decisive factor the Court has to go beyond the relief and have regard to the capacity in which the plaintiff has sued and the purpose for which the suit was brought. The Courts have to be careful to eliminate the possibility of a suit being laid against public trusts under Section 92 by persons whose activities were not for protection of the interests of the public trusts.[394]

The case, *Aurobindo Ashram Trust v R Ramanathan*[395], emanated from a suit under section 92 praying that the trustees of Sri Aurobindo Ashram Trust be removed and new trustees be appointed since they had failed the philosophy of Sri Aurobindo and the mother. The averments concentrated around a book titled "The Lives of Sri Aurobindo" by one Peter Heehs which allegedly contained deliberate and baseless distortions relating to the life of Sri Aurobindo. Leave to sue was granted by the trial court to the respondents and the summons was then issued in the civil suit to the appellants who preferred an IA to revoke the leave granted. The trial court held that only where leave is granted under section 92 without notice to the defendants, the defendants would have a right to apply for revocation of leave and thereby rejected the contention. The high court in appeal took into consideration the law laid down in *Swami Paramatamanand Saraswati v Ramji Tripathi*[396] and *Vidyodaya Trust v Mohan Prasad R*[397] and reversed the trial court's judgment. The Supreme Court, speaking through Justice Lokur held that only the allegations made in the plaint ought to be looked into in the first instance to determine whether the suit filed lies within the ambit of section 92 of the CPC. It was also reiterated that if the allegations in the plaint indicate that the suit has been filed to remedy the infringement of a private right or to vindicate a private right, then the suit would not fall within the ambit of section 92 of the CPC. In deciding whether the suit falls within the ambit of section 92 of the CPC, the court must consider the purpose for which the suit was filed and reversed the high court's judgment.

In a case from Tamil Nadu, where the trustees proposed modification in the original trust, it was held by the high court that consultation with the beneficiaries of the original deed was necessary. Exclusion of the beneficiaries of the original trust by creating new trust deed was not valid. But since the trust was a private one, it was held that section 92 was not applicable.[398]

[s 92.35] Suits for a Declaration and for Possession of Trust Property Against Third Persons, That Is, Strangers to the Trust

Suits against strangers to the trust, that is, against trespassers and against transferees from trustees, for a declaration that property in their hands is trust property and for possession, are outside the scope of this section. The reason is that the relief claimed is not one of those mentioned in clauses (a)–(h). Such suit must be instituted in the ordinary manner and not under this section.[399] This has been definitely held by the Privy Council in *Abdur Rahim v Mahomed Barkat Ali*[400]. The following are instances of suits of this character:

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394. *Vidyodaya Trust v Mohan Prasad*, AIR 2008 SC 1633, para 25 at p 1640 : (2008) 4 SCC 115.
395. *Aurobindo Ashram Trust v R Ramanathan*, AIR 2016 SC 237 : (2016) 6 SCC 126.
396. *Swami Paramatamanand Saraswati v Ramji Tripathi*, AIR 1974 SC 2141 : (1974) 2 SCC 695 : (1975) 1 SCR 790.
397. *Vidyodaya Trust v Mohan Prasad R*, AIR 2008 SC 1633 : (2008) 4 SCC 115.
398. *Perumalammal v R Guruvammal*, 2008 (69) All Ind Cas 427 : 2008 (3) CTC 476 (Madurai Bench)
399. *Budree Das v Chooni Lal* (1906) ILR 33 Cal 789, p. 805; *Gayaprasad v Bhargao*, AIR 1934 Nag 144; *Bachan Singh v Ganpat Rai*, AIR 1937 Lah 660; *Gobind Chandra Ghosh v Abdul Majid*, AIR 1944 Cal 163 : (1944) ILR 1 Cal 329; *Mukarem Das Mannudas v Chhagan Kishan*, AIR 1959 Bom 491 : (1957) ILR Bom 809 : (1957) 59 Bom LR 1144; *A Gunamani v WR Stephen*, (1962) 1 Mad LJ 278.
400. *Abdur Rahim v Mahomed Barkat Ali*, AIR 1928 PC 16 : (1928) ILR 55 Cal 519 : (1928) 55 IA 96. *O Rm OM Firm v Nagappa*, AIR 1941 PC 1 : (1941) ILR Mad 175 : 67 IA 448 : (1940) 42 Bom LR 444 : (1941) 45 CWN 385 : (1941) 73 Cal LJ 166 (PC). See case (i) below.

(i) A suit for a declaration that property belongs to a *wakf* can be maintained by Mahommedan interested in the *wakf* without the sanction of the Advocate-General: *Abdur Rahim v Mahomed Barkat Ali.*[401] A suit by certain persons on behalf of all the villagers for a declaration that the suit property belongs to a temple in that village, that certain alienations thereof by the *pujaris* are void and not binding on the institution, is maintainable apart from the provisions of this section: *Subramania Ayyar v Maya Kone.*[402] Where the plaintiff filed a suit under section 92 on the allegations that the defendant was a trustee of a public charity and had committed breach of trust and both these allegations were denied and there was no case in the plaint that the direction of court was necessary for the administration of trust, it was held by the Supreme Court that when the charge of breach of trust failed, it was not open to the plaintiffs to claim a mere declaration that the properties are trust properties as that is not a relief falling within any of the clauses in the section. *Mahant Prasad v Ishwarlal.*[403] Where, on the allegations in the plaint and the reliefs claimed therein, the suit falls within section 92 the inclusion of a prayer for a declaration that certain funds are trust property and that the defendants held them as trustees would not take it out of the section: *Abdul Razack Saheb v Abdul Hameed Said.*[404] A suit for a declaration that certain properties belong to the trust and for possession thereof from the alienee is outside this section and it does not make any difference that the trustee is a party to the action, when no relief is sought against him, the prayer being only that the properties be put in his possession: *Ranchhoddas Kalidas v Goswami Mahalaxmi Vahuji.*[405]

(ii) A suit by the disciples of a *mutt* for a declaration that the defendant was not the duly appointed successor to the late head of the *mutt*, and that he was in possession under a false claim of title, and for evicting the defendant from the *mutt* properties: *Strinivasa v Strinivasa*[406] [here, the claim against the defendant is as against a trespasser]. A suit for a declaration that the assumption of the office of trustee by the defendant was invalid, and that he was not entitled to be a trustee, is outside this section: *Sundaralingam v Nagalingam.*[407]

(iii) A suit for a declaration that a certain piece of land of which it was alleged that the defendants had taken wrongful possession was a public graveyard, and for the eviction of the defendants from the land: *Mudammad v Kallu*[408] (here also the claim against the defendants is as against trespassers.) Compare *Latifunissa Bibi v Nazirun Bibi*,[409] where the suit was for a declaration that certain property was *wakf* property and for recovery of possession thereof from a third party, and where the court held

401. *Abdur Rahim v Mahomed Barkat Ali*, AIR 1928 PC 16 : (1928) ILR 55 Cal 519,108 IC 361 : 55 IA 96.
402. *Subramania Ayyar v Maya Kone*, AIR 1940 Mad 81 : 189 IC 749 : (1939) 2 Mad LJ 920.
403. *Mahant Prasad v Ishwarlal*, AIR 1952 SC 143 : (1952) SCR 513 : (1952) SCJ 125 : 1952 SCA 281.
404. *Abdul Razack Saheb v Abdul Hameed Said*, AIR 1951 Mad 406 : (1951) ILR Mad 228 : (1950) 2 Mad LJ 282.
405. *Ranchhoddas Kalidas v Goswami Mahalaxmi Vahuji*, AIR 1963 Bom 153 : (1953) ILR Bom 271; *Kakaram Das Mannudas v Chhagan Kishen.*
406. *Strinivasa v Strinivasa*, (1893) ILR 16 Mad 31; *Ganga Charan v Ramchandra*, AIR 1928 All 33 : (1928) ILR 50 All 165 : 106 IC 389.
407. *Sundaralingam v Nagalingam*, AIR 1958 Mad 307 : (1957) 2 Mad LJ 634 : 70 Mad LW 940.
408. *Mudammad v Kallu* (1899) ILR 21 All 187; *Ghazaffar v Yawar Husain*, (1906) ILR28 All 112, 117, 120, 121; *Dasondhay v Muhammad*, (1911) ILR 33 All 660 : 11 IC 36; *Muhammad Baksh v Musammat Piari*, AIR 1921 All 116 : 62 IC 744 : (1921) 19 All LJ 236.
409. *Latifunissa Bibi v Nazirun Bibi*, (1885) ILR 11 Cal 33.

that the suit ought to have been instituted in conformity with the provisions of this section. This decision would appear to be no longer law.[410]

(iv) A suit to set aside an alienation of trust property alleged to have been wrongfully made by the trustees, and for the recovery of property from the alienee: *Kazi Hassan v Sagun*.[411] There, the defendants are transferees from trustees.

(v) A suit by the trustees of a temple against the manager and treasurer of the temple for accounts and for a decree for what may be found due on taking such accounts: *Malhar v Narasinha*.[412]

(vi) A suit by two of the worshippers of a temple with the leave of court under O I, rule 8, against the committee of management (not being trustees) and *Archakas* of the temple for a declaration that a transfer made by the committee to the *Archakas* of the right to collect and receive offerings made by the pilgrims is invalid: *Venkataramana v Kasturiranga*.[413]

(vii) A suit by the newly appointed trustees of an imambara for possession of the *Imambara* against a former trustee who has been dismissed: *Inayat v Faiz Muhammad*.[414]

But in a case where the plaintiff not only asked for a declaration as against the defendant that a temple was a public trust of a religious nature, but also alleged that the defendant was under a contractual obligation to hold the profits of a shop in the temple premises for the use of the temple and prayed for an account of the profit – –the suit was one for directing accounts against a constructive trustee *Abdur Rahman's* case did not apply and the sanction of the Advocate-General was necessary.[415] It has been held that though a stranger to a trust is not a necessary nor a proper party to a suit under section 92, where the stranger receives money or property from the trustee, knowing that it is a part of trust property and has been handed over to him in breach of the trust, he is a constructive trustee of the trust property and a relief against him can be claimed under this section.[416] But it has been held that though no relief against third parties could be granted in a suit under this section, there is no bar to their being impleaded as parties when that is allowed by the general law.[417]

[s 92.36] Suits for Removal of Trustees for Unlawful Alienation of Trust Property and Against Transferees from Those Trustees

A common type of suits under this section is a suit against the trustee of a charity for his removal on the ground that he has unlawfully alienated the trust property treating it as his private property, and for the appointment of a new trustee in his place. It is clear that such a suit is within this section for the relief claimed is one under clause (a) of this section, and the ground on which the relief is claimed is a breach of trust in alienating the property. It is also

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410. See *Mohiuddin v Sayiduddin*, (1893) ILR 20 Cal 810.
411. *Kazi Hassan v Sagun*, (1900) ILR 24 Bom 170; *Lakshmandas v Ganpatrav*, (1884) ILR 8 Bom 365; *Vishvanath v Rambhat*, (1891) ILR 15 Bom 148; *Ghelabhai v Uderam*, 12 IC 577.
412. *Malhar v Narasinha*, (1912) 37 Bom 95 : 17 IC 665.
413. *Venkataramana v Kasturiranga*, (1917) ILR 40 Mad 212 : 38 IC 73 (FB); *Alekha Gadi Brahma v Sudarsan Mohapatra*, AIR 1954 Ori 11 : (1953) ILR Cut 578,.
414. *Inayat v Faiz Muhammad*, AIR 1923 All 319 : (1923) ILR 45 All 335 : 71 IC 767 (the defendant in such a case is a trespasser); *Ganga Puri v Mohan Lal*, AIR 1924 Lah 131 : (1923) ILR 4 Lah 295 : 73 IC 645.
415. *Narsidas v Ravishankar*, AIR 1931 Bom 33 : (1930) 32 Bom LR 1435.
416. *Gobind Chandra Ghosh v Abdul Majid*, AIR 1944 Cal 163; *Abdul Majid v Abiar Nabi*, AIR 1935 Cal 805 : (1935) 39 Cal WN 1103.
417. *Janki Prasad v Kuber Singh*, AIR 1963 All 187. See note "Trustee" above.

clear that the court cannot remove the trustee unless it finds that the property is trust property and that it has been wrongfully alienated by the trustee. The question to be considered is whether the court has power, in the absence of the alienee, to declare that the property is trust property and that the alienation is unlawful. It has been held by the High Court of Madras that an alienee is not a proper party to a suit under this section, and that if he is joined as a party, the suit against him should be dismissed. But this, it has been held, does not preclude the court from determining, in a suit against the trustee alone, whether the property is trust property, and declaring, if it is so found, that it is trust property. But the transferee, not being a party to the suit, is not bound by the declaration, and if a suit is subsequently brought against him for possession of the property, it is open to him to contend that the property is not trust property.[418] A similar view has been taken by the High Court of Calcutta.[419] On the other hand, it has been held by the High Court of Allahabad that the alienee, though not a necessary party to the suit[420] is a proper party,[421] and that if he is joined as a party, and the court declares that the property is trust property, he will be bound by such declaration in a subsequent suit for possession against him.[422] In a later decision, the Madras High Court has held that persons who deny that title of the trust and on that footing claim to be in possession of property which is necessary to the proper discharging of that trust, are proper parties to the suit.[423] The High Court of Bombay has gone further and held that the transferee is not only a proper but a necessary party,[424] and that no such declaration can be such as the above, a decree cannot be passed against the alienee directing him to deliver possession of the property to the plaintiffs, though he is a party to the suit, as such relief is neither specifically mentioned in the section nor implied in clause (h), and that the remedy of the newly appointed trustee is to institute a separate suit for possession against him.[425] The proposition that the court has no power under this section to pass a decree against an alienee directing him to deliver possession to the plaintiffs is in accordance with a ruling of the Privy Council where it was held that a relief or a remedy against third persons, that is, strangers to the trust, was not within the scope of this section.[426] It is submitted that the court also has no power under this section to make a declaration that the property in suit is not trust property so as to bind the alienee, such a relief also being outside the scope of the section. The Rangoon High Court, however, has gone further and holds that if in a suit under section 92, a claim to relief against alienees who are strangers to the trust is added, there is a misjoinder both of parties and causes of action, and that unless the plaint is amended, the suit cannot be entertained. This view was approved by the Calcutta High Court in *Abdul Majid v Akthar*.[427] In such a suit, praying:

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418. *Raghavalu v Pellati,* (1914) 27 Mad LJ 266; *Rangasamy v Chinnasamy,* (1915) 28 Mad LJ 326; *Evalappa Mudaliar v Balakrishnamma,* AIR 1927 Mad 710 : (1927) 53 MLJ 183.
419. *Budhsingh v Niradbaran,* (1905) 2 Cal LJ 431; dissenting from *Gour Mohun Das Baishnav v Sajedur Raja Ghowdhuri,* (1897) ILR 24 Cal 418; *Budree Das v Chooni Lal,* (1906) ILR 33 Cal 789, 805; *Gholam Mowlah v Ali Hafiz,* (1918) 28 Cal LJ 4.
420. *Husenio Begam v Collector of Moradabad,* (1898) ILR 20 All 46.
421. *Ratan Sen v Suraj Bhan,* AIR 1944 All 1 : (1944) ILR All 20; *Ghazaffar v Yawar Husain,* (1906) ILR 28 All 112, 116; *Dadda Narayana Sa v Hanumanthappa,* AIR 1953 Mys 25 : (1953) ILR Mys 107 : 32 Mys LJ 61.
422. *Manohari v Muhammad,* (1911) 33 All 752; *Janki Prasad v Kuber Singh,* AIR 1963 All 187.
423. *Anjaneya v Kothandapani,* AIR 1936 Mad 449.
424. *Collector of Poona v Basi Chanchalbal,* (1911) ILR 35 Bom 470.
425. *Budhsingh v Naradbaran,* (1905) 2 Cal LJ 431; *Gholam Mowlah v Ali Hafiz,* (1918) 28 Cal LJ 4; reversing (1915) ILR 42 Cal 1135; *Budree Das v Chooni Lal,* (1906) ILR 33 Cal 789, 805; *Raghavalu v Pellati,* (1914) 27 Mad LJ 266; *Collector of Poona v Bai Chanchalbai,* (1911) ILR 35 Bom 470.
426. *Abdur Rahim v Abu Mahomed,* AIR 1928 PC 16 : (1928) ILR 55 Cal 519 : 55 IA 96.
427. *Abdul Majid v Akthar,* (1935) 39 Cal WN 1103.

(i) for the removal of a trustee;

(ii) for the vesting of property in new trustees; and

(iii) for a declaration that a mortgage of the property by the trustee was invalid. The first two reliefs were granted but the suit as against the mortgagee was dismissed.[428] Where a property included in the schedule to the plaint, in a suit under this section, had been alienated by the defendant, and he pleaded that it was not trust property, and the alliance was not a party to the suit, it was held that the question — whether that property belonged to the trust — could not be gone into in the suit.[429]

[s 92.37] Suits only for a Declaration of Trust

This section presupposes the existence of a trust for the administration of which it is necessary to make provision. Hence, it does not apply to a suit brought solely for the purpose of having a declaration of the court that certain property is *wakf*, the fact of endowment being denied on the other side.[430] Nor does this section apply to a suit brought merely for a declaration that the plaintiffs are trustees of an endowment.[431] Even if the trust is proved to be a public trust, if facts are not established in support of the reliefs set out in the section, no declaration can be given, for the very foundation of the cause of action under this action does not arise.[432] Where in consequence of a bequest for education of Hindu boys and girls, a representative suit is instituted on behalf of Hindu boys and girls for a declaration of trust in their favour, the suit does not fall within this section.[433]

[s 92.38] Suits for a Declaration That the Defendant is Not Properly Appointed Trustee and for an Injunction Against Him

See note above: "clause (a): Removing any Trustee".

[s 92.39] Courts Competent to Try Suits Under this Section

A suit under this section must be instituted either in the principal civil court of original jurisdiction or in any other court empowered in that behalf by the state government. But this does not empower the state government to direct the transfer of a particular suit pending in a district court to a particular judge. The authority must be a general one to try suits under this section.[434]

The expression "principal civil court of original jurisdiction" in this section does not include the court of an additional district judge appointed under section 8 of the Civil Courts Act, XII of 1887[435] unless the district judge has under sub-section (2) of that section, assigned to him

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428. *Johnson D Po Min v U Ogh*, AIR 1932 Rang 132 : (1932) ILR 10 Rang 342.
429. *Kalimata Thakurani v Jibandhan Mukherjee*, AIR 1962 SC 1239.
430. *Jamal-uddin v Mujaba Husain*, (1903) ILR 25 All 631; *Nihal Shah v Mst Malan*, (1920) 2 Lah LJ 457; *Khursaidi Begum v Secretary of State*, AIR 1926 Pat 321 : (1926) ILR 5 Pat 539; *Miran Baksh v Allah Baksh*, AIR 1927 Lah 350 : (1927) ILR 8 Lah 111 : 99 IC 756; *Shiban Abdul v Abdul Alim*, AIR 1930 Cal 787 : (1930) ILR 58 Cal 474.
431. *Budree Das v Chooni Lal*, (1906) 33 Cal 789; *Ramados v Hanumantha*, (1913) 36 Mad 364.
432. *Alimiya v Sayad Mohamed*, AIR 1968 Guj257.
433. *Pannalal v Hansraj*, AIR 1940 Cal 236 : (1940) ILR 1 Cal 14. See note above: "Suits for a declaration and for possession of trust property against third persons, i.e., strangers to the trust".
434. *Abdul Karim v Abdus Sobhan*, (1911) ILR 39 Cal 146.
435. *Mohomed v Abdul Hassan*, (1941) ILR 41 Cal 886.

the functions of a district judge relating to all suits cognisable by the district judge.[436] If the suit falls under this section but is filed in the *munsif's* court, the plaint must be returned for presentation to the district court.[437]

The issue in the case was: Can the court of an additional district judge grant leave under section 92 of the CPC to institute a suit against Public Charities, when there is no notification under section 7(2) of the Kerala Civil Courts Act, 1957 authorising it to institute such a suit; and whether the district judge make over a petition seeking such leave to the additional district judge?

The court observed that as per section 3(17) of the General Clauses Act, 1897 it defines "District Judge" to mean the judge of a "Principal Civil Court of Original Jurisdiction". Further, court said that the expression "Principal Civil Court of Original Jurisdiction" used in section 92 of the CPC, is intended solely to refer to the "District Judge" and not to an additional district judge; and therefore, a suit under section 92 can only be instituted in such court and no other.

Moreover, court noted that the Civil Courts Act, 1887 refers to only one district judge, called the "District Court", with additional district judges being appointed to that court. Hence, there is no "Additional District Court" as per the Act, but only additional district judges appointed to a district court. Also, the court noted that the expression "instituted" is used in section 96 whereas, an additional district judge as per section 4(2) of the Civil Courts Act, 1887, can only dispose of the matters assigned to him by a district judge. Furthermore, only those matters can be instituted before additional district judge which is notified in the gazette and there is no notification issued by the high court, enabling institution of a suit under section 92 of the CPC in the court of the additional district judge. Thus, making over a petition to the additional district judge by the district judge is misconceived in law.[438]

Where a suit is brought against an executor in the court of a subordinate judge for the administration of the testator's estate, the mere fact, that the will contains directions for applying portions of the estate to charitable purposes, does not bring the suit within this section. The subordinate judge has jurisdiction to entertain such a suit, but if any questions relating to charitable bequests arise before him and a scheme has to be framed under this section, he should hold the amount appropriated for charities in the possession of a receiver until the Advocate-General or the collector obtains the directions of the district court.[439]

Where a suit under this section was instituted in the subordinate court, Alleppey, which was not competent to entertain it, and the district judge, who had jurisdiction to hear it, passed an Order under section 24 of the CPC withdrawing it to his own file, it was held that the order of withdrawal and the subsequent proceedings consequent thereon were all null and void.[440] Likewise it is not competent to a district judge to transfer a suit under this section to a subordinate court.[441]

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436. *Mohabor v Hazi*, AIR 1921 Cal 210 : (1921) ILR 48 Cal 53; *Gangagir Chela v Rasal Singh*, AIR 1965 Punj 472 : (1965) ILR 2 Punj 81 : (1965) 67 Punj LR 592.
437. *Arjun Nath v Kailash*, AIR 1966 J&K 31.
438. *Sree Gurudeva Charitable and Educational Trust v K Gopalakrishnan*, (2020) 5 Ker LT 632.
439. *Bapuji v Gobindlal*, (1916) ILR 40 Bom 439.
440. *Mohammed Haji v Saithu Muhammed*, AIR 1962 Ker 28 : (1960) 1 Ker LR 47 : (1961) Ker LT 13.
441. *Dhoribhai v Pragdasi*, AIR 1935 Bom 172 : (1935) ILR 59 Bom 412 : (1935) 37 Bom LR 120.

[s 92.40] Where Some of the Reliefs are Outside the Scope of the Section

When some of the reliefs claimed are outside the scope of the section, the court is not justified in returning the plaint. It should require the plaintiff to amend his plaint by confining himself to reliefs within this section, or it might wait till it came to pronounce judgment and dismiss the suit as to reliefs without the section.[442] So in a suit by worshippers for the appointment of trustees and for the eviction of trespassers, the court may appoint trustees without passing a decree in eviction.[443] Conversely, when a suit is filed for obtaining reliefs to which the plaintiff is entitled under the general law, he does not become disentitled to them by claiming in addition reliefs which fall within this section.[444] But worshippers cannot sue under O I, rule 8, to recover the property unless they are supported by the trustees. They should sue to remove the trustees first and then let the new trustees sue in eviction.[445] When a trustee dies, the party entitled to succeed to the management may sue to establish his right. The section does not apply to such a suit and if objection is raised to his appointment on the ground of misconduct, the objector should be referred to a suit under section 92.[446]

[s 92.41] Sub-section (2): This Section is Mandatory

The Legislature has, by enacting this section, constituted a special tribunal for the trial of a class of suits which it has removed from the cognizance of the ordinary courts. Those are suits for any of the reliefs specified in sub-section (1) in cases where there is an "alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature", or "where the direction of the court is deemed necessary for the administration of any such trust". This class of suits can only be instituted in the special courts mentioned in this section, and they can only be brought either by the Advocate-General or by two or more persons having an interest in the trust and having obtained the leave of the court. This is enacted by sub-section (2) of the present section. Under the corresponding section 539 of the Codes of 1877 and 1882, it was doubtful whether every suit of the character described above was to be instituted in the manner aforesaid. Sub-section (2) makes it clear that every such suit must be so instituted; it enacts that no suit claiming any of the reliefs specified in sub-section (1) shall be instituted without the consent of the Advocate-General,[447] now leave of the court. But sub-section (2) must be read with sub-section (1). Reading sub-section (2) with sub-section (1) it follows that it is not every suit claiming any of the reliefs specified in sub-section (1) that should be brought with the leave of the court, but those suits only which besides claiming any of those reliefs are brought by individuals as representatives of the general public. Accordingly, a Full Bench of the Madras High Court has held that a suit by a trustee of a public religious trust against a co-trustee, for accounts, does not fall within this section. though the relief claimed is the one specified in sub-section (1), clause (d). Such a suit is not a representative suit. The relief is sought not in the larger interest of the public but merely for the

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442. *Amardas v Harmanbhai*, AIR 1942 Cal 1 : (1941) 73 Cal LJ 475; *Ramrup v Ramdhari*, AIR 1925 All 683 : (1925) ILR 47 All 770; *Sarat Kumar Mitra v Hem Chandra Dey*, AIR 1960 Cal 558.
443. *Lachman v Munia*, AIR 1925 All 759 : (1925) ILR 47 All 867; *Johnson D Po Min v U Ogh*, AIR 1932 Rang 132 : (1932) ILR 10 Rang 342.
444. *Akbar Ali Barlaskar v Ataur Rahman Barlaskar*, AIR 1954 Assam 361; *Sarat Kumar Mitra v Hem Chandra Dey*, AIR 1960 Cal 558.
445. *Vadlamudi v Venkataseshayya*, AIR 1928 Mad 614.
446. *Kashinath v Gangabai*, AIR 1931 Bom 170 : (1930) 32 Bom LR 1687; *Bishambar v Phulgari*, AIR 1930 Lah 715 : (1930) ILR 11 Lah 673.
447. *Syed v Bibi*, AIR 1925 Pat 544 : (1925) ILR 4 Pat 741; *Saw v Baggah*, AIR 1925 Rang 294 : (1925) ILR 3 Rang 213 (suit for the possession of a church and for accounts from the defendants).

purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by the trust.[448] Another Full Bench of the same court has held, that the nature of the relief claimed in the suit itself would not bring the suit within section 92. The capacity in which the plaintiff was suing and the purpose for which the suit has been brought are material factors. Thus the section does not apply where the general trustees of a public temple sue the trustees of certain offerings given to the deity for accounts,[449] for, in the suit, the right of the public is not sought to be enforced but only the personal rights of the trustees *qua* trustees. When a trustee sued his two co-trustees for the settlement of the scheme of management by rotation, the court said that if the suit was brought on the basis of an agreement between the trustees or on the terms of the will of the founder of the trust, it would be a suit to assert a private right and section 92 would not apply; but as there was no such agreement or will, the learned judge held that the suit was a representative suit and that section 92 did apply.[450]

The doubt referred to in the preceding paragraph arose in the following way. The Code of 1859 did not contain any special provisions for the institution of suits relating to public charities. Such provisions were introduced for the first time by section 539 of the Code of 1877. They were reproduced in section 539 of the Code of 1882, and they now find a place in sub-section (1) of the present section. But neither the Code of 1877 nor the Code of 1882 contained any provision corresponding to sub-section (2). Before the enactment of the Code of 1877 suits relating to public charitable or religious trusts could be instituted in the ordinary courts by certain persons as plaintiffs. Thus—

(i) persons appointed supervisors over trustees could sue in any ordinary court competent to hear the suit for the removal of the trustees for malversation and to obtain the appointment in their place of other fit and proper persons;[451] similarly

(ii) one or more of the members of a defined class of the general public (such as the *Satchasi* community of *Chatral*) could sue on behalf of the whole class, with the leave of the court under section 30 (now O I, rule 81), in any ordinary court competent to hear the suit, to obtain a declaration of their right to take part in the management of the worship of a goddess.[452]

It is obvious that the above suits fall within the purview of the present section. They also came within the terms of section 539 of the earlier Codes. In the absence of any provision in section 539 similar to that contained in sub-section (2), the question arose whether these suits were to be instituted in the special courts mentioned in section 539 and by the Advocate-General as plaintiff, or whether they could be instituted as before in ordinary courts and by persons who could have sued if section 539 had not been enacted. The High Court of Bombay held that section 539 was mandatory, in other words that every suit of the character mentioned in that section must be brought in accordance with its provisions, and not otherwise. Therefore, the suits referred to above could not be brought by the supervisors as plaintiffs in one case and by the members of the community in the other, but they had to be instituted either by the

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448. *Appanna v Narasinga*, AIR 1922 Mad 17 : (1922) ILR 45 Mad 113 (FB); *Narayan v Mootha*, (1930) ILR 53 Mad 214.
449. *Tirumalai Tirupati Devasthan Committee v Udairav Krishnayya Shambhaga*, AIR 1943 Mad 466 : (1943) ILR Mad 619 (FB).
450. *Krishna v Alwarappa*, AIR 1933 Mad 70 : (1932) 63 Mad LR 703; *Jankibai v Kothandpani*, AIR 1935 Mad 825 : (1935) ILR 58 Mad 988.
451. *Nellaiyapa v Thangamma*, (1898) ILR 21 Mad 406; *Ram Das v Badri Narain*, (1907) ILR 29 All 27.
452. *Monmotho Harish Chandra*, (1906) ILR 33 Cal 905.

Advocate-General or by two or more persons interested in the trust after obtaining the sanction of the Advocate-General; and further, these suits could only be brought in the special courts indicated in that section, namely the high court or the district court, as the case might be.[453] On the other hand, the other high courts held that section 539 was permissive, and that it did not take away the right of suit which existed prior to and independently of it. According to the latter view, suits of the character mentioned above could, notwithstanding the enactment of section 539, be brought as before by the above-named parties as plaintiffs in any court competent to entertain those suits, and it was not obligatory to institute them in accordance with the provisions of section 539.[454] Sub-section (2) gives effect to the Bombay decisions and supersedes the decisions of the other high courts. It provides, in distinct terms, that no suit claiming any of the reliefs specified in sub-section (1) shall be instituted except in conformity with the provisions of that sub-section. At the same time, it declares that the special provisions of the Religious Endowments Act, 20 of 1863 for the institution of suits governed by that Act are not affected by the provisions of this section. The provisions of that Act and their bearing on the present section are discussed in the next paragraph.

[s 92.42] Trust and Endowment—Distinction

The trust and endowment are different concepts altogether. Trust is an obligation annexed to ownership. The word "trust" is defined in Underhill's Law of Trust and Trustees to mean equitable obligation binding a person to deal with property for which he has control for the benefit of persons for whom he may himself be one. In order to understand the meaning of the expression "private religious" or "charitable endowment" used in the saving clause of section 1 of the Indian Trusts Act, 1882, we may examine the categories excluded from the provisions of Indian Trusts Act, 1882 through the saving clause. First category is Mohammedan Law as to *wakf*. The word "trust" as such is not used when Legislature used the expression Mohammedan law as to *wakf*. "*Wakf*" means the permanent dedication by a person professing the Muslim faith of any property for any purpose recognised by the Mohammedan law as religious, pious or charitable. *Wakf* is a trust for the purpose of section 92 of the CPC. Though the expression "trust" as such is not used, while dealing with Mohammedan law as to *wakf* the concept of trust is inbuilt therein. Second category of cases excluded by the saving clause is "mutual relations of an undivided family as determined by customary or personal law". The word "trust" is not employed by the Legislature but the element of trust is embedded in the relationship between the members of an undivided family. Joint and undivided family is normal condition of Indian society. Senior member of the joint undivided family is entitled to manage the family properties including even charitable properties and is presumed to be the manager. Manager as the head of the joint family has control over the income and expenditure and the decision is that of a trustee. Though the word "trust" or "trustee" as such is not used in the saving clause when the expression "mutual relations of undivided family as determined by customary or personal law" is used the element of trust is inbuilt in that category of cases. Next category of cases excluded from the Indian Trusts Act, 1882 is public or private religious or charitable endowments. When the Legislature used the expression public or private religious charitable endowment, the word "trust" as such is not used. But the words "religious" or "charitable" are to be noted. The expression "charity" has not been defined in the Indian Trusts Act,

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453. *Tricumdass v Khimji*, (1892) ILR 16 Bom 626; *Syad Hussain v Collectore of Kaira*, (1897) ILR 21 Bom 48.
454. *Nellaiyappa v Thangama*, (1898) ILR 21 Mad 406; *Budree Das v Choomi Lal*, (1906) ILR 33 Cal 789; *Monmotho v Harish Chandra*, (1906) ILR 33 Cal 905; *Ram Das v Badri Narain*, (1907) ILR 29 All 27.

1882. Charity in its legal sense comprises four principal divisions; trusts for relief or poverty; trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community. The element of trust is embedded in the word "charity" and various enactments like the Charitable Endowment Act, 1890, the Charitable and Religious Trust Act, 1920, the Religious Endowment Act, 1863, Travancore Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 and the like. Besides the above Legislations, section 18 of the Transfer of Property Act, 1882 says that restrictions in sections 14, 16 and 17 thereof shall not apply in the case of transfer of property for the benefit of public in the advancement of religion. Therefore, the words "private religious endowment" used in the saving clause of the Indian Trusts Act, 1882 have the imprint of a trust without which private religious endowment would not fall in the categories of cases excluded through the saving clause.

The word "endowment" defined in the *Legal Thesaurus* to mean aid, allotment, allowance, protection, assistance, award, benefit, bestowment, contribution, presentation and the like. Endowment is also defined in *Aiyar's Judicial Dictionary* to mean any property kept or money invested with the intention of any particular service or particular charity connected therewith and includes temples and any offerings made to the idols therein. "Endowment" is defined in *Black's Law Dictionary*, 7th Edn, to mean "A gift of money or property to an institution (such as a University) for a specific purpose, especially one in which the principal is kept intact indefinitely and only the interest income from that principal is used". It is only a dedication of properties to a public or private religious trust. The reasoning that "endowment" is the genus and "trust" is specie, is unsound. The Supreme Court in a case[455] held that endowment is dedication of property for purpose of religion or charity having both the subject and object certain and capable of assessment. Therefore, the expression "private religious endowment" used in the saving clause has got the imprint of a trust, and hence, a private religious trust and the properties endowed, are dedicated to Private Religious Trust. If it is a private religious trust, then it falls outside the purview of the Indian Trusts Act, 1882.[456]

[s 92.43] Save as Provided by the Religious Endowments Act, 1863 Etc

After the downfall of the Moghul Empire in India, it was discovered that the income of many endowments granted in land "by the presiding governments of this country and by individuals for the support of mosques, temples, colleges and for other pious and beneficial purposes" was misappropriated by persons managing the endowments. It was, therefore, deemed expedient that the British government should take charge of the endowments, and for that purpose and the purpose also of providing for the maintenances of bridges, *serais*, *uttaras* and other buildings erected for the use of the public Regulation 19 of 1810 was passed, whereby the general superintendence of all the religious and charitable endowments referred to above was vested in the board of revenue. That regulation applied to endowments in Bengal. A similar regulation, Regulation 7 of 1817, was subsequently passed to provide for endowments in the Madras Presidency.[457] Several years after the passing of these regulations, it was thought that the connection of a Christian government with the religious establishment of Hindus and Mahommedan was inexpedient, and a report was, therefore, called for by the Government of India in the year 1841 from the collectors of all districts with a view to divest themselves of

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455. *Pratapsinghji N Desai v Deputy Charity Commr*, AIR 1987 SC 2064 : 1987 (Supp) 1 SCC 714 : (1987) 3 SCR 909.
456. *Shanmughan v Vishnu Bharatheeyan*, AIR 2004 Ker 143 (DB).
457. *Sitharama v Subramania Iyer*, (1916) 39 Mad 700.

the management of religious endowments, and transfer the management to properly qualified individuals. As a result, Act 20 of 1863 was passed, whereby such of the provisions of the abovementioned regulations as related to religious endowments were repealed, and provision was made for the transfer of all such endowments, in certain cases to trustees, and in others to committees (sections 3–8). But the duty of superintending charitable endowments imposed on the board of revenue by the old regulations is still retained, and, in fact, express care is taken in the Act to declare that this duty as to charitable endowments is not intended to be affected or interfered with (sections 21, 23).

The Religious Endowments Act applies only to public religious endowments, as did the old Regulations. It does not apply to private religious endowments. Section 14 of the Act provides that any person interested in any mosque, temple or religious establishment may sue the trustees or members of a committee for any misfeasance, breach of trust, or neglect of duty committed by them in respect of the trust vested in them, and the court may, in such suit, direct the specific performance of any act by them, and may decree damages and costs against them, and may also direct the removal of any of the trustees or any members of a committee. A suit which does not charge the trustees or members of a committee with misfeasance, breach of trust, or neglect of duty, does not fall under that section.[458] Section 18 provides that no suit under the Act shall be instituted without the leave of the court.

The Act is in force in all states except the State of Bombay where it is in force in certain areas only. But it does not apply to presidency-towns; so that a suit instituted in a high court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee does not require the leave of the court under section 18 of the Act.[459]

After the passing of the regulations above referred to, the board of revenue took over the management of some endowments, but in the large majority of cases, they did not take charge of endowments created by private individuals. The operation of the Act, however, is not confined in such endowments as had actually been taken under the management of the board of revenue under the old regulations. The Act applies to every public religious endowment to which the provisions of the old regulations applied, that is to say, to every public religious endowment created "by the preceding governments of this country and by individuals", whether the management of the endowments was taken over by the Board of Revenue or not.[460]

Reading section 92 of the CPC and the Religious Endowments Act together, we have the following result:

(i) No suit in respect of charitable endowments of a public nature, claiming any of the reliefs specified in sub-section (1) of section 92, can be brought except in conformity with the provisions of that sub-section.

(ii) In the case of religious endowments of a public nature to which the Religious Endowments Act applies, a suit charging the trustee, manager, superintendent, or a member of a committee of a mosque, temple, or religious establishment, with misfeasance, breach of trust or neglect of duty, may be brought under the provisions of that Act with the leave of the principal civil court of original civil jurisdiction in

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458. *Subramania v Krishnaswamy*, (1919) 42 Mad 668.
459. *Panch Courrie Mull v Chumroo Lall*, (1878) 3 Cal 563; *Annasami Pillai v Ram Krishna Mudaliar*, (1901) 24 Mad 219.
460. *Jan Ali v Ram Nath*, (1882) ILR 8 Cal 32; *Sheoratan v Ram Pargash*, (1886) ILR 18 All 227; *Muthu v Gangathara*, (1894) ILR17 Mad 95.

the district in which the mosque, temple, or religious establishment is situated as provided by section 18 of the said Act, or it may be brought under the provisions of the CPC with the consent of the collector as provided by section 92 of the CPC.[461]

(iii) No suit in respect of *religious* endowments of a public nature to which the Religious Endowments Act does not apply, claiming any of the reliefs specified in sub-section (1) of section 92, can be brought except in conformity with the provisions of that section.

[s 92.44] The Madras Hindu Religious and Charitable Endowments Act, Act 22 of 1959

There has been successive legislation by the Madras Legislature on the topic of administration of religious endowments, whereby the jurisdiction of civil courts under this section has been taken away and vested in authorities constituted under the respective Acts. Firstly, there was the Hindu Religious Endowment Act 1 of 1925. Its validity was questioned on the ground that there was a fundamental defect in the legislative process, which rendered it a nullity. To remove all doubts, a new law, the Madras Hindu Religious Endowment Act 2 of 1927 was enacted. This Act repeated the Religious Endowments Act, 1863, and Madras Regulation 1 of 1817 so far as they applied to the more important Hindu public religious endowments in the State of Madras except the presidency-town. It made provisions for the better administration of such endowments by temple committee and by a board of commissioners. Section 73 of the Act provides that sections 92 and 93 and O I, rule 8 of the CPC shall not apply to any suit claiming relief in respect of the administration or management of such a religious endowment. Such suits can only be brought by the board or temple committee or by an interested person with the consent of the board or committee. If an endowment is partly secular and partly religious the board is empowered to make an allocation and declare what part is secular and what part is religious. After such allocation, the religious portion is subject to the provisions of the Act. But if such allocation has not been made, a suit for removing a trustee of an endowment partly secular and partly religious is within section 92.[462] Proceedings under section 142 of the Sikh Gurdwaras Act are analogous to those under this section.[463] (Reference may be made to *Balbir Singh v Sikh Gurdwaras, Judicial Commission*).[464]

This Act was repealed by the Hindu Religious and Charitable Endowments Act, 19 of 1951, which made substantial changes in the previous enactment. Section 3 extended the operation of the Act to charitable endowments which might be notified. The supervision and administration of religious endowments were vested in a department of the government and a hierarchy of officers was constituted for the purpose, with a commissioner at its head. The validity of this law was questioned, and the Supreme Court held that some of its provisions infringed the fundamental rights guaranteed by the Constitution and were bad.[465] With a view to remove these defects, the Madras Legislature introduced certain amendments in 1954, but the Madras High Court held that the amended sections 30 and 31 suffered from the same defects as the

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461. *Venkataranga v Krishnama*, (1914) ILR 37 Mad 184; *Harsraj v Anant*, (1918) ILR 42 Bom 742.
462. *Ranganayaki v Shivarama*, AIR 1930 Mad 216 : (1930) 58 Mad LJ 104.
463. *Balbir Singh v Sikh Gurdwaras Judicial Commission*, AIR 1967 Punj 272 : (1967) ILR 2 Punj 494.
464. *Balbir Singh v Sikh Gurdwaras, Judicial Commission*, AIR 1967 Punj 272 : (1967) ILR 2 Punj 494.
465. *Commr, Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar*, AIR 1954 SC 282 : (1954) SCR 1005 : (1954) SCJ 335 : (1954) SCA 415.

original enactment.[466] In 1959, the Legislature repealed the Act of 1951 and enacted the Madras Hindu Religious and Charitable Endowments Act, 22 of 1959, which is the law, in force now. Its scope is similar to that of the repealed Act. It applies to charitable as well as religious endowments. Their supervision and administration are vested in a hierarchy of government officials, consisting of a commissioner, deputy commissioner, assistant commissioners and area committees. Sections 92 and 93 of the CPC have no application to endowments failing within the Act. In *Ramanasramam v Hindu Religious and Charitable Endowments Commr*,[467] the question was whether the *Matribhuteswar* shrine, which was an adjunct of the *Ramanasramam* was a temple falling within the purview of Act 19 of 1951. It was held that it was a *Samadhi*, not a temple, and that further *Ramanasramam* was a public religious trust of cosmopolitan character and not a Hindu temple as defined in the Act and that consequently, a scheme could be framed for its administration under section 92 of the CPC.

If a corresponding legislative provision is made in a special law in respect of the reliefs prayed for in suit filed under section 92 of the CPC in case of alleged breach of trust created for public purposes of a charitable or religious nature, the civil suit would be barred and the remedy provided in the special law has to be resorted. Therefore, where to secure such relief, viz for removal of trustee and appointment of new trustees, provisions were made in the Hyderabad Endowment Regulations, civil suit under section 92 of the CPC would not be maintainable in view of bar contained in section 92(2) of the CPC.[468] A suit for framing a scheme for a composite endowment, that is, an endowment which is secular as well as religious, can be filed under section 92 of the CPC and is not barred by sections 5 and 180 of Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959.[469]

In view of the provisions of section 5 of Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, sections 92 and 93 of the CPC have ceased to apply to Hindu Religious and Charitable Endowments in the concerned state.[470] The court having framed a scheme under section 92 of the CPC could not exercise jurisdiction and authority for modification or cancellation of the scheme after the Act, 1951 came into force as section 92 of the CPC ceased to apply to such schemes from the date of commencement of the Act. This order[471] was confirmed by the Hon'ble Supreme Court in *T Lakshmikumara Thathachariar v Commr HRCF*.[472]

Where, the application for leave to file suit under section 92 of the CPC was filed and the trustees obtained declaration that the trust is a religious denomination, an injunction restraining interference with its management under Tamil Nadu Hindu Religious and Charitable Endowments Act, 22 of 1959 was passed. Subsequently leave under section 92 of the CPC was sought by appellants to file suit for modification of scheme of administration. It was held that trustees cannot oppose grant of leave on ground that appellant has remedy under T N Religious and Charitable Endowments Act, 22 of 1959, they are bound by judgment

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466. *Sudhindra Thirtha Swamiar v Hindu Religious and Charitable Endowment Commissioner*, AIR 1956 Mad 491 : (1956) ILR Mad 229 : (1956) 1 Mad LJ 53269 LW 337.
467. *Ramanasramam v Hindu Religious and Charitable Endowments Commr*, AIR 1961 Mad 265 : (1960) II R Mad 992 : (1960) 2 Mad LJ 12173 LW 774.
468. *Emlea Tripamma v Nagappa*, AIR 1991 Kant 413 (DB) (case under the Hyderabad Endowment Regulation 1941).
469. *Rajeevlochanchar v D Ramachar*, AIR 1988 Mad 227; See also *Srisaila Kshetra All India Arya Vysya Anna Satra Sangam v P Satyanarayana*, AIR 2006 (NOC) 1471 (AP).
470. *BKC Muruga Konar v Setha Kone*, (1989) Supp 2 SCC 612.
471. *T Lakshmikumara Thathachariar v Commr, Hindu Religious and Charitable Endowments Administration Dept*, AIR 1997 Mad 346 (DB).
472. *T Lakshmikumara Thathachariar v Commr HRCF*, (1998) 6 SCC 643.

earlier passed and which has become final. They cannot be allowed to approbate and reprobate in two suits in which subject-matters and issue of jurisdiction of civil court involved are same.[473]

[s 92.45] This Section and Bombay Public Trusts Act, 29 of 1950

After reading the object of the Bombay Public Trusts Act, 1950 it can be appropriately said the Act seeks to regulate and make better provision for administration of public religious and charitable trusts. Such trusts cater to things of public interest, i.e., things which concern large sections of public. Unless such trusts are properly administered public interest will suffer. Therefore, matters affecting administration of such trusts are covered under section 50 of the Bombay Public Trusts Act, 1950. This situation is somewhat similar to suits under section 92 of the CPC. These suits in representative capacity pertain to matters of public interest. In contrast the suit which has given rise to the present appeal is a suit to establish an individual right. The plaintiffs claim that they are hereditary *archaks* of the temple since time immemorial and are entitled to exercise this right which cannot be taken away from them. No public interest is involved. Public is not concerned whether *A* acts as an *archak* or *B* acts. Such a suit therefore, cannot be covered by section 50 of the Act. Law is settled on this aspect as per various judgments of Supreme Court.[474]

[s 92.46] This Section and Himachal Pradesh Hindu Religious Institutions and Charitable Endowments Act, 18 of 1984

A premises constructed by an ex-ruler and used for 125 years as *dharmashala* was claimed to be a public trust. Admittedly no instrument of trust was created. The material adduced by the parties showed that the shops situated in the premises were let out to the other people. People could come and stay in the *dharmashala* but for stay of more than three days, permission of owner was necessary. Rents received from the shops were being used by the owners for their own purpose. *Dharmashala* was being managed/maintained from the personal funds of the owner. The management and control of the *dharmashala* was all along with the owners. A school was opened in the *dharmashala*. A *chowkidar* was appointed by the owner to look after the *dharmashala* and his salary used to be paid by the owner from his own pocket. *Dharmashala* could be used for marriage purpose but only with the permission of the owners. The first floor rooms could be used only by the officers or by others with the permission of the owner. The *dharmashala* was ordinarily being used by the pilgrims only during the fair. The public never contributed anything for maintenance of the *dharmashala*. No member of public had any say as regards management of the *dharmashala* and had no legal right to use the same. No member of the public ever participated in the management of the *dharmashala*. No manager had ever been appointed to look after and manage the property. The *dharmashala* was not registered under the Sarais Act, 1867. There was no evidence to show that the owners acted as *shabaits* or trustees. In the revenue records the ownership of the property stands in the name of the owner. The right of the general public is not mentioned therein. On these facts it was held, mere long use of a property as *dharmashala* by itself would not lead to an inference that dedication of the property by the owners in favour of the public was complete and absolute. Had such dedication been made, the same was expected to be recorded in the revenue records. Complete control is retained by the owner, be it by appointment of a *chowkidar*, appropriation of rents,

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473. *R Murali v Kanyake P Deuasthanam and Charities*, AIR 2005 SC 3096 : (2005) 6 SCC 166.
474. *Vinayak Dev Idagunji v Shivaram*, AIR 2005 SC 3081 : (2005) 6 SCC 641.

or maintenance thereof from his personal funds. Dedication cannot be said to be complete. Premises are not public trust.[475]

[s 92.47] Sections 92, 93 and Wakf Act, 43 of 1995

Where scheme was framed by court in regard to appointment of *Mutawalli* in a suit under sections 92, 93 of the CPC, as the founder of mosque had not framed any scheme, the scheme would continue to be operative in respect of the mosque even after coming into force of 1954 Act. In such a case, even if the Explanation added to sub-section (1) of section 15 and section 69 of 1984 is to be ignored, it is evident from the proviso to sub-section (1) of section 15 that exercise of the power by the board was to be in conformity with the directions of the *wakf* and usage and custom of the concerned *wakf*. Since the *wakf* did not provide for any mode of administration or appointment of trustees, the devotees approached the court and got a scheme framed. There is nothing in that section which excluded the application of the scheme. Further, the scheme, which was framed in the year 1915 and which was strictly followed by the devotees can be said to have given rise to usage and established the custom. Further, the power of the board to appoint *Mutawalli* is only where there is no one to be appointed under the terms of the deed of the *wakf* or where the right of any person to act as *Mutawalli* is disputed. When the method is prescribed under a scheme, the same can be equated to the terms of a deed. At any rate, as long as it is in operation, and proceedings are initiated thereunder, the right of any one to act as *Mutawalli*, till appointed by the court, has to be treated as disputed. Moreover, even after the 1954 Act came to be enacted, sections 92 and 93 of the CPC continued to be available for the aggrieved persons to get schemes framed in relation to religious institutions including *wakfs*. Similarly, though separate machinery is provided for adjudication of disputes, sections 92 and 93 of the CPC, for the repeal of which an abortive attempt was made in 1954 Act, are not repealed under this Act.[476]

[s 92.48] This Section and the Wakf Act, 29 of 1954

It has been held that section 55(1) of the Wakf Act, 1954, dispenses with the necessity for sanction under this section only when the board constituted under the Act institutes the suit, and that accordingly a person or authority other than the board can apply for sanction of the district court under this section.[477] The provision of sections 55, 57 (1) and (3) and 59 of Muslim Wakfs Act, 1954 make it clear that a suit under section 92 of the CPC instituted prior to the coming into force of the Wakf Act, 1954 does not abate on the coming into force of the Act. On the other hand, the court is required to issue notice of such a suit to the board and in the absence of a notice it would be open to the board to have the decree declared void within one month of board's knowledge of the decree.[478]

The civil suit was not proved to have been filed with the sanction of the Advocate-General. it therefore, follows that by no stretch of imagination the said civil suit can be considered as a scheme suit or a suit providing for any of the reliefs mentioned in section 92 of the CPC.[479]

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475. *Kuldip Chand v AG, Govt of Himachal Pradesh*, AIR 2003 SC 1685.
476. *Radhakrishne Rice Mill v Jumma Maseed*, AIR 2003 AP 70 (DB).
477. *Mohammad Jacco Sait v District Collector, Trichur*, AIR 1962 Ker 343 : (1962) II R 2 Ker 187 : (1962) Ker LJ 902 : (1962) Ker LT 544.
478. *Mohammad Ghouse Sahib v Mohammad Kuthubudin Sahib*, (1985) 1 SCC 628.
479. *Syed Moinuddin v Tamil Nadu Wakf Board, Madras*, AIR 1998 Mad 129 (DB).

[s 92.49] Death of a Plaintiff Pending Suit

It has been held by the High Court of Allahabad that where a suit is brought by two persons under this section, and one of them dies pending the suit, the suit abates unless some other person is brought on the record in place of the deceased. Such person must be one who has an interest in the trust, and he must have obtained the consent of the Advocate-General as required by this section.[480] On the other hand, the High Court of Madras has held that a suit brought under this section being a representative suit, no question of abatement can arise, and the court has power under O I, rule 10 (2), to add other persons interested in the trust as parties not because they are the legal representatives of the deceased plaintiff, but because they had become parties to the representatives' suit by the very fact of its having been instituted on behalf of all persons interested in the trust, and that the consent of the Advocate-General to such addition is not necessary.[481] The Madras decisions have been followed in Lahore[482]and Rangoon.[483] That is also the view taken by the High Court of Travancore Cochin.[484] The Allahabad decision is in effect overruled, for the judicial committee has held that when one of two plaintiffs dies the suit does not abate as the suit under this section is a representative suit,[485] and has been in fact held overruled in a later decision.[486] The Bombay High Court has held that if the previous parties are dead or colluding with the defendant, other persons interested may apply to the court to be brought on the record under O I, rule 10, in order to apply for an amendment of the scheme.[487]

[s 92.50] Death of Defendant-Trustee Pending Suit

Where a suit is brought under this section against a trustee not only for his removal but for framing a scheme, and the scheme is one of the main reliefs sought, the suit does not abate on the death of the trustee, and his successor in office may be brought on the record as a party defendant.[488] If a suit is properly instituted by several plaintiffs under section 92, there is no illegality in permitting one of the plaintiffs to withdraw, where the plaintiff is to be transposed as defendant.[489] Consent cannot be granted unless a public trust exists. Plaintiff cannot claim reliefs not mentioned in the Advocate General's consent (now, leave of the court).[490] A consent under section 92 cannot be granted unless a public trust exists. Section 50 of Bombay Public Trusts Act, 1950 is not in *pari materia* with section 92 of the CPC.[491] The suit, of course, would abate, if it was solely for the removal of the trustee.

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480. *Chhabile Ram v Durga*, (1915) ILR37 All 296.
481. *Parameswaran v Narayanana*, (1917) ILR40 Mad 110; *Sayyed v Dost*, AIR 1925 Mad 244 : (1924) 47 Mad LJ 745; *Bapiraji v Ramchandra*, AIR 1933 Mad 854 : (1933) 65 Mad LJ 690.
482. *Gopi Das v Lal Das*, (1918) PR No 97 p 321.
483. *CE Dooply v ME Moolla*, AIR 1927 Rang 180 : (1927) ILR 5 Rang 263.
484. *Abdul Satar v Kunhu Moidu*, AIR 1953 TC 390 : (1952) ILR TC 871.
485. *Anand Rao v Ramdas*, AIR 1921 PC 123 : (1921) ILR 48 Cal 493, pp 497–98 : 48 IA 12, p 16; *Ali Begum v Badnil*, AIR 1938 PC 184 : (1938) ILR Lah 383 : 65 IA 198; *Narain Lal v Sunderlal Tholia*, AIR 1967 SC 1540.
486. *Ram Ghulam v Shyam Sarup*, AIR 1934 All 1 : (1934) ILR 55 All 687.
487. *Kadri v Khubmiya*, AIR 1931 Bom 388 : (1931) 33 Bom LR 546.
488. *Sivagnana v Advocate-General*, (1915) 28 Mad LJ 174; *Mongilal v Durga Devi*, AIR 1968 Raj 314.
489. *Anand Prakash Sharma v Sunil Kumar*, AIR 1987 All 296.
490. *Dhirendra Singh v Dhanai*, AIR 1983 All 216.
491. *Shre Goleswar Dev v Gungawwa Kom Shantayya Nath*, AIR 1986 SC 231 : (1985) 4 SCC 393 : (1985) Supp 3 SCR 646.

[s 92.51] Specific Relief Act, 1963, Section 34

Section 34 of the Specific Relief Act, 47 of 1963, corresponding to section 42 of the Specific Relief Act, 1877, which it repeals, provides in effect that where a suit is brought for a declaratory decree and the plaintiff is able to seek further relief than a mere declaration but omits to do so, the suit should be dismissed. Where a suit falls within section 92, the plaintiffs cannot evade the requirements of the CPC by framing the suit as one under section 42 of the Specific Relief Act, 1877,[492] or section 34 of the Specific Relief Act, 1963. At the same time where the suit is one maintainable under section 92, and the plaintiff seeks any of the reliefs specified in the section, neither section 42 of the Specific Relief Act, 1877, nor section 34 of the Specific Relief Act, 1963, would apply. Thus, if a suit is brought under this section, for a declaration' that the defendants are not the lawful trustees and for the appointment of new trustees, the suit will not be dismissed because consequential relief such as delivery of the trust property to the new trustee is not claimed.[493]

[s 92.52] Dismissal of Suit by Trustees No Bar to Suit by Advocate-General

The fact that *de jure* managers and trustees of a public charity have been held in a previous suit to have lost their right by limitation to oust *de facto* trustees, does not confer on the latter immunity from suit on the part of the Advocate-General under this section.[494]

[s 92.53] Arbitration

Where the suit under this section is for the removal of the trustee and for consequential reliefs the court is not relieved of its duty to come to a finding regarding removal of the trustee. Only after coming to a finding on that point can the judge take the help of arbitrators in the matter of the scheme or appointment of trustees.[495] But an application to refer the matters in suit to arbitration or to file an award is not maintainable as the object of the section is to safeguard the rights of the public, who are the beneficiaries and that is entrusted to the decision of the court.[496]

[s 92.54] Limitation: Accounts Against Trustee *De Son Tort*

A suit for accounts under this section against a trustee *de son tort* is governed not by section 10 of the Limitation Act, 1963 but by Article 113, which is equivalent to Article 120 of the Limitation Act, 1908.[497]

[s 92.55] Relators Cannot Appeal in their Own Right

Where a suit instituted under this section by the Advocate-General at the instance of relators is dismissed, and the Advocate-General does not think fit to appeal, the relators are

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492. *Mufti v Fazal*, AIR 1922 All 349 : (1922) ILR 44 All 622.
493. *Neti Rama v Venkatacharulu*, (1903) ILR 23 Mad 450; *Srinivasa v Srinivasa*, (1893) ILR 16 Mad 31.
494. *Lakshmandas v Jugalkishore*, (1898) ILR 22 Bom 216; *Gopu v Rajammal*, AIR 1922 Mad 394 : (1922) 43 Mad LJ 448, pp 452–53.
495. *Mahant Banabhary Puri v Naga Anand Puri*, AIR 1944 Pat 115.
496. *Mohd Ibrahim Khan v Ahmad Said Khan*, (1910) ILR 32 All 503.
497. *Bihari Lal v Shiva Narain*, AIR 1924 All 884 : (1925) ILR 47 All 17.

not competent to file an appeal on their own account against the decree dismissing the suit.[498] The reason is that relators are not parties to the suit.[499]

However, where an application filed by a Trust under section 92(1)(f) of the CPC for selling property of the *Math* was allowed by the district judge, it was held by the Supreme Court that a person in charge of another *Math* cannot be said to have no *locus standi* to file *appeal* against the said order granting permission to sell.[500]

Sinha, J, speaking for the Bench of the Supreme Court, observed as follows:

> In a case of this nature judiciary exercises the jurisdiction of *parens patriae* and, thus, when an objection is filed for grant of sanction in terms of section 92(1)(f) of the Code, the same should receive serious consideration. The High Court thus may not be entirely correct in opining that the appellant had no locus standi to maintain an appeal. It is true that the appellant is said to be incharge of a math situated at Varanasi. However, it is contended that he really stays at Mirzapur. According to the respondents, he has nothing to do with the math in question. But, that is to say, no person being a third party to the application, would not be a "person aggrieved", in case of this nature cannot be sustained, if the appellant establishes that he is otherwise interested in the welfare of the Trust.[501]

[s 92.56] Sub-section (3): Doctrine of *Cypres*

Sub-section (3) is new and has been inserted by the Amendment Act, 1976. But even before its insertion when the section did not expressly empower the courts to apply the *cypres* doctrine the courts did have under the law as to public trusts the power to apply it.[502] Section 92(3) of the CPC which underwent an amendment in the year 1976, empowers the court to alter the original purpose of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied "*cypres*" in one or more of the circumstances laid down therein. It cannot be said that any of the original purposes of the trust, either in whole or in part had been fulfilled or remains partly fulfilled or cannot be carried out at all or cannot be carried out according to the directions given in the instruments creating the trust. Section 92(3) of the CPC only empowers the use of the property of the trust for religious object in "*cypres*" when the property is otherwise not capable of being used for purposes for which the trust has been created. The "Doctrine of *cypres*" would only apply where a charitable bequest fails or is incapable of being fulfilled in accordance with the spirit or when directions of the founder cannot be carried out for the purpose and the spirit for which the trust was created. The doctrine applies in India only to Wills and not to deeds or settlement or transfers *inter vivos*. The principle upon which the doctrine is founded, namely, the giving effect to the intention of the testator as far as possible, cannot apply to deeds. Literally, expression "*cypres*" means approximation. The courts have acted on the principle that where a gift is made to charity and that charity failed for any reason, the object of the donor or testator should not be defeated, but the property endowed should be applied to another object approximating as clearly as possible to the objects which the testator had in view. This was the fundamental basis of the "*cypres*" rule.[503] This was done where the donor or the testator had expressed a general charitable intention and there was surplus after the fund had been applied for the particular

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498. *Jan Mahomed v Syed Nurudin*, (1908) ILR 32 Bom 155.
499. *AG v Wright*, (1841) 3 Beav 447; *AG v Logan*, (1891) 2 QB 100, p 106.
500. *Swami Shankaranand vMahant Sri Sadguru Sarnanand*, AIR 2008 SC 2763 : (2008) 14 SCC 642.
501. *Swami Shankaranand vMahant Sri Sadguru Sarnanand*, AIR 2008 SC 2763, para 9 at p 2765 : (2008) 14 SCC 642.
502. *Mayor of Lyons v AG of Bengal*, (1876) ILR 1 Cal 303 : 3 IA 32.
503. *TKVTSS Medical, Educational and Charitable Trust v State of Tamil Nadu*, AIR 2002 Mad 42 (DB); *BK Kamppannan v P Thirumalai*, AIR 1962 Mad 500.

purpose expressed by him. In the absence of such a general intention the doctrine of *cypres* was, however, held not to apply and such surplus was treated as having been undisposed of. The court, of course, declined to apply the doctrine where the testator had expressed a contrary intention.[504] Certain land, along with a dharmashala thereon, was dedicated for the benefit of the public. The subsequent mutation entry in the revenue record showed that the land belonged to the *dharmashala*. On compulsory acquisition of land along with the *dharmashala*, the amount of compensation was to be applied for another purpose of the charity. It could be done by applying the doctrine of *cypres* and by framing a scheme.[505]

Without waiting for a revision of the law relating to public trusts of a religious or charitable nature, the legislature has provided, by the new sub-section, wide powers to alter the original purposes of such trusts in the circumstances set out in clauses (a)–(c). But using such vague terms as "the spirit of the trust" the legislature has possibly given scope for fresh disputes and consequent litigations. Sub-clauses (i), (ii) and (iv) of clause (e) in particular are likely also to bring about the same result.

The court has no jurisdiction to apply the *cypres* doctrine *extra territorium*.[506]

[s 92.57] Appeal

An order refusing to join persons as defendants in a suit under this section has been held to be a judgment within the meaning of clause 15 of the Letters Patent and therefore appealable.[507] But where orders are passed merely for carrying out a scheme, they are orders in execution. Decisions that such orders were appealable under section 47[508] are no longer good law in view of the change made in the definition of "decree" in section 2(2). The Bombay High Court even earlier had held that such orders are not open to appeal.[509] Although clause (ffa) of section 104(1) of the CPC provides that an appeal shall lie against the refusal of grant of leave, that cannot lead to the conclusion that it is obligatory on the part of court to give notice to the proposed defendants before granting leave because an appeal lies only against the refusal of leave and not against the grant of leave.[510] An order of the court granting permission to file suit against trust under section 92 is an administrative order and not a judicial one. Such an order is not revisable under section 115 of the CPC.[511]

[s 92.58] Suit *in Forma Pauperis*

It has been held that a suit under this section can be instituted *in forma pauperis*.[512]

[s 92.59] Constitutionality of the Section

The section is not repugnant to Article 14 of the Constitution.[513]

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504. *Vadivelu v Rajabada*, AIR 1967 Mad 175.
505. *Ram Sarup v UOI*, AIR 1985 Del 318 (DB).
506. *Kanji v AG*, (1916) 18 Bom LR 60.
507. *CE Dooply v ME Moola*, AIR 1927 Rang 180 : (1927) ILR 5 Rang 263.
508. *U Po Sein v U Pu*, AIR 1938 Rang 363.
509. *Chandraprasad v Jinabharthi*, AIR 1931 Bom 391 : (1930) ILR 55 Bom 414; *Mahadev v Govindrao*, AIR 1937 Bom 421 : (1936) 38 Bom LR 1137.
510. *RK Narayana Chettiar v N Lakshmanan Chettiar*, (1991) 1 SCC 48.
511. *Raju Pillai v VP Paramasivan*, AIR 1995 Mad 253.
512. *Hemaram v Mansukhram*, AIR 1961 Raj 15 : (1960) ILR Raj 903 where the observation contra in *Sarabjit Bharti v Lagan Dei*, ILR 15 Oudh 202 case are discussed.
513. *Shrimali Lal v AG*, AIR 1955 Raj 166 : (1955) ILR Raj 324.

[S 93] Exercise of powers of Advocate-General outside Presidency-towns.— The powers conferred by sections 91 and 92 on the Advocate-General may, outside the presidency-towns, be, with the previous sanction of the State Government, exercised also by the Collector or by such officer as the State Government may appoint in this behalf.

SYNOPSIS

[s 93.1]	Previous Sanction of the State Government 1103	[s 93.4]	Visitatorial Power of Collector 1104
[s 93.2]	Sections 92, 93 and Wakf Act, 43 of 1995..... 1103	[s 93.5]	Collector's Refusal to Sanction Proceeding..... 1104
[s 93.3]	Collector 1103	[s 93.6]	Exception 1104

[s 93.1] Previous Sanction of the State Government

The Privy Council have held, under the section as it then stood, that the previous sanction of the local government would be necessary whether the suit is instituted by the collector, or by an officer appointed by the local government or whether the suit is instituted by two or more persons with the consent in writing of such collector or officer.[514] The effect of this decision is that the collector or other officer appointed must, in every case, obtain the sanction of the local government (now State Government) before instituting a suit or giving his consent to the institution of a suit.[515] The previous practice of local governments had been to give previous sanction generally and not in respect of each particular case and, therefore, the Public Suits Validation Act, 1932 (11 of 1932) was passed to validate pending suits filed under the previous practice. The Act also provides for the restoration of suits and appeals dismissed after 30 November 1931 (the date of the Privy Council decision) for want of sanction of the local government, on application made within six months of the commencement of the Act, i.e., 8 April 1932. In the case of suits already filed under the previous practice, it is not necessary to obtain the sanction of the local government.[516] A judgment in a suit, decided previous to the aforesaid decision of the Privy Council, in which the permission of the collector had been obtained according to the previous practices, will be *res judicata* in any subsequent suit between the parties to the judgment on the same cause of action.[517] This section does not require that the State Government should appoint when there is an Advocate-General, another person to perform the functions assigned to him under section 92.[518]

[s 93.2] Sections 92, 93 and Wakf Act, 43 of 1995

See under the same heading under section 92 above.

[s 93.3] Collector

The fact that the legal remembrancer is in a particular state invested as a rule with the duties elsewhere discharged by the Advocate-General is no reason why in a particular case the local

514. *Prem Narain v Ram Charan*, AIR 1932 PC 51 : (1931) 53 All 990 : 59 IA 121; *Lachmandas Gobardhandas v Narayandas Amrutlal*, AIR 1948 Nag 357 : (1948) ILR Nag 281.
515. *Satyananda v Phani Lal Mukherjee*, AIR 1955 Cal 155 : (1954) 58 Cal WN 861.
516. *Premo v Sheo Nath*, AIR 33 Oudh 22 : (1933) ILR 8 Luck 266.
517. *Rasulkhan v Jamma Masjid Sabugarpura*, AIR 1935 Nag 28.
518. *Shrimali Lal v AG*, AIR 1955 Raj 166.

government may not appoint the collector or any other officer to prosecute it.[519] Before the Privy Council decision requiring sanction of the local government in each case, it was held that an assistant collector had no power to give his consent to the institution of a suit and that if a suit was filed with his consent but not that of the collector, the plaint must be rejected.[520]

[s 93.4] Visitatorial Power of Collector

Formerly the collector had a visitatorial power enabling him to enforce an honest and proper administration of religious endowments. The connection of the government in its executive capacity with Hindu and Mahommedan foundations was brought to an end for Bombay by Bombay Act, 7 of 1863 and for Bengal and Madras by Act, 20 of 1863.[521]

[s 93.5] Collector's Refusal to Sanction Proceeding

The Advocate-General, it seems, may give his consent to a suit to be instituted outside the presidency-towns though the collector has refused to give his consent under this section.[522]

[s 93.6] Exception

Section 52(1) of Bombay Public Trusts Act, 1950 makes section 92 and section 93 of the CPC inapplicable to public trust registered under the Act.[523] In view of the provisions of section 5 of Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, sections 92 and 93 of the CPC have ceased to apply to Hindu Religious and Charitable Endowments in the concerned state.[524]

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519. *Gulzari Lal v Collector of Etah*, AIR 1931 PC 121 : (1931) ILR 53 All 910 : 58 IA 460.
520. *Purammal Fateh Chand v Jagganath Hansraj*, AIR 1949 Nag 183 : (1948) ILR Nag 846; *Somchand v Chhaganlal*, (1911) ILR 35 Bom 243.
521. *Manohar Ganesh Tambekar v Lakhmiram Govindram*, (1888) ILR 12 Bom 247.
522. *Aromalla v Arimanda*, AIR 1928 Mad 401.
523. *Shree Gollaleshwar Dev v Gangawwa kom Shantayya Math*, (1985) 4 SCC 393.
524. *BKC Muruga Konar v Setha Kone*, (1989) Supp 2 SCC 612.

PART VI

SUPPLEMENTAL PROCEEDINGS

[S 94] Supplemental proceedings.—In order to prevent the ends of justice from being defeated the Court may; if it is so prescribed,—

(*a*) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(*b*) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(*c*) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(*d*) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(*e*) make such other interlocutory orders as may appear to the Court to be just and convenient.

SYNOPSIS

[s 94.1] High Court Amendment 1105
[s 94.2] Scope 1105
[s 94.3] Power of Court..... 1106
[s 94.4] Clauses (a) and (b): Arrest and Attachment Before Judgment 1106
[s 94.5] Clauses (c) and (e): Temporary Injunctions and Interlocutory Orders 1106
[s 94.6] Clause (d): Appointment of Receiver 1107
[s 94.7] Clause (e): Other Interlocutory Orders..... 1107

[s 94.1] High Court Amendment

Calcutta.—Add Proviso

Provided that the Court of Small Causes of Calcutta shall have no power to order attachment of *immovable property or to appoint a receiver of such property.—Calcutta Gazette, Pt I, dated 20 April* 1967.

[s 94.2] Scope

This section summarises the general powers of the court in regard to interlocutory proceedings. The details of procedure have been relegated to Sch I.

[s 94.3] Power of Court

The source of power of the court to grant interim relief is under section 94. However, exercise of that power can only be done if the circumstances of the case fall under the rules. Therefore, when a matter comes before the court, the court has to examine the facts of each case and ascertain whether the ingredients of section 94, read with the rules in an order, are satisfied and accordingly grant an appropriate relief. It is only in cases where circumstances do not fall under any of the rules prescribed that the court can invoke its inherent power under section 151, Code of Civil Procedure, 1908 (CPC). Accordingly, the courts have to grant relief of attachment before judgment, if the circumstances fall under O XXXVIII, CPC. Similarly, courts will grant temporary injunction if the case satisfies O XXXIX. So, depending on the circumstances falling in the prescribed rules, the power of the court to grant specified reliefs would vary. Therefore, each set of rules prescribed are distinct and different from the other, and therefore, one cannot equate rules of temporary injunction with rules of attachment before judgment although all are broadly termed as interlocutory orders.[1]

[s 94.4] Clauses (a) and (b): Arrest and Attachment Before Judgment

See O XXXVIII.

[s 94.5] Clauses (c) and (e): Temporary Injunctions and Interlocutory Orders

(See O XXXIX). The combined effect of this section and O XXXIX, rules 1 and 2 is that the penalty provided by rule 2(3) applies to an injunction issued under this section and O XXXIX.[2] Section 94(c) shows that a court may grant a temporary injunction thereunder, only "if it is so prescribed". The expression "prescribed" in section 94(c) would, as defined in section 2(16), mean prescribed by the rules. The rules relating to the grant of temporary injunctions are rules 1 and 2 of O XXXIX. Therefore, a temporary injunction may be granted under section 94(c), only if a case satisfying the requirements of O XXXIX, rules 1 and 2 is made out. It is not correct to say that the court has two sources of power to grant temporary injunction—one under section 94(c) and the other under O XXXIX, rules 1 and 2—or that the court may resort to one or the other. A temporary injunction may be granted, only under one set of provisions, namely, section 94(c) read with O XXXIX, rules 1 and 2. The court can grant a temporary injunction in the exercise of its inherent powers under section 151 also. But, there, it does not grant it under any power conferred by the CPC, but under inherent powers.[3] An application was made for temporary injunction. Prayer was for ad interim injunction, which was refused. It was held that ad interim injunction may be granted subsequently if further developments and altered circumstances warrant it.[4] Clauses 3 and 4 of rule 2 have been deleted by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976).[5]

In a case of disobedience of its interim order, the Supreme Court held that wilful and deliberate disobedience of interim orders passed by the Supreme Court can never be said to be *bona fide*, honest and in good faith and held the contemner guilty under section 12 of the Contempt of Courts Act, 1971, read with section 94(c) and O XXXIX, rule 2A of the CPC

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1. *Vareed Jacob v Sosamma Geevarghese*, AIR 2004 SC 3992 : (2004) 6 SCC 378 : 2004 (1) SCR 534.
2. *Hiralal v Popatlal*, AIR 1969 Guj 28.
3. *Jagjit Singh v Rakhal Das*, AIR 1988 Cal 95.
4. *Jagjit Singh v Rakhal Das*, AIR 1988 Cal 95.
5. But see the new rule 2A.

and Article 129 of the Constitution.[6] Rejecting the apology tendered by the contemner, CK Thakker J, speaking for the Bench observed as follows:

> We are also satisfied that the so called apology is not an act of penitence, contrition or regret. It has been tendered as a "tactful move" when the contemners are in the tight corner and with a view to ward off the Court. Acceptance of such apology in the case on hand would be allowing the contemners to go away with impunity after committing gross contempt of Court. In our considered opinion, on the facts and in the circumstances of the case, imposition of fine in lieu of imprisonment will not meet the ends of justice.[7]

[s 94.6] Clause (d): Appointment of Receiver

(See O XL. See also notes to section 51, "Receiver in Execution Proceedings"). In suitable cases, the court is not powerless to pass appropriate orders for appointment of receiver without any application by any of the parties while rejecting the application of temporary injunction. Such power, of course, has to be exercised sparingly and in exceptional cases where dismissal of an application for grant of temporary injunction may lead the party to take the law in to their own hands and use their own devices either for protection of unlawful possession of recent origin or for gaining possession on such like circumstances. There is no impediment put by the CPC in passing such order to prevent the ends of justice being defeated. Such order may be immediately required to be passed also, so that possession may be made over to that party who is *prima facie* entitled to possession, but is deprived by unlawful conduct or illegal act of the other party. An appointment of receiver can be made on the application of either parties to the litigation as well as *suo motu* and therefore, absence of application shall not preclude the court from passing such order if it is just and convenient.[8]

An interim order is as much an order as a final order and is capable of being enforced.[9]

[s 94.7] Clause (e): Other Interlocutory Orders

An application under O VI, rule 17 for amendment of written statement can be made in an application under O VI, rule 17 read with section 94 and 151 of the CPC.[10]

[S 95] Compensation for obtaining arrest, attachment or injunction on insufficient grounds.—(1) Where, in any suit in which an arrest or attachment has been affected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable grounds for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, [11][not exceeding fifty thousand

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6. *Patel Rajnikant Dhulabhai v Patel Chandrakant Dhulabhai*, AIR 2008 SC 3016 : (2008) 14 SCC 561.
7. *Patel Rajnikant Dhulabhai v Patel Chandrakant Dhulabhai*, AIR 2008 SC 3016, p 3027, para 68 : (2008) 14 SCC 561.
8. *Mulji Umershi Shah v Paradisia Builders Pvt Ltd*, AIR 1998 Bom 87.
9. *RB Thakur v Shreeram Durgaprasad*, AIR 1968 Bom 35 : (1968) 69 Bom LR 250 : (1967) ILR Bom 925.
10. *Pothineni Venkateswarlu v Bodempudi Kotamma*, AIR 1994 AP 40.
11. Substituted for "not exceeding one thousand rupees" by the CPC (Amendment) Act, 1999 (46 of 1999), section 8 (w.e.f. 1-7-2002) *vide* Notification S.O. 603(E), dated 6 June 2002.

rupees], as it deems a reasonable compensation to the defendant for the [12]expense or injury (including injury to reputation) caused to him]:

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

SYNOPSIS

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[s 95.1] Changes Introduced in the Section

This section corresponds with sections 491 and 497 of the Code of Civil Procedure, 1882 except that the words "by its order" were substituted for the words "in its decree". The words "by its order" signified that the award should not form part of the decree, but should be a separate order. Such an order is appealable under section 104. Section 32 of the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), has inserted, after the words "expense or injury" in sub-section (1) the words into brackets, viz (including injury to reputation).

Words "not exceeding fifty thousand rupees" in place of "not exceeding one thousand rupees" have been substituted by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) *vide* section 8, with effect from 1 July 2002. Section 95 prior to amendment, provided for award of compensation not exceeding Rs 1000 where in any suit in which an arrest or attachment has been effected or a temporary injunction granted under section 94 of the CPC on insufficient grounds or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable grounds for instituting the same. The right of the plaintiff under this section was independent of the right of the plaintiff to institute separate suit for compensation. Law Commission of India, 240th Report has recommended amendment of section 95 in order to raise the ceiling limit of rupees fifty thousand to rupees one lakh.

Where the plaintiff desired to insist on damages exceeding Rs 1000, the remedy of suit for damage was the only available remedy. This amendment raises the amount of compensation that could be awarded without instituting separate suit for damages. The limit prescribed under section 95 is increased to Rs 50,000. This amendment shall desist the litigants to institute frivolous litigation. Only serious and deserving litigants, it is expected shall approach the court to press for arrest, attachment or injunction. The amendment is a good step to reduce

12. Substituted by Act 104 of 1976, section 32, for the words "expense or injury caused to him" (w.e.f. 1-7-2002).

the burden of the courts as a clear signal is sent to non-serious litigants to avoid approaching the court, unless a *prima facie* case is made out.

[s 95.2] Scope of the Section

This section provides for compensation to the defendant in the two following cases:

(i) (a) Where an arrest or attachment before judgment has been effected or a temporary injunction has been granted (see Orders XXXVIII and XXXIX); and

(b) such arrest, attachment or injunction was applied for on insufficient grounds.

(ii) (a) Where an arrest or attachment before judgment has been effected or a temporary injunction has been granted;

(b) the plaintiff fails in the suit; and

(c) there was no reasonable or probable ground for instituting the suit.

In case (i), a conditional attachment under O XXXVIII, rule 5(3), even if withdrawn on security being furnished, is still within the section.[13] The right to apply for compensation when an injunction is obtained wrongfully, arises not when the order is made but when it is vacated or dissolved either by the court granting it or by a court on appeal or revision.[14] A claim for compensation does not arise unless the writ is set aside on the defendant's application on the ground that it was issued on insufficient grounds. If the order of attachment before judgment terminates automatically on the defendant depositing the requisite amount in court, an application for compensation would not be entertained.[15] But in order to maintain such an application, it is not necessary that the order of arrest or attachment need be set aside. Where the order is made after hearing the parties, it must mean that there were sufficient grounds therefore. A subsequent application for compensation in such a case would be barred by *res judicata*.[16] Application styled as under section 94 may really be under O XXI, rule 29. Where the plaintiff is not making out a case for relief under O XXI, rule 29 on the merits, he cannot get relief under section 151. Suit was for declaration that the decree passed in earlier title suit filed by plaintiff's father was not binding on the plaintiff, on the ground that the father had wantonly omitted to implead the plaintiff. The plaintiff's application for stay of execution of the decree in the title suit, though styled as made under section 94 was, in fact, one covered by O XXI, rule 29 of the CPC.[17]

In case (ii), it is not necessary to show that the arrest, attachment or injunction was applied for, on insufficient grounds. It is enough if the plaintiff fails in the suit, and there was no reasonable or probable ground for instituting the suit. The principle is that a plaintiff who has obtained an arrest, attachment or injunction by instituting a suit without any probable ground, should be punished as much as a plaintiff who has obtained the process on insufficient grounds.

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13. *Ananda v Shariatulla*, AIR 1932 Cal 92 : (1932) 35 Cal WN 546.
14. *Garagiah v Manche Gowda*, AIR 1971 Mys 178 : (1971) Mys LJ 53.
15. *Gyan Prakash Mital v Kishorilal*, AIR 1942 All 261 : (1942) ILR All 360.
16. *Khalilur Rahman v Syed Hussain*, AIR 1961 Mad 220 : (1961) ILR Mad 178 : (1960) 2 Mad LJ 479; *Subrayan v Kochuvarkey*, AIR 1959 Ker 18 : (1958) ILR Ker 819 : (1958) Ker LJ 606.
17. *Parmananda Panda v Krishna Chandra Panda*, AIR 1990 Ori 188.

[s 95.3] Section No Bar to a Regular Suit

This section provides a summary remedy for an injured defendant and enables him to seek compensation for the injury done to him by the plaintiff by an application to the court instead of by a suit. But the remedy under this section is optional, and an injured defendant may, if he so chooses, institute a regular suit against the plaintiff for compensation for wrongful arrest, attachment or injunction.[18] Thus, this section is an alternative remedy in cases of wrongful obtainment of an injunction and it does not in any way interfere with the principle regulating suits for damages for tort or malicious legal process.[19] This clearly appears from sub-section (2), which impliedly recognises the right of a defendant to institute a regular suit for compensation.[20] In a suit for compensation, however, the plaintiff must prove malice in fact, in addition to the facts required to be proved by this section.[21] But whether the proceeding is by way of suit or by an application under this section, the defendant is not entitled to any compensation unless the attachment "has been affected". Merely procuring an order for attachment before judgment, however, maliciously is not sufficient to entitle the defendant to compensation.[22] (As to the period of limitation for a suit, see Limitation Act, 1963, Sch 1, Articles 73, 80 and 90 and the undermentioned cases).[23] (As to suits for damages for temporary injunction, see the undermentioned cases).[24] On determination of lease by efflux of time, plaintiff was granted decree for possession. Defendant had obtained ad interim injunction under O XXI, rule 101 restraining the decree-holder from dealing with the goods stored in the premises (oil seeds). It appeared that the defendants had wrongfully stored oil seeds in the plaintiff's godown. It was held that the plaintiff could claim damages from the defendant. Apart from section 95(1), an aggrieved party can sue for damages for wrongful occupation. The scope of such a suit was much wider than section 95. Malice also need not be proved.

> Where malice is the gist of the action, neither section 95 nor the ingredients of an action for malicious prosecution stand in the way. Damage, with all the legal implications pleaded and proved, should govern the fate of such a suit.[25]

[s 95.4] On Insufficient Grounds

These words are equivalent to "without reasonable and probably cause".[26] The question to be decided under section 95 is whether there are no sufficient grounds for applying for attachment and not whether there are no reasonable grounds stated in the creditor's application.[27] If the only ground put forward is that unless the attachment is made, the plaintiff in the event

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18. *Har Kumar v Jagat Bandhu*, AIR 1927 Cal 247 : (1927) 53 Cal 1008.
19. *Bank of India v Lakshmi Das*, [2000] LRI 18.
20. *Palani v Udayar*, (1909) 32 Mad 170.
21. *Nanjappa v Ganapathi*, (1912) 35 Mad 598; *Imperial Tobacco Co v Bonnan*, AIR 1928 Cal 1 : (1927) 47 Cal LJ 455.
22. *Rama v Govinda*, (1916) 39 Mad 952; *Mohammed v SM Ashar*, AIR 1939 Rang 260; *Lakshmichand v Abdul Gaffoor*, AIR 1952 Bho 14; *Jagad v Misrilal*, (1958) Raj LW 367.
23. *Ram Narain v Umrao Singh*, (1907) 29 All 615; *Surajmal v Maneckchand*, (1904) 6 Bom LR 704; *Manavikraman v Avisilan*, (1896) 19 Mad 80; *Murugesa v Jattaram*, (1900) 23 Mad 621; *Sokkalingam v Krishneswami*, (1920) 38 Mad LJ 324; *Kanthammal v Rajalakshmi*, (1960) 2 Mad LJ 484.
24. *Nand Coomar v Gour Sunkar*, (1870) 13 WR 305; *Mohini v Surendra*, (1915) 42 Cal 550, 556–57.
25. *Bank of India v Sital Chandra*, AIR 1986 Cal 313 (DB).
26. *Roulet v Petterle*, (1894) 18 Bom 717, 720; *Parikh Jivanlal v Shah Chhitalal*, AIR 1960 Bom 326 : (1959) ILR Bom 1680; *Jeewanlal v Central Bank of India*, AIR 1953 MB 90 : (1953) ILR MB 29.
27. *Rajaram v Balkrishna*, AIR 1937 Nag 126 : (1938) ILR Nag 361.

of success will have difficulty in realising the decretal amount, the application is made on altogether insufficient grounds.[28]

[s 95.5] May Apply

An order for compensation under this section cannot be made as part of the suit, and incorporated in the decree, but on an independent application. Such an order is one, passed in a collateral proceeding and is open to appeal as an order under section 104.[29]

[s 95.6] Compensation for Injury

There was a conflict of opinion amongst the high courts on the question of whether in the absence of injury to person or property compensation could be awarded[30] for loss of reputation which must result from an order of arrest or attachment. This conflict is resolved by the insertion in sub-section (1) of the words "(including injury to reputation)" which clarifies that compensation can be awarded for loss of, or injury to reputation.

[s 95.7] An Award Under This Section Is a Bar to a Regular Suit

Once an application is made by a defendant under this section for compensation for wrongful arrest, attachment or injunction and an order is made under this section, the defendant cannot institute a regular suit for compensation for the same wrong whether any compensation is awarded to him or not. In other words, the disposal of an application under this section has the effect of *res judicata* so as to bar any subsequent suit in respect of the same cause of action. It is the disposal of the application and not its mere presentation which is a bar to a regular suit.

Where the suit for damages caused for having obtained interim injunction wrongfully was filed, application for compensation filed under section 95 was dismissed, no appeal or revision was preferred against the said order. Separate regular suit for damages is debarred by virtue of section 95(b), CPC.[31]

[s 95.8] Amount of Compensation

The amount of compensation that may be awarded under this section cannot exceed Rs 50,000. Where a defendant claims a larger amount of compensation, he must institute a regular suit.

[s 95.9] Realistic Cost

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large

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28. *Har Dayal v Raghubir Dayal*, AIR 1934 Oudh 429 : (1935) 10 Luck 199.
29. *Abraham v Varampattan Asirbatham*, (1961) 2 Mad LJ 454 : 74 LW 810.
30. *Palanisami v Kaliappa*, AIR 1940 Mad 77; *Srinivasaraghan v Sundararajan*, AIR 1955 Mad 552; *Choudhary v PV Bhagwat*, AIR 1954 Mad 62 : AIR 1953 MB 247; contra *Chandulal v Sivaoji*, 39 Cal WN 915; *Johermal Chimanlal & Co v Iswardas*, AIR 1932 Cal 695 : ILR 59 Cal 1082; *Seenappa Setty v Suryanarayana Rao*, AIR 1958 Mys 136 : (1957) ILR Mys 339.
31. *Yerragorla Narayana v Gavvala Nellesu*, AIR 2006 AP 305.

number of cases, such an order is passed despite section 35(2) of the CPC. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court-fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the high courts to examine these aspects and wherever necessary, make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.[32]

[s 95.10] Right of Defendant Not Served with Summons to Apply for Compensation Under This Section

If a defendant is arrested before judgment, he is entitled to apply for compensation under this section, though he has not been served with the writ of summons in the suit.[33]

[s 95.11] Counter-claim for Compensation in a Summary Suit

If a defendant, who is arrested before judgment in a summary suit brought against him on a negotiable instrument under O XXXVII, claims compensation for arrest under this section, he is entitled on that ground to apply for leave to defend the suit under O XXXVII, rule 3, and if a *prima facie* case is made out, leave to defend should be given.[34]

[s 95.12] Provincial Small Cause Courts

A provincial small cause court has no jurisdiction to make an order for the attachment before judgment of immovable property. But it may order an attachment before judgment of movable property, and if the attachment was obtained on insufficient grounds, it may award compensation to the defendant under this section.[35]

[s 95.13] Minor Plaintiff

This section applies to cases in which the plaintiff is a minor,[36] but the next friend cannot be made liable under the section.[37]

[s 95.14] Appeal

An appeal lies from an order under this section: see section 104, sub-section (1), clause (g). Section 491 of the Code of Civil Procedure, 1882 provided for compensation for wrongful arrest and attachment. Section 497 provided for compensation for wrongful injunction. An order under section 497 was appealable under the Code,[38] but orders under section 491 were

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32. *Salem Advocate Bar Assn v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344 : 2005 (1) SCR 929.
33. *Syed Ali v Abid*, (1891) 15 Bom 160.
34. *Roulet v Fetterle*, (1894) 18 Bom 717.
35. *Ibrahim v Sangaram*, (1903) 26 Mad 504. See section 7(b)(i), and O XXXVIII, rule 13.
36. *Ramachari v Govind*, AIR 1935 Mad 886.
37. *Satyanarayana v Anjareddi*, AIR 1941 Mad 719 : (1941) ILR Mad 985.
38. Code of Civil Procedure, 1882, section 588, clause (24).

held to be not appealable.[39] The present section combines the provisions of sections 491 and 497, and section 104 gives a right of appeal from all orders under this section, whether they are orders made on an application for compensation for wrongful injunction, or for wrongful arrest or attachment.

[s 95.15] Undertaking

Where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction, the undertaking is enforced by an application under this section to the court which granted the injunction. *A* attaches a house in execution of a decree against *B*. *C* sues for a declaration that the house belongs to him, and obtains a temporary injunction staying the sale on his undertaking to pay interest to *A* at 6 percent on the value of the house if his suit be dismissed. *C*'s suit is dismissed. In such a case, the procedure to be adopted by *A* to recover the interest from *C* is to apply not to the court executing the decree, but to the court which granted the injunction.[40]

[s 95.16] Injunctions and Compensation

The High Court of Rajasthan, in a judgment, has held that if a person obtains a temporary injunction and the circumstances are such that the court finds it just to make the injunction conditional on the petitioner giving an undertaking to pay compensation, if the injunction is later found to be unjustified, the court has got the power to give such a direction and to impose such a condition. In the Rajasthan case mentioned above, the trial court had granted a temporary injunction in favour of the petitioner, staying the eviction of the petitioner from the disputed premises. The temporary injunction was vacated (on appeal) by the District Judge of Tonk. Aggrieved with the appellate order against him, the petitioner approached the high court in revision. The high court noted that the other party had a decree in its favour to evict the petitioner. A dispute arose as to the exact premises in respect of which such party was in possession. The high court passed a limited order to the effect that the *status quo*, as it existed, shall be maintained by both the parties and no one will try to evict the other by use of force. The trial court shall determine the actual possession as existing on the date of the high court's judgment, by sending a commissioner to the spot. But more important is the condition imposed by the high court, which gave a direction that the petitioner will pay Rs 500 per month as damages to the opposite party, in case the petitioner fails finally in the suit. For this purpose, within six weeks, the petitioner shall give an undertaking to the trial court, failing which the opposite party would have a right to execute the decree and the conditional stay order granted by the high court shall come to an end. It may be mentioned that in this case the court itself has imposed a condition. Of course, under section 95, the court may award against the plaintiff, by its order, an amount not exceeding one thousand rupees as reasonable compensation to the defendant for the expense or injury (including injury to reputation) caused to the defendant. But this is after the proceedings are over.

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39. *Narasinga v Govinda*, (1901) 24 Mad 62; *Lok Nath v Amir Singh*, (1906) 28 All 81.
40. *Varajlal v Kastur*, (1898) 22 Bom 42.

[s 95.17] High Court

Where a temporary injunction was granted by the High Court of Bombay in its original jurisdiction on an undertaking by the plaintiff under rule 347 (present rule 351) of that court, to pay such sum by way of damages as the court may award as compensation in the event of a party affected, sustaining prejudice by such order, it was held that the court has power under that rule to award compensation to the defendant, exceeding Rs 1,000 on an application by the defendant in that behalf.[41]

41. *Haji Abdul v Munjibhai*, AIR 1926 Bom 523 : (1926) 28 Bom LR 1077.

PART VII

APPEALS

Appeals from Original Decrees

[S 96] Appeal from original decrees.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

[1][(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed [2][ten thousand rupees].]

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1. Inserted by Act 104 of 1976, section 33 (w.e.f. 1-2-1977).
2. Substituted by Act 46 of 1999, section 9, for "three thousand rupees" (w.e.f. 1-7-2002).

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[s 96.1] Changes in the Section

Except for sub-section (3) which was inserted in 1908, the section corresponds with section 540 of the Code of Civil Procedure, 1882.[3]

Sub-section (4) has been added by the Amendment Act, 1976.

Compare the Judicature Act, 1873, section 49, which provides that "no order made by the High Court of Justice or any judge thereof, by the consent of parties, shall be subject to any appeal except by leave of the court or judge making such order".

By Code of Civil Procedure (Amendment) Act, 1999, *vide* its section 9, effective from 1-7-2002, the words "three thousand rupees" were replaced by "ten thousand rupees". The provision of section 96 shall not apply to or affect any appeal from original decree which had been admitted before the commencement of amended section 96; and every admitted appeal shall be dealt with as if the amended section had not come into force.

[s 96.2] Letters Patent Appeals

The right of appeal from a decree of a single judge of a high court to the high court is governed not by this section, but clause 15 of the Letters Patent. "The Code makes no provision for an appeal within the High Court, that is to say, from a single judge of the High Court. This right of appeal depends on clause 15 of the Charter".[4] As regards procedure, the code and the rules therein contained, especially those in O XLI, apply to proceedings in such a

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3. As to the effect of sub-section (3), see notes below under the head "sub-section (3): Consent decrees are not appealable".
4. *Debendra Nath Das v Bibudhendra Mansingh*, (1916) ILR 43 Cal 90, 93–94 : (1916) 33 Ind Cas 745; *Sabhapathi Chetti v Narayanasami Chetti*, (1902) 25 Mad 555, 558; *Nawab Behram Jung v Hafi Subanadi Shustry*, (1913) ILR 37 Bom 572; *Surajmal B Mehta v BG Horniman*, (1918) 20 Bom LR 185, 217–18; *Ratanlal Jankidas Agarwal v Gajadhar*, AIR 1949 Ngp 188 : (1948) ILR Nag 690; *Chandra Kant Sinha v Oriental Insurance Co Ltd*, (2001) 6 SCC 158 : (2001) 3 SCR 759 : (2000) 2 LRI 1251.

high court under the Letters Patent, save so far as the code expressly provides to the contrary.[5] A "judgment", however, for the purposes of clause 15 of the Letters Patent has no limitation of the order being a decree.[6]

[s 96.3] Scope of the Section

Although it is desirable that an appellate court should not appraise oral evidence for itself, this section enjoins it to hear the appeal and arrive at its own conclusion about the controversy in the suit. It is not bound by the findings recorded by the trial court in the sense that the second appellate court is bound by the findings of fact arrived at by the first appellate court. It is, therefore, not correct to say that the appellate court commits any error of law if it reappraises the oral evidence and comes to its own conclusion, different from that of the trial court.[7] It is, however, well-settled that a finding of fact arrived at by the trial court on oral testimony should not be lightly disturbed except in rare cases where some error susceptible of being dealt with wholly by argument is disclosed, such as an omission to take account of circumstances or probabilities material to an estimate of the evidence or giving credence to testimony which turns out, on more careful analysis, to be substantially inconsistent with itself or with some indisputable fact.[8] Though there is power under O XLI, rule 11(1) of the Code of Civil Procedure, 1908 (CPC) to summarily dismiss the first appeal without issuance of notice to the respondent, yet, the court must be chary in exercising the power and if it chooses to do so, must express is own reasons as the appellate forum for summarily rejecting the first appeal. First appeal is a valuable right and the parties have a right to be heard, both on questions of law and fact and decided by giving reasons in support of the findings.[9] Therefore, where the appellate court had not chosen to assess the merits of the case in the first appeal by the reasons of its own, the dismissal of the first appeal on the reasons mentioned in the judgment of the first court would not be proper.[10] The maxim "*actio personalis cum moritur persona*" have been applied not only to those cases where a plaintiff dies during the pendency of a suit filed by him, for damages for personal injuries sustained by him but also to cases where a plaintiff dies during the pendency of an appeal to the appellate court, be it the first appellate court or the second appellate court against the dismissal of the suit by the trial court and/or the first appellate court, as the case may be. This is on the footing that by reason of the dismissal of the suit by the trial court or the first appellate court as the case may be, the plaintiff stands relegated to his original position before the trial court.[11] The jurisdiction of the courts in the first appeals, second appeals or revisions are all, to that extent conferred by the legislature. No litigant possesses any natural or inherent right to appeal against any order, unless a statute confers it and it is to the extent it is conferred.[12] To enforce the preferential right conferred under sub-section (1) of section 22 of Hindu Succession Act, 1956, the only remedy is by way of a civil suit. Therefore, the trial court has necessarily to pass a decree if it finds that the plaintiff is entitled to enforce the preferential right under sub-section (1) of section 22. Against such a

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5. *Sabitri Thakarain v Savi,* AIR 1921 PC 80 : (1921) LR 48 IA 76 : (1921) ILR 48 PC 481.
6. *Y Venkanna Chowdry v G Lakshmidevamma,* AIR 1994 Mad 140 (DB).
7. *Vijai Nath v Damodar Das Chela Shiv Mangal Das,* AIR 1971 All 109 : (1970) All LJ 1260; *Har Bhaj v Barfi,* AIR 1969 Del 197 : 71 Punj LR 59.
8. *Sumanbai v Anandrao Onkar Panpatil,* AIR 1976 Bom 212.
9. *Madhukar v Sangram,* (2000) 2 LRI 1126.
10. *Harijan Vanabhai Deva Bhai v Khoda Gram Panchayat,* AIR 1994 Guj 1 (DB).
11. *M Veerappa v Evelyn Sequeria,* (1988) 1 SCC 556.
12. *Hari Singh v Kanhiya Lal,* (1999) 4 LRI 1040.

decree, an appeal will certainly lie under section 96 of the CPC.[13] A pure question of law, unless waived by the parties can, in the discretion of the appellate court, be allowed to be taken even if raised for the first time, provided notice of it is given to the other side and does not involve a fresh investigation of delving into facts.[14] Thus the question as to the commencement of a tenancy is not a pure question of law and cannot be allowed to be raised for the first time in appeal.[15] It is incumbent upon the final court of fact, i.e., the first appellate court; and particularly when the judgment and decree of the trial court is reversed, to meet the reasoning of the trial court while decreeing the suit and to indicate its own reasons for arriving at contrary conclusions. It is the duty of the lower appellate court to discuss the entire evidence afresh, take notice of the ground taken and the reasons advanced by the trial court to reach its decisions.[16] When no plea of novation of contract is raised in the trial court the appellant cannot be allowed to raise such a plea at the stage of appeal.[17] The plea regarding maintainability of the suit on account of mis-joinder of necessary parties was neither taken in the written statement nor an issue in that respect was framed by the trial court. The objections of non-joinder cannot be raised for the first time at the stage of first appeal.[18] The demand promissory note and the bond of guarantee were allowed by the defendants to be admitted in evidence without objection, and even they did not examine themselves in court to deny their genuineness. The defendants were precluded from contending before the appellate court that the documents have not been duly proved.[19] A party can carry a matter and appeal on a limited question of non-awarding of costs.[20] The plea regarding factual points on inadequacy in evidence of the plaintiff cannot be allowed to be raised for first time in appeal.[21] It is the duty of the first appellate court to write a self-contained judgment, giving reasons, after considering all the evidence adduced by the parties. O XLI, rule 31 requires the first appellate court to write a self-contained judgment, to give reasons for its decision on the points for determination and while doing so, the first appellate court being the final court of facts has to consider all the evidence on record.[22] No issue on the point of limitation framed by the trial court and the findings were recorded straight by the court, without giving an opportunity to the parties to lead evidence on any such specific issue, such findings cannot be sustained.[23] A party who abandons a particular plea, at a particular state, cannot be allowed to re-agitate in appeal.[24] Where the first appellate court has duly discussed important and material evidence adduced by both the parties, its judgment is not vitiated, merely because it had failed to consider one circumstance or evidence relied upon by the trial court.[25] The Madhya Pradesh High Court

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13. *Kamal Goel v Purshotam Dass,* AIR 1999 P&H 254.
14. *M Kesava Gounder v DC Rajan,* AIR 1976 Mad 102 : (1976) 1 Mad LJ 56.
15. *Biva Banerjee v Manmatha Nath Banerjee,* AIR 1977 Cal 82.
16. *Joginder Singh v Nidhan Singh,* AIR 1996 P&H 120; *Ram Bhajan v Abdul Rahman,* AIR 1997 All 17; *Haquik Mian v Rajendra Prasad,* AIR 1997 Pat 59.
17. *KM Madhavkrishnan v SR Swami,* AIR 1995 Mad 318 (DB).
18. *Prithavi Raj Singh v Dilip Kulkarni,* AIR 1999 Raj 201; *Addepalli Venkata Laxmi v Ayinampudi Narsimha Rao,* AIR 1994 AP 72 (DB).
19. *State Bank of India v Ramayanapu Krishnarao,* AIR 1995 Ori 244; *Oil and Natural Gas Commission v EM and EM Associates,* AIR 1996 All 318 (DB); *Baban Girju Bangar v Namdeo Girju Bangar,* AIR 1999 Bom 46; *Maharshi Dayanand University v Jitendra Singh,* AIR 1999 P&H 95.
20. *Modgi Krishna v Modgi Krishna Bai,* AIR 1994 AP 16 (DB).
21. *Food Corp of India v Williamson Magor & Co,* AIR 1999 Cal 219 (DB); *Allahabad Bank v Sowendra Nath Shaw,* AIR 1997 Cal 80 (DB); *State Bank of India v Surinder* Singh, AIR 1997 J&K 70.
22. *Rukmanand Ajitsaria v Usha Sales Pvt Ltd,* AIR 1991 NOC 108 (Gau).
23. *Bindu Sharma v Ram Prakash Sharma,* AIR 1997 All 429.
24. *Mahesh Chand Sharma v Raj Kumari Sharma,* AIR 1996 SC 869 : (1996) 8 SCC 128 : JT 1995 (8) 466.
25. *Budhu Dusadh v Mangani Devi,* AIR 1984 Pat 123.

relying upon *State of Maharastra v Ram Das Sriniwas Naiyak*,[26] held that the correctness of the court proceedings cannot be challenged before the appellate or revisional court unless such a challenge was made before the said court because the conduct of the judge in recording the proceedings cannot be put in issue.[27] The high court, instead of considering whether the trial court was justified in taking a view, instead, wrongly declined to go into the question on the footing that there was no pleading to enable the court to go into that question. It was held that the high court erred in not considering the judgment of the trial court.[28] The Jammu & Kashmir court observed that there is a growing tendency of the litigants to bypass the trial courts in matters where *ex parte* orders are subject to objection of other side and are valid only till next date and vacation whereof can be sought under O XXXIX, rule 4 of the CPC before the trial court, it has been consistent policy and practice of the court not to entertain such appeals and not to interfere in such orders. This practice has almost hardened into a rule and it is in very rare cases that a departure is made where impugned orders appear manifestly perverse or where these suffer any manifest lack of jurisdiction or where the bias of the trial court is apparent on the face of the record. There may be some other circumstances also which may warrant interference, but by and large, this policy is adhered to discourage litigating parties from rushing to the court.[29] The judgment and decree of the court of appeal either under section 54 of Land Acquisition Act, 1894 or section 96 of the CPC or under Articles 132, 133 or 136 of the Constitution does not furnish fresh cause of action nor provides fresh limitation to make application under section 28 A(1) of the Land Acquisition Act.[30]

While dealing with the meaning and ambit of the expression "substantial question of law" occurring in section 30 of the Workmen's Compensation Act, 1923, the Supreme Court observed that the expression will carry the same meaning as is commonly understood. No distinction can be made between a substantial question of law for the purpose of first appeal and one for the second appeal.[31]

In *North East Karnataka Road Transport Corp v Sujatha*,[32] the Supreme Court considered the scope of appellate jurisdiction of the high court under section 30 of the Employee's Compensation Act, 1923 (which was earlier known as Workmen's Compensation Act, 1923). The aforesaid section 30 provides for appeal from the order of the commissioner to the high court. The Apex Court clarified that the appeal under section 30 is not like a Regular First Appeal akin to section 96 of the Code of Civil Procedure, 1908 which can be heard both on facts and law. The appellate jurisdiction of the High Court to decide the appeal is confined only to examine the substantial questions of law arising in the case.

A Division Bench of the Karnataka High Court has held that where an application for grant of probate or letter of administration is contested, the said application automatically converted into a regular suit. Once the application under the Succession Act is converted into an original suit, all stages of suit have to be proceeded with. The final decision in the said suit ultimately results in the form of a decree under section 2(2) of the Code. Therefore, in view

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26. *State of Maharastra v Ramdas Sriniwas Nayak*, AIR 1982 SC 1249.
27. *Benibai v Champabai*, AIR 1996 MP 243.
28. *Narayanan Prabhu v Janardhana Mallan*, AIR 1996 SC 3276 : (1996) 8 SCC 661 : JT 1996 (5) 617 : (1996) 4 Scale 437.
29. *KK Puri v AK Puri*, AIR 1994 J&K 25.
30. *Babua Ram v State of Uttar Pradesh*, (1995) 2 SCC 689.
31. *Om Prakash Batish v Ranjit*, AIR 2008 SC 2143 : (2008) 12 SCC 212.
32. *North East Karnataka Road Transport Corp v Sujatha*, (2019) 11 SCC 514

of sections 2(2) and 96 and O XLI, rule 1 of the Code, a regular first appeal would lie against such decree.[33]

[s 96.4] Rejection of Plaint — Remedy is Appeal and Not Application Under Section 151

The question is whether the court could exercise the so-called inherent power available to it when the plaintiff invokes its jurisdiction under section 151 of the CPCe. It is now well settled that the court can exercise its inherent power, which is saved by section 151 of the CPC, in situation where there is no specific provision in the Code for grant of relief to a party in appropriate cases. When a rejection of the plaint under O VII, rule 11(c) of the CPC is a decree and the party has a substantive right to appeal under section 96 and, in cases where he is able to make out a case for a review under O XLVII, the question of exercise of the inherent jurisdiction of the court normally does not arise. In a case where there is another remedy provided to the party by the CPC, the court cannot ordinarily resort to its inherent power in substitution of that remedy. A remedy by way of appeal has necessarily to be understood as a substantive remedy available to a party. When an appeal is provided, the party aggrieved gets an opportunity to have his whole case reconsidered by the appellate court. It is therefore clear that there is no occasion for the court to exercise its inherent power in such a situation. The Supreme Court, in *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*,[34] has laid down that the inherent power of the court can be exercised only in the absence of a specific provision in the CPC and if a matter is covered by any of the specific provisions of the Code, no question of the court exercising its inherent jurisdiction would arise. It is therefore clear that the plaintiff is not entitled to invoke the jurisdiction of the court under section 151 of the CPC when a plaint gets rejected in terms of O VII, rule 11. In *Varghese v Devi Academy*,[35] the learned single judge followed a decision of the Kerala High Court in *Gopalakrishna Pillai v Narayan*.[36] That decision, in turn, was rendered following a decision of the Travancore High Court in *John v Kuriyan*.[37] It has to be noted that both these decisions were rendered before the Supreme Court clarified the scope of section 151 of the CPC or the entitlement of the court to exercise its inherent power in the face of other specific provisions in the CPC in *Manohar Lal Chopra v Rai Bahadur Rao Raja Hiralal*.[38] This principle is reiterated also in *Arjun Singh v Mohindra Kumar*[39] and in *Ram Chand and Sons Sugar Mills v Kanhayalal*.[40] The power under section 151 of the CPC cannot be invoked to restore the suit in a case where a plaint has been rejected under O VII, rule 11 (b) or (c) of the CPC.[41]

The Andhra Pradesh High Court has held that an order rejecting a plaint is a decree and is appealable under section 96 of the CPC. A revision under section 115 or an appeal under O XLIII of the CPC would not be maintainable.[42]

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33. *Pressy Pinto v Rony Maxim Pinto*, AIR 2009 Kant 157 : (2009) 5 Kar LJ 601 (DB).
34. *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527.
35. *CV Varghese v Devi Academy*, AIR 1999 Ker 185 : (1999) 1 Ker LT 440 : (1999) 2 RCR (Civil) 177.
36. *Gopalakrishna Pillai v Narayanan*, AIR 1959 Ker 406.
37. *John v Kuriyan*, (1936) 26 Travancore LJ 932.
38. *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527.
39. *Arjun Singh v Mohindra Kumar*, AIR 1964 SC 993.
40. *Ram Chand and Sons Sugar Mills Pvt Ltd v Kanhayalal Lal Bhargava*, AIR 1966 SC 1899.
41. *Mable v Dolores*, AIR 2001 Ker 353 (DB).
42. *Amir Ali v Maneck H Ghadiali*, 2008 (2) Andh LT 205 : (2008) 2 Andh LD 261.

[s 96.5] Right of Appeal Must Be Expressly Given

It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a court; such right must be given by statute, or by some authority equivalent to a statute such as rules framed under a statute.[43] The right to appeal is a creature of statute and an appeal can be presented, only:

(i) by a party in the suit if he is aggrieved by the judgment; or

(ii) by a person who is not a party but who is aggrieved by the judgment if he seeks and gets leave of the court to prefer an appeal against the judgment.

It is also not correct to say that any person can file a suit. The right to file suit is also limited to a person referred to in section 9, provided he has got a cause of action and a remedy to be sought.[44] "Unless a right of appeal is clearly given by statute, it does not exist, whereas a litigant has independently of any statute a right to institute any suit of a civil nature in some court or another".[45] No right of appeal can be given except by express words.[46] In other words, a right of appeal infers in no one and therefore an appeal for its maintainability must have the clear authority of law.[47] The right of appeal, which is a statutory right, can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. If the statute does not create any right of appeal, no appeal can be filed. The right to appeal inheres in no one and, therefore, for maintainability for an appeal there must be the authority of law. Where such a law authorises filing an appeal, it can impose conditions as well.[48] The right of appeal is a substantive right conferred on a party by the statute. The conferring of right of appeal is not circumscribed by the right being available at the time of the institution of the cause in the court of first instance. The right of appeal in a given situation may already be available at the institution of the cause in the court of the first instance or may even be subsequently conferred. In either situation, without any distinction, such right is conferred by statute.[49] The right to notice in a proceedings in court of law or quasi-judicial proceedings is different from the right of appeal. The former may arise either under the statutory provision or the principle of natural justice may require it or it may be necessary on principle of legitimate expectation. But right of appeal is always statutory. The courts cannot confer or infer it.[50] Any person who moves the machinery of the court for contempt only, brings to the notice of the court certain facts constituting contempt of court. After furnishing such information he may still assist the court, but it may always be borne in mind that in contempt proceedings, there are only two parties, namely, the court and the contemnor.[51] Dealing with the Travancore Cochin Act of 1925, the Supreme Court observed that Acts did not purport to confer a right of appeal and that it dealt only with procedural matters. Accordingly, the court rejected the

43. *Minakshi v Subramanya,* (1888) ILR 11 Mad 26, 33 : 14 IA 160; *Parasurama Ayyar v Seshier,* (1904) ILR 27 Mad 504; *Rangoon Botatoung Co Ltd v Collector, Rangoon,* (1913) ILR 40 Cal 21, 27 : 39 IA 197, 200; *Raja Himamshu Dhar Singh v Additional Registrar, Co-op Societies, Uttar Pradesh,* AIR 1962 All 439.
44. *Champak Vashram v Dharamsi Pola of Rajkot,* AIR 1984 Guj 18 (DB); *DN Taneja v Bhajan Lal,* (1988) 3 SCC 26.
45. *Zair Hussain Khan v Khurshed Jan,* (1906) 28 All 545.
46. *Narayan v Secretary of State,* (1896) 20 Bom 803; *Sainiks Motors v State Transport Authority,* AIR 1956 Raj 65 : (1956) ILR Raj 110 : (1956) Raj LW 182.
47. *Ganga Bai v Vijay Kumar,* AIR 1974 SC 1126 : (1974) 2 SCC 393.
48. *The Gujarat Agro Industries Co Ltd v The Municipal Corp of City of Ahmedabad,* AIR 1999 SC 1818 : (1999) 4 SCC 468 : [1999] 3 LRI 14.
49. *Special Military Estates Officer v Munivenkataramiah,* AIR 1990 SC 499 : (1990) 2 SCC 168.
50. *Uttar Pradesh Awas Evam Vikas Parishad v Gyan Devi,* (1995) 2 SCC 326 (five judges).
51. *DN Taneja v Bhajan Lal,* (1988) 3 SCC 26.

appellant's contention that he had, under that Act, a vested right to have his appeal heard by a Division Bench under that Act which was in force, not only when the suit was filed, but also when the appeal therefrom was filed and that right was not taken away expressly by Kerala Act 5 of 1959, and could not be taken away by implication.[52] The right of appeal being a creature of the statute, its scope must be determined by reference to the provisions of the statute conferring it,[53] and an appellate court can exercise only such powers as are confided to it.[54] If the legislature in its wisdom thinks in a particular case that no appeal should be provided for, it cannot be held that the legislation is bad.[55] No appeal lies against an award passed by an arbitrator appointed under section 19(1)(b) of the Defence of India Act, 1939, rejecting a claim for compensation, as an appeal is provided under rule 19 only when compensation is awarded and that exceeds Rs 5000.[56] But an order varying a scheme under section 92(1) is a decree and is appealable.[57] The unilateral act of a decree-holder of getting satisfaction of the decree recorded without notice to the judgment-debtor does not take away the latter's right of appeal.[58] This section in express words, gives a right of appeal from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from the decision of such court. Where, by a special statute, matters are referred to the ordinary courts of the country, the implication is that the court will determine those matters as court. Its jurisdiction is only enlarged and all the incidents of that jurisdiction including the right to appeal from its decision remain,[59] provided the decision is open to appeal under the law applicable to the court.[60] Section 28 of the Hindu Marriage Act, 1955 read with its sections 3(b), 19 and 21 makes it clear that the court in which proceedings are held on petitions under that Act is the established court and appeals from its decrees and orders lie to the court to which appeals from its decrees and orders passed in civil cases will lie.[61] The rule is that when a question is referred to an established court, it imparts that court with the ordinary incidents of the procedure of that court including the right of appeal. But this rule would not apply where a special jurisdiction is by the statute conferred on the civil court.[62] Section 202(1) of the Companies Act, 1913 (now replaced by Companies Act, 1956) conferred a right of appeal against orders passed by a district judge or by a single judge of the high court in the matter of winding-up of

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52. *P Mohammed Meera Lebbai v Thirumalaya Gounder Ramaswamy Goundner,* AIR 1966 SC 430 : (1966) 1 SCR 574 : (1966) Ker LJ 456.
53. *Kishen Lal v Sohanlal,* AIR 1954 Raj 138 : (1954) ILR Raj 597 : (1954) RLW 398; *R Veerayya and M Siddalingaiah v State of Andhra Pradesh,* AIR 1967 AP 265.
54. *Prem Narayan Amirtlal Varme v Divisional Traffic Manager,* AIR 1954 Bom 78 : (1953) ILR Bom 334 : (1953) 55 Bom LR 735.
55. *Ishar Das v State of Haryana,* AIR 1975 P&H 29.
56. *Surajmull Nagarmull v State of West Bengal,* AIR 1963 SC 393.
57. *Sree Kalimata Thakuraniof Kalighat v Ram Chandra Chatterjee,* AIR 1970 Cal 373.
58. *Nandigama Venkata Krishna Rao v Mullpudi Ganeswara Rao,* AIR 1971 AP 246.
59. *National Telephone Co Ltd v Post Master General,* AIR 1913 Cal 548; *Secretary of State for India v Chellikani Rama Rao,* (1916) ILR 39 Mad 617 : (1916) LR 43 IA 192 : 20 Cal WN 1311; *Rangoon Botatoung Co Ltd v Collector, Rangoon,* (1912) 14 Bom LR 833 : (1912) LR 39 IA 197 : (1912) 40 Cal 21; *Ram Parshad v Shiromani Gurudwara Parbandhak Committee,* AIR 1931 Lah 161 : 61 IA 180 : 40 Cal WN 610; *RMARA Adaikappa Chettia v R Chandrasekhara Thevar,* AIR 1948 PC 12 : 74 IA 264 : (1948) ILR Mad 505 : 50 Bom LR 18 : 52 Cal WN 275; *Maung Ba Thaw v Ma Pin,* (1934) PC 81 : 61 IA 158 : (1934) 36 Bom LR 427 : (1934) 148 IC 1; *National Sewing Thread Co Ltd v James Chadwick & Bros Ltd,* AIR 1953 SC 357 : (1953) 4 SCR 1028 : 1953 SCJ 509 : (1954) 56 BomLR 21; *A Arunachala Naicker v Ghulam Mohamood,* AIR 1959 Mad 191 : (1959) ILR Mad 336 : (1959) 1 Mad LJ 181 : (1959) 72 Mad LW 59.
60. *Sankaran v Kochukutty,* AIR 1954 TR 259.
61. *Dassi v Dhani Ram Tiku,* AIR 1969 P&H 25 : (1969) ILR 2 P&H 365; *Kusum Lata v Kanta Prasad,* AIR 1965 All 280.
62. *SM Solaiman v Noor Mahommed,* AIR 1944 Cal 395 : (1944) 49 Cal WN 10.

a company and this right was a right independent of the provisions of this section.[63] But the court of a special judicial officer appointed under section 3(d) of the Land Acquisition Act, 1894, is a court of special jurisdiction and the high court is not authorised to hear appeals from it.[64] But a decision on a reference under section 202 of that Act is a decree since it determines the right of parties in respect of their disputes. Such a decree is appealable under this section.[65] Rights of appeal again are substantive rights. They are not merely matters of procedure. Hence, an Act which takes away an existing right of appeal must not be applied retrospectively in the absence of express enactment or necessary intendment.[66] In other words, as stated by the Supreme Court, as soon as a *lis* commences, all rights get crystallised and no clog upon a likely appeal can be put, unless the law was made retrospective either expressly or by clear implication.[67] However, it is open to the appropriate legislature to take away such a vested right.[68] A notification issued under section 22A of the Bombay Civil Courts Act transferring certain areas to another revenue division does not affect the right of appeal to a superior court situated in the original place, arising from either pending cases or cases decided before the data of notification.[69] The Bengal, Agra and Assam Civil courts (Amendment) Act which raised the jurisdiction of the district judge from Rs 10,000 to Rs 15,000 does not contain any provision which, in any way, takes away the vested right of appeal. Hence, the forum of appeal arising out of a suit filed before the Amendment Act and valued at Rs 12,000 would still be the high court and not the district judge.[70] It has been held by the Supreme Court that a new legislation cannot operate to impart an existing right of appeal and that accordingly a law enhancing court fees payable on appeals can have no application to appeals arising out of proceedings commenced before its enactment.[71] So also a statute creating a new right of appeal is prospective in the absence of a provision to the contrary,[72] and cannot be availed of by parties to proceedings commenced prior thereto.[73]

[s 96.6] Right of Appeal—Suits Instituted Before the Constitution of India

There was considerable difference of judicial opinion whether an appeal against a decree passed in a suit instituted before the Constitution was governed by section 110 of the CPC as it stood prior to its adaptation in 1950 or by Article 133 of the Constitution and section 110 of the CPC as adapted in 1950. Under section 110, as it stood before adaptation, the party had, subject to other conditions, a right of appeal to the Privy Council and then to the federal court if

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63. *Shankarlal Aggarwal v Shankarlal Poddar,* AIR 1965 SC 507 : (1964) 1 SCR 717.
64. *Doss Bavaji v M Sarangaraja Aiyangar,* AIR 1931 Mad 586 : (1931) ILR 54 Mad 722.
65. *Bai Lalita v Shardaben,* AIR 1970 Guj 37.
66. *Colonial Sugar Refining Co Ltd v Irving,* AIR 1905 Cal 369 : (1905) AC 369; *Delhi Cloth and General Mills Co Ltd v CIT,* AIR 1927 PC 242 : 54 IA 421 : (1927) 106 IC 156; *Nana Aba Katkar v Sheku Andu Bokade,* (1908) 10 Bom LR 330; *Sardar Ali v Dolimuddin Ostagar,* AIR 1928 Cal 640 : (1929) ILR 56 Cal 512; *Sarsothamma v Amrithamma,* AIR 1953 Hyd 258 : (1953) ILR Hyd 423; *Small Town Committee of Budhlada v Firm Bhuria Mal-Parmeshwari Dass,* AIR 1953 P&H 94; *Chinna Kunjukunju v Kutty Neelkantan,* AIR 1958 Ker 251 : (1957) Ker LJ 882 : (1957) ILR Ker 1004.
67. *Vitthalbai Naranbhai Patel v Commr of Sales Tax, MP, Nagpur,* AIR 1967 SC 344; *Vasava Narottam Unju v Shah Ambalal Maganlal,* AIR 1969 Guj 94; *Pratap Narain Agarwal v Ragho Prasad,* AIR 1970 All 15.
68. *Behari Lal v Keshri Nandan,* AIR 1970 All 201 : (1969) All LJ 537.
69. *Vasava Narottam Unju v Shah Ambalal Maganlal,* AIR 1969 Guj 94.
70. *Taramoni Dasi v Kalidasi Majhi,* AIR 1977 Cal 43 : 81 Cal WN 661 : (1978) ILR 1 Cal 253.
71. *State of Bombay v Supreme General Films Exchange Ltd,* AIR 1960 SC 980 : (1960) 3 SCR 640 : (1961) 1 SCJ 119 : (1960) 62 Bom LR 910; affirming *Sawaldas Madhavdas v Arati Cotton Mills Ltd,* AIR 1955 Bom 332 : (1954) 57 Bom LR 394.
72. *Delhi Cloth and General Mills Co Ltd v CIT,* AIR 1927 PC 242 : 54 IA 421 : (1927) 106 IC 156.
73. *Ratansi Agariya Bhate v Jaysingh Dinkarrao Rajurkar,* AIR 1954 Nag 348.

the value of the subject matter is Rs 10,000 or upwards but under Article 133 and section 110 as adapted, the requisite valuation was Rs 20,000 or upwards. Where the value of the suit instituted prior to the Constitution was Rs 10,000 or more but less than Rs 20,000, would an appeal lie to the Supreme Court? There was no dispute that if the decree had been passed before the Constitution, an appeal would lie against it. The controversy related to decrees passed after the Constitution came into force in cases where the subject-matter was less than Rs 20,000 in value. On this question, the decision were numerous and conflicting, but there is no need to refer to or discuss them as the point is now concluded by the decision of the Supreme Court in *Garikapatti Veerayya v N Subbiah Choudhury,*[74] where it was held that the right of appeal which vests in a litigant, carries with it, the right to prefer appeals to the superior courts, as constituted on the date of suit and that therefore where an appeal could have been preferred to the federal court before the Constitution, it would lie to the Supreme Court thereafter. But where the court to which the appeal lies, is abolished without any forum being substituted therefore, the right of appeal to that court must perish with it.[75] While the litigant has a vested right of appeal, he has no vested right in the constitution of the forum that is to hear the appeal.[76] A plea which was neither raised before the trial court after the plaint was amended, nor formed part of any issue framed after its amendment, is not maintainable in appeal.[77]

[s 96.7] Admission of Appeal by Registrar, High Court—Validity

From a perusal of rule 205 of the High Court of Jharkhand Rules, 2001, it is manifestly clear that the Registrar General of the high court has been conferred power to admit the appeal by passing formal order of admission and direct issuance of notices to the respondents if the memorandum of appeal is not barred by limitation and is sufficiently and properly stamped, irrespective of the fact whether such appeal has merit or not. Now the question that falls for consideration is to whether procedure provided under rule 205 conflicts with the CPC.[78]

Comparing the two provisions, i.e., sections 99 and 100 of CPC, it is manifestly clear that an appeal shall lie from every decree passed by any court exercising original jurisdiction unless the CPC or any other law expressly bars it, for the time being in force. On the other hand, a second appeal, i.e., appeal from appellate decree shall be entertained by the high court only after it is satisfied that the case involves substantial question of law. Section 100 of the CPC further provides that in a second appeal the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. It further provides that the high court, if satisfied that substantial questions of law are involved, then it shall formulate such questions.

Section 101 of the CPC further clarifies that no second appeal shall lie, except on the ground mentioned in section 100.[79]

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74. *Garikapati Veerayya v N Subbiah Choudhury,* AIR 1957 SC 540 : (1957) 1 SCR 488 : (1857) SCJ 439 : (1957) SCA 495.
75. *Dajisaheb Mane v Shankar Rao Vithal Rao Mane,* AIR 1956 SC 29 : (1955) 2 SCR 872 : (1956) SCJ 70 : (1956) 58 Bom LR 496.
76. *Narayanan v Sankaranarayana,* AIR 1953 TC 53; *Re Sridhara Rao,* AIR 1958 AP 60; *Chana Basappa v Narasing Rao,* AIR 1959 Mys 253 : (1959) ILR Mys 257; *Firm Murlidhar v Firm Kishorilal,* AIR 1959 Raj 246 : (1959) ILR Raj 734 : (1959) RLW 391; *Kochupennu Kochukka v Kochukka Kunjipennu,* AIR 1961 Ker 226 : (1960) ILR Ker 734; *Soosai Anthony D'Costa Nicholas D'Costa v Francis Roche Anthony Kurush Roche,* AIR 1962 Mad 304 : (1962) 1 Mad LJ 376 : (1962) 75 Mad LW 244.
77. *Bank of Baroda v Nandkishore Kachhawa,* AIR 1991 Raj 151.
78. *Bishnu Bhagat v Pushpa Devi,* AIR 2006 Jhar 117.
79. *Bishnu Bhagat v Pushpa Devi,* AIR 2006 Jhar 117.

Sub-rule (4) of rule 11 has been inserted in the year 1976 by Code of Civil Procedure Amendment Act of 1976. Sub-rule (4) now made obligatory for the appellate court not being a high court to deliver judgment recording in brief the grounds for dismissing the appeal under sub-rule (1). By now the legal proposition has been set at rest by the Supreme Court that notwithstanding the provision of sub-rule (4) of rule 11 of O XLI, CPC, the high court is expected to pass a reasoned order even in dismissing appeal on the first day of hearing at the admission stage in absence of the respondents to ensure that justice not only done but appears to be done. Provisions of O XLI, r 11(4) does not do away with its basic obligation of doing justice in deciding rights and liabilities of the contesting parties.

In this connection reference may be made to the report of Justice Malimath Committees, Chapter III, p 30, which reads as under:

> Indeed, the provisions of Order XLI Rules 11, 11A and 12 of the Code of Civil Procedure read together make it obligatory for the Appellate Court to fix a day for the preliminary hearing of appeal as expeditiously as possible and to make endeavour to conclude such hearing within sixty days from the date of which the memorandum of appeal is filed and, unless the appeal is summarily dismissed at preliminary hearing, to fix a day for final hearing. In other words, the question of fixing a day for the final hearing of appeal arises only if the appeal is not summarily dismissed at the preliminary hearing which has to be fixed as expeditiously as possible after the memorandum of appeal is filed. These provisions should be strictly followed. However, care should be taken that an appeal which raises triable issue is not dismissed in limine. We would also like to emphasis that when an appeal is dismissed *in limine*, a brief order giving reasons for dismissal at the preliminary stage should invariably be recorded. A similar recommendation has been made by the Law Commission of India in its 79th report.[80]

Reading the entire provisions from O XLI, rule 11, it can safely be held that it is the appellate court and the appellate court alone before whom the appeal shall be listed for admission. If the appellate court finds no merit in the appeal, then it shall dismiss the appeal without even issuing notices to the respondents. On the first day of hearing, at the admission stage, if the appellate court finds arguable points in appeal, then notices shall be issued to the respondents, fixing a date for hearing of the appeal.[81]

Section 29 of the Bihar Reorganisation Act, 2000 under which the High Court of Jharkhand Rules, 2001 are framed, enables the High Court of Jharkhand either to adopt the rules of the High Court of Patna or to make rules for itself. This power to make rules relates to the procedure to be followed in the matter of a proceeding filed in the high court. This power to regulate the procedure has to be understood consistently with the requirement of the CPC, which governs the filing of an appeal in the Jharkhand High Court. So understood, rule 205 of the High Court of Jharkhand Rules, 2001 cannot prevail over the requirement of O XLI, rule 11 of the CPC. Appeals, whether under the CPC or any special enactment have to be sent up for admission before the bench in terms of O XLI, rule 11 of the CPC and notwithstanding the power conferred on the Registrar by rule 205 of the High Court of Jharkhand Rules 2001.[82]

[s 96.8] Appeal and Revision—Respective Scope

It is fairly a well settled position in law that the right of appeal is a substantive right. But there is no such substantive right in making an application under section 115.

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80. *Sarkar on Code of Civil Procedure*, 10th Edn; *Bishnu Bhagat v Pushpa Devi*, AIR 2006 Jhar 117.
81. *Sarkar on Code of Civil Procedure*, 10th Edn; *Bishnu Bhagat v Pushpa Devi*, AIR 2006 Jhar 117.
82. *Sarkar on Code of Civil Procedure*, 10th Edn; *Bishnu Bhagat v Pushpa Devi*, AIR 2006 Jhar 117.

Section 115 is essentially a source of power for the high court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the high court for relief. The scope for making a revision under section 115 is not linked with a substantive right.

The language of sections 96 and 100 of the CPC, which deal with appeals can be compared with section 115. While in the former, two provisions specifically provide for right of appeal, the same is not the position *vis-a-vis section* 115. It does not speak of an application being made by a person aggrieved by an order of subordinate court. As noted above, it is a source of power of the high court to have effective control on the functioning of the subordinate courts by exercising supervisory power.[83]

In *Shankar Ram Chandra Abhyankar v Krishnaji Dattatreya Bapat*,[84] it has been held by the Supreme Court that the revisional jurisdiction partakes the appellate jurisdiction of a superior Court. In a subsequent decision[85], the Supreme Court affirmed the above view thus:

> The right of appeal is one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are : the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. When the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Subject to limitations placed on the exercise of revisional jurisdiction, it remains a part of the general appellate jurisdiction of a superior Court in a wider and larger sense.

In a recent decision the Supreme Court has reaffirmed the above view by stating that revisional jurisdiction, in effect and substance is an appellate jurisdiction.[86]

The Allahabad High Court has held that a revision is maintainable against an order passed on the objection filed by a third party in the execution proceeding of an ejectment decree: filing of appeal under section 96 read with O XXI, rule 103 of the Code is not proper.[87]

When a plaint is returned by the court, the plaintiff is entitled to present it again either by complying with the deficiency pointed out or by explaining that the objections raised by the court are inconsequential. But once the plaint is returned by court or not being satisfied by the explanation given by the plaintiff, the said order is revisable and not appealable.[88] The Patna High Court has held that an order rejecting a plaint is a decree and such decree is not revisable under section 115 but appealable under section 96 of the Code.[89]

In a partition suit, directions were given for issuance of final decree after production of stamp papers. On objections being raised in relation to process of engrossment, the matter was adjudicated upon. It was held by the Rajasthan High Court that such adjudication cannot be said to be determination of rights of parties leading to a decree. Therefore, no appeal under section 96 of the Code would lie.[90]

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83. *Shiv Shakti Coop Housing Society, Nagpur v Swaraj Developers*, AIR 2003 SC 2434 : (2003) 6 SCC 659 : (2003) 3 SCR 762. See also notes under the same heading under section 100.
84. *Shankar Ramchandra Abhyankar v Krishnaji Dattatreya Bapat*, AIR 1970 SC 1 : (1969) 2 SCC 74.
85. *Nalakath Sainuddin v Koorikadan Sulaiman*, AIR 2002 SC 2562 : (2002) 6 SCC 1; *RC Lahoti* J (as he then was), speaking for the Bench.
86. *GL Vijain v K Shankar*, AIR 2007 SC 1103 : (2006) 13 SCC 136.
87. *Wahid v Mohd Anwar*, 2009 (4) All LJ 225 : 2009 (3) All WC 2121 : (2009) 75 All LR 437.
88. *Kotapati Ramalakshmi v Doneparthi Hymavathi*, 2009 (4) Andh LD 655.
89. *Meera Sinha v Girja Sinha*, AIR 2009 Pat 19 : 2009 (2) Civ LJ 494 (DB) : (2009) 1 Pat LJR 329.
90. *Arun Kumar Singh v Hari Singh*, AIR 2009 Raj 18 : (2009) 1 Raj LW 18.

An order passed under section 28 of the Specific Relief Act, 1963 rescinding an agreement would amount to a decree against which appeal would lie and not a revision.[91]

[s 96.9] Simultaneous Relief of Appeal and Review Permissibility

The right of review is a statutory right. Such right can be invoked if the conditions therefor are fulfilled. So is a right of appeal. A right of review and right to appeal stand on different footings although some grounds may be overlapping. If a review is granted, the decree stands modified, but such modification of a decree is not an ancillary or a supplemental proceeding so as to be revived upon setting aside the decree granting review.[92]

An appeal preferred in terms of section 96, CPC must conform to the requirements contained in O XLI thereof. An appeal at the time of its filing would either be maintainable or would not be.[93] O XLVII, rule 1, CPC postulates filing of an application by a person considering himself aggrieved, by a decree or order from which an appeal is allowed but from which no appeal has been preferred, to file an application if he desires to obtain a review from a decree passed against him. An appeal during the pendency of the review petition was, therefore, not maintainable. In terms of O XLVII, the court may either reject or grant an application for review. In case a review is rejected, the order would not be appealable whereas an order granting an application may be objected at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit. Rule 8 of O XLVII of CPC postulates that when an application for review is granted, a note thereof shall be made in the register and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.[94]

[s 96.10] Conditional Admission of Appeal — Implication of

The jurisdiction of the court in first appeal extends to examine the questions of facts as well as that of law. Although it is true that under O XLI, rule 11, CPC it would be open for the court to dismiss the appeal *in limine* at the time of admission but even examining the matter from that point of view, the court, while considering the question of admission of appeal filed under section 96, CPC, may admit the appeal if it is considered for full hearing, having *prima facie* merit. Otherwise, if it finds that the appeal lacks merit it may be dismissed at the initial stage itself. But admission of the appeal, subject to condition of deposit of some given amount, is not envisaged in the provision as contained under section 96 read with O XLI41, rule 11 of CPC. The deposit of money would obviously have no connection with the merits of the case, which alone would be basis for admitting or not admitting an appeal filed under section 96, CPC. Further, imposition of condition that failure to deposit the amount, would result in dismissal of the appeal, compounds the infirmity in the order of conditional admission.

It is a different matter in case the appellant prays for stay of the execution of the decree or for any order by way of an interim relief during the pendency of the appeal, and it is open for the court to impose any condition as it may think fit and proper in the facts and circumstances of

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91. *NVSM Anandvale v KT Santhanakrishnan*, AIR 2010 Mad 204.
92. *Rekha Mukherjee v Ashis Kumar Das*, AIR 2005 SC 1944 : (2005) 3 SCC 427 : (2005) 2 SCR 473.
93. *Rekha Mukherjee v Ashis Kumar Das*, AIR 2005 SC 1944 : (2005) 3 SCC 427 : (2005) 2 SCR 473.
94. *Rekha Mukherjee v Ashis Kumar Das*, AIR 2005 SC 1944 : (2005) 3 SCC 427 : (2005) 2 SCR 473.

the case. Otherwise, imposing a condition of deposit of money subject to which an appeal may be admitted for hearing on merits, is not legally justified and such order cannot be sustained.[95]

[s 96.11] Proceedings Under the Motor Vehicles Act, 1988

The basic distinction between an appeal under section 96 of the CPC and appeal under section 173 of the Motor Vehicles Act, 1988 is that under the provisions of the rules framed under the Act only a summary of testimony of witness is to be kept on record by the claims tribunal for the purpose of giving the award. The logical conclusion is that the provisions of the Act for awarding compensation in the motor accident claim cannot be equated with a regular suit tried under the provisions of the CPC. The two provisions, one under section 96 of the CPC providing appeal and the other under section 173 of the Motor Vehicles Act, 1988, both providing appeal before the high court, cannot be equated. Under section 96 of the CPC, the appeal will lie against a judgment and decree of the court. Under the CPC, a civil court is to decide a suit after following the detailed procedure prescribed under the Code, recording evidence in detail as per statement of the witnesses.[96]

[s 96.12] Appeal Against Order in Execution

There is no gainsaying the fact that an appeal preferred an against an order on a application under rule 97, CPC is an appeal, whether it is termed a "regular appeal" or by any other name, and is governed by the provisions of rule 103 of O XXI, CPC. On adjudicating an application under rule 97, the resultant order is given the status of a decree and as against every decree, appeal is provided for under the CPC. It is under such circumstances that the provisions of rule 103, CPC have been incorporated by the Amending Act 104 of 1976, indicating the manner in which such appeals are to be dealt with. Even if the appeal is styled as a regular appeal, the scope is again to be looked into from the provisions of O XXI CPC. However, describing that as an execution appeal which was an expression in vogue earlier, is not an accurate description of an appeal of this nature. The same has to be treated as appeal as contemplated under O XXI, rule 103.[97]

An execution petition filed within 12 years from date of order of appellate court is not barred by limitation.[98]

[s 96.13] No Right of Appeal by Consent, Waiver or Estoppel

The right of appeal must be conferred by a statute or by rules framed thereunder. It cannot be claimed on the basis of agreement of parties or waiver or estoppel.[99]

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95. *MGMT of Devi Theatre v Vishwanath Raju*, AIR 2004 SC 3325 : (2004) 7 SCC 337 : (2004) 3 SCR 1039 : (2004) 5 Scale 100.
96. *New India Assurance India Co Ltd, Etawah v Shakuntala Devi*, AIR 1996 All 188 (DB); *Shrimati Vasant Bhagwat v Shevanta Dattaram Indulkar*, AIR 1997 Bom 242 (DB).
97. *MS Khalid v KR Rangaswamy*, AIR 2003 Kant 174.
98. *Hari Singh v Harbhajan Singh*, AIR 2001 P&H 108.
99. *Prayag v Suka Deo*, 17 Cal LJ 605; *Peeru v Pobna Development Co*, 44 Cal WN 958; *UOI v Mangal Jain*, AIR 1962 Cal 635 : 62 Cal WN 970; *Manilal v Kasamali*, AIR 1953 Kutch 28.

[s 96.14] Judgment of Trial Court and Appeal by Same Judge not Proper

Same presiding officer disposing of the matter at the trial stage and subsequently in his capacity as appellate court, is opposed to judicial probity, propriety and fairness.[100]

[s 96.15] Findings Not Based on Pleadings

In the absence of any pleading whatsoever on the question as to who gave child in adoption, the father or brother, the courts could not have gone into the same even if some evidence was adduced.[101]

[s 96.16] Agreement Not to Appeal

An agreement, whereby the parties agree not to appeal from a decree, is binding upon the parties thereto, if it is for a lawful consideration and is otherwise valid.[102] But an agreement by the next friend of a minor not to appeal is not binding on the minor.[103]

[s 96.17] Decree

All decrees are appealable unless the appeal is barred under the CPC, e.g., as has now been done under sub-section (4) of this section or any other law. Before section 2(2) defining the word "decree" was amended, a determination of any question under section 47, was included in that definition and hence such determination was subject to an appeal.[104]

An order determining the apportionment of compensation awarded under the Land Acquisition Act, 1894 has been held to be a decree and is appealable therefore.[105] A dismissal of a suit, as withdrawn, is not a decree.[106] But an order dismissing a suit for default in payment of costs, is a decree and is appealable.[107] A judgment or order of the family court is appealable under section 19(4) of the Family Court Act, 1984, except where it is passed with consent or is interlocutory.[108] Dismissal of proceeding in a higher forum at the stage of admission does not have the effect of merger of the decision of subordinate forum with that of the higher forum. Where the revision against order of an executing court has been dismissed at admission stage by the high court, the order of dismissal does not have the effect of merger of order of executing court. When appeal against the order of executing court is pending, jurisdiction of appellate forum is not affected by such order of dismissal

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100. *Kuppuswamy Naicker v Lakshmana Gounder,* AIR 1989 Mad 270.
101. *Rajgopal v Kishan Gopal,* AIR 2003 SC 4319.
102. *Moonshee Ameer Ali v Maharanee Inderjeet Singh,* (1871) 14 MIA 203; *Protap Chunder Dass v Arathoon,* (1882) ILR 8 Cal 455; *Hakim Bashir Ahmed v Sadiq Ali,* AIR 1929 Oudh 451 : (1930) ILR 5 Luck 391; *Mahammad Mia Pandit v Osman Ali,* AIR 1935 Cal 239 : (1935) ILR 62 Cal 229.
103. *Rhodes v Swithenbank,* (1889) 22 QB 577.
104. *Rangaswami Gounder v Ramana Goundar,* AIR 1966 Mad 308 : (1965) 2 Mad LJ 548.
105. *Raghunathdas Harjivandas v District Supdt of Police,* AIR 1933 Bom 187 : (1937) ILR 57 Bom 314; *Janapareddi Venkata Reddi v Janapareddi Adinarayana,* AIR 1929 Mad 351 : (1929) ILR 52 Mad 142; *Hanumanthappa v Korisetty Sivalingappa,* AIR 1960 Kant 139; *Dy Director of Agriculature v S Ramanadhan,* AIR 1978 AP 412.
106. *Devassi v Anthoni,* AIR 1969 Ker 78.
107. *Budhulal Kasturchand v Chhotelal,* AIR 1977 MP 1.
108. *Anil Bahal v Manju,* AIR 1989 All 9.

of revision.[109] A decree passed by a sub-judge against a Muslim husband for divorce is appealable even if the sub-judge is also a *Kazi*.[110]

A decree passed in a summary suit under O XXXVII of the code where leave to defend has been refused is almost automatic and the consequence of passing a decree cannot be avoided. Against the decree an appeal would lie under section 96. When an appeal would lie, an application under Article 227 of the Constitution would not be entertained.[111]

Explaining the principle, Sinha, J, speaking for the Supreme Court Bench in the above case, observed as follows:

> A decree passed subsequent to the refusal of leave to defend could either be under Order XXXVII, Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and given the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order XXXVII of the Code to reopen the decree.[112]

Where in a Probate application, the maintainability was challenged on the ground of territorial jurisdiction, it was held by the high court that the order discussing application challenging maintainability and holding that the court has jurisdiction, cannot be said to be a substantive order governing rights of parties under the Succession Act. The order being interlocutory, appeal against it is not maintainable.[113]

An order under O XXI r 58 is appealable as a decree, even though section 2(2) excludes adjudications, in general, under section 47, from the definition of decree. This is because of the specific provision in O XXI, rule 58(4).[114] Order made under rule 58 (2) of O XXI of the amended Code adjudicating the claim made against attachment of property in execution, therefore, has only the status of "deemed decree" and not a "decree" by itself. Such orders are not covered by the definition under section 2(2) so as to attract the provisions of section 96 of the CPC:[115]

(i) when an appellate court decides an appeal by affirming, reversing or modifying the decree of the trial court, the decree of the trial court merges in the appellate court.

(ii) The appellate court has also to take into account any subsequent change in the legal relationship occurring between the parties by virtue of the subsequent operation of a previous law.[116]

The words "any court exercising original jurisdiction" under section 96 of the CPC has to be read to mean that if the original jurisdiction has been exercised by any court, the decree passed shall be deemed to be a decree by a court exercising original jurisdiction. Therefore, where the revisional court exercised the original jurisdiction by rejecting the plaint, the order is appealable under section 96 of the CPC.[117]

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109. *Padmalaya v Shyamsunder Sahu,* AIR 1980 Ori 1.
110. *Gul Mohd v Samar Jahan,* AIR 1983 Del 90 : (1982) 3 DRJ 326.
111. *Ajay Bansal v Anup Mehta,* AIR 2007 SC 909 : (2007) 2 SCC 275.
112. *Ajay Bansal v Anup Mehta,* AIR 2007 SC 909, para 14 at p 911 : (2007) 2 SCC 275.
113. *Kanubhai Hargovinddas Dave v Jaydevsinh Kalyansinh Chauhan,* AIR 2007 Guj 3 : (2007) 1 Guj LR 667.
114. *Avinash Chander v Mohan Lal,* AIR 1984 P&H 391.
115. *B Nookaraju v MSN Charities,* AIR 1994 AP 334 (DB); *Jose Thengumpillil v Secretary, Peruvanchery Service Coop Bank Ltd,* AIR 1997 Ker 261(DB).
116. *Kerala Transport Co v Anil Kumar,* AIR 1986 AP 306 (DB).
117. *Namdeo Devangan v Seetaram,* AIR 1998 MP 148.

[s 96.18] Where Decree Not Drawn Up

No appeal can be entertained from a decree unless has been drawn-up.[118] In a suit for partition, even when the report of the commissioner is confirmed and it is ordered that a decree in terms of such report is directed to be drawn up, the suit remains pending until the court signs the final decree.[119] But in a subsequent case, the Mysore High Court has observed that the omission to have the decree drawn up, does not render the decree non-appealable since it is the substance and not the form which determines the appealability.[120] An order dismissing an appeal for failure to file judgment is not a decree and so not appealable.[121] A judgment of the appellate court should be self-contained. It should be a speaking judgment. It should contain decision on each and every point arising for consideration before the court, with reasons therefor. The requirement of giving reasons for the decision on each point is a statutory requirement. It is like the principle of *audi alteram partem.* It has to be observed in proper spirit. A mere pretence of compliance will not suffice. An appellate judgment, which does not comply with these requirements, would be vitiated.[122] O XLI, rule 3A provides for the filing of the application for condonation of delay, along with the appeal. Sub-rule (3) even prohibits the court from granting any *ad interim* stay of execution of decree unless after hearing the parties, it admits the appeal. This rule is not mandatory — its requirements are directory. Besides, this rule is not in derogation of the Limitation Act, 1963; it is in addition to that. It has, therefore, to be read along with the said provision. It is clear that despite its provision, application for condonation of delay may be filed even after the filing of the appeal.[123] It is well-established that parties cannot suffer on account of mistake of court. Where the trial court rejected the plaint under O VII, rule 11 of the CPC and failed to frame a decree, and the appellant's attempts to get the decree framed also proved to be futile, dismissal of his appeal for want of certified copy of decree was not proper as the appellate court could have directed the trial court to frame the decree.[124]

[s 96.19] Appeal from *Ex Parte* Decree

Section 540 of the Code of 1882, as it originally stood, did not contain any clause allowing appeals from *ex parte* decrees. The clause allowing such appeals was added by section 45 of the Code of Civil Procedure Amending Act 7 of 1888. Prior to that Act it, was doubted in some cases whether an appeal lay from an *ex parte* decree. An appellant in an appeal against *ex parte* decree can question the propriety of a refusal to adjourn and proceeding with the suit *ex parte* since the corrective jurisdiction of the appellate court includes consideration of procedural errors.[125] When an *ex parte* decree is passed, the defendant (apart from filing a review petition

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118. *Baliram Ganpatrao Bhoot v Manohar Damodar Bhoot,* AIR 1943 Ngp 204 (FB) : (1943) ILR Nag 241; *Bai Divali v Vishnav Manordas,* (1910) ILR 34 Bom 182; *Irrani Mundle v Naimuddin Sardar,* AIR 1924 Cal 1006 : (1924) 39 Cal LJ 251 : 81 IC 527 (limitation); *Janapareddi Venkata Reddi v Janapareddi Adhinarayana,* AIR 1929 Mad 351; *Raghunathdas Harjivandas v District Superintendent of Police,* AIR 1933 Bom 187 : (1933) ILR 57 Bom 314; *Jothi Prasad v Ganesh,* AIR 1916 P&H 120; *Loli Kaikho v Peli Sibo,* AIR 1959 Gau 46; *Mangalballav v Nihar Prava,* AIR 1959 Tri 6; *Rukmini Kumari v Ram Shankar Sah,* AIR 1973 Pat 434.
119. *Surjeo Dubey v Kripanarayan Tiwary,* AIR 1969 Pat 284.
120. *Umamaheshwar Cotton Ginning and Pressing Factory v Rama Rao Shroff,* AIR 1971 Kant 347 : (1971) 1 Mys LJ 397. See notes to section 97, "Where preliminary decree not drawn up".
121. *Rajbullam Singh v Madhusudan Prasad Singh,* AIR 1950 Pat 443.
122. *Bogamal Gohain v Lakhinath Kalita,* AIR 1991 Gau 100.
123. *State of Assam v Gobinda Chandra Paul,* AIR 1991 Gau 104.
124. *Jai Narain Charitable Registered Society v Kumud Verma,* AIR 1999 MP 37.
125. *Muttangi Ranganayakamma v Kuttangi Venkata Mahalakshmi,* AIR 1972 AP 117.

and a suit for setting aside the *ex parte* decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of O IX, rule 13 of the Code of Civil Procedure,1908 (CPC). He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed, as a result whereof the *ex parte* decree passed by the trial court merges with the order passed by the appellate court, having regard to the explanation appended to O IX, rule 13 of the CPC, a petition under O IX, rule 13 would not be maintainable. However, the Explanation 1 appended to the said provision does not suggest that the converse is also true.[126]

When an application under O IX, rule 13 is dismissed, the defendant can only avail a remedy available there against, *viz*, to prefer an appeal in terms of O XLIII, rule 1 of the CPC. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under O IX, rule 13, it may lead to conflict of decisions which is not contemplated in law.[127]

The dichotomy can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for *ex parte* hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him against section 96(2) of the CPC on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour, or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. The "explanation" appended to O IX, rule 13 of the CPC shall receive a strict construction.[128]

It is open to defendant who had a filed an appeal against an *ex parte* decree under section 96(2) of the Code to show from record that there is in the order proceeding *ex parte* against him, any error, defect or irregularity which has affected the decision of the case. But in such an appeal, the defendant cannot be allowed to show that he was prevented by sufficient cause from appearing at the hearing. For that purpose, he must have recourse to provisions under O IX, rule 13 of the CPC because for that purpose evidence on factual aspect have to be led. Therefore, an appeal under section 96 against an *ex parte* decree the appellate court is not permitted to examine the sufficiency of the cause for non-appearance.[129]

As to the power, of an appellate court in the matter of *ex parte* decrees, see notes to O IX, rule 13, "Whether remedies concurrent". Where no application under O IX, rule 13 was moved for setting aside *ex parte* decree in an appeal against such decree under section 96(2), an error, defect or irregularity which has affected the decision of the case, can be challenged. Such an appeal cannot he converted into proceedings for setting aside the *ex parte* decree. The CPC prescribes the remedy for setting aside of the *ex parte* decree under O IX, rule 13 and when a plea under the said provision fails, an appeal is specifically provided under clause (d) of rule 1 of O XLIII of the CPC against an order of the trial court refusing to set aside

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126. *Bhanu Kumar Jain v Archana Kumar,* AIR 2005 SC 626 : (2005) 1 SCC 787 : (2004) 6 SCR 1104 : (2004) 10 Scale 610.
127. *Bhanu Kumar Jain v Archana Kumar,* AIR 2005 SC 626 : (2005) 1 SCC 787 : (2004) 6 SCR 1104 : (2004) 10 Scale 610.
128. *Bhanu Kumar Jain v Archana Kumar,* AIR 2005 SC 626 : (2005) 1 SCC 787 : (2004) 6 SCR 1104 : (2004) 10 Scale 610; *Rani Choudhary v Suraj Jit Choudhury,* AIR 1982 SC 1397 : (1982) 2 SCC 596; *P Kiran Kumar v AS Khadar,* AIR 2002 SC 2286 : (2002) 5 SCC 161 : (2002) 3 SCR 775; *Shyam Sundar Sarma v Pannalal Jaiswal,* (2004) 9 Scale 270.
129. *Amir Mohammad v Saliman Bibi,* AIR 2008 Ori 46 : (2008) 105 Cut LT 304.

ex parte decree. When particular remedy is provided for setting aside an *ex parte* decree and there is, by way of appeal, another special remedy against an order refusing to set aside such a decree, these remedies alone, and none other, can be taken resort to. Therefore, when these remedies have not been availed of in an appeal under section 96(2) or in the second appeal under section 100 of the CPC no ground can be entertained that the *ex parte* proceedings were wrongly taken against the appellant which resulted in passing of the *ex parte* decree.[130] The application under O IX, rule 13 is a statutory remedy which is available to the defendant. In pursuance to this remedy, it could not be said that other remedy available under section 96 of the CPC was suspended, or that the same could be exercised at some later point of time, in case the proceedings under O IX, rule 13 failed.[131]

In a proceeding under section 47-A of the Stamp Act, 1899, two orders were passed, one an *ex parte* order directing recovery of deficient stamp duty and the second order by which application to set aside the *ex parte* order was rejected. The appeal against both orders was rejected directing the appellant to file separate appeals. It was held by the Allahabad High Court that the rejection of appeal was improper. The proper course was to give option to the appellant to confine his appeal against either of the orders.[132]

The Andhra Pradesh High Court has held that appeal against au *ex parte* decree can be performed by third party to suit with the leave of the court.[133]

It is relevant to note that legislature has advisedly not made an analogous provision as has been made in the form of Explanation to rule 13, so as to bar remedy of appeal if the application under O IX, rule 13 for setting aside the decree was to be rejected. It is well settled that defendants can take recourse to three different remedies, *viz* (i) by way of application under O IX, rule 13 for setting aside the *ex parte* decree, (ii) by way of appeal against the *ex parte* decree under section 96(2) of CPC and, (iii) also by way of review before the same court against the *ex parte* decree. In any case, it is well settled that concurrent remedy in the form of application under O IX, rule 13 as well as appeal under section 96(2) of the CPC against the *ex parte* decree is available to the defendant. However, the remedy under O IX, rule 13 is subject to the limitation that it cannot be perused once the appeal preferred by the defendant against the same decree is dismissed, except when it is withdrawn. But no such limitation would apply to an appeal under section 96(2) of CPC, even if the application under O IX, rule 13 was rejected. In the latter case, the remedy is a substantive remedy provided against the *ex parte* decree under section 96(2) of the CPC, which can be pursued regardless of whether application for setting aside the *ex parte* decree under O IX, rule 13 is filed, or for that matter, rejected. However, it is only when the application under O IX, rule 13 is allowed that the appeal would become infructuous as the *ex parte* decree would be *non est*. Therefore, having regard to the scheme of the provisions of the CPC, the rejection of the application under O IX, rule 13 cannot bar the substantive remedy of appeal under section 96(2) of the CPC.[134]

[s 96.20] Forum of Appeal

The value of a suit, that is, the amount or value of the subject-matter thereof, determines the forum of suit, that is, the court in which the suit is to be filed. It also determines the

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130. *Maya Devi v Mehria Gram Dall Mill,* AIR 1988 P&H 176.
131. *Harishbhai Chunilal Shah v Nalinkumar Champaklal Shah,* AIR 1995 Guj 197.
132. *Vijay Kumar Gupta v State of Uttar Pradesh,* AIR 2008 All 119 : (2008) 4 All LJ 127 : (2008) 4 ADJ 651.
133. *Sadula Narasimha v Sadula Tulsi Das,* 2009 (1) Andh LD 616 : 2009 (2) Civil Court C 715 : (2009) 2 All LT 119.
134. *Khurshed Banoo v Vasant Mallikarjun Manthalkar,* AIR 2003 Bom 52.

forum of appeal, that is, the court to which the appeal lies. What then is the value of a suit for the purpose of appeal? Now, a plaintiff may, in his plaint, fix a sum definitely as the amount of his claim as in a suit for debt, or he may fix it approximately or tentatively as in a suit for accounts or for mesne profits (O VII, rule 2). Where the plaintiff fixes a sum definitely, it is that sum which determines the forum of appeal, and not the amount awarded by the decree and involved in the appeal. Where the plaintiff fixes a sum approximately, there is a difference of opinion as to the forum of appeal. According to the Calcutta High Court, it is the amount decreed by the first court as the amount due to the plaintiff which determines the forum of appeal.[135]

According to the Bombay[136] and Allahabad[137] High Courts, it is the amount determined by the first court as the amount due to the plaintiff and accepted by the plaintiff by payment of additional court fee which determines the forum of appeal. According to the Madras High Court, it is the amount or value of the subject matter as fixed in the plaint, though approximately, which determines the court to which the appeal lies and not the amount decreed. It has accordingly been held by that court that where in a suit for accounts filed in the court of a district *munsif* whose jurisdiction is limited to suits of which the value does not exceed Rs 2,500 the plaintiff fixes his claim approximately at Rs 2,000 and the *munsiff* passes a decree for more than Rs 5,000, the appeal from the *munsif's* decree lies not to the high court, but to the district court.[138] In a subsequent case,[139] the Allahabad and Patna High Courts adopted the same rule as Madras. Where a suit is dismissed by the first court — in which case the mesne profits remain undetermined — the sum stated in the plaint determines the forum of appeal.[140]

It has been held by the Supreme Court that raising of objections as to jurisdiction of court is permissible when objection is with regard to subject-matter of the suit and not with regard to pecuniary or territorial jurisdiction.[141] It has been observed in the above case as follows:

> A distinction, however, must be made between a jurisdiction with regard to subject matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be.[142]

A full Bench of the High Court of Calcutta has held that where a suit is properly brought in the court of a *munsiff* for recovery of possession of land and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the *munsif*, the *munsif* has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction. The value of such a suit for purposes of jurisdiction is the value of the immovable property, plus mesne profits up to the date of the suit where such profits are claimed. If a suit is rightly entertained as within the jurisdiction of the *munsif* and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. The forum of appeal is determined by the value of

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135. *Mohini Mohan Das v Satis Chandra Roy,* (1890) 17 Cal 704; *Gulab Khan v Abdul Wahab Khan,* (1904) 31 Cal 365; *Ijjatulla Bhuyan v Chandra Mohan Banerjee,* (1907) 34 Cal 954 (FB).
136. *Ibrahimji v Bejani,* (1896) 20 Bom 265; but see *Hirjibhai Navroji Anklesaria v Jamshedji Nassarwanji Ginvalla,* (1913) 15 Bom LR 1021 : 21 IC 783.
137. *Raman Lalji v Desraj,* (1910) ILR 32 All 222 : 5 IC 875.
138. *Putta Kannayya Chetti v Rudrabhatla Venkata Narasayya,* (1917) ILR 40 Mad 1 : 39 IC 439 (FB).
139. *Muhammad Abdul Majid v Ala Bux,* AIR 1925 All 376 : (1925) ILR 47 All 534 : 86 IC 1055; *Sumitra Devi v Jahnvi Prasad Sah,* AIR 1995 Pat 202 (DB).
140. *Satya Kinkar Sahana v Raja Sri Sri Shiba Prasad Singh,* (1919) 4 Pat LJ 447 : (1919) 52 IC 452.
141. *Mantoo Sarkar v Oriental Insurance Co Ltd,* AIR 2009 SC 1022 : (2009) 2 SCC 244.
142. *Mantoo Sarkar v Oriental Insurance Co Ltd,* AIR 2009 SC 1022, para 19 at p 1026 : (2009) 2 SCC 244

the suit and not by the amount decreed.[143] The undermentioned decisions[144] of the same high court must be taken to have been overruled by the Full Bench case. Where on the valuation given in the plaint in a suit instituted in the sub-court an appeal would lie to the district court, it is not open to the defendant to prefer an appeal against the decree passed therein to the high court on the allegation that the suit had been undervalued and that on its proper valuation, the appeal would lie to the high court.[145] Nor can the defendant, in such a case, give his own valuation in the memorandum of appeal and on the basis of that valuation prefer an appeal to the high court, when, on the valuation in the plaint, the proper forum for appeal was the district court.[146] A decree is passed by court *M* in respect of a cause of action which arose at Kadiri. Appeals from decree of court *M* lie to court *C*. Subsequently Kadiri is transferred to the territorial jurisdiction of court *P* from which appeals lie to court *B*. To which court does the appeal from the decree lie — to court *C* or to court *B*? The answer is, the court *B*, because a transfer of territorial jurisdiction *ipso facto* effects a transfer of venue.[147] Disposal of appeal by presiding officer of appellate court who himself had disposed of the same matter in his capacity as presiding officer of trial court, is opposed to established norms and canons of judicial procedure. This unawareness that he had earlier dealt with the matter, indicates total lack of application of mind. Such action is bound to undermine confidence reposed by litigants in the justice delivery system.[148]

On the question of forum of appeal, the Orissa High Court has held that appeal against an order on an application under O XXI, rule 97 is to be filed like a regular appeal under section 96 of the Code. The valuation of the suit shall determine the jurisdiction of court where the appeal is to be filed. The Court-fee has to be paid in terms of clause 11(i) of Sch II of the Court Fees Act, 1870.[149] In the above judgement the Orissa High Court followed a Full Bench decision of the Andhra Pradesh High Court. The Full Bench decision was in respect of an order passed under rule 58 of O XXI of the Code, wherein it has been observed in para 32 as follows:

> Once it emerges that an order passed under r 58 of O 21 is conferred the status of a decree, in the particular context of appeal, Section 96 gets attracted. Section 96 does not enumerate the types of decrees that can fall into its fold. Once the outcome of adjudication partakes the character of a decree, it gains an entry into the realm of Section 96. The contention of the learned counsel for the petitioner that the appeal provided for under section 96 are against original decrees and not other kinds of decrees is unacceptable. The word 'original' in the heading of section 96 signifies the jurisdiction, *i.e.* original jurisdiction in contradiction to appellate jurisdiction.[150]

Paragraph 7 of the plaint clearly showed that for the purpose of jurisdiction and advocate fees, the value of the property was fixed at Rs one lakh, being its market value. In the very first line of para 7, it was stated that for the purpose of the court fees and jurisdiction, the suit was valued at Rs 1,08,000. Since it was a suit for declaration, the relief in that regard was valued at

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143. *Bidhyadhar Bachar v Manindra Nath Das,* AIR 1925 Cal 1076 (FB) : (1926) ILR 53 Cal 14 : (1925) 89 IC 726; *Srimati Sumitra Devi v Jahnvi Prasad Sah,* AIR 1995 Pat 202 (DB).
144. *Bhupendra Kumar Chakravarty v Purna Chandra Bose,* (1916) ILR 43 Cal 650 : (1910) 8 IC 34; *Baikuntha Nath Kundu v Mohananda Borat Modak,* (1919) 24 Cal WN 342 : (1920) 58 IC 170.
145. *Deonath Missir v Chandraman Missir,* AIR 1958 Pat 430 : ILR 36 Pat 1223 : (1958) 6 BJLR 246.
146. *Pyara v Shiv Shankar,* AIR 1963 All 476. See notes to section 6, above, also notes to section 15, "Over-valuation and under valuation", above.
147. *M Subbayya v M Rachayya,* (1914) ILR 37 Mad 477.
148. *Kuppusamy Naicker v Lakshmana Gounder,* AIR 1989 Mad 270.
149. *Pravat Kumar Ghosh v Jharna Ghosh,* AIR 2008 Ori 9 : (2007) 2 Ori LR 429.
150. *Gurram Seetharam Reddy v Gunti Yashoda,* AIR 2005 AP 95 : (2004) 6 Andh LT 111 (FB); Devinder Gupta, C.J. speaking for the Full Bench.

Rs 300. For the purpose of deciding whether the appeal lies to the high court or not, the value for the purpose of jurisdiction would be material which was Rs one lakh being the market value of the property, as mentioned in para 7. Obviously therefore, against the judgment and decree of the learned civil judge (senior division), an appeal would lie to the high court in view of section 26 of the Bombay Civil Courts Act, 1869, which provided that in all suits, decided by a civil judge, of which amount or value of the subject-matter exceeds Rs 10,000 (which later on was substituted by Rs 20,000), the appeal from his decision shall be direct to the high court. Therefore, the appeal lies to the high court and not the district court.[151]

[s 96.21] "Person aggrieved" — Appeal by Third Party

Sections 96 and 100 of the CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal, the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree, he is not entitled to file an appeal.[152]

The Supreme Court has repeatedly held that sections 96 and 100 are provisions for preferring an appeal from any original appeal or from a decree in an appeal respectively. The two provisions do not enumerate the categories of persons who can file an appeal. The Supreme Court relied on *Banarsi v Ram Phal*[153] to affirm that if a person is prejudicially or adversely affected by the decree, he can maintain an appeal.[154]

"*Locus*" of a person to prefer an appeal in a matter of matrimonial nature is vital as the right of privacy of two spouses would be interfered with thereby. The court cannot enlarge the scope of "*locus*" in a case of this nature where the parties are fighting litigations. Allegations made by the first respondent in his revision application does not disclose any cause of action for maintaining the said application nor does it state as to how and in what manner he would be prejudiced if the impugned judgment is allowed to stand. In the aforementioned premise, *bona fide* of the first respondent was also required to be determined by the court.[155]

When the status of the parties in a matrimonial case is not in question, such judgments ordinarily cannot be said to be judgments in *rem*. Even if the said judgment is a judgment in *rem*, the third party herein could not have questioned the same as he could not be said to be aggrieved thereby. In that view of the matter, the question as to whether in the instant case, the civil court had any jurisdiction to pass the decree in question, takes a back seat.[156] A stranger cannot be permitted to file an appeal unless he satisfies the court that he falls within the category of "aggrieved persons". Furthermore, court noted that the expression "person aggrieved" means a person whose right or interest is affected and does not include a person who suffers from an imaginary injury. The court further discussed about the test that when can it grant leave to appeal to a person who is not a party to a proceeding? The Court observed that leave to appeal should be granted to those persons who, though not parties to the proceedings.

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151. *Manubhai Khandubai Naik v Sumantrai Ranchhodji Naik*, AIR 2004 Guj 73 (DB).
152. *Banarsi v Ram Phal*, AIR 2003 SC 1989; See also *Phoolchand v Gopal Lal*, (1967) 3 SCR 153; *Jaisri Kanwar Golcha v Golcha Pvt Ltd*, (1970) 3 SCC 573; *Ganga Bai v Vijay Kumar*, (1974) 2 SCC 393.
153. *Banarsi v Ram Phal*, AIR 2003 SC 1989 : (2003) 9 SCC 606.
154. *Hardevinder Singh v Paramjit Singh*, (2013) 9 SCC 261 : (2013) 1 SCR 903.
155. *Baldev Singh v Surinder Mohan Sharma*, AIR 2003 SC 225.
156. *Baldev Singh v Surinder Mohan Sharma*, AIR 2003 SC 225.

would be bound by the decree or judgment rendered and who would be unable to attack its correctness in other proceedings.[157]

In a suit for specific performance of agreement of sale by vendee, it was held by the Andhra Pradesh High Court that third parties claiming title to property agreed to be sold are neither necessary nor proper parties to file appeal against decree for specific performance. They can resist delivery of possession and it cannot be said that they have no other remedy except an appeal.[158]

It may be true that a decree obtained by fraud is a nullity. But the question as to whether a decree has been obtained by fraud or not, is again a question which must be raised by a person who is interested in the subject matter thereof and not at the instance of a person who is a third party. The spouses have a right of privacy. Such a right of privacy not only extends to the matrimonial home but also to the matter of dissolution of a marriage. A third party who has nothing to do with the relationship of a husband and wife, cannot be permitted to intrude into their privacy by preferring an appeal only on one or more of the grounds, which do not confer *locus* on the third party to prefer an appeal against the decree passed by the learned civil judge.[159] The third party in relation to his disputes with the appellant herein has been pursuing his remedies in appropriate proceedings. What would be the effect of the said judgment and decree in a departmental proceeding is required to be determined by the appropriate authorities. Only because a departmental proceeding was initiated against the appellant on the complaint of third party, he, only thereby, cannot be said to have any *locus* to prefer an appeal.[160]

[s 96.22] Who may Appeal

As a general principle, no one can appeal unless he was a party to the proceedings or was treated as such, or the legal representative of the party or unless his privity in estate, title or interest is apparent on the face of the record. However, any person having a legal grievance which might have deprived him of the benefit or bound by the order passed is certainly entitled to the leave. Even in case of doubt as to the existence of the right of appeal, the appellant should get the benefit of doubt.[161]

An appeal under this section may be preferred by any of the following persons:

(i) Any party to the suit adversely affected by the decree,[162] or, if such party is dead, by his legal representative.[163]

(ii) Any transferee of the interest of such party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit.[164]

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157. *VN Krishna Murthy v Sri Ravikumar*, Civil Appeal Nos. 2701-2704 of 2020, decided on 21 August 2020 (SC).
158. *S Vajra Manemma v Ileni Laxman Reddy*, AIR 2007 AP 2003 : (2007) 55 AIC 937.
159. *Baldev Singh v Surinder Mohan Sharma*, AIR 2003 SC 225 : (2003) 1 SCC 34 : 2002 (4) SCR 43 : (2002) 8 Scale 296.
160. *Baldev Singh v Surinder Mohan Sharma*, AIR 2003 SC 225 : (2003) 1 SCC 34 : 2002 (4) SCR 43 : (2002) 8 Scale 296.
161. *Petromarine Products Ltd v Ocean Marine Services Co Ltd*, AIR 2015 SC 1487 : (2015) 7 SCC 229.
162. *Hafiz Mohammad Fateh Nasib v Swarup Chand Hukum Chand, Firm*, AIR 1942 Cal 1 : (1942) ILR 2 Cal 434 : (1941) 73 CLJ 475; *Subbaramiach v Balarami Reddy*, AIR 1949 Mad 91; *Krishna Chandra Golder v Mahesh Chandra Sahu*, (1905) 9 Cal WN 584.
163. *Gajadhar v Ganesh*, (1871) 7 Bom LR 149. See section 146.
164. *Moreshwar Bapuji Phatak v Kushaba Shankroji*, (1878) ILR 2 Bom 248. See notes tosection 47, "Representatives" above.

No person, unless he is party to the suit, is entitled to appeal under this section.[165] But a person who is not a party to the suit, may prefer an appeal with the leave of the appellate court and such leave should be granted if he would be prejudicially affected by the judgment and if it would be binding on him as *res judicata*, under Explanation 6 to section 11.[166] A person who is not a party to a proceeding, can still appeal against the order passed in the proceeding with leave of appellate court, provided he would have been a proper party to the proceeding.[167] Even a party to the suit or a proceeding will have no right of appeal against a decision, unless he is, in fact, affected by it. Thus, a person who is impleaded as a respondent in a writ petition on his own application, is not entitled to appeal against the order therein when there is nothing in it prejudicial. to him.[168] If a suit is filed against a government officer in his official capacity and against the state and is decreed only against the officer, the state has no *locus standi* to file an appeal even though the decreed amount against the officer will have to be paid by the government.[169] This is because it is only a party who has been adversely affected by a decree or order that can appeal from such a decree or order.[170] When in proceedings under the Companies Act, 1956, the contention was urged on behalf of the Central Government that certain rules framed under the Act were *ultra vires* and that was accepted by the court and an order passed accordingly, it was held that it was not open to the government to prefer an appeal against that order and contend that the rules are *intra vires* as the order was one passed at the instance of the government and in its favour.[171]

A successful party in whose favour a decree has been passed, cannot challenge the decree by filing an appeal on the ground that an adverse finding against that party has been recorded in the judgment. According to the Bombay High Court the remedy available to such party to challenge an adverse finding is to file cross-objection when the opposite party files appeal challenging the decree. Where, however, no appeal is filed by the opposite party challenging the decree, the adverse finding cannot be challenged by the party in whose favour the decree was passed.[172]

The question whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances. It is clear that if a plaintiff's claim is decreed in its entirety and all the issues are found in his favour, the plaintiff cannot appeal from the decree. In case the plaintiff's claim is decreed in its entirety, but one of the issues is found against him, can the plaintiff appeal from the adverse finding? It has been held that he cannot.[173] The reason is that the very fact that the decree is entirely in the plaintiff's

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165. *Rustomji v Official Liquidator,* (1919) PR No 79 p 196; *Indian Bank v Seth Bansiram Jashamal Firm,* AIR 1934 Mad 360 : (1934) ILR 57 Mad 670; however *Province of Bombay v Western India Automobile Association,* AIR 1949 Bom 141 : (1949) 51 Bom LR 58.
166. *Province of Bombay v Western India Automobile Association,* AIR 1949 Bom 141 : (1949) 51 Bom LR 58; *K Ponnalagu Ammal v State of Madras,* AIR 1953 Mad 485 : (1953) 1 Mad LJ 410 : (1953) 66 LW 136; *Heersingh v Veerka,* AIR 1958 Raj 181 : (1958) ILR Raj 380 : (1958) RLW 251; *Executive Officer, Sri Padmanabhaswamy Temple v Raghavan Pillai,* AIR 1961 Ker 114 : (1961) ILR Ker 77 : (1960) Ker LJ 1353 : (1961) 2 Andh WR 204 : 1961 Andh LT 736 : AIR 1962 All 140 (FB); *Sivaramiah v Siddhamma,* AIR 1963 Mys 127 : 40 Mys LJ 990.
167. *United Commercial Bank v Hanuman Synthetics Ltd,* AIR 1985 Cal 96.
168. *Rajaram v Moolraj Singh,* (1961) All LJ 473.
169. *State of Rajasthan v Chander Singh,* AIR 1971 Raj 299.
170. *Seth Loonkaran Sethiya v Ivan E John,* AIR 1975 All 113; *Fakir Mohamed Abdul Razak v Charity Comm'r,* AIR 1976 Bom 304.
171. *UOI v Official Liquidator,* AIR 1963 Cal 214.
172. *Mangla v Laxman Ganpat Jadhav,* (2008) 1 Mah LJ 244 : (2008) 1 All MR 769 (DB).
173. *Secretary of State for India in Council v Saminatha Kounden,* (1914) ILR 37 Mad 25; *Ali Ahmad v Jaswant Singh,* AIR 1951 P&H 444; *Ganga Bai v Vijay Kumar,* AIR 1974 SC 1126; *Ramesh Sah v Bhagwandeo Sah,* AIR 1977 Pat 206; *Corp of Madras v PR Ramachandriah,* AIR 1977 Mad 25.

favour, notwithstanding a finding adverse to him on one of the issues shows that such finding was unnecessary to the determination of the plaintiffs suit. It has been stated in the notes to section 11, that when a finding on an issue is not necessary to the determination of a suit, such finding does not operate as *res judicata;* and it is an elementary principle that an appeal is not admissible on any point that does not operate as *res judicata.* Where, however the plaintiff had sued for alternative reliefs and has been granted relief in respect of one such relief, a question arises as to whether he can appeal against the decree which has refused the other relief. The trend of decisions is that he cannot appeal, but the point was left open in a Patna case.[174]

In a later decision, however, the same high court has held that in such a situation the question has to be determined on the averments in the plaint. If the plaint read as whole discloses that the plaintiff will be satisfied with either of the reliefs claimed by him, he cannot appeal if one of the reliefs is granted. One who gets what he wants is not a "person aggrieved". But if the plaint read as whole gives an impression that of the alternative reliefs one is the main relief and the other one is claimed only if it is found that the main relief cannot be granted and is refused, the plaintiff can appeal and urge that he is entitled on the facts of the case to the main relief.[175] Where the order of the appellate court remanding a case becomes final, no appeal can lie against the decision of the trial court which implements the directions of the appellate court.[176] Similarly, if a suit is brought by *A* and *B*, and the suit is dismissed in its entirety, *B* cannot appeal from the decree. And even if one of the issues is found against *B*, *B* cannot appeal from the finding, for such finding does not operate as *res judicata* for the reason stated above.[177] It sometimes happens, where there are two or more defendants, that although a suit is dismissed as against one of them, in other words, the decree on the face of it is entirely in his favour, the decree impliedly negatives the right claimed by such defendant as against the plaintiff and the other defendants. In such a case, it has been held that an appeal lies at the instance of such defendant on the ground that he is adversely affected by the decree. *X* owes Rs 2,000 to *A*. *A* assigns the debt first to *B* and then to *C*. *C* sues *A* and *B* to recover the debt, alleging that the assignment to *B* had become void through non-fulfilment of the conditions upon which it was made. A decree is passed against *A*, but the suit is dismissed as against *B*. Here, the decree necessarily implies the finding that the assignment to *B* had become void, in as much as but for such a finding the decree could not have been passed in favour of *C* who admittedly was the second assignee of the debt. *B* may, therefore, appeal from the decree, though as against him the suit was dismissed.[178] In a suit by *X* against *A* and *B* with respect to immovable property, *A* pleaded the title of *B*. Then *B* died and *A* was recorded as his legal representative. The suit was decreed in favour of *X*. *A* is entitled to file an appeal against the decree.[179] But where a suit

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174. *Amir Mahton v Sheopujan Missir,* AIR 1946 Pat 231 : (1945) ILR 25 Pat 1.
175. *UOI v Garbhu Sao,* AIR 1972 Pat 341.
176. *Sakharchand Bhukandas Gujarathi v Punju Chintaman Wani,* AIR 1973 Bom 148 : (1972) 74 Bom LR 709.
177. *Syed Ghulam Khadir Sahib v Viswanathayyar,* AIR 1943 Mad 297 : (1943) 2 ILR Mad 357; *Run Bahadur Singh v Lucho Koer,* (1884) ILR 11 Cal 301; *Nando v Bindhu,* (1886) 13 Cal 17; *Mindanpore Zamindari Co v Naresh,* AIR 1922 PC 241 : (1921) 48 Cal 460 : 48 IA 49; *Tansukh Ram v Gopal,* AIR 1929 Pat 586 : (1929) 8 Pat 617; *Latchaya v Kotamma,* AIR 1925 Mad 264 : (1924) 47 MLJ 743; *Shazadi Begum v Vinod Kumar,* AIR 1978 MP 20. See notes to section 11, "Decision in the former suit must have been necessary to the determination of that suit", and the cases cited there.
178. *Bhubindra Narayan Bhattachariya v Tarupriya Debya,* AIR 1950 Gau 119 : (1950) ILR Assam 225; *Jamna Das v Udey Ram,* (1898) 21 All 117; *Krishna Chandra v Mahesh Chandra Sahu,* (1905) 9 Cal WN 584; *Yusuf Sahib v Durgi,* (1907) 30 Mad 447; *Nimmagadda Venkateswaralu v Bodapati Lingayya,* AIR 1924 Mad 689 : (1924) ILR 47 Mad 633; *P Venkobacharlu v S Radabayamma,* AIR 1924 Mad 858 : (1924) 47 Mad LJ 612.
179. *Tulsiram v Shyamlal Ganpatlal,* AIR 1960 MP 73.

is filed against two defendants and a decree is passed which effects the rights of only one of them and the defendant so affected allows the decree to become final by omitting to appeal, the other defendant cannot, by appeal, challenge the decree, first, because he did not represent the co-defendant and secondly, because the decree did not adversely affect his interests and therefore he cannot be said to be an aggrieved person.[180]

In some cases, an appeal may be preferred by a defendant against his co-defendants. *A* sues two Hindu brothers *B* and *C*, on a promissory note passed by *B* for money borrowed by him (*B*) as manager of the family, alleging that *B* and *C* were joint, and that the loan was obtained by *B* for family purposes. *B* does not appear at the hearing. *C* appears and admits that he and *B* are joint, but denies that the loan was obtained for family purposes. An issue is raised as to whether the debt contracted by *B* was for family purposes. It is found by the court that the loan was obtained by *B* for family purposes, and a decree is passed against *B* and *C*. Here *C* can appeal the decree as between himself and *B*. The rule is that when a court deals with a case as raising not only a question between the plaintiff and the defendants, but also as between the defendants, one of the defendants can appeal from the decree as between himself and the other defendants.[181] An appeal will lie even against a finding if it is necessary and operates as *res judicata*.[182]

[s 96.23] Consideration Before first Appellate Court

Raising a ground in the form of substantial question of law is not enough unless that question of law in fact arises in the case. To find out whether the first appellate court considered the reasons given by the trial court, a mere mechanical reading of the two judgments is not enough, nor it is enough to find out whether all of the reasons have been re-written in the appellate court's judgment or not. What is binding is the finding. Reasons may be same for upholding the finding of fact, reasons may be supplemented by the first appellate court in addition to the already recorded reasons, the reasons given by the trial court in totality may be considered by the first appellate court and sometimes each individual reason may be considered by the first appellate court. The questions are, whether, in the process of arriving at a conclusion, the first appellate court applied its mind to the facts of the case; whether the first appellate court's judgment discloses that the reasons given by the trial court were considered, which can be gathered from the reading of the judgment of the appellate court, though the appellate court has not quoted or specifically mentioned all the reasons given by the lower court; and whether the first appellate court appreciated the evidence in lawful manner and found reasons for interference in ultimate decision of the trial court.[183] It has long been settled that the first appellate court has ample jurisdiction under section 96 of the CPC to appreciate the evidence independent to the appreciation done by the trial court and come to its own conclusion.[184]

It has been held that an appellate court may not interfere with the finding of the trial court unless the finding recorded by the trial court was erroneous or the trial court ignored the evidence on record. In the instant case, the high court had reversed the decree passed by the trial court without discussing oral and documentary evidence and several grounds raised before the

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180. *Nirmala Bale Ghose v Balai Chand Ghose*, AIR 1965 SC 1874 : (1965) 3 SCR 550.
181. *Surn v Naravanarao*, (1894) 18 Bom 520.
182. *Jammu and Kashmir Bank v Lal Mohamed*, AIR 1969 J&K 25. See notes to section 11, "*Res judicata* between co-defendants", above.
183. *SS Khurana v Mahaveer Prasad*, AIR 2004 Raj 107.
184. *Kavedla Parthasaradhi v Gangula Ramanamma*, AIR 2015 SC 891 : (2014) 15 SCC 789. See Also - *Laxmi Krishnarao Pansare v Babasaheb Bhanudas Ithape*, AIR 2014 SC 2867 : (2014) 15 SCC 821.

trial court. It was held by the Supreme Court that without considering oral and documentary evidence, the high court had erred in interfering with the factual findings recorded by the trial court and the impugned judgment was therefore set aside.[185]

Where the suit was decided by the judge of the trial court who has not recorded the evidence of the parties, and therefore, had no advantage of observing the manner in which the witnesses deposed in court, nor could he pass the finding on the basis of demeanour of the witnesses, it is the duty of the appellate court to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the court, outweighs such finding recorded by the trial court. Therefore, it is relevant to consider the evidence of the parties in detail.[186]

In a case of reversal of findings of the trial court by the first appellate court, it was held by the Madras High Court that the first appellate court must give its own reasoning by applying its mind independently on evidence adduced by parties before the trial court.[187]

In an appeal preferred against the judgement of the trial court by the intervenor-defendant, the Patna High Court held that the first appellate court was authorised to consider all points decided by the trial court in the suit including the issue of title as well as correctness or incorrectness of the record of rights. Being the last court of facts, the first appellate court is bound to give its own findings and reasoning on all points discussed in the judgment of the trial court. It was further observed that the first appellate court is entitled to reverse the findings of the trial court after scrutinising the entire materials available on record, although the party against whom the findings has been given by the trial court did not prefer appeal.[188] Where in a suit for declaration of right and title, the appellate court never considered the admission made by the defendant in the written statement and surrounding evidence and passed orders holding that the plaintiff has title over suit land, the appellate order was held to be improper.[189]

In a suit for specific performance of contract of sale of immovable property which was mortgaged with bank, the evidence on record showed that the plaintiff was willing to purchase the property subject to encumbrance. It was held that the grant of the relief of refund of earnest money instead of the relief of specific performance by the trial court was improper and the reversal of the order of trial court by the first appellate court was justified.[190]

In exercise of appellate jurisdiction, the manner of disposal is equally important. Thus, where the high court dismissed appeal against decree is a suit for specific performance and the high court gave a finding regarding adverse possession in a suit for specific performance, it was held by the Supreme Court that there was total non-application of mind and no serious effort to analyse the various points raised.[191]

The first appeal has to be decided on questions of law and of fact. The first appellate court being the final court of fact, a litigant needs full, fair and independent consideration of evidence at that stage and it is the duty of the first appellate court to deal with all the issues

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185. *Venkatesh Construction Co v Karnataka Vidyuth Karkhane Ltd Kavika*, (2016) 4 SCC 119.
186. *Ameer Mohammed v Barkat Ali*, AIR 2002 Raj 406.
187. *V Subramaniam v T Krishnan*, (2007) 3 Mad LJ 583 : (2007) 3 LW 541 : (2007) 3 CTC 368.
188. *Deodhari Singh v Mulchand Hazam*, (2007) 2 AIR Jhar R 360 : (2006) 48 AIC 825 : (2006) 4 PJLR 233.
189. *Tarinikanta Giri v Bhajanananda Giri*, (2008) 2 Ori LR 458.
190. *Ram Kumar v Virendra Singh*, AIR 2007 Uttr 6 : (2007) 2 UC 774.
191. *BK Sri Harsha v Bharath Heavy Electricals Ltd*, AIR 2008 SC 1267 : (2008) 4 SCC 48.

and evidence led by the parties before recording its conclusions. If the appellate court reverses findings of the trial court, it has to record its own reasons for such conclusions.[192]

The Supreme Court was seized of a question that whether the high court was right in merely deciding the issue of limitation in a first appeal filed under section 96 without going into the merits of the case. It was held to be impermissible.[193]

The Supreme Court in the above judgment quoted with approval from an earlier decision in *Rajeshwari v Puran Indoria*,[194] wherein it has been observed as follows:

> 3. Normally, a suit for specific performance of an agreement for sale on immovable property, involves the question whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, whether it was a case for exercise of discretion by the court to decree specific performance in terms of Section 20 of the Specific Relief Act and whether there were laches on the part of the plaintiff in approaching the court to enforce specific performance of the contract.[195]

Since the above factors and other surrounding circumstances were not considered, the Supreme Court, is *BHEL's* case (*supra*) remitted the matter to high court for fresh consideration.

In other case, where the high court quoted the depositions of witnesses as findings and quoted findings of the lower court which had been set aside by high court is an earlier round of litigation and did not consider important aspects relating to adverse possession, the Supreme Court remitted the matter to high court for consideration *de novo*.

Kapadia, J, (as he then was), speaking for the Division Bench in the above case, observed as follows:

> In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show hostile title. He has to communicate his hostility to the real owner. None of these aspects have been considered by the High Court in its impugned judgment. As stated above, the impugned judgment is under Section 96 CPC, it is not a judgment under Section 100, CPC. As stated above, adverse possession or ouster is an inference to be drawn from the facts proved that work is of the first appellate court.[196]

The Andhra Pradesh High Court has held that where the appellate court which dealing with the actual controversy discussed the matter elaborately, it committed no irregularity even if it has taken the task of examining the validity of a particular document in respect of which there was neither any issue nor any relief claimed.[197]

The claim of a plaintiff in a suit for partition was based on a Will executed by his grandfather. The plaintiff produced only a certified copy of the Will and defendant also referred to the same in his written statement. However, neither party brought the original Will on the record. The trial court and the high court without giving any specific finding on the Will decreed the suit. The Supreme Court remitted the matter to high court for reconsideration.[198]

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192. *Shasidhar v Ashwini Uma Mathad*, AIR 2015 SC 1139 : (2015) 11 SCC 269 : (2015) 2 SCR 1 : (2015) 1 Scale 341; Also see *Vinod Kumar v Gangadhar*, (2015) 1 SCC 391 : 2014 (12) Scale 171.
193. *Madina Begum v Shiv Murti Prasad*, AIR 2016 SC 3554 : (206) 15 SCC 322 : (2016) 7 Scale 478 : JT 2016 (7) SC 457.
194. *Rajeshwari v Puran Indoria*, 2005 (7) SCC 60.
195. *Krishnamurthy S Setlur v OV Narasimha Setty*, AIR 2007 SC 1788 : (2007) 3 SCC 569.
196. *Krishnamurthy S Setlur v OV Narasimha Setty*, AIR 2007 SC 1788, para 13 at p 1794 : (2007) 3 SCC 569.
197. *Chand Bee v Smt. Hamidunnissa*, AIR 2007 AP 150 : 2007 (2) Andh LT 112.
198. *N. Srihari v N. Prakash*, AIR 2008 SC 1548 : (2008) 4 SCC 683.

Where the high court set aside the finding of fact recorded by the trial court without a reasoned order, it was held by the Supreme Court that the conclusions reached by the high court cannot be endorsed.[199]

CK Thakker, J, speaking for the Division Bench in the above case observed as follows:

> **33.** Three requisites should normally be present before an appellate court reverses a finding of the trial court:
>
> (i) it applies its mind to reasons given by the trial court;
>
> (ii) it has no advantage of seeing and hearing the witnesses; and
>
> (iii) it records cogent and convincing reasons for disagreeing with the trial court.
>
> **34.** If the above principles are kept in mind, in our judgment, the decision of the High Court falls short of the grounds which would allow the first appellate court to reverse a finding of fact recorded by the trial court. As already adverted earlier, the High Court has 'virtually' reached a conclusion without recording reasons in support of such conclusion. When the Court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial Court or conclusions arrived at were not in consonance with law.[200]

Where, in a suit for permanent injunction, the plea as to non-joinder of necessary parties *viz* non-implement of legal representatives of the deceased defendant was not taken up during trial and no evidence was lead on that point and the matter proceeded with the consent of the defendant who invited finding without any objection, it was held by the Himachal Pradesh High Court that it amounts to abandonment and the plea non-implement cannot be raised by defendant for the first time in appeal.[201]

In another case, the Himachal Pradesh High Court has held that the duty of the appellate court is to discuss the entire evidence, points of law and submissions urged by parties in support of their contentions. Where the judgment is not showing the grounds factual or legal on the basis of which the appellate court came to a different conclusion than that arrived at by the trial court, such judgment cannot be termed as proper. The summary dismissal or mere expression of concurrence with the conclusions of the trial court is not contemplated by the Code.[202]

In a first appeal, the judgment of the trial court showed that on the question of identity of the disputed land, the parties adduced evidence, court commissioner was appointed, who submitted his report and was examined and only cross-examined. Under these circumstances it was held by the Supreme Court that the remand of the matter by high court with direction to give opportunities to parties to adduce further evidence on the question of identity of disputed land was not proper.[203]

In a case relating to fire insurance policy, where the appellate court upheld the reasons given by trial court but reduced the amount of damage without giving any reasons, it was held by the Supreme Court that the appellate court's order was liable to be set aside.[204]

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199. *Jagdish Singh v Madhuri Devi*, AIR 2008 SC 2296 : (2008) 10 SCC 497.
200. *Jagdish Singh v Madhuri Devi*, AIR 2008 SC 2296, para 33, 34 at p 2302 : (2008) 10 SCC 497.
201. *Ravi Kant v Bhupender Kumar*, AIR 2008 HP 31.
202. *Ramji v State of HP*, (2008) 2 Shim LC 60.
203. *Gowrammanni v VV Patil*, AIR 2009 SC 1998.
204. *Malnad Traders v New India Assurance Co Ltd*, AIR 2009 SC 2084 : (2009) 2 SCC 663.

[s 96.24] Decree-Holder May Accept What the Decree Awards Him, and Appeal for What the Decree Refuses Him

If the decree awards the decree-holder a sum smaller than what he claims, he may accept the smaller sum and appeal for the balance. He may approbate the decree as to what it awards him and reprobate the decree as to what it refuses him.[205]

The CPC confers a right upon a plaintiff to pray for one or more reliefs, categorised as main and alternative reliefs. A decree may grant or decline all the reliefs. It may also grant some of the reliefs claimed and decline others. The Code does not place any bar upon the right of an aggrieved plaintiff to file an appeal against that part of the decree which declines relief. Even otherwise, where law permits the claim of an alternative relief, like grant thereof would not disentitle an aggrieved plaintiff from filing appeal against that part of the decree which adversely affects his right. Thus, in a suit for specific performance, where the court granted the alternative relief of damages, the plaintiff is not debarred from filing appeal against denial of the main relief.[206]

[s 96.25] Appeal by Defendant, When Suit is Dismissed

A decree challenged in appeal is reopened and the appellant hearing is a rehearing of the whole subject matter and when the decree is passed in appeal, the first decree merges in the appellant decree.[207] An appeal does not lie against mere "findings" recorded by a court unless the findings amount to a "decree" or "order". Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the appellate court.[208]

[s 96.26] Merger of Decrees

When a trial court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of this suit and when the appellate decree affirms, modifies or reverses the decree on merits, the trial court decrees said in law to merge in the appellate decree, and it is the appellate decree which rules.[209] But when the decree is passed without notice to party that decree will not, in law, be a decree to which he is a party. Equally so in the case of an appellate decree.[210]

[s 96.27] Joinder of Appellants

It is irregular for defendants with different defences to a suit and with different grounds for appeal to join in a single appeal,[211] *aliter* where the defence is the same.[212] Plaintiff himself had said in the plaint, that he was in doubt as to which two sets of defendants was liable and sued them in the alternative. In the circumstances, as one set of defendants was held liable, an appeal against the other set would not be maintainable.[213]

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205. *Hurrybux Deora v Johurmall Bhotoria,* AIR 1929 Cal 796 : (1930) ILR 57 Cal 386.
206. *Banwari Lal v Sundra,* AIR 2007 P&H 133 : (2008) 149 PLR 134.
207. *Sadhu Singh v Dharam Dev,* (1981) 1 SCC 510.
208. *Deva Ram v Ishwar Chand,* (1995) 6 SCC 733.
209. *Lakshmi Narayan Guin v Niranjan Modak,* (1985) 1 SCC 270; *Shardamma v Bangalore Development Authority,* AIR 1998 Kant 265.
210. *Kewal Ram v Ram Lubhai,* (1987) 2 SCC 344.
211. *Hodges v Delhi and London Bank Ltd,* (1900) 23 All 137.
212. *Karunapejjalage Bilindi v Wellawa Attadassi,* AIR 1946 PC 48.
213. *BOI v Mehta Bros,* AIR 1991 Del 194.

[s 96.28] Cross Suits — Appeal Against One of Two Decrees — Maintainability

Two cross-suits were filed between the very same parties; the subject matter of dispute was the very same property, and the reliefs sought by each plaintiff in their respective suits were similar; the trial court, by consent of parties, consolidated the two suits and directed that they be tried together. The two suits were decided by a common judgment. As a result of the said common judgment, the suit filed by one party was dismissed, whereas the suit filed by another party was allowed. Thus, although the judgment was common, it dealt with two separate suits and consequently the common judgment resulted in two separate and distinct decrees. The party whose suit was dismissed filed only one appeal against the decree whereunder the suit of another party was allowed, but did not file any appeal against the decree, wherefore his suit was dismissed. It was held in the circumstances that, when two decrees were passed, appeal against only one of them was not maintainable.[214]

Admittedly, two suits were filed by the parties against each other. For the sake of convenience, the trial court passed a common judgment. The trial of the suits was separate and the judgment and decree in the two suits are different. The first appellate court has reversed the result in both the suits in a single appeal. That was not permissible in law. Even though the judgment is common, for all practical purposes it shall be treated as two judgments and decrees. Hence the lower appellate court was not justified in passing the judgment and decree under appeal in a single appeal filed before it.[215]

[s 96.29] Appeal To Be From Each Decree

The language of the section makes it clear that each decree should be the subject matter of an independent appeal and that one appeal against two decrees passed in two different suits based on different causes of action is not contemplated.[216] Even in a single suit such as a suit for partition, there can be more than one preliminary decree. An order of the court directing sale of a certain property, after the passing of the preliminary decree, which cannot be conveniently divided among the sharers, amounts to a final adjudication of the rights of the parties regarding the manner in which that property has to be divided. Such an order amounts to a preliminary decree and can be appealed against.[217] The principles of merger of original decree with appellate decree cannot be invoked to claim protection under the general provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.[218]

[s 96.30] First Appeal — Request for Issuewise Finding — Not Proper

First appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.[219]

In the regular first appeal, the request to examine conclusions arrived at, and to the district judge to give finding on each issue as first appellate court, is not proper.[220]

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214. *Darayas Bamanshah Medhora v Nariman Bamansha Medhora,* AIR 2002 Guj 166 (DB).
215. *Mallanna v Muninanjamma,* AIR 2001 Kant 205.
216. *Re Gundu Rao,* AIR 1960 Mad 57; *Sultan Singh v Rachhpal,* AIR 1953 Pepsu 129 : (1952) ILR Patiala 197; *Sarvan Nath v Ram Kishen,* AIR 1963 P&H 131.
217. *Bambathi Bibi v Chariya Maliyammal,* AIR 1968 Ker 282 : (1968) ILR 1 Ker 129 : (1968) Ker LJ 103.
218. *Motiram Ghelabhai v Jagan Nagar,* (1985) 2 SCC 279.
219. *Madhukar v Sangram,* AIR 2001 SC 2171 : (2001) 4 SCC 756 : (2001) 3 SCR 138.
220. *Om Prakash v State of Himachal Pradesh,* AIR 2001 HP 18.

[s 96.31] Finding of Fact — Limited Scope of Interference

The general rule is that the appellate court should permit the finding of fact rendered by the trial court to prevail, unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is sufficient balance of improbability to displace its opinion as to whether the credibility lies.[221] The trial court has the advantage of recording the evidence and noticing the demeanour of the witness. In such a situation, the view is that the first appellate court should be slow to interfere with the findings recorded by the trial court.[222]

In a case relating to work contract, the plaintiff challenged the assessment of the work made by the defendant. However, the trial court found that the plaintiff did not sign the measurement book or give any endorsement thereon. He did not lead any evidence to establish taken he get the work measured by any independent agency. On the contrary the trial court also found that evidence of the defendant was credible and cogent and work upto only 65% and not 95% had been done. Under these circumstances the high court declined to interfere in the findings of fact.[223] Where no exceptional circumstances was pointed out by the appellate court for dislodging the finding of fact recorded by the trial court on the basis of appraisal of oral testimony, it was held by the Allahabad High Court that the appellate court erred in upsetting the findings of the trial court on all issues.[224]

[s 96.32] Relief

A money suit was filed by the bank against manufacturer of handloom sarees. The suit was decreed by the trial court granting 12 equal quarterly instalments. Considering the loss suffered in business owing to drought condition, the appellate court granted six more quarterly equal instalments to the defendants.[225]

[s 96.33] Sub-section (3): Consent Decrees not Appealable

Sub-section (3) declares that no decree passed by consent of parties shall be appealable. Under the 1882 Code, consent decrees were passed under section 375. Under the present CPC,[226] a consent decree may be passed under O XXIII, rule 3.

Right of appeal has been given under O XXIII, rule 1(A)(2) to a party who challenges the recording of the compromise to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the CPC is not barred to such an appeal, because section 96(3) is applicable to cases where the factor of compromise or agreement is not in dispute.[227] Nothing in O XXIII describes that the order passed under rules 1 and 3 thereof, has force of decree and none of the provisions contain in the CPC renders an order under O XXIII, rule 1, refusing or to allow such an application or the order under O XXIII, rule 3 refusing to record compromise. has force or is deemed decree. Though, however an order passed under O XXIII, rule 3 may be treated to be a decree, but then again, section 66(3) prohibits appeal against the decree passed

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221. *Harvansh Singh v Bhagwan Das*, AIR 2006 (NOL) 1364 (MP) : (2006) 1 MP LJ 604 : (2006) ILR MP 54.
222. *Shripat Rao v Raghuvirsingh*, AIR 1995 MP 113.
223. *State of Uttaranchal v Hukum Singh*, AIR 2007 Uttr 20 : (2007) 3 All LJ 618.
224. *Chhangura v Mata Prasad*, (2008) 1 ALJ 524 : (2008) AIHC 1096 : (2008) 1 ARC 7 : (2008) 1 AWC 742 All.
225. *RN Bannad and Sons v State Bank of India, Gadag*, AIR 1989 Kant 28 (DB).
226. *Gurcharan Singh v Shibdev Singh*, AIR 1922 Lah 309 : (1922) ILR 3 Lah 175 : 66 IC 258.
227. *Pradip Kumar Das v Abanti Das*, AIR 1998 Ori 26 (DB).

by the court with the consent of the parties.[228] An appeal against a consent decree passed in presence of counsel of both the parties in not maintainable.[229] No appeal lies against a consent order appointing an arbitrator.[230] The bar under section 96(3) does not get attracted when the compromise entered into between the parties is disputed. If a part of the compromise decree is refused by the court or is not recorded, then also the bar of section 96(3) would not be applicable in those cases.[231]

The rule contained in this sub-section is one of estoppel. Therefore, once a decree is passed with the consent of parties and the decree *ex facie* indicates that the parties thereto had given their consent, the decree cannot be challenged in an appeal on grounds such as fraud, misrepresentation, coercion etc.[232] On the other hand, it has been held that where in an appeal against a consent decree the ground taken is that there was in fact no agreement between the parties, though such an appeal is barred by this section, there could be an appeal by the party aggrieved by such consent decree under clause (m) of rule 1 of O XLIII. It is submitted that the distinction made between the two classes of cases, namely, those where the factum of compromise is in dispute and those in which its legality is in question cannot be sustained on principle. Such a distinction is no longer tenable in view of the deletion of clause (m) of rule 1 of O XLIII by the Amendment Act, 1976 and which renders the decisions cited below[233] inapplicable.

In a case relating to lease of property for residential purposes, where the suit is said to have been compromised and a compromise decree was passed, the Supreme Court held that no appeal is maintainable against a consent decree in view of the specific bar contained in sub-section (3) of section 96 of the Code.[234]

Raveendran, J, speaking for the Bench in the above case laid down the law in the following words:

> The position that emerges from the amended provisions of Order 23, can be summed up thus:
>
> (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.
>
> (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of Clause (m) Rule 1 Order 43.
>
> (iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.
>
> (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.
>
> Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in

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228. *Rajeet Ram Singh v Fifth ADJ, Kanpur Dehat,* AIR 1999 All 189.
229. *Desi Kedari v Huzurabad Coop Marketing Society Ltd,* AIR 1994 AP 301 (DB).
230. *UOI v Beant Singh and Sons,* AIR 1998 J&K 24.
231. *Sri Ram Krishna Vivekanand Shishu Niketan v Onkarnath,* (2019) ILR 10 All 1224 : (2019) 137 ALR 584.
232. *Kewal Krishan v Shiv Kumar,* AIR 1970 P&H 176 : (1970) ILR 2 Punj 758.
233. *Chinnasami Pillai v Thyagaraja,* AIR 1961 Mad 303 : (1961) 1 Mad LJ 154; *Huddersfield Banking Co Ltd v Henry Lister and Son Ltd,* (1895) 2 Ch 273 (CA); *Ainsworth v Wilding,* [1896] 1 Ch D 678; *Wilding v Sandeson,* (1897) 15 Bom 694.
234. *Pushpa Devi Bhagat v Rajinder Singh,* AIR 2006 SC 2628 : (2006) 5 SCC 566; *Lord Radha Krishna Ji Maharaj v Acharya Gopal Krishna Goswami,* 2009 (1) UC 374.

> terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made.[235]

It has, however, been held by the Jharkhand High Court that in a matrimonial suit for passing a decree for dissolution of marriage by mutual consent as contemplated under section 13B of the Hindu Marriage Act, 1955, the provisions of O XXIII, rule 3 of the Code will not apply and as such an appeal is maintainable against a decree passed under section 13B of the Act.[236]

When a preliminary decree is passed in disregard of the provisions of O XXXII, rule 7 it has been held by the Supreme Court in *Kausalya Devi v Baijnath Sayal,*[237] that it could not be questioned in an appeal against the final decree. By parity of reasoning an order recording compromise without complying with O XXXII, rule 7, should not be liable to be attacked in an appeal against a decree following therefrom. The CPC does not allow an appeal from a consent decree in any case. The deletion of clause (m) of rule (1) of O XLIII shows that it is no longer competent to appeal from an order recording the compromise where such compromise is not lawful on the ground that where the compromise is not a lawful one, the court has no power under O XXIII, rule 3 to record such a compromise.

This section applies to consent decrees passed in appeal also.[238] Plaintiff sued upon an account stated. The court found that the account stated was a deliberate fabrication and fraud and the plaintiff had to fall back on items in the general account. Each of these was found to be barred by limitation but defendants consented to a decree for such items as plaintiff could prove. A decree was passed on this footing. The Privy Council held that it was a consent decree and not appealable and that if it were not a consent decree the plaintiff's claim would have to be dismissed.[239] In a suit for partition, all the parties are plaintiffs and defendants, and, without even one party, the suit cannot proceed, nor can the matter be settled. Where all parties to a suit agree to the appointment of a referee and agree to be bound by his decision, the decree passed on the basis of the decision of the referee may amount to a "consent decree". But rule 8 of the CPC provides for the issuance of notice to all interested persons, in case the suit was to be decided by a referee and the parties were to be bound by his decision. If this is not done, then there is no agreed appointment of referee and no agreement by all the interested persons to be bound by the decision of the referee.[240]

It has been held by the Rajasthan High Court that a party to a suit whose rights are affected by a compromise decree for which he had not consented, is not precluded from assailing the validity of the decree by way of an appeal under section 96 of the Code.[241]

[s 96.34] Consent Decree when Appealable

In the following circumstances, an appeal lies against a consent decree

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235. *Pushpa Devi Bhagat v Rajinder Singh*, AIR 2006 SC 2628, para 12 at p 2633 : (2006) 5 SCC 566.
236. *Hina Singh v Satya Kumar Singh*, AIR 2007 Jhar 34 : (2007) 1 Jhar LJR 615 (DB) : (2007) 52 AIC 944.
237. *Kausalya Devi v Baijnath Sayal*, AIR 1961 SC 790 : (1961) 3 SCR 769.
238. *Baqridan v Bashir Ahmed Khan*, AIR 1956 All 94 : (1956) ILR 1 All 856 : (1955) All LJ 850 : (1955) 25 AWR 731; overruling *Audh Behari Lal v Faqir Rai*, AIR 1951 All 236.
239. *Sri Sri Sri Ramachandra Deo Garu v Chattana Sahu*, (1920) 39 Mad LJ 68 : 47 IA 200 (PC) : 56 IC 539.
240. *Ram Mehar v Surat Singh*, AIR 1989 P&H 307.
241. *Mohar Singh v Hermale Singh*, (2008) 3 Raj LW 1989.

[s 96.34.1] Extraneous Matter

This omission has been supplied by sub-section (3) of the present section. The said words barred an appeal from a consent decree only so far as such decree related to so much of the subject matter of the suit as was dealt with by the agreement, compromise or satisfaction on which the decree was based. If a consent decree dealt with any matter extraneous to the suit, that is, matters that did not relate to the subject matter of the suit, it was held that the decree, though passed with the consent of parties, was appealable, and that it should be modified by omitting such terms as did not relate to the subject matter of the suit.[242] As regards the terms so excluded, it was held that they might be enforced in a separate suit as a contract.[243] It would also be so under the present CPC.[244]

[s 96.34.2] When Compromise is Unlawful

Both under O XXIII, rule 3 and the corresponding section 375 of the Code of Civil Procedure, 1882, the agreement or compromise in terms of which the court is invited to pass a consent decree must be "lawful". It was accordingly observed by the High Court of Bombay in *Goculdas Bulabdas Manifacturing Co Ltd v James Scott*,[245] a case under section 375, that notwithstanding the declared finality of the decree, an appeal against it would be maintainable, where the party against whom the decree was passed alleged that there had been in fact no "lawful agreement" arrived at, in which case the condition precedent to the making of the decree would not be fulfilled. These observations were mere *obiter dicta*, but they were adopted by the High Court of Madras in *Sridharan v Puramathan*,[246] where it was held that an appeal would lie from a consent decree if the agreement in terms of which the decree was passed was not lawful. The High Court of Allahabad has held that an appeal lies against a consent decree when the compromise on which it is based is attacked as unlawful, as, for example, when a compromise is entered into on behalf of a minor without the leave of court under O XXXII, rule 7,[247] or without the sanction of the Central Board which is required under section 51 of the Uttar Pradesh Muslim Wakf Act, 1936,[248] or when a compromise is entered into by counsel without authority.[249] That is also the view taken by the High Court of Rajasthan.[250]

The Patna High Court has held that filing of title suit for setting aside compromise decree on the ground that compromise was not lawful is specially barred under O XXIII, rule 3A of the Code. The remedy open to plaintiff is to challenge the said decree by preferring an appeal under section 96 of the Code.[251] The Patna High Court placed reliance on a decision of the

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242. *Venkatappa Nayanim v Thimma Nayanim*, (1895) ILR 18 Mad 410; *Pragdas v Girdhardas*, (1901) 26 Bom 76; *Manager of Sri Meenakshi Devastanam v Abdul Kasim Sahib*, (1907) 30 Mad 421 : 17 Mad LJ 255 : 2 MLT 349.
243. *Jasimuddin Biswas v Bhuban Jelini*, (1907) ILR 34 Cal 456.
244. See in this connection the observations of the judicial committee in *Rani Hemanta Kumari Debi v Midnapur Zeminadri Co Ltd*, (1920) 22 BomLR 488 : 46 IA 240, 246.
245. *Goculdas Bulabdas Manifacturing Co Ltd v James Scott*, (1891) ILR 16 Bom 202, 212; *Pragdas v Girdhardas*, (1901) 26 Bom 76.
246. *Sridharan v Puramathan*, (1900) ILR 23 Mad 101.
247. *Sagwa v Dalwa*, AIR 1952 All 97 : (1953) ILR 2 All 807 : (1951) 21 All LR 673; *Mathura Singh v Deodhari Singh*, AIR 1972 Pat 17.
248. *Baqridam v Bashir Ahmed Khan*, AIR 1956 All 94 : (1956) ILR 1 All 856 : (1955) All LJ 850 : (1955) 25 AWR 731.
249. *Jagdish Narain v Rasul Ahmad*, AIR 1952 All 29 : (1953) ILR 2 All 544.
250. *Aksingh v Durjansingh*, AIR 1953 Raj 153.
251. *Surendra Ojha v Panpati Kaur*, AIR 2008 Pat 128.

Supreme Court in the case of *Banwari Lal v Chando Devi*,[252] wherein it has been observed as follows:

> Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly, a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3A of Order 23. As such a right has been given under Rule 1A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

[s 96.34.3] Compromise not Showing Ground Relief

The High Court of Allahabad has held that if a compromise decree for dissolution of marriage does not show that any of the grounds specified in sections 10 and 13 of the Hindu Marriage Act, 1955 is made out, the decree would be without jurisdiction and that this sub-section would not apply to such a decree.[253]

[s 96.34.4] Dispute on the Question of Compromise

When there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree passed with the consent of the parties. Therefore, the bar under section 93 (3) of the CPC could not have applied. An appeal, and a second appeal, with its limitations would be available to the party feeling aggrieved by the decree passed on such a disputed compromise or on a rejection of the compromise set up.[254]

Balasubramanyan, J, speaking for the three-Judge Bench in the above case, observed as follows:

> When on a dispute in that behalf being raised, an enquiry is made (now it has to be done in view of the proviso to Order XXIII Rule 3 of the Code added by Act 104 of 1976) and the suit is decreed on the basis of a compromise based on that enquiry, it could not be held to be a decree passed on consent within the meaning of section 96(3) of the Code. Section 96(3) contemplates non-appealability of a decree passed by the court with the consent of parties. Obviously, when one of the parties sets up a compromise and the other disputes it and the court is forced to adjudicate on whether there was a compromise or not and to pass a decree, it could not be understood as a decree passed by the court with the consent of parties.[255]

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252. *Banwari Lal v Chando Devi*, AIR 1993 SC 1139 : (1993) 1 SCC 581 : (1993) 1 PLJR 21.
253. *Kamla Devi v RP Singh*, AIR 1972 All 339 : (1972) All LJ 465.
254. *Kishun v Bihari*, AIR 2005 SC 3799 : (2005) 6 SCC 300 : 2005 All LJ 2877 : (2005) 33 AIC 29.
255. *Kishun v Bihari*, AIR 2005 SC 3799, para 6 at p 3801 : (2005) 6 SCC 300 : 2005 All LJ 2877 : (2005) 33 AIC 29.

In a compromise of a suit, one party raised dispute with respect to the terms of the compromise and the objecting party requested the court not to pass a decree on the basis of the consent. But dispute objections the court passed decree in terms of the consent. The Gujarat High Court held that in the face of the controversy regarding terms of consent it cannot be said that the decree was passed with the consent of parties and as such appeal under section 96 would be maintainable.[256]

[s 96.35] Practices

The Privy Council has said that when a decree or any part of a decree is by consent of parties, it should always so appear on the face of the decree when drawn up.[257] The terms of a decree agreed to between the parties need not be in writing. It is enough if the judgment discloses that the decree or order which came to be passed was on the basis of consent of the parties.[258] There was a question whether the appeal itself is not maintainable. A preliminary contention and prolonged arguments about the entertainment of the appeal had been urged. For the purpose of this interlocutory matter, it can be assumed that the appeal was maintainable. There are compulsive situations, however, where the exercise of the appellate jurisdiction is mandated to avert a possible deflection of the course of justice, when the affected party is relegated to the routine process of fighting the interlocutory matter under the normal procedure of O XXXIX, rule 4.[259] The rule of practice, which has almost the force of law, is that the appellate court does not reverse a finding of fact rested on proper appreciation of the oral evidence.[260]

[s 96.36] Award of *Lok Adalat* — Not Appealable

The *Lok Adalat* will pass the award with the consent of the parties, therefore there is no need either to reconsider or review the matter repeatedly, as the award passed by the *Lok Adalat* shall be final, even as under section 96(3) of CPC it is stated that "no appeal shall lie from a decree passed by the Court with the consent of the parties". The award of the *Lok Adalat* is an order by the *Lok Adalat* under the consent of the parties, and it shall be deemed to be a decree of the civil court, therefore an appeal shall not lie from the award of the *Lok Adalat* as under section 96(3) CPC.[261]

However, where parties who entered into compromise has no power to enter into compromise and the compromise had been effected by playing fraud, it was held that the award passed by *Lok Adalat* on the basis of such compromise is not settlement and is void. Therefore, appeal against such an award would be maintainable under section 96 of the Code.[262]

[s 96.37] Procedure for Setting Aside Consent Decrees

Sub-section (3), in so far as it bars an appeal from consent decrees, gives effect to the principle that, a judgment by consent, acts as an estoppel.[263] In the case of a consent decree,

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256. *Kankuben v Ramratanbhai Badriprasad Agarwal*, AIR 2009 Guj 16 : (2009) 1 Guj LR 270.
257. *Zahirulsaid Alvi v RS Seth Lachhmi Narayan*, AIR 1931 PC 107 : (1931) 35 Cal WN 612.
258. *Isac Osman v Valimohmad*, AIR 1968 Guj 301.
259. *VT Thomas v Malayala Manorama Co Ltd*, AIR 1989 Ker 49.
260. *MS Jagdambal v Southern India Education Trust*, AIR 1988 SC 103 : (1988) Supp SCC 144 : (1987) 2 Scale 925.
261. *PT Thomas v Thomas Job*, AIR 2005 SC 3575 : (2005) 6 SCC 478 : (2005) Supp (3) SCR 20.
262. *Mahila Bhanwari Bai v Kashmir Singh*, AIR 2009 MP 232 : (2009) 3 MPLJ 183 (Gwalior Bench).
263. *Re South American and Mexican Co; Ex parte Bank of England*, (1895) 1 Ch 37.

the Privy Council refused to entertain an appeal or to consider the sufficiency or otherwise of the consent as the decree could only be set aside by substantive proceedings appropriate to that particular remedy.[264] A consent decree can be set aside on any ground which would invalidate an agreement, such as misrepresentation, fraud or mistake.[265] This can only be done by a suit, and a consent decree cannot be set aside by an appeal,[266] of a review,[267] or by a rule obtained on a motion.[268] But the court in its inherent jurisdiction, may set aside an interlocutory consent order which is not a final order or judgment.[269] Where in the facts and circumstances of the case, the plaintiff's amendment did not change the nature and character of the suit, the amendment could be allowed at the appellate stage as that did not cause any prejudice to the defendants.[270]

But an appeal from an order recording a compromise under O XXIII, rule 3, is not incompetent if the decree is passed before the appeal.[271] This is no longer the position in view of the fact that clause (m) of O XLIII, rule 1 which provided that an order under O XXIII, rule 3 recording or refusing to record an agreement, compromise or satisfaction was an appealable order has been deleted by the Amendment Act, 1976. In some cases, it may be done by an application for a review.[272] But it cannot be done by a rule.[273]

It is no doubt true that the appellants-plaintiffs could have approached the trial court under the proviso to rule 3, O XXIII, CPC, but they can also challenge the decree in appeal under section 96(1), CPC before the high court. However, when high court has already entertained the appeal against the consent decree passed by the trial court, then, merely because they have alternative remedy of approaching the trial court by way of application under the provision to rule 3 of O XXIII, it would not be a ground for the high court not to entertain this appeal on merits.[274]

[s 96.38] Subsequent Events

A court (including a court of appeal) should take into account developments subsequent to the commencement of the litigation. When the relief, otherwise awardable at the date of commencement of the suit, would become inappropriate in view of the changed circumstances, the court should mould the relief in accordance with the changed circumstances, whenever it is necessary to do so, for shortening the litigation or doing complete justice. This is particularly so in the case of matrimonial proceedings, proceedings relating to guardianship, etc, where the interests involved are not merely those of the immediate parties to the litigation, but also those of society and of the future generation. In the instant case, custody of a girl was awarded under

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264. *Zahirulsaid Alvi v RS Seth Lachhmi Narayan,* AIR 1931 PC 107 : (1931) 35 Cal WN 612.
265. *Huddersfield Banking Co Ltd v Henry Lister and Son Ltd,* (1895) 2 Ch 273 (CA), [1895] 2 Ch 273 (mistake common to both parties); *Wilding v Sunderson v Abdool Azeez,* (1881) 6 Cal 687, 706; *Kandarpa v Banking Co v Banwari,* 33 CLJ 244.
266. *Huddersfield Banking Co Ltd v Henry Lister and Son Ltd,* (1895) 2 Ch 273 (CA); *Ainsworth v Wilding,* [1986] 1 Ch 673; *Wilding v Sanderson,* [1897] 2 Ch 534; *Mirali v Rehmoobhoy,* (1891) 15 Bom 594; *Audh Behari Lal v Faqir Rai,* AIR 1951 All 236 (case of an appellate decree passed by consent).
267. *Galstaun v Promatha Nath,* AIR 1929 Cal 470 : (1929) 57 Cal 154; *Mst Gulab Kuer v Badshah,* (1911) 13 Cal WN 119; *Nathu Lal v Raghubir Singh,* AIR 1926 All 50 : (1926) 48 All 160.
268. *Fatmabai v Sonbai,* (1912) 36 Bom 77; *Yusuf v Abdullabhai,* AIR 1932 Bom 615 : (1932) 56 Bom 231.
269. *Yusuf v Abdullabhoy (No. 2),* AIR 1930 Bom 362 : (1931) 55 Bom 372.
270. *Nigamanda Patra v Sarat Chandra Patra,* AIR 1998 Ori 19.
271. *Haridas v Iswar,* AIR 1933 Cal 94 : (1931) 36 Cal WN 1013.
272. *Aushootosh v Tata,* (1884) 10 Cal 612, 615.
273. *Fatmabai v Sonbai,* (1912) 36 Bom 77.
274. *Kantaben T Shah v Devendra Kumar C. Shah,* AIR 2002 Guj 160.

section 25 of the Guardians and Wards Act, 1890, to her mother, at a time when the girl was under five years of age. During the pendency of the litigation, the girl attained the age of five years. The high court proceeded to dispose of the appeal on the merits, taking note of the fact that as the girl had completed the age of five years, the mother could not claim the custody as a matter of right.[275]

Ordinarily, the rights of the parties stand crystallized on the date the suit is instituted before a court and only the same set of facts must be considered by such court. Relying on the said principle, a decision of the high court made in an appeal under section 96 of the CPC was challenged before the Supreme Court in *Gaiv Dinshaw Irani v Tehmtan Irani.*[276] The Supreme Court upheld the order of the high court and held that in the interest of justice, a court, including a court of appeal under section 96 is not precluded from taking note of developments subsequent to the commencement of the litigation, when such events have a direct bearing on the relief claimed by a party or on the entire purpose of the suit and hence the courts taking note of the same should mould the relief accordingly.

An appellate court can take note of events that have taken place since the judgment of the trial court. In a suit by landlord for eviction, the high court in second appeal, can take note of the fact that:

(i) landlord's children have since grown up and so his family has increased;

(ii) tenant's sons have shifted to another house, one son has gone to foreign country, daughter has got married and wife has expired.[277] The case of *Pasupaleti v Motor and General Traders,*[278] was followed.

[s 96.39] Decisions of the Court *Extra Cursum Curiae*

Sometimes it happens that parties to a suit or proceeding refer the matter for the decision of the court. The question is whether such a decision when given is open to appeal. When the parties invite the court to adopt a procedure *extra cursum curiae* and give a decision agreeing to be bound by it, such a reference is not one under the Arbitration Act. Such a decision amounts to a decree but is not open to appeal.[279] Hence, the language used in decisions for such a decree is that such a decision is 'in the nature of an award' or 'as if it is an award'.[280] Where the dispute related to the value of improvements made by a mortgagee in possession and the parties filed a joint statement asking the court to make a local inspection, peruse the documentary evidence in the case and give its decision and agreed that they would abide by that decision, it was held that the procedure agreed to was *extra cursum curiae* and no appeal lay against the decision.[281] But where the procedure adopted is one prescribed and followed in courts, the fact that the parties agreed to dispense with oral evidence and take the decision of the court on the materials on record would not make it a consent decree so as to bar an appeal.[282] Likewise, an agreement between the parties that they would not adduce oral evidence and that the court might give a decision against the party on whom the onus of proving the case lay, would not make the

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275. *Raj Kumar Gupta v Barbara Gupta,* AIR 1989 Cal 165 (DB).
276. *Gaiv Dinshaw Irani v Tehmtan Irani,* AIR 2014 SC 2326 : (2014) 8 SCC 294.
277. *Basti Chand v Dharamvir,* AIR 1989 Raj 135.
278. *Pasupaleti v Motor and General Traders,* AIR 1975 SC 1409.
279. *Re Joghee Gowder,* (1956) 1 Mad LJ 234.
280. *Arti v Registrar, HCOS* AIR 1965 Cal 3.
281. *Guddappa Roy v Ramanna Banta,* AIR 1957 Mad 95 : (1956) 2 MLJ 504 : 69 LW 163; *Rohtas Insustries Ltd v PN Gour,* AIR 1957 Pat 700.
282. *Kotamma v Mangamma,* AIR 1957 Pat 700 : (1956) Andh WR 517 : 1956 Andh LT 639.

decree passed a consent decree and it would be open to the party aggrieved to appeal against it on the ground that the onus had been wrongly thrown.[283] Where counsel for the parties agreed that a decree might be passed on the basis of the decision of the court on issue (1) without reference to other issues and the court acting on this agreement decreed the suit, it was held that the defendant was entitled to file an appeal against it and challenge the correctness of the decree on issue (1).[284] Where the parties agreed that the court should authorise a commissioner to take additional evidence and that that order should not be appealable, that does not render the ultimate decree passed in the suit, a consent decree.[285] Mere acceptance by a party of an order offered by the court has been held not to amount to consent.[286] Where the terms of the decree were not agreed to by the parties but imposed upon them by the court, there is no consent decree and an appeal against it is not barred.[287] A decree passed on the strength of a special oath administered in pursuance of an agreement thereto between the parties is a consent decree and is not appealable.[288] Where, in a suit, the plaintiff agrees to be bound by the statement of the defendant on oath, the decree passed on the basis of such a statement is not a consent decree.[289]

[s 96.40] Appeal is a Continuation of the Suit

In theory, the appeal is only a continuation of the hearing of the suit.[290] Accordingly, the word "suit" in section 15 of the Uttar Pradesh Temporary Control of Rent and Eviction Act, 1947 has to be understood to include an appeal. The result is that although at the time of the institution of the suit for eviction, section 15 was not in force in the area where the rented premises are situated, if at the time of appeal it was brought in force in that area, the tenant in appeal becomes entitled to its protection.[291]

[s 96.41] Dismissal of Application for Condonation of Delay and Appeal is Decision of Appeal

An appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that rule 3A of O XLI introduced by Amendment Act 104 of 1976 to the CPC. did not in any way affect that principle. An appeal registered under rule 9 of O XLI of the CPC had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against.[292]

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283. *Dulhin Mahabati Kuer v Raghunandan Prasad Singh,* AIR 1958 Pat 249.
284. *Sat Narain Pandey v Dhruva Narain,* AIR 1959 All 22 : (1958) All LJ 526.
285. *Shantilal v Madanalal,* AIR 1954 All 789.
286. *Aldam v Brown,* (1890) WN 116; *Hadida v Fordham,* (1893) 10 LTR 139.
287. *Kotamma v Mangamma,* (1956) Andh WR 517 : 1956 Andh LT 639.
288. *Kedar Nath v Badri Prasad,* AIR 1972 All 453.
289. See note to O XXIII, rule 3, under the heading "Agreement adjusting a suit". *Mohamed Hashim v Mohamed Jam,* AIR 1934 Lah 67 : (1934) 15 Lah 305; *Laxmibai v Bajirao,* AIR 1938 Nag 64 : (1940) ILR Nag 310.
290. *Krishnan Chettiar v Mangammal,* ILR 26 Mad 91; *Atchayya v Venkatasitaramachandra,* ILR 39 Mad 195; *Dinanth Ghosh v Shama Bibi,* ILR 28 Cal 23; *Samad Sheikh v Naba Nepal Ghosh,* AIR 1914 Cal 614 : 19 Cal WN 359; *Ramchand v Ram Sarup,* AIR 1952 All 654; *Umayamma v Muthukaruppa,* AIR 1954 Tr & Coch 353; *Damodar v Bonwarilal,* AIR 1960 Cal 469; *Umedmal v NK Chopda & Co,* AIR 1967 Bom 514 : 69 Bom LR 153; *Kakhanqai Kabui v Apanbi,* AIR 1968 Mani 42.
291. *Shyam Sunder Lal v Shagun Chand,* AIR 1967 All 214.
292. *Thambi v Mathew,* (1987) 2 KLT 848.

Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.[293]

The order passed by appellate court allowing appellant to file copy of decree at the time of final hearing amounts to condonation of delay in filing appeal.[294]

[s 96.42] Amendment of Pleadings

Plaintiff failed in his plea of invalidity of will. He wanted to amend the plaint to include pleas based on certain partition and section 14(1) of the Hindu Succession Act, 1956. Amendment was held to be setting up a different cause of action and cannot be allowed in appeal.[295] Where in the facts and circumstances of the case, the plaintiff's amendment did not change the nature and character of the suit, the amendment could be allowed at the appellate stage as that did not cause any prejudice to the defendants.[296]

[s 96.43] Appeal Disposed of No further Orders can be Passed by Court on Application of Parties

After the dismissal of first appeal by the high court, property stood vested with both sisters and they became absolute owners and property no more remain *custodia legis*. The appointment of joint receiver came to an end and they stood discharged. As such, there was no need for the Division Bench to consider the application filed by the applicant.[297]

Thus, the high court had no jurisdiction to pass any order on subsequent application filed by parties in that matter.[298]

When an appeal is dismissed and finally disposed of, he becomes *functus officio* and all applications pending adjudication before the appellate court become infructuous. Thus, after dismissal of the appeal where the appellate court further passes order to dismiss a pending application under O VI, rule 17 of the Code, the order is improper.[299] Where in a first appeal before the high court, an application an application under O XLI, rule 27 of the Code was filed for acceptance of additional evidence and the high court dismissed the appeal without considering the said application, it was held that the order was liable to be set aside and the matter remitted for consideration of the application for additional evidence in accordance with law.[300]

[s 96.44] Sub-Section (4) — Restriction on Right of Appeal from Decrees of Courts of Small Causes

This sub-section is new, having been inserted by the Amendment Act, 1976. Though the section provides for appeals against every decree, the new sub-section restricts that right and bars appeal from facts against decrees passed in suits cognizable by the courts of small causes

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293. *Shyam Sundar Sarma v Pannalal Jaiswal,* AIR 2005 SC 226 : (2005) 1 SCC 436.
294. *Prakash v State of Madhya Pradesh,* AIR 2002 MP 3.
295. *Chinanammal v Kannagi,* AIR 1989 Mad 185.
296. *Nigamanda Patra v Sarat Chandra Patra,* AIR 1998 Ori 19.
297. *Subhadra Rani Pal Choudhary v Sheirly Weigal Nain,* AIR 2005 SC 3011 : (2005) 5 SCC 230 : 2005 (3) SCR 270.
298. *Subhadra Rani Pal Choudhary v Sheirly Weigal Nain,* AIR 2005 SC 3011 : (2005) 5 SCC 230 : 2005 (3) SCR 270.
299. *Nirma Ram v Sita Ram,* AIR 2007 HP 2.
300. *Hakam Singh v State of Haryana,* AIR 2008 SC 2990 : (2008) 12 SCC 762.

and where the amount or value of the subject matter of the suit does not exceed three thousand rupees. The sub-section has been enacted to bring the section in line with the Presidency Small Cause Courts Act, 1882 and the Provincial Small Cause Courts Act, 1887 which contain similar restriction.

It should not be forgotten that right of appeal is not an inherent right, but it is essentially a creature of statute. Unless the statute gives the right of appeal, the same does not exist. At the same time, it cannot be disputed that once such right is conferred by a statute, it becomes a vested right; however, the same can always be subjected to conditions which may be imposed by the legislature, in which case a party would not be entitled to exercise such right without fulfilment of those conditions. Bearing in mind this well settled principle of law, if one peruses sub-section (4) of section 96, it is apparent that the same comprises two conditions relating to the exercise of right of appeal against a decree passed by the civil court. The first condition is that, for the purpose of regular appeal against a decree, the valuation of the suit has to exceed Rs 10,000. Otherwise, the second condition is that the interference by the appellate court can only be on the point of law and not otherwise. Therefore, the contention that the petitioner has no right of appeal, cannot be accepted.[301]

In respect of appeal from decrees passed by Courts of Small Causes, a very unusual question arose before a Division Bench of the Calcutta High Court. In a suit the plaint was not returned by the Court Small Causes and the suit was decided by that Court. An appeal was filed against the decree on the ground that sub-section (4) of section 96 permitted filing of an appeal against a decree of a Court of Small Causes where the value of the subject-matter does not exceed Rs 10.000/-. Repelling the plea, the Division Bench held that section 96(4) has no application in such cases.[302]

The legal aspect involved in the matter has been explained by the Division Bench in the following way:

> 7. According to the Presidency Small Causes Courts Act, all money decree of the nature cognizable by the Presidency Small Causes Court and decided by such Court is final and no appeal lies against such decree. There is a similar provision also in the Provincial Small Causes Court Act. However, Sub-section (4) of Section 96 of the Act (sic) has been introduced for the purpose of giving right of appeal against decree passed by an ordinary civil Court in respect of a suit which is of the "nature cognizable by Court of Small Causes", but the plaint of which has been returned by the Court of Small Causes as the question of title is involved in such suit.
>
> 8. Therefore, if a suit of the nature cognizable by Courts of Small Causes is not decided by such Court in view of involvement of question of title and consequently, is returned to an ordinary civil court for disposal, a decree passed by such ordinary civil Court in this type of suit is appealable in terms of Section 96(4) of the Act.(sic).
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> 9. In the case before us, the plaint was not returned by the Court of Small Causes and the suit was decided by such Court. Therefore, Section 96(4) of the Code of Civil Procedure has no application.
>
> 10. The use of the phrase "from a decree in any suit of the nature cognizable by Courts of Small Causes" itself signifies that if a decree is passed by the Court of Small causes without returning the plaint, there is no scope of appeal and for that reason the legislature has not used the phrase "from a decree of any suit passed by Courts of Small Causes.[303]

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301. *Motiram Yeswant Gaikwad v Akkatai Uttam Trimukhe*, AIR 2003 Bom 325.
302. *Bankim Chandra Lohar v Sitangshu Kumar Bhanja*, AIR 2009 Cal 285 (DB).
303. *Bankim Chandra Lohar v Sitangshu Kumar Bhanja*, AIR 2009 Cal 285 (DB), at page 285.

[s 96.45] Death of One of Appellants

Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in O XXII of the CPC as well as the subsequent amendments thereto, would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and are not lost forever due to the death of one or the other in the proceedings. The provisions contained in O XXII are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administrating of justice.[304]

Where, in the appeal, there was death of one or the other appellant, an application for setting aside abatement, condonation of delay and bringing legal representatives on record was made and the main appeal was on file before the high court, and in such circumstances, an order by the high court rejecting application of legal representations would result in grave injustice to remaining appellants by denying them of their right to have an adjudication of their claims on merits and such order was found liable to be set aside by the Supreme Court.[305]

[s 96.46] Bar of Limitation – Effect

As soon a court decides that a particular suit or appeal or application is barred by limitation, then, the only course left to the court is to dismiss that suit or appeal or application. This is for the simple reason that being time barred, if such suit, appeal or application is not maintainable, the court cannot proceed to decide the issues involved therein on merits.[306]

[s 96.47] Power of Court

See notes under the same heading under section 47.

The Supreme Court has held that a suit is ordinarily tried on the issues raised by the parties. Additional issues which do not arise for consideration in suit or appeal cannot be framed by court on its own.[307]

SB Sinha, J, speaking for the Division Bench in the above case observed as follows:

> We, therefore, are of the opinion that the High Court was not correct in framing the additional issues which did not arise for consideration in the suit or in the appeal. Even otherwise, the High Court should have formulated the points for its consideration in terms of Order XLI, Rule 31 of the Code. On the pleadings of the parties and in view of the submissions made, no such question arose for its consideration.[308]

The Supreme Court also observed in the above case, as follows:

> Scope and ambit of jurisdiction of the High Court in determining an issue in an appeal filed in terms of Section 96 of the Code of Civil Procedure (which would be in continuation

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304. *S Amarjit Singh Kalra v Pramod Gupta*, AIR 2003 SC 2588 : (2003) 3 SCC 272 : (2002) 5 SCR 350.
305. *S Amarjit Singh Kalra v Pramod Gupta*, AIR 2003 SC 2588 : (2003) 3 SCC 272 : (2002) 5 SCR 350.
306. *Auto & Hardware Stores v State of Bihar*, AIR 2004 Pat 13.
307. *Shiv Kumar Sharma v Santosh Kumari*, AIR 2008 SC 171 : (2007) 8 SCC 600.
308. *Shiv Kumar Sharma v Santosh Kumari*, AIR 2008 SC 171, para 23 at p 175 : (2007) 8 SCC 600.

> of the original suit) and exercising power of judicial review under Articles 226 and 227 of the Constitution of India would be different. While in the former, the court, subject to the procedural flexibility has laid down under the statute is bound to act within the four corners thereof, in adjudicating a lis in exercise of its power of judicial review, the High Court exercises a wider jurisdiction. No doubt, the court in an appropriate case, even in a civil suit may mould a relief but its jurisdiction in this behalf would be confined to Order VII, Rule 7 of the Code of Civil Procedure.[309]

Where criminal proceedings are initiated on the basis of observations made in civil suit, the appellate court in appeal against decree can go into the correctness of the observations made by the lower court. But filing of an independent criminal proceeding is not barred by any statute. Therefore, stay granted to criminal proceedings is improper.[310]

[S 97] Appeal from final decree where no appeal from preliminary decree.— Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

SYNOPSIS

[s 97.1]	Object	1158	[s 97.5]	Two Preliminary Decrees	1161
[s 97.2]	Preliminary Decree	1158	[s 97.6]	Final Decree Passed Prior to or During Pendency of Appeal from Preliminary Decree	1161
[s 97.3]	Appeal from Preliminary Decree	1159			
[s 97.4]	Where Preliminary Decree not Drawn Up	1161			

[s 97.1] Object

The object of the section is that questions which have been urged by the parties and decided by the court at the stage of the preliminary decree will not be open for re-agitation at the stage of the preparation of the final decree, and would be taken as finally decided if no appeal has been preferred against the preliminary decree.[311]

[s 97.2] Preliminary Decree

(a) Definition.—For definition of preliminary decree, see section 2(2).

(b) Scope.—Section 97 provides that where any party aggrieved by a preliminary decree. passed after commencement of this code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which will be preferred from the final decree. Thus, in view of section 97 of the CPC finality is attached to the preliminary decree. If no appeal is filed against the preliminary decree, its correctness cannot be disputed in any appeal which may be preferred from the final decree. If this is so and this has been the intention of the legislature, then it would be going against the wisdom of the legislature to permit appellant to raise the same question going to the root of the preliminary decree in an appeal from final decree, which was already raised and decided during the appeal against preliminary decree. Likewise, those questions cannot be permitted to be raised in the second appeal.[312]

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309. *Shiv Kumar Sharma v Santosh Kumari*, AIR 2008 SC 171, para 18 at p 174 : (2007) 8 SCC 600.
310. *P Swaroopa Rani v M. Hari Narayana*, AIR 2008 SC 1884 : (2008) 5 SCC 765.
311. *Subbanna v Subbanna*, AIR 1965 SC 1325; *Kewal Ram v Ram Lubhai*, (1987) 2 SCC 344.
312. *Patel Ranbhodbhai Bhaichanddas v Rabari Jiva Java*, AIR 1998 Guj 207.

The Supreme Court held that property can be added in the list of properties in the decree after a preliminary decree is passed in a partition suit. It was observed that a decree, whether preliminary or final is the formal expression of an adjudication, which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. The court, therefore, may not have a *suo motu* power to amend a decree but the same would not mean that the court cannot rectify a mistake. Hence, section 97 would not be a bar to file an application for amendment of a decree to rectify a mistake of the court.[313]

[s 97.3] Appeal from Preliminary Decree

A perusal of the provision of section 97 of CPC will go to show that any party aggrieved by a preliminary decree is under an obligation to file an appeal from such decree, but if he declines to avail of this opportunity, he cannot thereafter dispute the correctness of the preliminary decree when preferring an appeal against the final decree. In other words, in the event of failure to prefer an appeal against a preliminary decree, the preliminary decree is deemed to have attained finality.[314]

The section expressly excepts preliminary decrees from the position assigned to interlocutory orders, precluding an appellant from impeaching them in the course of an attack upon the final decree. This is because a preliminary decree, unless it is appealed against, finally adjudicates the rights and titles of the parties.[315] The final decree in its nature, is dependant and subordinate as it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon.[316] Matters decided by a preliminary decree cannot therefore be re-agitated at the time of the final decree.[317] In a suit for partition where a preliminary decree is passed, at the time of passing of the final decree it was not open to the respondent to raise the contention that he was a tenant of the suit premises. Section 97 of the CPC specifically provides that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree.[318]

The court reiterated its earlier stand that where an appeal against preliminary decree is filed after passing of the final decree, the right of the party does not get anywhere affected by the subsequent passing of the final decree. Furthermore, the court observed that there is no provision in the Code that says that an appeal against a preliminary decree becomes defunct by the passing of a final decree pending the appeal.[319]

The finality of a decree or judgment does not depend on the executability of a decree. The court may pass a decree declaring the rights of parties. In such decrees, there may be no executable mandate. Nevertheless, issues raised and decided in those cases are binding on the parties and conclusive between the parties in later suits. Section 97 is certainly an indication that matters decided by the court in a preliminary decree should be regarded as embodying

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313. *S Satnam Singh v Surender Kaur*, AIR 2009 SC 1089 : (2009) 2 SCC 562.
314. *Tapan Kumar Bhattacharjee v Ratan Kr Bhattacharjee*, AIR 2004 Gau 27.
315. *Rudra Pal v Ram Pal*, AIR 1972 All 67.
316. The judgment of Rankin CJ, in *Taleb Ali v Abdul Aziz*, AIR 1929 Cal 689 : (1929) 57 Cal 1013.
317. *N. Bhaironbux & Co v Kashi Ram*, (1973) Raj 271; *Tapan Kumar Bhattacharjee v Ratan Kr Bhattacharjee*, AIR 2004 Gau 27.
318. *Venkatrao Anantdeo Joshi v Malatibai*, AIR 2003 SC 267 : 2002 AIR SCW 4729.
319. *N Thanu Pillai v N Chenthil Perumal Pillai*, Second Appeal (MD) No. 282 of 2015 and MP MD No 1 of 2015, decided on 30 July 2019 (Madras HC).

the final decision on those matters, as far as the parties are concerned. The points decided in a preliminary judgment in a partition suit will estop the parties on the principle of *res judicata* from contending the same point in a later suit.[320]

The Calcutta decisions under the Code of Civil Procedure, 1882 are now obsolete. The general trend of these decisions was in the opposite direction. According to these decisions, a party aggrieved by an order in the nature of preliminary decree was not bound to appeal from the order; though the order was appealable as a decree, he was at liberty to wait until the final decree was passed, and then to dispute the correctness of the order in an appeal from the final decree, though the period of limitation for an appeal from the order had then expired. Thus, it was held that when an order was passed in a suit for dissolution of partnership and accounts, declaring the shares of the parties and referring the case to a commissioner for taking accounts, it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order, and the period prescribed by the law of limitation for appealing from the order had then expired.[321] In subsequent case, it was held by a full bench of that court in *Khadem Hossein v Emdad Hossein*,[322] that where an order was passed in a suit for partition, declaring the rights of the parties,[323] it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order within the time allowed by law. The contrary had been laid down in an earlier case decided by the same high court,[324] but that decision was dissented from by a majority of the full bench in *Khadem Hossein*'s case. Under this section omission to prefer an appeal from a preliminary decree precludes objections to it in an appeal from the final decree.[325] Thus, it has been held that when a preliminary decree in a partition suit was passed by consent without complying with the provisions of O XXXII, rule 7(1), and no appeal was preferred against it, its validity cannot be questioned in an appeal against the final decree.[326] Where the preliminary decree declared the liability of the defendant to pay compensation, and there was no appeal against it, its correctness could not be attacked in an appeal against the final decree.[327] A contention that the defendant is a man of unsound mind, cannot be urged in an appeal against the final decree, as it could have been put forward at the trial of the suit, nor a contention that the award of mesne profits in the preliminary decree was not legal.[328] A claim by the manager of a *tarwad* to a fourth share in certain properties alleged to be self-acquired cannot be put forward for the first time in an appeal against the final decree.[329] It is to be noted that the present section applies only to preliminary decrees passed after the commencement of the CPC.[330]

As per section 97, CPC, if a person aggrieved by the preliminary decree has not preferred an appeal from such decree, he or she is not allowed to dispute the correctness of the findings in the preliminary decree in an appeal filed against the final decree. In *Selvi v Gopalakrishnan Nair*[331], an aggrieved defendant had not preferred an appeal against the preliminary decree

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320. *Laxmi v Sankappa Alwa*, AIR 1989 Ker 289.
321. *Biswa Nath v Bani Kanta*, (1896) 23 Cal 406.
322. *Khadem Hossein v Emdad Hossein*, (1902) 29 Cal 758.
323. Code of Civil Procedure 1908, O XX, rule 18 below.
324. *Baloram Dey v Ram Chandra Dey*, (1896) 23 Cal 279.
325. *Ahmed v Hashim*, IA 91 : ILR 42 Cal 914; *Kanai Lal v Shyam Kishore*, AIR 1959 Cal 76 : 63 Cal WN 334.
326. *Kaushalya Devi v Baijnath*, AIR 1961 SC 790 : (1962) 1 SCC 684 : (1961) 3 SCR 769.
327. *Arshad Ali v Tahir Ali*, AIR 1954 Gau 33 (FB).
328. *Kesavana v Padmanabhan*, AIR 1958 Ker 158 : (1957) Ker LJ 1206 : (1958) Ker LJ 211.
329. *Narayanan v Narayanan*, AIR 1959 Ker 116 : (1958) ILR Ker 889 : (1958) Ker LJ 530 : (1958) Ker LT 782.
330. For preliminary decrees, see O XX below.
331. *Selvi v Gopalakrishnan Nair*, (2018) 7 SCC 319.

but he contested the findings thereof in an appeal against the final decree. Keeping in view the peculiar facts and circumstances of the case, where the trial court had not enquired into consistent averments made by the defendant disputing the boundaries and description of the suit property, the apex court made an exception and remanded the case back to the trial court to decide the disputed question on the basis of evidence.

[s 97.4] Where Preliminary Decree not Drawn Up

A right of appeal under this section arises only when a preliminary decree is "passed", that is, drawn up. It is the duty of the court, and not of the parties, to see that a decree is drawn up. Unless a decree is drawn up, there is no appeal. Therefore, the provisions of this section do not apply unless the preliminary decree is drawn up.[332]

[s 97.5] Two Preliminary Decrees

According to a decision of the Bombay High Court, the CPC contemplates only one preliminary decree.[333] But this observation requires modification. In the view of the Calcutta High Court, there can be, in exceptional cases, more than one preliminary decree.[334] So far as partition suits are concerned, if an event transpires after a preliminary decree has been passed which necessitates an alteration in the shares already determined, the court can and should do so and if there is dispute in that regard, the order of the court deciding such a dispute and altering the shares is a decree which is appealable.[335]

[s 97.6] Final Decree Passed Prior to or During Pendency of Appeal from Preliminary Decree

A Full Bench of the Calcutta High Court, after an exhaustive review of the case law, has held that an appeal from a preliminary decree is not incompetent if the final decree is passed before it is presented, and that in such a case, it is not necessary for the party aggrieved by the preliminary decree to appeal against the final decree, if the final decree, apart from being based on the preliminary decree, is otherwise correct.[336] Chief Justice Rankin said that the function of the final decree is merely to restate and apply with precision what the preliminary decree has ordained; that the decrees being in the same suit, the court in appeal from the preliminary decree, as it has power to reverse or vary the preliminary decree, has also the power to affect the final decree; that as the right of appeal from the preliminary decree is given without any qualification, the passing of a final decree is no bar to the institution or hearing of any appeal against the preliminary decree; that if the preliminary decree is set aside the final decree is superseded whether the appeal was brought before or after the passing of the final decree; and that the court when setting aside or varying the preliminary decree can and should give directions for setting aside or varying the final decree if the existence of the final decree is brought to its notice as in all cases it should be. The Bombay High Court has taken a similar

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332. *Vamanacharya v Govind,* AIR 1924 Bom 33 : (1923) 25 Bom LR 826; *Sakharam v Sadashiv,* (1913) 37 Bom 480; *Kaluram v Gangaram,* (1914) 16 Bom LR 67. See notes to section 33 and notes to section 96 "Where decree not drawn up," above.
333. *Vamanacharya v Govind,* AIR 1924 Cal 160 : (1923) 25 Bom LR 826.
334. *Raja Peary Mohan v Manohar,* AIR 1924 Cal 160 : (1923) 27 Cal WN 989.
335. *Phoolchand v Gopal Lal,* AIR 1967 SC 1470; *Mayimu v Maliyammal,* AIR 1968 Ker 282 : (1968) 1 Ker 129.
336. *Taleb Ali v Abdul Aziz,* AIR 1929 Cal 689 : (1929) 57 Cal 1013.

view.[337] Even apart from special directions, the principle is well-settled "that orders and decrees which are subordinate and dependent on earlier orders and decrees could remain in force so long as the order or decrees on which they are dependent are not reversed or superseded".[338] Where an appeal has been preferred against a preliminary decree, and during its pendency a final decree is passed, that is no bar to the hearing of the appeal against the preliminary decree, as the final decree will be governed by it.[339]

The abovementioned judgment has the effect of overruling previous Calcutta decisions which had held that after the final decree, an appeal from the preliminary decree was incompetent,[340] or infructuous as the final decree cannot be contingent on the result of the appeal from the preliminary decree,[341] and that if the final decree is passed after institution of the appeal from the preliminary decree, the latter should be amended to include an appeal from the final decree.[342]

The Madras and Allahabad High Courts had held that an appeal from the preliminary decree is competent although no appeal has been filed against the final decree, and that after the preliminary decree is set aside, the final decree fails with it.[343] The same view had been taken by the Lahore High Court.[344] If after the passing of the final decree, an appeal from the preliminary decree is dismissed, the decree-holder has a right to apply for a second final decree in conformity with the appellate decree. He may exercise this right within three years of the date of the appellate decree.[345]

[S 98] Decision where appeal heard by two or more Judges.—(1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal, is [346][composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench] and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, the such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it.

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337. *Baswant v Kallappa,* AIR 1938 Bom 222 : (1938) 40 Bom LR 164.
338. *Rangaiah v Kunela Peddireddi,* AIR 1957 AP 330; *Kanakiah v Lakshmayya,* AIR 1950 Mad 218 : (1950) 2 Mad LJ 379; *Varadarajan v Venkatapathi Reddi,* AIR 1953 Mad 587 : (1953) 1 Mad LJ 148.
339. *Uppala Subbaiah v Chitrala Narasimhaloo,* AIR 1956 Hyd 161 : (1956) ILR Hyd 45.
340. *Mackenzie v Narsingh Shai,* (1909) 36 Cal 762.
341. *Gopal Chandra v Abdur Rahim,* AIR 1927 Cal 492 : (1927) 54 Cal 328; *Jogendra Narayan v Satyendra,* AIR 1925 Cal 790 : (1925) 29 Cal WN 640.
342. *Khirodomoyi v Adhar,* (1913) 18 Cal LJ 321; *Chandumal v Motilal,* AIR 1926 Bom 43 : (1925) 27 Bom LR 1942; *Nanibala v Ichhamoyee,* AIR 1925 Cal 218 : (1925) 40 Cal LJ 29.
343. *Lakshmi v Maru,* (1914) 37 Mad 29; *Ramavien v Veerappudayan,* (1912) 37 Mad 455; *Kanhaiya Lal v Tribeni,* (1914) 36 All 532 (FB).
344. *Gurmukh Singh v Shiv Ram,* AIR 1935 Lah 482 : (1935) 17 Lah 53.
345. *Ramaswami v Pakkiri,* AIR 1924 Mad 65 : (1934) 66 Mad LJ 24.
346. Substituted by Act 104 of 1976, section 34, for certain words (w.e.f. 1-2-1977).

[347][(3) Nothing in this section be deemed to alter or otherwise affect any provision of the letters patent of any High Court].

SYNOPSIS

[s 98.1] Changes in the Section..... 1163
[s 98.2] Scope..... 1163
[s 98.3] "Consisting of"..... 1164
[s 98.4] Difference of Opinion as to Part of Decree..... 1165
[s 98.5] Difference of Opinion on a Point of Law..... 1165
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[s 98.1] Changes in the Section

This section corresponds with section 575 of the Code of Civil Procedure 1882 except that the proviso to sub-section (2) of the present section differs in several material respects from the proviso to the second paragraph of section 575. That proviso ran as follows:

> Provided that if the Bench hearing the appeal is composed of two Judges belonging to a court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same court, and shall be decided according to the opinion of the majority (if any) of all the judges who have heard the appeal including those who first heard it.

The proviso to sub-section (2) before its amendment in 1976 used the words:

> where the Bench hearing the appeal is composed of *two Judges* belonging to a court consisting of more than two Judges.

The amendment substitutes for these words the following:

> where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a court consisting or more Judges than those constituting the Bench.

The amendment has been carried out to include cases where a bench of more than two even number of judges is equally divided, and a reference is made to one or more of the other judges of that high court.

Sub-section (3) was inserted in the section by the Repealing and Amending Act 18 of 1928.

[s 98.2] Scope

There can be only one judgment in a case. Two contradictory judgments or judgments in variance with each other will not have the effect of deciding any question or issue in the case or of deciding any of the rights of the parties. It is also plain that such judgments can neither be enforced nor be given effect to. Therefore, if two judges constituting a Division Bench give contradictory decisions or decisions in variance with each other, in law, such decisions cannot be called as judgments as they do not decide any question or issue in the case or proceeding

347. Inserted by Act 18 of 1928, section 2 and Sch I.

nor do they decide any of the rights of the parties—the real test being what is the effect of the two decisions on the case or proceedings in which it is made, the language or phraseology used being wholly immaterial, having no bearing. In such a situation, the decisions so rendered will only amount to opinions of the respective judges. This principal will, however, not apply where on account of some statutory provisions like section 98 of the CPC, contradictory decisions by their own force lead to decision of any question or issue in the case or any of the rights of the parties.

There can be no doubt that the proper course for the judges who have dissented in their respective opinions while hearing a writ petition is not to pass final order, either allowing or dismissing the same, but to state their point of difference after expressing their opinions. However, it will still be open to them to state the point upon which they have differed even if they have passed final orders. If the point of difference is not stated, it will be for the third judge (or judges) to whom the case is referred to ascertain the same and to give his (or their) opinion thereon.[348] For the applicability of the section 98(2) of the CPC, the basic requirement is that the Division Bench of the high court consisting of two or more judges must be dealing with the case, where there is a decision of the lower court which is placed for consideration of the Division Bench of the high court. By its very language, section 98(2), of the CPC cannot be applied to the decisions rendered by a Division Bench of a high court in exercise of its original civil jurisdiction.[349]

In a very recent judgment from the Supreme Court, a peculiar situation arose in the High Court of Sikkim, wherein a matter was heard by the Division Bench at a time when the total strength of the high court was of two judges. There was a difference of opinion between both the judges, as such the matter was agreed to be placed before the Hon'ble Chief Justice/judge as soon as he assumes charge. Thereafter, one of the judges of the Division Bench was transferred to another high court and another judge assumed office in his place. One of the parties thereafter moved an application under section 98(2) read with section 151 of CPC, praying that appeal be not heard by a third judge. Due to inadvertence, the matter was not listed before the successor court but was listed before the court of the Chief Justice. The learned Chief Justice was of the view that the order of reference made on the judicial side by the Division Bench cannot be upset either on the administrative side or on the judicial side. The Chief Justice, hearing the appeal as a third judge, dismissed the application under section 98.

The Supreme Court held that taking into account the fact that for the time being there were only two judges in position and that the learned judges, who constituted the Division Bench, expressed different views and at the same time thought fit to refer the matter to the opinion of a third judge, the matter should wait till the arrival of a third judge.[350]

[s 98.3] "Consisting of"

The words "consisting of" shall mean and also considered to have relevance only to the sanctioned strength. Therefore, taking into account the fact that for the time being, there were only two judges in position and that the learned judges, who constituted the Division Bench.

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348. *Shriram Industrial Enterprise Ltd v UOI*, AIR 1996 All 135 (FB).
349. *Reliance Industries Ltd v Praveen Bhai Jas Bhai Patel*, (1997) 7 SCC 300.
350. *Sikkim Subba Associates v State of Sikkim*, AIR 2001 SC 2062 : (2001) 5 SCC 629 : (2001) 3 SCR 261 : [2001] 2 LRI 1072.

expressed different views and at the same time thought fit to refer the matter to the opinion of a third judge, the matter should await till the arrival of a third judge.[351]

[s 98.4] Difference of Opinion as to Part of Decree

When a bench of two judges agree in reversing part of a decree but differ as to the rest, the portion of which they agree will be reversed and the rest confirmed.[352]

[s 98.5] Difference of Opinion on a Point of Law

No reference can be made under this section if the judges differ on a question of fact. The power to refer can only be exercised if there is a difference of opinion on a point of law.[353]

[s 98.6] Difference of Opinion on a Question of Fact

No reference can be made under this section if the judges differ on question of fact.

The issues of facts arising between the parties in the suit and appeal were sufficient to decide the cases for or against the plaintiff; the cleavage of opinion between the two judges of the Division Benches on the other mixed issues of law and fact is inconsequential. Their difference of opinion on mixed issues of law and fact, even if it would have been referred for obtaining majority opinion of the judges of the court, would not have changed the ultimate result of the appeals because the judges had also differed on issues of fact and the decision of one of them was sufficient for decision of the cases in appeals. Thus, as the opinion of one of the judges on issues of fact was decisive of the appeal, it would not be in accordance with the established practice of the Supreme Court to interfere by grant of special leave to appeal. Grant of special leave to appeal against judgments raising issues of fact which were determinative would be against the legislative intent contained in provisions of sub-section (2) of section 98 of the CPC.[354]

A two Judge Bench of the Supreme Court[355] doubted the correctness of the decision in *PV Hemalatha*[356] in which the High Court of Kerala had while relying upon section 98 confirmed the decree under appeal despite difference of opinion between the two judges on the bench and the Supreme Court held that while section 23 of the Travancore-Cochin High Court Act was the general law, section 98(2) was a special provision. In *Pankajakshi - I*,[357] the Supreme Court took a diametrically opposite view. The matter came up before a three Judge Bench in *Pankajakshi –II*[358] in 2014, wherein the matter was referred to a 5 Judge Bench on two questions –

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351. *Sikkim Subba Associates v State of Sikkim*, AIR 2001 SC 2062 : (2001) 5 SCC 629 : (2001) 3 SCR 261.
352. *Rajagopala v Subbamal*, AIR 1928 Mad 180 : (1938) 51 Mad 291; *Harakh Narain v Babban*, AIR 1933 All 473 : (1933) 55 All 672; dissenting from *Punjab Akhbarat and Land Press Cok v Ogilvie*, AIR 1926 Lah 65 : (1926) 7 Lah 179.
353. *Gossami v Romanlalji* (1890) 17 Cal 3; *Har Prasad v Fazal Ahmad*, AIR 1933 PC 83 : (1932) 60 IA 116 : 55 All LJ 83; *Baboo Ram v Ishrat Ali* AIR 1975 All 180.
354. *PV Hemalatha v Kattamkandi Puthiya Maliackal Saheeda*, AIR 2002 SC 2445 : (2002) 5 SCC 548; see also *Tejkam v Kirpal Singh*, AIR 1995 SC 1681.
355. *Pankajakshi v Chandrika*, (2010) 13 SCC 303 : (2010) 11 Scale 567 : (2010) 12 SCR 989 : JT (2010) 12 SC 151.
356. *PV Hemalatha v Kattamkandi Puthiya Maliackal Saheeda*, AIR 2002 SC 2445 : (2002) 5 SCC 548.
357. *Pankajakshi v Chandrika*, (2010) 13 SCC 303 : (2010) 12 SCR : (2010) 11 Scale 567 989 : JT (2010) 12 SC 151.
358. *Pankajakshi v Chandrika*, AIR 2016 SC 1213 (CB) : (2016) 6 SCC 157.

> (1) Whether Section 23 of the Travancore-Cochin Act remains unaffected by the repealing provisions of Section 9 of the Kerala High Court Act. If so, whether Section 23 is in the nature of a special provision *vis-à-vis* Section 98(2) of CPC?
>
> (2) Whether this Court can under Articles 136 and 142 of the Constitution direct in any appropriate case a reference to a third judge to resolve the conflict arising between two judges of the High Court hearing an appeal, on a question of fact?

A constitution bench of the Supreme Court, therefore, in *Pankajakshi –III*[359] speaking through Justice Nariman held that held that section 23 of the Travancore-Cochin High Court Act remains unaffected by the repealing provision of section 9 of the Kerala High Court Act, and that, being in the nature of special provision vis-à-vis section 98(2) of the CPC would apply to the Kerala High Court. The view taken in *PV Hemalatha*,[360] *Kulwant Kaur*[361] and *Tej Kaur*[362] therefore stand overruled on this aspect. In his supplementing opinion, Kurian Joseph, J while calling out for a comprehensive legislation pointed out that –

> Under Section 98 of The Civil Procedure Code, 1908 (for short, 'the CPC'), when the Judges differ in opinion on a point of law, the matter is required to be placed for opinion of the third Judge or more of other Judges as the Chief Justice of the High Court deems fit and the point of law on which a difference has arisen is decided by the majority and the appeal is decided accordingly. It is to be seen that under the proviso to Section 98(2) of the CPC, hearing by a third Judge or more Judges is only on the point of law on which the Division Bench could not concur. There is no hearing of the appeal by the third Judge or more Judges on any other aspect. Under Section 98(2) of the CPC, in case an appeal is heard by a Division Bench of two or more Judges, and if there is no majority and if the proviso is not attracted, the opinion of that Judge or of the equally divided strength in the Bench which concurs in a judgment following or reversing the decree appealed from, such decree shall stand confirmed.

[s 98.7] The Appeal Shall Then Be Heard upon That Point Only

Under the old section, it was the appeal that was referred to a third judge when the judges hearing the appeal differed in opinion on a point of law and it was held that on such reference the whole appeal was open for argument, and not only the point of law on which the judges had differed.[363] Under the present section, the judges have to state the point of law upon which they differ, and the appeal is to be heard upon that point only. The third judge has no jurisdiction to adjudicate on points on which the two judges were in agreement.[364]

When a reference is made to the third judge on the difference of opinion on the question of law, it is not open to the third judge to go behind the question of fact arrived at by both the judges. Under section 98, only the question of law on the admitted fact can be referred to the third judge for the disposal.[365]

[s 98.8] By Whom Appeal to be Heard Upon Point of Law Stated

Where a point of law on which the judges hearing the appeal differ has been stated, the appeal is to be heard upon that point by one or more of the other judges of the court. This

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359. *Pankajakshi v Chandrika*, AIR 2016 SC 1213 (CB) : (2016) 6 SCC 157.
360. *PV Hemalatha v Kattamkandi Puthiya Maliackal Sabeeda*, AIR 2002 SC 2445 : (2002) 5 SCC 548.
361. *Kulwant Kaur v Gurdial Singh Mann*, 2001 AIR (SC) 1273 : (2001) 4 SCC 262 : (2001) 1 PLJ 416.
362. *Tej Kaur v Kirpal Singh*, AIR 1995 SC 1681 : (1995) 5 SCC 119 : 1995 (3) LJR 182.
363. *Seshadri v Nataraja*, (1898) 21 Mad 189.
364. *Zainuddin Hussein v Sohan Lal*, AIR 1958 Pat 290.
365. *Pulin Behari Pal Mahadeb Dutta*, AIR 1981 Cal 61.

was, in fact, the practice followed in Bombay under the Code of Civil Procedure, 1882.[366] In Allahabad, the appeal was heard by a bench including the judges who first heard it.[367] It is to be noted that while the appeal upon the point of law under this section is to be heard by a judge or judges other than those who first heard it, the point is to be decided according to the opinion of the majority (if any) of the judges who have heard the appeal including those who first heard it.

[s 98.9] Where Judges Differ on a Point of Law, but do not State the Point

A obtains a decree against *B* in the court of a subordinate judge. *B* appeals from the decree to the district judge and the decree is confirmed in appeal. *B* appeals to the high court. The appeal is heard by a bench of two judges. The judges differ in opinion on a point of law, but they do not state the point of law, and deliver judgments as judgments of the court without any reservation, one judge holding that the appeal should be allowed and the other that it should be dismissed. In such a case, the dissenting judgments operate as confirming the decree of the district court under para 1 of sub-section sub-section (2).[368] The question still remains whether an appeal lies to the high court under the Letters Patent from the confirming judgment. Under the Letters Patent, before they were amended in 1928, it was held that an appeal did lie from such judgment.[369] Under the amended Letters Patent no appeal lies to the high court.[370] It may here be noted that where the judges differ in opinion on a point of law, but do not state the point of law and deliver judgments as judgments of the court without any reservation, they cannot afterwards state the point of law.[371] Judges hearing an appeal were equally divided. Hearing of appeal by third judge was proposed. But there was no joint order, specifying the difference. It was held that this did not vitiate the hearing by the third judge.[372]

[s 98.10] Appeal to High Court From Award Under Land Acquisition Act, 1894

This section applies to land acquisition appeals by virtue of the provisions of section 54 of the Land Acquisition Act, 1894.[373]

[s 98.11] This Section and Clause 36 of the Letters Patent

Sub-section (3) was inserted by the Repealing and Amending Act 18 of 1928. It provides that nothing in the section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any high court. Before the Act of 1928, the trend of decisions was that where an appeal was heard by a bench of two judges of a chartered high court and the judges

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366. *Nagu v Salu,* (1891) 15 Bom 424; *Jahangir v Secretary of State,* (1904) 6 Bom LR 131.
367. *Rohilkhand Bank v Raw,* (1884) 6 All 468.
368. *Lal Singh v Ghansham,* (1887) 9 All 625; *Devchand v Hirachand,* (1889) 13 Bom 449; *Keshav v Vinayak,* (1894) 18 Bom 355; *Narayanaswami v Osuru,* (1902) 25 Mad 548 (revision petition against decree of the district *munsif* under the Provincial Small Cause Court Act); *Ashtabhuja Singh v Board of Revenue Allahabad,* AIR 1954 All 521 : 1154 All LJ 230.
369. (1887) 9 All 625, 644–45; (1889) 13 Bom 449; (1894) 18 Bom 355.
370. See amended clause 15 of the Letters Patent for the High Courts of Calcutta, Madras and Bombay, amended clause 10 of the Letters Patent for the High Courts of Allahabad, Lahore and Patna, and amended clause 13 of the Letters Patent for the High Courts of Rangoon.
371. *Lal Singh v Ghansham,* (1889) 9 All 625.
372. *Jayanti Devi v Sri Chand Mal,* AIR 1984 Pat 296.
373. *Manavikraman v Collector of the Nilgiris,* (1918) 41 Mad 943.

differed, then if the appeal was one from the original side of the high court the procedure was governed by clause 36 of the Letters Patent,[374] but if the appeal was from the decree of a subordinate judge, the procedure was governed by the present section.[375] At the same time, it was held by the High Court of Allahabad[376] that clause 27 of the Letters Patent of that high court (corresponding to clause 36 of the Letters Patent of the High Courts of Calcutta, Madras and Bombay) applied even to appeals from the decree of a subordinate judge. All the cases were reviewed by a Full Bench of the Madras High Court[377] and it was held that the effect of sub-section (3) was that clause 36 applied not only to appeals from the original side of a chartered high court but also to appeals to the high court from decrees of subordinate courts. The Supreme Court considered the Madras judgment and held that the view of Madras High Court and various other high courts is right that the provisions of section 98 are not applicable to high courts which are governed by Letters Patent and a matter can be referred to a third judge on a difference of opinion between two judges even on a point of fact.[378] Thus, the effect of sub-section (3) is that section 98 applies only to courts other than chartered high courts. The difference of procedure between clause 36 and section 98 is:

(i) that while a reference on the point of difference is obligatory under clause 36, it is optional under section 98; and

(ii) while a reference under clause 36 may be on a question of fact and law, it can be on a question of law only under section 98.[379]

In *State of Andhra Pradesh v Pratap Karan*,[380] it was contended that the judges of Division Bench who heard the appeal differed vertically in as much as section 98(2) provides for confirmation of the decree of the trial court. Reference to the third judge was made in the present case not after formulating any points of disagreement on the question of law, hence the reference by the Chief Justice to the third judge was ultra vires. It was also submitted that even if the provisions of the Letters Patent Act were invoked the same cannot override the provisions of section 98. It was also submitted that even if clause 36 of the Letters Patent of Madras High Court as adopted by the Andhra Pradesh High Court is held applicable, as no points of agreement have at all been formulated for consideration by two judges who heard the appeal, reference to third judge was incompetent. The Supreme Court held that there was complete compliance with clause 36 of the Letters Patent of the Andhra Pradesh High Court and refused to reverse the finding of the two judges of the high court.

Rule 6 of Chapter II of Patna High Court Rules states as follows:

> 6. Appeals to the High Court under Clause 10 of the Letters Patent from the judgement of a Bench confirming the judgement of a Lower Court under Section 98 of the Code of Civil Procedure shall be heard by a Bench consisting of at least three Judges, including both or neither of the Judges of the Bench from whose judgment the appeal is preferred, and

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374. *Bhaidas v Bai Gulab*, AIR 1921 PC 6 : 48 IA 181; *Roop Laul v Lakshmi Dass*, (1906) 29 Mad 1; *Nundeeput v Alenexander Shaw*, (1870) 13 WR 209; *Surajman v Horniman*, (1918) 20 Bom LR 185, 218; *Justin Hull v Arthur Francis*, (1919) 24 Cal WN 352.
375. *Bhuta v Lakadu*, (1919) 43 Bom 433; *Tin Tin v Maung Ba*, AIR 1924 Rang 148 : (1923) 1 Rang 584, 596; *Prafulla v Bhabani*, AIR 1926 Cal 121 : (1925) 52 Cal 1018; *Punjab Akhbarat and Press Co v Ogilvie*, AIR 1926 Lah 65 : (1926) 7 Lah 179; *Venkatasubbiah v Venkatasubbamma*, AIR 1925 Mad 1032.
376. *Lachman Singh v Ram Lagan* (1904) 26 All 10.
377. *Dhanaraju v Balkissendas*, AIR 1929 Mad 641 : (1929) 52 Mad 563; *Debi Prasad v Gaudham*, AIR 1933 Pat 67 : (1932) 11 Pat 772; *Sardar Bibi v Nawaz Khan*, AIR 1934 Lah 371 (FB) : (1934) 15 Lah 425.
378. *SGP Committee v MP Dass Chela*, (1998) 5 SCC 157.
379. *Bakaro & Ramgur Ltd v State of Bihar*, AIR 1966 Pat 154. See notes under clause 36 of the Letters Patent.
380. *State of AP v Pratap Karan*, AIR 2016 SC 1717 : (2016) 2 SCC 82.

> if from the judgment of one Judge of a Bench of two Judges, it shall be heard by a Bench consisting of at least two Judges other than the Judge from whose judgment the appeal is preferred.

Full Bench of the Patna High Court has held that since the appeal is to be heard by the Full Bench of the high court, Hon'ble Chief Justice can be a member of a Full Bench.[381]

[s 98.12] This Section and Section 8 of the Hyderabad High Courts Act

When in an appeal arising out of a suit instituted when the Hyderabad High Court Act was in force, the judges differ, the case should be disposed of in accordance with section 8 of the Hyderabad High Court Act, and not section 98 of the CPC, which was extended to Hyderabad after the commencement of the list.[382]

[s 98.13] Income-Tax Act, 1961

It is clause 36 of the Letters Patent that applies to a reference to the high court under section 66 of the Income-Tax Act, 1922 (see section 256 of the Income-Tax Act, 1961) and not section 98 of the CPC.[383]

[S 99] No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.—No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [384][or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

[385][Provided that nothing in this section shall apply to non-joinder of a necessary party.]

SYNOPSIS

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[s 99.1] Changes in the Section

This section corresponds with section 578 of the Code of Civil Procedure 1882, except in the following respects:

(i) The words "any misjoinder of parties or causes of action" are new.[386]

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381. *Kalpana Rani and Prashant Kumar v The State of Bihar*, through The Principal Secretary, Human Resources Development Department, AIR 2014 Pat 173 : (2014) 2 PLJR 665 : (2014) 4 LLN 753.
382. *Gurappa v Renukdadas*, AIR 1962 Mys 10.
383. *Emperor v Probhat*, AIR 1924 Cal 668 : (1924) 51 Cal 504.
384. Inserted by Act 104 of 1976, section 35 (w.e.f. 1-2-1977).
385. Inserted by Act 104 of 1976, section 35 (w.e.f. 1-2-1977).
386. As to the effect of these words see notes to O II, r ule; "Procedure in case of misjoinder of plaintiffs and causes of action", and "Procedure in case of multifariousness", and notes to O II, rule 4, "Leave of the court".

(ii) The words, "in any proceedings in the suit", have been substituted for the words, "whether in the decision or in any order passed in the suit or otherwise".[387]

(iii) The proviso is new and has been inserted by the Amendment Act, 1976.

[s 99.2] Scope of the Section

The mere circumstance of there being an error, defect or irregularity in any proceeding in a suit, is no ground for reversing or varying a decree in appeal. But if it appears that the error, defect or irregularity affected the merits of the case or jurisdiction of the court, it would be a ground for reversing or varying the decree. Where an irregularity is one which affects the merits of a case or the "jurisdiction of a court", it is said to be a material irregularity. Where it does not, it is usually spoken as a mere irregularity. This section cures a mere irregularity, error of defect. It does not cure a material irregularity, error or defect. In a case of alleged misjoinder of causes of action, the Privy Council applied the principle of this section and observed:

> The provisions contained in the Civil Procedure Code do not regulate the procedure of their Lordships in bearing appeals from India, but there can be no doubt that the rule embodied in Section 99 proceeds upon a sound principle, and is calculated to promote justice.[388]

The appellate court should interfere with the judgment under appeal not because it is not right, but when it is shown to be wrong.[389] In *Kiran Singh v Chaman Paswan*,[390] the policy behind this section was thus stated by the Supreme Court:

> When a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice.

A claim of second wife for maintenance after the suppression of the fact about the first marriage and desertion of second wife after cruelty is a substantial question of law for the purposes of section 100.[391]

An objection as to territorial jurisdiction of a court which has passed the decree on merits and where no prejudice has been caused, is held to be of a technical nature to which this section would apply. Thus, where judicial separation in an application by the husband was decreed, such a decree would not be treated as a nullity in subsequent divorce proceedings under section 13 of the Hindu Marriage Act, 1955 on the ground that the marriage was neither solemnised nor had the parties the required residence within the territorial jurisdiction of the court.[392] But this section would not protect a decree where there is defect of pecuniary jurisdiction.[393] The eviction of the same tenant or the same tenants jointly from two or more tenements in one suit by the landlord is legally permissible; and that such a suit cannot be dismissed for mis-joinder of causes of action.[394] The question before the Hon'ble Supreme Court was whether every violation of regulations renders the inquiry and the punishment

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387. (As to the effect of this alteration, see notes below, "In any proceedings in the suit".)
388. *Muhammad Hussain Khan v Kishva Nandan*, AIR 1937 PC 233 : 64 IA 250 : 1937 All 655 : (1937) Bom LR 979.
389. *Bibi Riajan Khatun v Sadrul Alam*, AIR 1996 Pat 156.
390. *Kiran Singh v Chaman Paswan*, AIR 1954 SC 340 : (1955) 1 SCR 117 : (1954) SCJ 514 : (1954) SCA 725.
391. *Sau Shaila Balasaheb Kadam v Balasaheb Hindurao Kadam*, (2015) 1 SCC 802 : 2014 (12) Scale 646 : 2015 (1) PLJR (SC) 232; *Badshah v Urmila Badshah Godse*, AIR 2014 SC 869 : (2014) 1 SCC 188 : (2013) 10 SCR 259.
392. *Omprakash Dhavan v Santosh Kumari*, AIR 1965 Mys 110.
393. *Suresh Kumar v State*, AIR 1975 MP 30 : (1974) MP LR 552.
394. *Jamiluddin v Shamsuddin*, AIR 1999 All 150 (DB).

void under the provisions of State Bank of Patiala (Officers') Service Regulation, containing provisions corresponding to section 99 of the CPC and section 465 of the Code of Criminal Procedure, 1973 or whether the principle underlining section 99 of the CPC and section 465 of the Code of Criminal Procedure, 1973 are applicable in the case of disciplinary proceedings as well. The Hon'ble Supreme Court held that the test in such a case should be one of prejudice, as would be later explained in this judgment. But this statement is subject to a rider. The regulation may contain substantive provisions and example regarding the authority competent to impose a particular punishment on a particular employee/officer. Such provisions must be strictly complied with. But there may be any number of procedural provisions which stand on a different footing. Even among procedural provisions, there may be some provisions which are of fundamental provision in the case of which the theory of substantial compliance may not be applicable.[395]

The question for consideration before the Supreme Court was that whether the suit filed by the father of the appellants in respect of property owned by appellants could be held to be not maintainable even when the appellants were added as plaintiffs as heirs of their father who died during pendency of the suit and whether description of the appellants who are owners as heirs instead of owners in their own right will be a case of mere "error, defect or irregularity" not affecting the merits or jurisdiction of the court which did not affect the maintainability of the suit? The Supreme Court, speaking through Goel, J, held that the District Judge was not justified in reversing the decree of the trial court on such a technicality which did not in any manner affect the merits of the case and referred to section 99 to hold that decree of trial court cannot be reversed on the said ground.[396]

[s 99.3] Misjoinder of Parties or Causes of Action

This expression may be analysed and the rule contained in this part of the section may be stated as follows:

No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of:

(i) misjoinder of plaintiffs (O I, rule 1);

(ii) misjoinder of defendants (O I, rule 3);

(iii) misjoinder of plaintiffs and causes of action (O II, rule 3).

The practice was different under the Code of Civil Procedure, 1882;[397]

(iv) misjoinder of defendants and causes of action.[398]

The practice was different under the Code of 1882.[399]

(v) misjoinder of causes of action.[400]

(See notes to O II, rule 4, "Leave of court".)

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395. *State Bank of Patiala v SK Sharma,* AIR 1996 SC 1669 : (1996) 3 SCC 364.
396. *Kuldeep Kr Dubey v Ramesh Chandra Goyal,* AIR 2015 SC 1135 : (2015) 3 SCC 525.
397. See notes O II, rule 3 "Procedure in case of misjoinder of plaintiffs and causes of action".
398. *Gauri Shankar v Keshab Deo,* AIR 1929 All 148 : (1929) 27 All LJ 204; *PG Venkataswamy v Hussain,* AIR 1973 Mys 145. See O II, rule 3.
399. See notes to O II, rule 3 "Procedure in case of multifariousness".
400. *Midnapore Zemindary Co Ltd v Naresh Narain,* AIR 1921 Cal 368 : (1921) 33 Cal LR 317; *Khub Lal v Jhapsi,* AIR 1924 Pat 613 : (1924) 3 Pat 244. See O II, rules 3, 4 and 5.

The words, "on account of any misjoinder of parties or causes of action", have been inserted in the section to make it clear that such a misjoinder is to be treated as a mere irregularity. Hence, the court will not interfere if the merits of the case have been satisfactorily disposed of in spite of the complication of the proceedings due to multifariousness.[401]

[s 99.4] Non-Joinder

The Madras High Court has held that the expression "misjoinder" in this section includes "non-joinder".[402] But this was doubted in a later Madras case.[403] The non-joinder of a necessary party is a defect which affects jurisdiction and is not within this section.[404] This is now confirmed legislatively by the new proviso to the section. The decision to the contrary in *Shanmuga v Subbayya,*[405] is no longer good law; and where the statute requires the joinder of certain parties, omission to do so cannot be cured by this section.[406] (See O I, rule 9, and notes thereto.)

Exercise of power under O I, rule 10(2) and O VI, rule 17 is not impaired by the addition of provisos to section 99 and O I, rule 9 by 1976 Amendment to the Code. Where there is non-joinder of a necessary party, the court should not dismiss the suit, but should invoke power under O I, rule 10(2) and O VI, rule 17. In such cases, the power of the court under O I, rule 10(2) and O VI, rule 17 (which remain unamended), can be invoked. This power is not impaired or indented in any manner by the aforesaid provisos, the real purport of which is not penal, but remedial.[407]

[s 99.5] Error, Defect or Irregularity not Affecting the Merits of the Case

A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped,[408] or for non-compliance with O XIII, rule 4, in admitting a document in evidence,[409] or for admitting a document declared invalid where the judgment is not based on that document,[410] or because the wrong side was allowed to begin,[411] or because the suit was decided on a Sunday,[412] or because the suit was instituted by an agent under a defective power of attorney[413] (O III, rule 2), or failure to obtain leave under O II, rule 4,[414] or because the plaint was signed on behalf of the plaintiff by his wife, and no power of attorney was on record,[415] or because an order allowing execution against the legal representative of a deceased judgment-debtor was made by the transferee court instead of by the court which passed the

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401. *Ramddhan Puri v Lachmi Narain,* AIR 1937 PC 42 : (1937) 16 Pat 149 : 39 Bom LR 363; *Jai Gobind v Nageshwar Prasad,* AIR 1953 Pat 326; *Jamiluddin v Shamsuddin,* AIR 1999 All 150.
402. *Yakkanath v Manakkat,* (1910) 33 Mad 436.
403. *Shanmuga v Subbayya,* AIR 1922 Mad 317 : (1922) 42 Mad LJ 133, 138.
404. *Amirchand v Raoji,* AIR 1930 Mad 714 : (1930) 58 Mad LJ 613.
405. *Shanmuga v Subbayya,* AIR 1922 Mad 317 : (1922) 42 Mad LJ 133, 138.
406. *K Mangaraju v Sri Venugopalswami Varu,* (1963) 2 Andh WR 1.
407. *Motoi Mis v Abdul Haque,* AIR 1984 Gau 77.
408. *Devachand v Hirachand,* (1889) 13 Bom 49.
409. *Hulas v Mohan Lal,* AIR 1960 Raj 94.
410. *Womes Chunder v Chundee Churn,* (1881) 7 Cal 293; *Girdhar v Ganpat,* (1874) 11 Bom HC 129.
411. *Makund v Bahori Lal,* (1881) 3 All 824.
412. *Sheoram v Thakur,* (1908) 30 All 136, in appeal from (1907) 29 All 562.
413. *Hirabai Gendalal v Bhagirath Ramchandra,* AIR 1946 Bom 174 : (1945) ILR Bom 819 : 47 Beng LR 808; *Ganpati v Jivanbai,* AIR 1923 Bom 44 : (1923) 47 Bom 227; *Manilal & Sons v Purushotham Umedbhai;* AIR 1960 Cal 15; *Wali Muhammad Khan v Ishaq Ali Khan,* AIR 1931 All 507 : ILR 54 All 57.
414. *New Mofussil Co v Shankerlal,* AIR 1941 Bom 247 : (1941) ILR Bom 361 : 43 Bom LR 293.
415. *Hudi Goshaon v Sudi Goshaon,* AIR 1962 P&H 467.

decree.[416] The expression 'any error, defect or irregularity in any proceedings in this suit' will also include signing and verification of the plaint as laid down in rules 14 and 15 of O VI of the CPC. It would be unfair and unjust to reject the plaint merely on the ground that the plaint was not properly signed and/or verified as plaintiff himself came to the witness box and made out the case (I) the plaint.[417] All these are irregularities not affecting the merits of the case or the jurisdiction of the court and they are cured by this section. It has similarly been held that this section applies when there is a misdescription of a party,[418] or when the summons issued is defective[419] or when a guardian *ad bite* is appointed without notice to the natural guardian as provided in O XXXII, rule 3,[420] or when notice is served without a direction from the court.[421] Where the court, having no jurisdiction, entertained the suit and no prejudice was caused to either side,[422] or where there is an improper verification of the plaint as regards the promissory note in the suit by the plaintiffs *mukhtar-i-am* especially when execution of the promissory note is admitted,[423] or when agreement to sell immovable property is executed by constituted attorney on behalf of the owner of the property and the suit for specific performance is filed against owner represented by his attorney holding irrevocable power of attorney,[424] the exclusion of evidence by the lower court is an irregularity which may or may not affect the merits of the case; if it does not, the irregularity is condoned under this section.[425] An omission to draw up a final decree under O XXXIV, rule 6, has been condoned under this section;[426] so also when it is not drawn in accordance with the form prescribed.[427] Similarly, substitution of the legal representatives of a deceased judgment-debtor in execution proceedings by the transferee court instead of the court which passed the decree is a procedural defect.[428] So also, failure to transpose the defendant as plaintiff.[429] But it would not be a defect within these sections where an *ex parte* decree has been passed without the defendant having been duly served.[430] For other cases, see—

(i) notes to section 15, "Where a suit which ought to have been instituted in a court of lower grade is instituted in a court of higher grade";

(ii) notes to section 92. "Consent of Advocate-General";

(iii) notes to O VI, rule 14, "Omission to sign plaint";

(iv) notes to O XVI, rule 1, "Remedy of party when witness-summons refused";

(v) notes to O XXVI, rule 4, "May issue";

(vi) notes to O XXXII, rule 1, "Objection of authority of next friend";

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416. *Jang Bahadur v Bank of Upper India Ltd,* AIR 1928 PC 162 : 55 IA 227 : ILR 3 Luck 314; *Nillawwa v Virupakshappa,* AIR 1959 Mys 99 : (1958) Mys 874.
417. *Kailash Singh v Hira Lal Day,* AIR 1994 Gau 12; *Mukhtiar Kaur v Gulab Kaur,* AIR 1977 P&H 257.
418. *Harsukh v Moshulal,* AIR 1957 Gau 22 : (1957) ILR Gau 25.
419. *Narendranath v Aaiya,* AIR 1959 Cal 231 : 63 Cal WN 216 : (1959) Cal LJ 249.
420. *Inder Pal Singh,* AIR 1956 All 218.
421. *Mohammed Ali v Abraham George,* AIR 1953 TC 209.
422. *Shanmughan v Vishnu Bharatheeyan,* AIR 2004 Ker 143.
423. *BR Sharma v Nanak Chand,* AIR 1967 All 487.
424. *Sushila v Nihal Chand Nahata,* AIR 2004 Mad 18.
425. *De Souza v Pestonji,* (1884) 8 Bom 408; *Suriyamoni v Kali Kanta,* (1901) 28 Cal 37; Indian Evidence Act 1872, section 167.
426. *Chhaganlal v Jayaram,* AIR 1927 Bom 131 : (1927) 51 Bom 125.
427. *Mahadev Pershand v Mungi,* AIR 1959 P&H 565 : (1959) ILR Punj 2266.
428. *JP Bhagat v Sharda Devi,* AIR 1965 Pat 52.
429. *Maddanappa v Chandramma,* AIR 1965 SC 1812 : (1965) 3 SCR 83.
430. *Charan Singh v Dewan Singh,* AIR 1972 P&H 288.

(vii) notes to O XXXII, rule 3, "Substantial representation";

(viii) notes to O XLI, rule 26, "Sending back case for a revised finding".

In a suit for restoration of possession, the court framed issue regarding title to property which was not required. The court also gave findings on the issue of title which was unnecessary. However, it was held that the decree which is otherwise correct need not be interfered on that ground. Such unnecessary issues and findings thereon can be struck off.[431]

[s 99.6] In any Proceedings in the Suit

These words have been substituted for the words, "whether in the decision or in any other passed in the suit or otherwise", which occurred in section 578 of the Code of Civil Procedure, 1882. The latter words were held to apply only to irregularities in proceedings subsequent to the institution of the suit, and not to irregularities in the frame or institution of the suit.[432] The rules of the Chief Court of Oudh require money deposited in court to be paid to the person entitled through the treasury; but when the *munsif* paid the money directly, this was held to be an irregularity cured by this section.[433] An order for a second commission on the same subject matter without setting aside the report of the first commissioner amounts to an irregularity in the proceedings.[434] The present section applies to irregularities in any proceedings in the suit. But it has no application to awards.[435]

[s 99.7] Irregularity Affecting Jurisdiction of Court

When a suit has been decided after going into merits and judgment delivered, the appellate court would not entertain an objection as to jurisdiction unless it has resulted in failure of justice. Thus, in a suit for accounts if the trial court has tried the issues on merits and passed a preliminary decree, the appellate court, in an appeal against that decree, would refuse to go into the question of territorial jurisdiction.[436]

Defendants claimed for themselves title to a temple constructed a hundred years ago and adjoining land in, and joined issues on the points with the plaintiffs. Oral evidence alone was led by the parties in the suit. It was held that the defendant cannot ask for reversing the finding given by the court in favour of the plaintiff, on the mere ground that the same was given on oral evidence.[437] Suit on basis of sale deed which was registered was filed. Certified copy of the sale deed was admitted by the trial court, as the original was lost. It was held that admissibility of the document could not be assailed in appeal.[438]

[s 99.8] Sale of Property of Minor

Where there was alienation of minor son's property by father and on attaining majority, the son filed a suit for declaration of title and ejectment of vendee without asking for relief of setting aside alienation covered by sale deed, it was held that the suit was not maintainable and

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431. *Radhikabai M. Sunwani v Tanu Isram Bishen*, (2007) 3 All MR 697 : (2007) AIHC 1923.
432. *Varajlal v Ramdat*, (1902) 26 Bom 259.
433. *Lakhpat Singh v Sat Narain*, AIR 1931 Oudh 22 : (1930) 5 Luck 116.
434. *Narayana Guptan v Madhava Menon*, AIR 1965 Ker 95.
435. *Jaidev v Kanhaiyalal*, AIR 1953 Ajm 49.
436. *Yogeshwar Raj v Yog Raj*, AIR 1967 P&H 163 : (1966) 68 Punj LR 214.
437. *Vidya Sagar Sharma v Anand Swarup Dublish*, AIR 1981 All 106.
438. *Rama Chandra Majhi v Hambai Majhi*, AIR 1989 Ori 27. See also section 21 and notes thereon.

was liable to be dismissed, as omission to ask for such relief cannot be considered as an error or defect or irregularity within the meaning of section 99.[439]

[s 99.9] Omission to Sign Exhibit — Effect

Where the exhibit which was accepted by both sides as a piece of document and which was marked in presence of both the parties, the failure to sign it by the presiding officer should not vitiate a judgment and a judgment cannot be deemed to be a nullity.[440]

[s 99.10] Suits Valuation Act, 1887, Section 11

Section 11 of the Suits Valuation Act, 1887 modifies the provisions of the present section in cases where an objection is taken in appeal that by reason of the over-valuation or under-valuation of a suit a court which had no jurisdiction with respect to the suit exercised jurisdiction with respect thereto.

After the amendment of section 2(2) by the deletion of the words "section 47 or (in 1976), an order under section 47 is no longer 'a decree' and is not appealable either under section 99A or under section 104."[441]

In a suit for possession, the reversal of the decree was sought on the ground that counter-claims was not properly valued. The plaintiffs could not establish their rights by means of an iota of evidence. It was held by the Allahabad High Court that even if the valuation was not in accordance with the Suits Valuation Act, the judgment and decree cannot be interfered with in second appeal.[442]

[[443][S 99A] **No order under section 47 to be reversed or modified unless decision of the case is prejudicially affected.**—Without prejudice to the generality of the provisions of section 99, no order under section 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case.]

The section follows the policy of the last section. Its object is to prevent interference with an order passed under section 47 by the executing court only on the ground of some error, defect or irregularity in the proceeding wherein it has been passed. But the section does not save from interference by the appellate court a material error, defect or irregularity which has prejudicially affected the decision of the case.

Appeals from appellate decrees

[[444][S 100] **Second appeal.**—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the

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439. *Sannidhi Ratnavathi v Arava Narasimha Murthy*, AIR 2004 AP 29.
440. *Matiur Rahman v Ramjan Ali*, AIR 2001 Gau 148.
441. *Tapan Chandra Deb Burma v Dulal Chandra Deb Burma*, AIR 1980 Gau 3.
442. *Dan Singh v Khaleel Higher Secondary School, Bareilly*, 2007 (5) ADJ 705 : (2007) AIHC 2605.
443. Inserted by Act 104 of 1976, section 36 (w.e.f. 1-2-1977).
444. Substituted by Act 104 of 1976), section 37, for section 100 (w.e.f. 1-2-1977).

High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard only on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.]

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[s 100.1] State Amendment

Kerala.—In sub-section (1) of Section 100, after clause (*c*), the following new clause (*d*) shall be added, namely:—

(*d*) the finding of the lower Appellate Court on any question of fact material to the right decision of the case on the merits being in conflict with the finding of the court of first instance on such question—CPC (Kerala Amendment) Act (13 of 1957) (w.e.f. 1-10-1958).

[s 100.2] Scope of the Section

The amended section has drastically cut down the scope of this section by providing in sub-section (1), that a second appeal is henceforth competent only if the case involves, at the

stage of admission, a substantial question of law. Further, such a question has to be precisely stated in the memorandum of appeal. Where the substantial question of law is not stated in the memorandum of appeal, the court shall formulate the same. The respondent however, has the right to challenge that no substantial question of law is involved. It has been reiterated that the framing of a substantial question of law is not necessary where the high court decides to dismiss the second appeal at an admission stage itself.[445]

Where the high court framed the substantial question of law involved in second appeal, but instead of answering them, it remitted the matter to the first appellate court, the Supreme Court set it aside on this ground itself and remanded the matter to the high court.[446]

It has been settled by the Supreme Court that on the day when the second appeal is listed for hearing on admission if the high court is satisfied that no substantial question of law is involved, it shall dismiss the second appeal without even formulating the substantial question of law. In cases where the high court after hearing the appeal is satisfied that the substantial question of law is involved, it shall formulate that question and then the appeal shall be heard on those substantial questions of law, after giving notice and opportunity of hearing to the respondent and the high court cannot reverse the judgment of the courts below without formulating the substantial question of law and complying with the mandatory requirements of section 100.[447]

In *Balwinder Singh v National Fertilizers Ltd*,[448] the Supreme Court held that the second appellate court has no jurisdiction to admit or decide the second appeal without formulating a substantial question of law at the initial stage.

In *Amar Nath v Kewla Devi*,[449] the Supreme Court observed:

> In our considered viewpoint, the High Court has committed a grave error in procedure by not framing substantial question of law and setting aside the judgment and decree of the first appellate court. The finding of fact recorded by the first appellate court on the contentious issues was based on reappreciation of the pleadings and evidence on record and careful perusal of the law and the High Court has failed to discharge its duty by not framing the mandatory substantial questions of law in order to examine the correctness of the judgment and decree passed by the first appellate court. In the interest of justice, the judgment and decree of the High Court has to be set aside as it has omitted to frame substantial questions of law and answer the same and thus has failed to discharge its duty under Section 100 CPC.

Under section 100 of Code of Civil Procedure, 1908 (as amended in 1976) the jurisdiction of the high court to interfere with the judgment of the court below is confined to hearing on substantial questions of law. Interference with a finding of a fact by the high court is not warranted if it involves re-appreciation of the evidence.[450] Where on the basis of evidence on

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445. *Harinarayan Bansal v Dada Dev Mandir Prabandhak Sabha (Barah Gaon) Palam*, (2015) 16 SCC 540.
446. *Satyendra Kumar v Mast Ram Uniyal*, (2013) 14 SCC 367.
447. *Ashok Rangnath Magar v Shrikant Govindrao Sangvikar*, (2015) 16 SCC 763.
448. *Balwinder Singh v National Fertilizers Ltd*, (2014) 13 SCC 277
449. *Amar Nath v Kewla Devi*, AIR 2014 SC 1243 : 2014 AIR SCW 3110 : (2014) 11 SCC 273 : JT 2014 (5) SC 570.
450. *Ram Kumar Agarwal v Thawar Das*, (1999) 4 LRI 687; *State of Himachal Pradesh v Mahavam Kam Sundri*, (1993) Supp 3 SCC 299; *Mst Sukhia v Took Narain Whish Wakarma*, AIR 1994 Pat 89; *Mari Chettiar v SP Arumuga Naicker*, (1995) Supp 1 SCC 152; *Pramilla Debbarama v Geetasree Debbarama*, AIR 1997 Gau 78; *Tirumala Tirupati Devasthanams v KM Krishnaiah*, (1998) 3 SCC 331; *Mahban Lal v Ashafi Lal*, (1997) 9 SCC 604; *Devi Prasad v Banshi Lal*, (1989) Supp 2 SCC 500; *AN Kapoor v Pushpa Talwar*, (1992) 2 SCC 80; *Chandramathan v Ishar Ram*, AIR 2000 Mad 60; *Secretary, Taliparamba Education Society v Moothedath Mallissery Illath MN*, (1997) 4 SCC 484; *Md Zuraz Asad Khan v Jasoo Mahakur*, AIR 1996 Ori 204; *Roop Singh v Ram Singh*, (1999) 4 LRI 390; *S Narayana Rao v R Narsinga Rao*

[Footnote No. 450 contd.]

record the trial court and the first appellate court had concurrently arrived at a finding of fact. The high court, in second appeal, cannot reverse the said concurrent findings under ordinary circumstances,[451] especially when the high court has not been able to find out any material that the findings of the trial court as well as the first appellate court were palpably erroneous.[452] The Supreme Court, time without number, pointed out that interference with the concurrent findings of the court below by the high court under section 100, must be avoided unless warranted by compelling reasons. In any case, the high court is not expected to re-appreciate the evidence just to replace the findings of the lower courts.[453] Where a court comes to a finding that the matter involved virtually the appreciation of oral and documentary evidence, it will not be proper in exercise of jurisdiction, under section 100 of the CPC to consider evidence afresh at the second appeal stage and in view of the fact that the parties are litigating for last 24 years. The interest of justice would be met if judgment and decree passed by lower appellate court is set aside and the matter is remanded back to the lower appellate court with a direction to decide afresh the appeal on merits in view of the observations of the high court in the judgment.[454] If, however, that court has patently gone wrong in casting the burden of proof and has misread the evidence and has also not considered the basic requirements to substantiate the case, it cannot be said that the high court is not competent to re-appreciate the evidence, to correct the mistake by the lower appellate court.[455]

Where the answer to the substantial questions of law framed by the high court was given after thorough adjudication to annul the concurrent findings of the courts below, the Supreme Court affirmed the same.[456]

It is well settled that in a second appeal, the high court can interfere with the concurrent findings of fact if they are perverse.[457] In *Rajasthan SRTC*,[458] the Supreme Court held that in exceptional circumstances, the high court can entertain the second appeal on pure questions of fact. It was further held that there is no prohibition for the high court to entertain a second appeal in this manner where factual findings are found to be perverse. Even in *Easwari v Parvathi*,[459] the Supreme Court reiterated the same. It was held in this case that though a plain reading of

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[Footnote No. 450 contd.]
AIR 1995 Kant 11; *Pal Singh v Sunder Singh*, (1989) 1 SCC 444; *Dudh Nath Pandey v Suresh Chandra Bhattasali*, (1986) 3 SCC 360; *Dr Ranbir Singh v Asharfi Lal*, (1995) 6 SCC 580; *Vrindavanibai Sambhaji Mane v Ramchandra Vithal Ganeshkar*, (1995) 5 SCC 215; *Mohd Zainulabudeen v Sayed Ahmed Mohideen*, (1990) 1 SCC 345; *Sitaramcharya v Gururajacharya*, (1996) 2 SCC 548; *Satya Pal Sikka v Amar Nath*, (1998) 8 SCC 358; *Sivanandan Thilakan, Vazhavila v Thankamma Omana, Puthumangalathu Veedu*, AIR 1995 Ker 223; *Shyam Sunder Dutta v Baikuntha Nath Banerjee*, (1994) 6 SCC 545; *Maniar Ismail Sab v Maniar Fakruddin*, (1989) 2 SCC 685.

451. *State of Haryana v Khalsa Motor Ltd*, (1990) 4 SCC 659; *Shri Ram Das v Ram Rekha*, AIR 1995 All 66; *Anwar Hossain Sheikh v Santi Kumar Mondal*, AIR 1997 Cal 120; *Dharam Singh v Sadhu Singh*, AIR 1997 P&H 198; *Samsuddin Rahman v Behari Das*, AIR 1996 SC 2535; *OTMOM Meyyappa Chettiar v OTMSM Kasi Viswanathan Chettiar*, (1993) Supp 4 SCC; *P Velayudhan v Kurungot Imbichia Moidu's Son Ayammad*, (1990) Supp SCC 9; *Parsini v Atma Ram*, AIR 1996 SC 1158; *Tulsa Singh v Agya Ram*, AIR 1994 HP 167; *Jaikisore Gattani v Godawari Devi*, AIR 1996 Pat 30.
452. *Gurdayal Singh v Ratan Kaur*, AIR 1996 P&H 265.
453. *Navaneethammal v Arjuna Chetty*, AIR 1996 SC 3521 : (1996) 6 SCC 166 : (1996) 7 JT 698 : (1996) SCR 582.
454. *Shayama Devi v Smt Premvati*, AIR 1996 All 57.
455. *Rajee v Babu Rao*, AIR 1996 Mad 262.
456. *Sebastiao Luis Ferandes v KVP Shastri*, AIR 2014 SC 977 : (2013) 15 SCC 161 : (2013) 11 SCR 1076; Relied on *Hero Vinoth (minor) v Seshammal*, AIR 2006 SC 2234 : (2006) 5 SCC 545.
457. *Keshar Bai v Chhunulal*, (2014) 11 SCC 438 : (2014) 1 SCR 166 : (2014) 1 Scale 170.
458. *Rajasthan SRTC v Bajrang Lal*, (2014) 4 SCC 693 : (2014) 3 SCR 782 : 2014 (3) Scale 615 : JT 2014 (3) 604.
459. *Easwari v Parvathi*, AIR 2014 SC 2912 : 2014 AIR SCW 4406 : (2014) 15 SCC 255 : JT (2014) 8 SC 432.

section 100 conveys that a second appeal be allowed only when there is a "substantial question of law" involved, the high court can interfere in second appeal when the findings of the first appellate court are not properly supported by evidence. There is no absolute ban on the high court in second appeal to interfere with the facts advanced in concurrent findings.

Thus, the position of law is that the high court can only entertain a second appeal on a substantial question of law and it has absolutely no jurisdiction to entertain a second appeal on the ground of erroneous finding of law, however gross the error may seem to be.[460] A combined reading of sections 100 and 101 of CPC providing the grounds for second appeal and providing further that no second appeal can be entertained on any other ground, will make it clear that facts are almost a no entry zone for the second appellate court.[461] Though, this is a basic principle of law, there is or cannot be any rigid rule in this respect. In deciding a second appeal in proper perspective, the second appellate court may have to enter into the question of facts.[462] Where the high court did not examine the facts of the case in the light of the laws prevailing at the time of the sales, the finding of the court is amenable to correction by way of an appeal.[463]

Section 100 states that the memorandum of the second appeal shall precisely state the substantial question of law involved in it. In such cases, the high court while admitting or entertaining the appeal must formulate the substantial question of law involved in the appeal if satisfied. The appeal shall then be heard on the questions so formulated and the parties shall be allowed to argue on the framed substantial questions of law. However, the proviso to section 100 empowers the court to hear the parties on other substantial questions of law which were not formulated earlier after recording reasons. Therefore, if the memorandum of appeal is not drafted in the stipulated manner, the court may reject the memorandum of appeal or return the same for the purposes of being amended within the time fixed by the court.[464]

In a suit for declaration of title and possession, which had been discussed by the trial court, the first appellate court granted partial relief to the plaintiff. The plaintiff filed second appeal questioning the rejection of his claim over part of the suit land. It was held by the Supreme Court that the reversal of the second appellate court of the partial relief granted by the lower court, without there being any appeal filed by the defendant, was improper.[465]

In *P Chandrasekharan v S Kanakrajan,*[466] it has been stated by the Supreme Court that there cannot be any doubt whatsoever that a substantial question of law is different from a question of law. Interpretation of a document which goes to the root of the title of a party to the lis would indisputably give rise to a question of law. It has been further observed that "what is prohibited for the High Court while exercising this jurisdiction under s 100 of CPC is to interfere with a finding of fact. This limited jurisdiction, inter alia, would become exercisable when the findings are based on misreading of evidence or so perverse that no reasonable person of ordinary prudence could take the said view."[467]

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460. *Sabira Khatun v Syeda Fatema Khatun,* AIR 1995 Gau 104.
461. *Tata Press Ltd v Mahanagar Telephone Nigam Ltd,* AIR 1995 Bom 107.
462. *BB Lohar v Prem Prakash Goyal,* AIR 1999 Sikkim 11.
463. *Mithlesh Kumari v Fateh Bahadur Singh,* (1991) 2 SCC 236.
464. *Biswanath Ghosh v Gobinda Ghosh,* (2014) 11 SCC 605 : (2014) 3 SCR 1097.
465. *Nathuni Ram v Raghupat Ram,* AIR 2007 SC 2487 : (2007) 12 SCC 438.
466. *P Chandrasekharan v S Kanakrajan,* AIR 2007 SC 2306 : (2007) 5 SCC 669.
467. *P Chandrasekharan v S Kanakrajan,* AIR 2007 SC 2306, para 14 at p 2309 : (2007) 5 SCC 669; Sinha J. speaking for the Bench.

Explaining the scope of section 100 of the Code, a Full Bench of the Bombay High Court held that the prohibition against second appeal contained in sub-section (3) of section 37 of the Arbitration and Conciliation Act, 1996, refers to second appeal from an order passed in appeal under section 37 of the said Act and not to second appeal contemplated under section 100 of the Code.[468]

Bhonsle, J, speaking for the full bench, observed as follows:

> It is true that s 37(3) expressly prohibits a "second appeal" from an order passed in appeal under s 37(1) and 38(2) except an appeal to the Supreme Court. However, there is clear indication inherent in sub-section (3) that the expression "second appeal" does not mean an appeal under100 of the Code of Civil Procedure.[469]

The Full Bench further went on to observe that second appeal contemplated under section 37(3) of the Act means an appeal under the letters patent for which there is express prohibition.[470]

In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The question that arises for determination in that area is known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained.[471]

A cross objection can be maintained in an appeal against an appellate decree but only if a substantial question of law is raised therein. The stringent conditions embodied in section 100 shall be applicable to a cross objection filed in a second appeal. In other words, the cross objection shall precisely state the substantial questions of law involved in the cross objection and the cross objection will be admitted only if the high court is satisfied that the case involves a substantial question of law.[472]

The high court, it is well settled, while exercising jurisdiction under section 100 of the CPC, cannot reverse the finding of the lower appellate court on facts merely on the ground that on the facts found by the lower appellate court, another view was possible.[473]

The jurisdiction of the courts in first appeals, second appeals or revisions are all, to the extent, conferred by the legislature. No litigant possesses any natural or inherent right to appeal against any order, unless a statue confers it and it is to the extent it is conferred.[474] The right of appeal which is statutory right can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. If the statue does not create any right of appeal, no appeal can be filed. The right of appeal inheres in no one, and therefore, for maintainability of an appeal, there must be the authority of law. When such a law authorises filing of an appeal, it can impose conditions as well.[475] Right to notice in proceedings in court of law or quasi-judicial proceedings is different from the right of appeal. The former may

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468. *Fountain Head Developers v Maria Arcangela Sequeira*, AIR 2007 Bom 149 : (2007) 3 All MR 304 (FB).
469. *Fountain Head Developers v Maria Arcangela Sequeira*, AIR 2007 Bom 149, at p 155 : (2007) 3 All MR 304 (FB).
470. *Fountain Head Developers v Maria Arcangela Sequeira*, AIR 2007 Bom 149, at p 155 : (2007) 3 All MR 304 (FB).
471. *Annapurna Barik Dei v Inda Bewa*, AIR 1995 Ori 273.
472. *Palasseri Velayudhan & anor v Palasseri Ithayi*, AIR 1994 Ker 267.
473. *Satya Gupta v Brijesh Kumar*, (1998) 6 SCC 423; *Guro v Atma Singh*, (1992) 2 SCC 507; *Copabandhu Das v Maheswar Mundian*, AIR 1998 Ori 131; *Shanmugham v Saraswathi*, AIR 1997 Mad 226.
474. *Hari Singh v Kanhaiya Lal*, (1998) 4 LRI 1040.
475. *The Gujarat Agro Industries Co Ltd v The Municipal Corp of the City of Ahmedabad*, (1999) 3 LRI 14.

arise, either under the statutory provisions or the principal of natural justice may require it or it may be necessary on principal of legitimate expectation; but right of appeal is always statutory. The courts cannot confer or infer it. What is legislatively not permitted cannot be read by implication, not in respect of right of appeal, as it "is a creature of statue". Granting right to appeal to local authorities against order of reference court would be legislating and not interpretation.[476] An appeal does not lie against mere "findings" recorded by a court unless the finding amount to a "decree" or "order". Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue, has no right of appeal and he cannot question those findings before the appellate court.[477] A second appeal is not maintainable against an order dismissing an appeal as time barred, after rejecting condonation application under section 5 of Limitation Act, 1963.[478]

The issue before the Supreme Court was whether the high court was right in interfering with the findings of facts arrived at by the lower appellate court on the ground that the appellate court had not adverted to the various reasons given by the trial court and whether the burden of proving the heirship was on the defendant. It was held that even assuming burden of proof is relevant in the context of the amended provisions of section 100 of CPC, the same would not be relevant when both sides had adduced evidence. It would be relevant, only if a person on whom the burden of proof lay failed to adduce any evidence altogether.[479]

In the undernoted case,[480] the Supreme Court has a word of caution for the high courts in respect of second appeals:

> **9.3.** it is a matter of concern that the scope of second appeals and as also the procedural aspects of second appeals are often ignored by the High Courts. Some of the off-repeated errors are:
>
> (a) Admitting a second appeal when it does not give rise to a substantial question of law.
>
> (b) Admitting second appeals without formulating substantial question of law.
>
> (c) Admitting second appeals by formulating a standard or mechanical question such as 'whether on the facts and circumstances the judgment of the first Appellate Court calls for interference' as the substantial question of law.
>
> (d) Failing to consider and formulate relevant and appropriate substantial question/s of law involved in the second appeal.
>
> (e) Rejecting second appeals on the ground that the case does not involve any substantial question of law, when the case in fact involves substantial questions of law.
>
> (f) Reformulating the substantial question of law after the conclusion of the hearing, while preparing the judgment, thereby denying an opportunity to the parties to make submissions on the reformulated substantial question of law.
>
> (g) Deciding second appeals by re-appreciating evidence and interfering with findings of fact, ignoring the questions of law.
>
> These lapses or technical errors lead to injustice and also give rise to avoidable further appeals to this court and remands by this court, thereby prolonging the period of litigation. Care should be taken to ensure that the cases not involving substantial questions of law are

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476. *UP Awas Evam Vikas Parishad v Gyan Devi*, (1995) 2 SCC 326.
477. *Deva Ram v Ishwar Chand*, (1995) 6 SCC 733.
478. *Rambharose Singh v Hemlata Aathle*, AIR 1994 MP 198.
479. *Arumughan v Sundarambal*, (1999) 3 LRI 277.
480. *State Bank of India v S.N Goyal*, AIR 2008 SC 2594 (2008) 8 SCC 92. (Ravendran, J. speaking for the Division Bench).

> not entertained, and at the same time ensure that cases involving substantial questions of law are not rejected, as not involving substantial questions of law.

The high court, in second appeal, should remand the case to the first appellate court which is the final court of fact and not directly to the trial court for recording a finding of fact. Where, however, the high court directly calls for a finding from trial court, depriving right of appeal to the first appellate court, it should scrutinise that finding.[481]

Once second appeal has been dismissed, this special civil application under Article 227 of the Constitution of India is not maintainable. The petitioners cannot be permitted to avail of the remedy under Article 227 of the Constitution of India when regular remedy under CPC has been availed of, in which they failed.[482]

An order under O XXII, rule 9, appealable as an order, would not be a decree and therefore, no second appeal would lie against that order. Such an appeal is liable to be rejected as incompetent.[483] Finding of the appellate court with the possession was not adverse and cannot normally be interfered within second appeal under section 100.[484]

While it is true that events and changes in the law occurring during the pendency of an appeal required to be taken into consideration in order to do complete justice between parties so that a futile decree may not be passed, it is also right and necessary that the decree should be so moulded as to accord with the changed statutory situation. The right obtained by a party under a decree cannot be allowed to be defeated by delay in the disposal of appeal against the decree, if it is possible to save the decree by moulding it to confer to the statute subsequently coming into force.[485]

An error in the lower court judgment can be rectified by the high court, even though the plaintiff has not preferred any appeal.[486]

Where the lower appellate court after taking all aspects into consideration directed CBSE to declare the final result of the candidate who did not possess the requisite attendance, the high court, in second appeal, shall not interfere in the findings of the lower appellate court, particularly, because question was regarding academic career of the students.[487]

An order of court decreeing suit cannot be set aside in second appeal on grounds of non-service of application for substitution as provided by rule 21 of Civil Rules and Orders when no such grievance was made before passing of decree.[488]

If under a wrong impression the appellate court has drawn up a decree, if does not confer a right on the appellant to prefer an appeal.[489]

A party who abandons a particular plea at a particular stage cannot be allowed to re-agitate an appeal.[490]

The defendants could suffer a decree before the trial court, by their omission to file any appeal before the first appellate court must be considered to have abandoned their right to file

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481. *Nasirul Haque v Jitendra Nath Dey,* (1984) 4 SCC 498.
482. *Hasmukhbhai Motilal v Anandiben,* AIR 1998 Guj 118.
483. *Madan Naik v Hansubala Devi,* (1983) 3 SCC 15.
484. *Thakur Kishan Singh v Arvind Kumar,* (1994) 6 SCC 591.
485. *Bai Dosabai v Mathuradas Govinddas,* (1980) 3 SCC 545.
486. *Karnataka Waqf Board v State of Karnataka,* AIR 1996 Kant 55.
487. *Central Board of Secondary Education, Ajmer v Sanjay Kumar,* AIR 1996 Raj 203.
488. *Minati Senalias and DP Sen v Kalipada Ganguly,* AIR 1997 Cal 386.
489. *Chhela Ram v Manak,* AIR 1997 Raj 284.
490. *Mahesh Chand Sharma v Raj Kumari Sharma,* AIR 1996 SC 869 : (1996) 8 SCC 128.

an appeal against the decree in so far as it went against them before the trial court, and cannot, therefore, be allowed to file an appeal in the high court by way of second appeal under the pretext of challenging the judgment and decree of the first appellate court. Permitting such an appeal will amount to permitting appeal directly to be allowed to file against the judgment and decree of the trial court by a person who has not chosen to challenge the judgment of the trial court before the first appellate court.[491]

Section 100 does not affect the provision of second appeal as contained in special or local laws like the Punjab Courts Act, 1877.[492]

The question before the Supreme Court was whether the Letters Patent Appeal (Patna High Court) filed against the order of the single judge was maintainable. It was held that a judgment passed by one judge in second appeal, under section 100 of the CPC or any other provision of an special Act no letters patent appeal will lie to the high court provided the second appeal was against a decree or order of a district judge or a subordinate judge or any other judge subject to the superintendence of the high court passed in a first appeal under section 96 of the CPC or any other provision of a special Act.[493]

[s 100.3] Changes in the Section

The first sub-section is largely retained, except for two changes. The first change is that the word "where" in the commencement of the sub-section is replaced by the word "as". The substitution is only nominal and makes no significant difference. The second change is vital and restricts the scope of the second appeal drastically in that clauses (a), (b) and (c) of the unamended sub-section are limited and are replaced by the words "if the High Court is satisfied that the case involves a substantial question of law". The substitution means that even if the decision of the court of first appeal is contrary to law, or some usage, or custom having the force of law or even if the decision has failed to determine a material issue of law or suffers from a substantial error or defect in the procedure, no second appeal would lie unless there is a substantial, question of law involved. There is, thus, a possibility of injustice being perpetuated. Sub-section (2) remains the same. Sub-sections (3), (4) and (5) and the proviso to sub-section (5) are new. One wonders why the high court is required to formulate the substantial question of law under sub-section (4) even though such question is required to be precisely formulated in the memorandum of appeal under sub-section (3) and the high court is required to be satisfied presumably at the time of admission that such a question is involved in the appeal. The section, as framed, is unnecessarily involved, for, if the object was to limit the second appeal where a substantial question of law is involved, sub-sections (1), (2) and (3) were enough. Even where the high court is satisfied that the appeal involves a substantial question of law and formulates it, the respondent is still given the right to argue that the case does not involve such a question' Luckily, the proviso retains the power of the high court to hear the appeal on a substantial point of law even though it has not been formulated by it. thus, ensuring that no injustice is done to appellant where such a question is not formulated through mistake or inadvertence.

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491. *Perumal v Gurunathan*, AIR 1996 Mad 415.
492. *Ganpat v Ram Devi*, AIR 1978 P&H 137.
493. *Chandra Kant Sinha v Oriental Insurance Co Ltd*, (2001) 6 SCC 158 : (2000) 2 LRI 1251.

[s 100.4] Section as it Stood Before the Amendment

In order to understand the scope of the second appeal as now restricted, the section as it stood before the amendment is set out below:

> 100(1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court on any of the following grounds, namely:
>
> (a) the decision being contrary to law or to some usage having the force of law;
>
> (b) the decision having failed to determine some material issue of law or usage having the force of law;
>
> (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
>
> (2) An appeal may lie under this section from an appellate decree passed *ex parte*.

[s 100.5] Grounds of Appeal Under the Unamended Section

The section even as it stood before its recent amendment allowed a second appeal only on the grounds set out in clauses (a), (b) or (c). Therefore, whereas a court of first appeal is competent to enter into questions of fact and decide for itself whether the findings of fact by the lower court are or are not erroneous, a court of second appeal was not and is not competent to entertain the question as to the soundness of a finding of fact by the court below.[494] A second appeal, accordingly, could lie only on one or the other grounds specified in the section.[495] A judge to whom a memorandum of appeal was presented for admission could consider whether any of the grounds specified in the section existed, and if they did not could reject the appeal summarily.[496] The limitations to the power of the court imposed by sectionss 100 and 101 in a second appeal had to be attended to and an appellant was not allowed to question the finding of fact of the first appellate court upon a matter of fact[497]. "Nothing can be clearer that the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in the section. No Court in India or elsewhere has power to add to or enlarge those grounds."[498]

As held in *Durga Chowdhrani v Jawahar Singh*,[499] by the Privy Council, there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross in error they may seem to be. The same view has been expressed also by the Supreme Court.[500] No doubt, a second appeal lay where there was a substantial error or defect in procedure under clause (c), but an erroneous finding of fact is distinct from an error or defect in procedure. Accordingly, where there was no error or defect in procedure, the finding of the first appellate

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494. *Ram Gopal v Shamskhaton, supra; Bhagwat v Bhagwat*, 1966 Bom 482 : 67 Bom LR 837 : 1967 AB 80.
495. *Luchman v Funa*, (1889) 16 Cal 753 : 161 A 125.
496. *Rudr Prasad v Baij Nath*, (1893) 15 All 367.
497. *Pertab Chunder v Mohendranath*, (1890) 17 Cal 291 : 16 IA 233; *Lakshmi Narayan v Nanjaiah*, AIR 1965 AP 136.
498. *Durga Chowdhrani v Jawahar Singh*, (1891) 17 IA 122 : 18 Cal 23.
499. *Durga Chowdhrani v Jawahar Singh*, (1891) 17 IA 122 : 18 Cal 23.
500. *Pattabhiramaswamy v Hanymayya*, 1959 SC 57; *Sinha Ramanuja v Ranga Ramanuja*, AIR 1961 SC 1720 : (1962) 2 SCR 509 : (1962) 1 SCJ 17; *Balkrishna Iyer v Ramaswami Iyer*, AIR 1965 SC 195 : (1964) 7 SCR 49 : 1965 Mad LJ 10; *Chunilal Vithaldas v Mohanlal*, AIR 1967 SC 226 : 69 Bom LR 36; *HK Biswas v RS Bhagat*, AIR 1969 AP 128; *Birbal Singh v Harphool Khan*, 1976 AA 23; *Anant Ram v Punjab*, AIR 1975 P&H 198.

court upon a question of fact had to be regarded as final, if that Court had before it evidence proper for its consideration in support of the finding,[501] even though the finding was material or the determination of a question not raised in the Court below but raised in the second appeal.[502] The finding of tact to be final has, ofcourse, to be clear, specific and unambiguous.[503] In *Ramratan Sukul v Mussamat Nandu*,[504] the Judicial Committee said:

> It has now been conclusively settled that the third Court, which in this case was the Court of Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered the decision of the second Court, however unsatisfactory it might be if examined, must stand final.

The mere fact that the high court would have upon documents and evidence placed before the Court of first appeal come to a different conclusion is no ground for a second appeal.[505] The section was enacted for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision.[506] In *Nafar Chandra Pal v Sukar,*[507] their Lordships said:

> Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is necessarily a question of law, so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact.

In the question to be decided is one of fact it does not involve an issue of law merely because documents which are not instruments of title or otherwise the direct foundation of rights but are merely historical documents have to be construed.[508] A second appeal did not lie on the ground that some of the evidence was contained in a document or documents and the first appellate court had made a mistake as to its meaning.[509] Misconstruction of documents which merely formed part of the evidence has been held not to be a ground of appeal.[510] Mere

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501. *Durga Chowdhrani v Jawahir Singh*, 1891 18 Cal 23 : 17 1A 122; *Raja of Pittapur v Secretary of State*, (1929) 56 IA 223 : 52 Mad 538 : (29) APC 152; *Ramji v Rao Kishore*, (1929) 56 IA 280 : 33 Cal WN 893 : (29) APC 190; *Sheo Gobind v Ram Adhin*, (1933) 8 Luck 182 : (33) AO 31; *Ram Gopal v Shamskhaton*, (1893) 20 Cal 93 : 19 IA 228; *Fazal Karim v Maula Baksh*, (1891) 18 Cal 448 : 18 IA 59; *Balkrishna v Gobind*, (1902) 26 Bom 617; *Lukhi Narain v Jodu Nath*, (1894) 21 Cal 504, 21 IA 39; *East India Rly Co v Changai*, (1915) 42 Cal 888; *Nilratan v Abdul*, (1920) 32 Cal LJ 75; *Ram Singh v Ganga Ram*, (1922) 3 Lah 389 : (22) AL 356; *Dalip Singh v Ishar*, (1925) 7 Lah LJ 11 : (25) AL 353; *Gajja Singh v Natha Singh*, (1925) 7 Lah LJ 70 : (25) AL 333; *Satyabhamadevi v Ramkishore*, 1975 AMP 115.
502. *Thadvarthi Bapayya v Myneni Pundarikshayya*, (1946) Mad : 648 (46) AM 198.
503. *Ram Lal Dutt v Dhirendra Nath Roy*, 70 IA 18 : (1943) 1 Cal 372 : (43) APC 24, 46, BLR 192 : 47 Cal WN 489.
504. *Ramratan Sukul v Mussamat Nandu*, (1892) 19 IA 1, 3 : 19 Cal 249, 252, 259; *State of .P v Ram Chandra*, AIR 1976 SC 2547.
505. *Lakshmi Ammal v Ramachandra*, 1960 Mad 991 : (I960) AM 568; *Mania v Dy Director*, Consolidation, 1971 AA 151.
506. *Nafar Chandra Pal v Shukur*, (1918) 45 IA 183, 189 : 46 Cal 189; *Sheo Panit Shah v Chabilal*, (1952) A Ass 52 (FB).
507. *Nafar Chandra Pal v Sukar*, (1918) 45 IA 183, 187 : 46 Cal 189, 195; *Rohini Kumar Chakrabarty v Nias Mahamad Khan*, 77 Cal LJ 93 : (44) AC 4.
508. *Midnapur Zemindari Co v Uma Charan*, (1923) 29 Cal WN 131 : (23) APC 187 (PC).
509. *Nowbat Singh v Chutter Dharee*, (1873) 9 WR 222, approved by the Privy Council in *Wali Mohammad v Mohammad Baksh*, (1930) 57 IA 86 : 11 Lah 199 : (30) APC 91; *Secretary of State v Rameswaram*, (1934) 61 IA 163 : 57 Mad 652 : (34) APC 112.
510. *N Kameswaramma v S Subba Rao*, (1963) SC 884; *Raja Durga Singh v Thalu*, AIR 1963 SC 361 : [1963] 2 SCR 693 : (1963) 2 SCJ 306; *Korada Gedha v Raghabo Patel*, 1963 Cutt 175 : AIR 1963 Ori 121.

inferences from or the evidentiary value of a document generally raise only a question of fact.[511] However, it was held that a second appeal would lie if the documents erroneously construed themselves constituted the foundation of rights claimed.[512] The question whether a statutory presumption was rebutted has been held to be always a question of fact.[513] Accordingly, no appeal could lie from a finding that an oral sale in Punjab was not proved and that entries in the Record of Rights were erroneous.[514] Again, if there was evidence to support the finding of the appellate court that the appellants were not tenure-holders and that an entry to that effect in the Record of Rights was erroneous no second appeal lay.[515] A finding as to the valuation of property has been held to be one of fact.[516] A finding on appeal that an estate had not been privately partitioned previously to its partition under the Estates Partition Act, 1897, was held to be a finding of fact binding on the high court in a second appeal.[517] So also a finding on the question whether there had been division or severance of interest in a joint family,[518] It might, however, be a mixed question of fact and law and therefore open to reconsideration in a second appeal.[519] Questions such as partition among co-owners,[520] or waiver of notice to quit[521] or waiver of the benefit of an instalment of decree by the decree-holder[522] have been held to be questions of fact. Whether the status of the plaintiffs was that of members of a particular *tarwad* has been held to be a question of fact.[523] So too, the question whether an instrument was obtained under undue influence and misrepresentation.[524] On the other hand, a second appeal was held to be competent where it was shown that the appellate court had misdirected itself on a question of law in dealing with evidence,[525] or where it had refused to consider material evidence on the erroneous ground that it was immaterial,[526] or where there was no evidence to support the finding or the finding was based on inadmissible evidence,[527] or where the first appellate court had not considered the evidence, or where its finding is wholly conjectural and

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511. *Jangbir v Mahavir*, AIR 1977 SC 27 : (1977) 1 SCR 670.
512. *Chunilal Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd*, AIR 1962 SC 1314; *Amiruddi v Makkan Lal*, (1930) 34 Cal WN 285 : (30) APC 83; *Jagdeo Singh v Ram Naresh*, (1935) 10 Luck 392 : (35) AO 217 (FB); *Jadu Gopal v Pannalal*, AIR 1978 SC 1329; *Kidar Nath v Swami Parshad*, AIR 1978 P&H 204.
513. *Kumeda Prosunna v Secretary of State*, (1915) 19 Cal WN 1017.
514. *Wali Mohammad v Mohammad Baksh*, (1930) 57 IA 86 : 11 Lah 199 : (30) APC 91.
515. *Midnapur Zamindary Co v Secretary of State*, (1929) 56 IA 388 : 57 Cal 756 : (29) APC 286 See *Anup Mahto v Mita Dusadh*, (1934) 61 IA 93 : 13 Pat 254 : (34) APC 5.
516. *PL Bapuswami v N Patty*, AIR 1966 SC 902 : (1966) 2 SCR 918.
517. *Basiram Saha Roy v Ram Ratan Roy*, (1927) 54 IA 196 : 54 Cal 586 : (27) APC 117.
518. *Msst. Kharbuja Kuer v Jang Bahadur*, AIR 1963 SC 1203; *Lal Behari Samanta v Gour Hari Dawn*, (1952) AC 253; *Hemant Kumar Pande v Somenath Pandey*, (1959) AP 557; *Rambha Bewa v Prahallad Sendha*, AIR 1959 Ori 65.
519. *Basdeo Narain v Karu Mahton*, (1947) 26 Pat 592 : (48) AP 153; *Sabal Singh v Salk Ram*, (1922) 44 All 602 : (22) AA 188; *Beti v Sikandar Singh*, (1928) 50 All 180 : (28) AA 39.
520. *Karuppan v Pannarasu*, 1965 AM 389.
521. *Munilal v Nandlal*, 1971 A Del 300.
522. *Sree Bank Ltd v SD Roy*, (1965) 3 SCR 708.
523. *Velumpi Kunji v Gopala Panickan*, AIR (1958) Ker 178 : 1958 Ker 389 : 1958 Ker LJ 138 : 1958 Ker : LT 253 (FB).
524. *Gopal v Jagannath*, (1935) 59 Bom 502 : (35) AB 326.
525. *Midnapur Zemindari Co v Uma Charan*, (1923) 29 CalWN 131 : (23) APC 187; *Sumitra v Dhannu*, (1952) AN 193; *Balmukund v Jagannath*, AIR 1963 Raj 212 : (1963) RLW Raj 579 : ; *Deo Chand v Shiv Ram*, (1969) 3 SCC 330; *Ramesh Chand v Gopeshwar*, AIR 1977 All 38.
526. *Ram Krishna v Mohd Yahia*, AIR 1960 All 482; *Radha Nath v Haripada*, (1971) SC 1049.
527. *Gosto Behari De v Purnachandra De*, (48) AC 219 : 82 GLJ 327; *Dirpal Singh v Karamchand*, AIR (1952) AP 9; *Dudhewala & Co, Ltd v Govindram Ramashwarlal*, (1952) AC 585 : 56 Cal WN 315; *Sathemma v Subbi Reddy*, AIR 1963 AP 72.

not based on evidence.[528] It has been held that where the appellate court has based its finding on the failure of a party to discharge the onus of proof which had been wrongly held to be incumbent on him, the finding, though one of fact, was not based on positive evidence.[529] In general the high court cannot in a second appeal take upon itself to reappreciate the evidence or enter into a consideration of sufficiency or adequacy of evidence.[530]

It has sometimes been held on the strength of observations in *Rani Hemanta Kumari v Jagadendra Nath*[531] that a finding of fact by the lower appellate court which reverses that of the trial court is liable to be set aside in a second appeal if it did not come to close quarters with its reasoning.[532] But as the Supreme Court has pointed out those observations of the Privy Council were made in an appeal against the high court's judgment which had reversed that of the trial court and had no application to a second appeal under this section and under this section a clear finding of fact was not liable to attack on the ground that the judgment of the lower appellate court was not as elaborate as that of the trial judge or because some of the reasons given by the trial judge had not been expressly reversed by the lower appellate court.[533] It must follow that when there are concurrent findings by two lower courts on what is a question of fact, the high court would not interfere in second appeal.[534] A concurrent finding to be binding in second appeal must have been arrived at after legal adjudication. Thus, where a finding has been given by the trial court without deciding the question whether an impugned public register should be accepted or rejected, though confirmed by the first appellate court is not binding as a concurrent finding on the high court in a second appeal.[535]

In *Nasib Kaur,*[536] interference with the concurrent findings of the courts below by the high court in the second appeal was challenged before the Supreme Court. The high court had framed a substantial question as to whether the courts below had failed to consider the material evidence on record? However, the high court in the impugned judgment did not point out the exact material evidence which had not been considered by the courts below and made its own assessment of the entire evidence. The Supreme Court held that the high court in exercise of its powers under section 100 could not have reversed the concurrent findings of the courts below so as to adversely affect such legal possession of the appellants.

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528. *Satya Narain v Laudhar,* AIR 1978 All 399.
529. *Asoke Chandra Mazumdar v Chota Nagpur Banking Association Ltd*, (48) AP 247; *Jogesh Chandra v Emdad Miyah*, (1932) 59 IA 29 : 59 Cal 1012 : (32) APC 28.
530. *Raruha Singh v Achal Singh*, 1961 SC 1097; *Madamanchi Ramappa v Muthuluru Bojappa*, 1963 SC 1633; *Harnath v Dhanoo Devi*, 1975 AC 98; *Ram Narain v LD Kundra*, AIR 1971 Del 268.
531. *Rani Hemanta Kumari v Jagadendra Nath,* 16 Mad LJ 272 PC.
532. *Mangamma v Paidayya*, 53 LW 160 : 1941 AM 393.
533. *Ramachandra v Ramalingam*, 1963 SC 302 : (1963) 1 SCA 330; *Har Bhaj v Barfi*, AIR 1969 Del 197 : 71 Punj LR 51; *Batkala v Durgasi*, AIR 1978 Ori 103.
534. *Venkatasubbayya v Venkataratnamma*, 1954 Mad 775 : (1954) 1 Mad LJ 396 : (1954) AM 681; *Ouseph Ouseph v Thomman*, 1954 Tr Co 627 : AIR 1954 Tr Co 473; *Mahalinga Bandappa v Venkatesh*, 1957 Bom 302 : (1957) AB 201; *Suryanarayan v Krishna*, AIR (1957) Ori 124 : 1957 Cutt 324; *Bir Singh v Bachni*, (1958) Punj 800; *Babu Nandan v UOI*, (1961) 2 All 90; *Inder Singh v Board of Revenue*, (1962) Raj 83; *Motimal v Visalakshmi Ammal*, (1965) AM 432; *Subbarama v Saraswathi*, (1967) AM 85; *GR Damanavar v Kallappa*, AIR 1973 Mys 190; *Nani Gopal v Sitanath*, 1966 AC 502; *Rajpat v Jagannath*, 1977 AA 558; *Padma Rani v Panchkari*, 1978 AC 104; *Babu Rajnarain v Ganesh Bind*, AIR 1978 All 30.
535. *Kumaraswami v DR Nanjappa*, 1978 AM 285 (FB).
536. *Nasib Kaur v Colonel Surat Singh*, AIR 2014 SC 1135 : (2013) 5 SCC 218 : (2013) 1 SCR 984 : JT (2013) 3 SC 37.

The Supreme Court will not, except in unusual circumstances, interfere with concurrent findings of fact by the Courts below.[537] This is in consonance with the practice followed both by the Privy Council[538] and the Federal Court.[539]

There have been a number of decisions on the question as to what are questions of fact. Thus, a question of benami.[540] or *bona fides*.[541] or negligence,[542] or a document being fictitious or not,[543] or certain proceedings being collusive,[544] or whether the suit properties were not family properties,[545] or whether there was reasonable or probable cause for prosecution in a case for damages for malicious prosecution,[546] or the question of status of the defendant as a tenant or not[547] is a question of fact. An order which is in the discretion of thc Court also was not disturbed in a second appeal, for instance, where the court had refused on consideration of all the circumstances to grant relief to a tenant against forfeiture.[548] See also cases noted below.[549]

An issue with regard to a fact cannot be raised before the second appellate court for the first time. The Supreme Court has held that a question whether the suit property belonged to an individual, i.e. whether he/she is a beneficial owner or is a benami, is a question of fact. As there was no averment made in the plaint with regard to that and consequently no issue was raised before the trial court, the said issue could not have been raised for the first time before the second appellate court.[550]

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537. *Nanalal Zaver v Bombay Life Insurance Co*, 1950 SCR 391 : 1950 SC 172 : 1950 SCJ 337; *Firm Sreenivas Ram Kumar v Mahabir Prasad*, 1951 SCR 277 : 1951 SC 177 : 1951 SCJ 261; *Chinnathayi v Kulasekhara*, 1952 SCR 241 : 1952 SCJ 1 : 1952 SC 29; *Nagubhai v Shama Rao*, 1956 SCR 451 : 1956 SC 593; *Biswanath v Radha Ballabhji*, 1967 SC 1044; *Ganga Bishnu v Pinjarapole Society*, (1968) 2 SCR 117 : 1968 SC 615.
538. *Srimathi Bibubathi Devi v Ramendra Narayan Roy*, 73 IA 246 : (1946) 2 Mad LJ 442.
539. *Gangadharier v Subramanya Sastrigal*, (1949) AFC 88 : 1949 FLJ 90.
540. *Meenakshi Mills v Commissioner of Income-tax*, 1956 SCR 691 : 1956 SCA 1139 : 1957 SC 49 : 1957 SCJ 1; *Bhushan Pal v Bibuthi Bhushanlal*, (1957) AC 177 : 66 Cal WN 154; *Kameshwari Singh v Sarju Singh*, (1958) AP 434; *Ramajanam v Beyas Singh*, (1958) AP 537; *Girdharilal v Krishan Datt* (1960) A Punj 575.
541. *Govind v Ragunath*, 1952 Bom 226 : (1952) AB 107; *Hajee Mumtaj-ud-din v Debendra Nath*, (1959) AC 78; *Ramanath Ram Chander v Bhagat Ram Co*, 1960 Raj 360 : (1960) A Raj 219.
542. *Kothari & Sons v Krishna Rao*, 1953 (1) Mad LJ 821 : (1953) AM 726 : 66 LW 369 : 1953 Mad WN 309; but see *Chabraji v Ganga*, 43 All 29 : (1921) AA 314; But see *Safdar Hussain v UOI*, 1978 AA 53.
543. *Parasnath v Mohani*, 1960 (1) SCR 271 : 1959 SC 1204.
544. *Nagubai v Shama Rao*, supra.
545. *Bachan Singh v Dhian Das*, (1973) 2 SCC 109 : 1974 SC 708.
546. *Pestonji v Queen Insurance Co*, 25 Bom 332 PC; *Chellu v Palghat Municipality*, 1955 (1) MLJ 269, (1955) AM 562 : 68 LW 317; *Venkatadri v Chandriah* (1956) A Andhra 174; *Beharilal v Jagannath*, (1959) AP 490; *Gangadhar v Priya Nath*, 29 Cutt LT 357; contra *Narayana Mudali v Peria Kalathi Mudali*, (1939) AM 783; *Kedarnath v Brahmanand*, (1959) A Raj 37.
547. *Sri Raja Durga Singh v Tholu*, 1963 SC 361.
548. *Namdeo v Narmada Bai*, 1953 SCR 1009 : 1953 SC 228 : 1953 SCJ 303.
549. *Venkatasubbiah v Venkataratrama*, 1954 Mad 775 : (1954) AM 681 (genuineness of signature); *Subhosc Chandra v Manorama*, 1956) (1) Cal 150 (genuineness of sale deed and agreement to reconvey); *Sheesh Dhan v Kishenlal*, (1957) A Raj 299 (execution of document); *Bageram Rai v Bhagwan Singh*, (1962) AP 319 (genuineness of sale deed); *Allahabad Bank Ltd v Kulbhushan*, (1961) A Punj 571 (genuineness of a cheque); *Subbiah Nadar v Champaka Pillai* (1961) AM 413 : 73 LW 666 (identity of property mortgaged and sought to be redeemed); *Uttam Rao v Sitaram*, 1963 Bom 77 (1963) AB 165 : 64 Bom LR 752 (legitimacy). *TV Subrahmanyam v Vishwanathraju* 1968 AAP 190; *Indubala Devi v Ghose*, 1971 AC 411; *Bhanwarlal v: Kamla*, 1970 A Raj 239; *Mallana v Eramma*, 1970 A Mys 84; *Venkata v Lakshmi*, 1967 AAP 64; *Assam Cold-Storage v UOI*, 1971 AA&N 69; *Mahendra Singh v Attar Singh*, 1967 AA 488; *Narain Das v Banarasi Das*, 1970 AP 50; *PG Reddy v G Obdulamma*, 1971 AAP 363; *Haripada v Bansidhar*, 1967 AC 255; *Manoharlal v Rajeshwari Devi*, 1977 AA 36.
550. *Narinder Singh Rao v Air Vice-Marshal Mahinder Singh Rao*, AIR 2013 SC 1470 : (2013) 9 SCC 425.

Vendor was an illiterate lady. Sale deed was alleged to be the outcome of fraud and undue influence. Material document, i.e. acknowledgement in token of having received consideration, was not produced by vendor. Burden to prove execution of sale deed and passing of consideration was not discharged by vendee. Plea by vendee, that sale was necessitated to discharge debts was found not convincing. Findings of facts that fraud and undue influence was perpetrated on vendor and that no consideration was paid to her, were not liable to interference by high court in second appeal. Appeal was dismissed.[551] Question whether a particular person is a transferee with notice of agreement of sale is a question part. The fact that the fending of the lower appellate court is based upon a document does not make it any the less a finding of fact.[552] First appellate court found that the plaintiffs (and not defendants) were in possession. Finding was one of fact. It cannot be disturbed, unless it is shown that the finding was based on a misconception of evidence or on an overlooking of material evidence. Certificates of sale are documents of title, which ought not be lightly regarded, or loosely construed.[553] High court cannot interfere with a finding about *bona fide* need of the landlord.[554] Second appeal in suit under O XXI, rule 63 was filed against orders passed in execution proceedings. It was held that a question not constituting the subject-matter of dispute cannot be raised for the first time in second appeal.

The further question as to whether the appellants are only liable to pay the decretal amount, was not the subject-matter of the dispute in the present suit. That is a question which the appellants if at all should have raised before the executing court.[555] Finding whether respondents were tenants or sub-tenants is a question of fact.[556] Courts below reached finding of "cruelty" fully aware of established principles pertaining to nature of proof necessary to establish a charge of cruelty so as to justify decree of divorce. It was held that — concurrent finding cannot be set aside on mere reappraisal of evidence.[557] A pure question of law arising on the admitted facts can be raised in second appeal. But a reasonable assessment of evidence cannot be set aside.[558] High court cannot entertain second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. That the finding of the first appellate court is based upon some documentary evidence, does not make it any the less a finding of fact.[559]

The high court acts erroneously if it disturbs concurrent findings of fact:—

(a) overlooking clear admissions of the plaintiff and

(b) erroneously interpreting the rent note.[560]

Where both the lower courts have held the will to be proved the court of second appeal cannot enter into the evidence.[561] The question of whether, in respect of a lease of trust property, notice of termination had been given by the Mukhtar (attorney) of his own or whether the Mukhtar had given the notice in pursuance of the resolution of trustees, is a question of fact, which cannot be allowed to be raised in second appeal.[562] Question whether an agreement of sale was in fact executed and whether it was genuine are questions of fact. Findings on these

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551. *Ram Sewak v Ajirana*, AIR 1988 All 41.
552. *Ram Briksha Singh v Rudra Narain Singh*, AIR 1986 All 19, 22.
553. *Jatiram Gharami v Atul Krishna*, AIR 1988 Cal 79.
554. *Bhairab Chandra v Randhir Chandra*, AIR 1988 SC 396 : (1988) 1 SCC 383.
555. *Dhan Singh v Baboo Ram*, AIR 1981 All 1.
556. *Kahar Singh v Yashpal*, AIR 1990 SC 2212.
557. *Aruna v Ramesh Chand*, AIR 1988 All 239.
558. *Rashid v Batulan Bibi*, AIR 1982 All 111, 113, 114 (SJ Hyder, J).
559. *Sadhu v Kishni*, AIR 1980 P&H 85.
560. *Bholaram v Ammerchand*, AIR 1981 SC 1209 : (1981) 2 SCC 414 : 1981 (13) UJ 242 SC.
561. *Prem Prakash v Narain Singh Bahadur*, AIR 1989 All 51.
562. *Prem Ptakash v Narain Singh Bahadur*, AIR 1989 All 51.

cannot be interfered with in second appeal.[563] A concurrent finding of the lower courts, to the effect that the tenant was in possession since 1962, cannot be disturbed in second appeal merely because a different view of the evidence is possible.[564] Concurrent finding of fact (based on appreciation of evidence) that the licensee's shop did not remain closed on account of the authority's failure to supply liquor as per demand of licensee, cannot be interfered with, where no infirmity is pointed out.[565] A finding that the income earned from the business by a person (natural guardian) was necessary to maintain his minor son and that the guardian invested the sale proceeds of the property of the minor in the business, is a finding of a fact, which cannot be questioned in second appeal.[566] A finding that the demands for pre-emption (required to be made under Muslim law) were not made, based on an appraisal of the evidence on record, cannot be questioned in second appeal.[567] Finding as to relationship of husband and wife between two persons is one on a question of fact. Court in second appeal cannot interfere with the finding in the lower courts.[568]

The high court in second appeal cannot interfere with a finding of the trial court that the sale deed was executed by the plaintiff when he was in an unsound state of mind where the finding is supported by reasons and evidence.[569] In an appeal against a decree in a suit by the plaintiff for a declaration that the suit property was joint family property and claiming a share therein, the first appellate court gave a finding of fact that the suit property was self acquired property of the father of the plaintiff, as he was a well known goldsmith and the suit property was purchased from his income from the business after the death of his father, i.e. the plaintiff's grandfather, who did not carry on any business. This finding was reasonable and legal and based on evidence. It was held that the high court would not be justified in interfering with it and holding that the goldsmithery was ancestral business of the plaintiff's father, from the income of which the suit property was purchased. It was not even the case as pleaded by the plaintiff in the plaint that goldsmithery was their ancestral business. Nor was evidence produced to that effect.[570] A finding that the accommodation already in the landlord's possession is sufficient for his needs is one of fact.[571]

A deed was executed by an illiterate old man who sued to set it aside on the ground that it had been obtained by fraud and misrepresentation. The courts below negatived the Plea, after considering the evidence. It was held that the finding, being just and proper, did not warrant interference in second appeal.[572] New point requiring determination of material facts cannot be raised for the first time in the second appeal.[573] Concurrent finding by lower courts that plaintiff's had established their right of pre-emption claimed on the basis of Shafi-a-Khalit cannot be challenged in second appeal in the high court.[574] The appellate court would be wrong in thinking that it would detract from the value to be attached to a trial judge's finding of fact if the judge does not expressly base his conclusion upon the impressions he gathers from the demeanour of witnesses. The duty of the appellate court in such cases is to see whether the

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563. *Ram Briksha Singh v Rudra Narain Singh*, AIR 1986 All 19.
564. *Nikhil Chandra v Ajit Chandra*, AIR 1984 Cal 31.
565. *Harishankar Pyarelal & Co v State of MP*, AIR 1984 MP 140. RK Vijayvargive, J.
566. *Kaiser Parvez v Abdul Majid*, AIR 1982 All 9, 12, para 15.
567. *Kudrat Ullah v Mohd. Yasin*, AIR 1982 All 98, 102, para 12 (Deoki Nandan, J).
568. *Manohar Singh v Ram Nath Chitkara*, AIR 1981 Del 129.
569. *Somalla Krishnamurthy v Samala Sasilal*, AIR 1983 AP 174.
570. *Ramchandra Pandurang Sonar v Murlidhar Ramchandra Sonar*, AIR 1990 SC 1973.
571. *Mangilal v Ramchandra*, AIR 1984 MP 154.
572. *Satyabhamabai v Pandurang Marotirac Pawar*, AIR 1990 Bom 134 (AA Desai, J).
573. *Bazrulttaque v Bihari Sharma*, AIR 1981 Pat. 290.
574. *Pyare Mohan v Rameshwar*, AIR 1980 Raj 116.

evidence, taken as a whole, can reasonably justify the conclusion which the trial court arrived at, or whether there is an element of improbability arising from the proved circumstances which, in the opinion of the court, outweighs such finding.[575]

Concurrent finding that the disputed will was genuine, cannot be disturbed in second appeal.[576] To determine whether the relationship between the parties is one of licensee or lessee, neither documentary evidence nor even the recitals in the document in question will be so relevant, as the real intention of the parties in entering into that relationship. When lower appellate court re-appreciates the evidence and differing from the trial court comes to the conclusion that the relationship is that of lessee, so long as nothing not before the court has been taken into account, such conclusion does not suffer from any error of law and does not call for interference.[577] The question whether a person is "Khatedar" within the meaning of section 42, proviso, Rajasthan Tenancy Act, 1955 (which prohibited transfer of interest as Khatedar by a member of Scheduled Caste etc. to one who is not such a member), cannot be gone into in second appeal, as it is a question of fact[578]. A plea that the Rent Control Act was not made applicable to the city in question and that such non-applicability was discriminatory, cannot be invoked for the first time in second appeal. Such a plea might involve controversial facts.[579]

[s 100.6] Amended Section and Pending Matters

The principle as to the applicability of a subsequent statutory provision doing away with or abridging the right of appeal arising from a matter pending at the date of enactment of such subsequent provision is well established. As early as in 1905, the Privy Council declared the principle in the following terms:

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it is more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express provision, or by necessary implication. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.[580]

This principle has been approvingly cited not only by the Supreme Court,[581] but has been followed in several high courts' decision.[582] In *Daivanayaga Reddiyar*'s case the Madras High Court held that the right to appeal to a particular superior court (there the district court) was governed by the law prevailing at the date of the institution of the suit and not by the law prevailing at the date of the decision or at the date of the filing of the appeal. To the same

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575. *VS Ayyappan v Fr. Thoma Viruthiyal*, AIR 1990 NOC 48 (Ker) (S Padmanabhan, J).
576. *Pravin Kumar v P. Rateswaran*, AIR 1988 Mad 132.
577. *Shivalingappa Sugirappa Kawishetti v Vishnukant Durgars Raibagi*, AIR 1981 Kant 212.
578. *Balu v Birds*, AIR 1983 Raj 13,16, para 22 (GM Lodha, J).
579. *Pyarelal v Banwarilal*, AIR 1982 Raj 181.
580. *Colonial Sugar Refining Co Ltd v Irving*, AIR 1905 Cal 369.
581. *Garikappatty Veeraya v N Subbiah Choudhury*, AIR 1957 SC 29 : (1957) SCR 488.
582. *Daivanayaga Reddiyar v Renukanibal Ammal*, (1927) 50 Mad 875.

effect is the Lahore decision in *Kirpa Singh v Ajaipal Singh.*[583] In *Kasibai v Mahadu,*[584] the suit was filed in 1944 in respect of property situated in the then *Nizam* territory. It was held that such a suit would be governed by the relevant provisions of the Hyderabad Civil Procedure Code then in force and that the restrictions set out in section 100 would not apply to a second appeal arising from such a suit. They would apply to second appeals arising from suits filed after 1 April 1951 when the CPC was applied. Hence the high court's jurisdiction in respect of suits filed before that date would be governed by section 602 of the Hyderabad Code which permitted interference with findings of fact in second appeals. The principle is thus well-established that the right to appeal is not a matter of procedure only and that that right to enter a Superior Court is deemed to arise to a litigant before any decision has been given by the inferior court. In other words, that right accrues to him at the date of the institution of the suit by him. The right of a second appeal being thus a substantive right, the new section 100 would not have restricted that right in appeals arising from suits already filed before the date when the Amendment Act, 1976 was brought into force and to such appeals the section, as it stood before it was replaced by the new section 100 would have applied. But to avoid such a result section 97 of the Amendment Act, 1976 which is a repeal and saving section, provides by its clause (m) that the provisions of the new section 100 shall not apply or affect any appeal from an appellate decree or order which had been admitted before the date of its enforcement after hearing under O XLI, rule 11 and that every such admitted appeal shall be dealt with as if the new section 100 had not come into force. It is clear from the language of clause (m) that the legislature intended to save from the applicability of the new section 100, only those second appeals, which had already been filed and admitted under O XLI, rule 11 before it was brought into operation. Consequently, the restrictive provisions of the new section 100 would apply to all appeals even though they arise from suits or first appeals filed before the date of enforcement of the new section except as aforesaid those second appeals already admitted by the high courts before that date. To such appeals, as were already admitted, must apply the section before its replacement by the new section. It has been considered necessary to retain the commentary under the old section, at least for the purposes of such saved appeals.

[s 100.7] Clause (a) of the Unamended Section; Decision Being Contrary to Law

In cases to which the old section before its replacement still applies as aforesaid, cl. (a) of that section would be relevant. That clause provided that a second appeal would lie where the decision of the lower appellate court is contrary to law. The term "*law*" in that clause is not limited to statute law; it means general law.[585]

When the question is one of a right *construction* of a document of title,[586] or of a document which forms the foundation of the suit,[587] or of a legal inference from a document,[588] the

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583. *Kirpa Singh v Ajaipal Singh,* (1928) 10 Lah 165 (FB).
584. *Kasibai v Mahadu,* AIR 1965 SC 703.
585. *Ram Gopal v Shamskhaton,* (1893) 20 Cal 93 : 19 IA 228.
586. *Umeshwar Prasad Singh v Dwarka Prasad,* (1943) 22 Pat 320 : (44) AP 5; *Secretary of State v Krishna Rao,* 72 IA 211 : (45) APC 165 : (1945) Mad 225; *Fateh Chand v Kishen Kunwar,* (1912) 34 All 579 : 39 IA 247; *Vithoba v Mahadav* (1918) 42 Bom 344, 350-351; *Lakshmichand v Yasoda Bai,* (1953) AN 337; *Kanhaya Singh v Bhagwat Singh,* (1954) AA 326; *Veerankutty v Pathumma Kutty,* (1956) AM 514; *Sobharam Mahato v Raja Mahton,* 36 Pat 471 : (1957) AP 278; *Kartar v Harcharan,* AIR 1969 P&H 244 : 71 Punj LR 152.
587. *Rashid Ali v Darparan,* AIR (1954) Gau 95; *Bhaggu v Mani Prasad,* AIR 1965 All 202.
588. *Umeshwar Prasad Singh v Dwarka Prasad Asariya, (supra); Dinkar Rao v Rattansey,* (1949) Nag 224 : (49) AM 300; *Chaudhri Satgur v Kishori Lal,* (1919) 46 IA 197, 201 : 42 All 152, 156.

question is one of law, and a second appeal will lie. Thus, where in a suit for a declaration of the plaintiff's proprietary title to the land in suit, the lower appellate court found on a construction of the *wajib-ul-arz* and other documentary evidence relating to the land that the plaintiffs were proprietors, their Lordships of the Privy Council held that the right construction of the documents was a question of law which the high court was not precluded from considering in second appeal. In the course of the judgment their Lordships said:

> That finding (namely, that the plaintiffs were proprietors of the lands) of the Subordinate Judge was the result of his having misconstrued the wajib-ul-arz. The right construction of documents is a question of law which Judges in second appeal are not by sections 584 and 585 of the Code of Civil Procedure (now sections 100 and 101) precluded from considering by any finding of a lower Appellate Court based upon such documents. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the *wajib-ul-arz* and the Judges in second appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands.[589]

Similarly, the question whether a writing which is ostensibly a deed of absolute sale and an agreement by the purchaser to reconvey the property to the vendor constitute an out and out sale and an agreement for reconveyance or a mortgage by conditional sale, is a question of construction of documents and the high court is entitled to interfere in second appeal.[590] In a Privy Council case where the question was whether the possession of properties by a Hindu widow was merely in lieu of maintenance and not adverse to the plaintiffs, their Lordships held that the question was one of inference from documents and not one of fact and that they were, therefore, entitled to draw their conclusion notwithstanding the con current opinions of the courts in India.[591] But where the question is not one of construction of a document or of legal inference to be drawn from a document, but is one as to the effect to be given to a document *as evidence of a fact or facts in issue*, a second appeal is not admissible. Thus, when the question was whether certain pension moneys were included in a *watan* or hereditary endowment and two courts after an examination of the *sanad* and other relevant documents had found that they were not, the Privy Council held that the high court in second appeal was not entitled to reverse the finding unless the documents had been misconstrued.[592] Also, where a suit involves a question of the *fact* of adoption, and documents are produced *as evidence of the fact of adoption*, the question whether the documents do or do not support the alleged adoption is a question of fact, and no second appeal will lie.[593] The law on the subject was thus stated by Mookerjee, J in *Makund Deb v Gopi Nath*[594]:

> We hold accordingly that, unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie. A second appeal is not admissible, merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower Appellate Court.

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589. *Lala Fateh Chand v Rani Kishen Kunwar,* (1912) ILR 34 All 579, 585 : 39 IA 247, 255, 256, supra; *Gosain v Puran Singh,* AIR 1926 All 542 : (1926) 48 All 588.
590. *Ganesa v Gnanasikhamani,* (1924) 47 Mad LJ 385, 386 : (1925) AM 37.
591. *Chaudhri Satgur v Kishori Lal,* (1919) 46 IA 197, 201 : 42 All 152–156.
592. *Sahebrao v Jaiwantrao,* (1933) 60 IA 231 : 35 Bom LR 816 : (33) APC 171.
593. *Lachman Lal v Kanhaya Lal,* (1895) 22 Cal 609 : 22 IA 51; *Anant Singh v Durga Singh,* (1910) 37 IA 191, 197 : 32 All 363–373; *Midnapore Zamindary Coy v Uma Charan,* (1923) 29 Cal WN 131 : (23) APC 187; *Bazlul v Latis,* (1911) 15 Cal WN 752; *Ujir v Shadhai,* (1922) 35 Cal LJ 182 : (1922) AC 185; *Pran Krishna v Prasanna,* (1923) 37 Cal LJ 580 : (1923) AC 358.
594. *Makund Deb v Gopi Nath,* (1915) 21 Cal LJ 45, 52; *Kuldip v Banvari,* (1920) 5 Pat LJ 251.

Where the lower appellate court arrives at a conclusion which is an inference based upon an erroneous view of the law, the judgment is open to question in second appeal.[595] A judgment is also open to question in second appeal where a defect in the judgment is due to an error as to the admissibility of evidence,[596] or where the judgment is based on a document which does not form part of the judicial record of the case,[597] or which had been improperly admitted as additional evidence by the first appellate court,[598] or where secondary evidence is admitted in contravention of the provisions of sections 65 and 66 of the Indian Evidence Act, 1872[599] or where there is failure to invoke a presumption of fact under section 114 of the Indian Evidence Act, 1872.[600] It is a ground for interference in second appeal if the lower appellate court relies on inadmissible evidence.[601] When a certified copy was admitted in evidence without objection, it was held that a contention that it was not properly proved could not be raised in second appeal.[602] The question of burden of proof is a question of law, and the high court is entitled to interfere in second appeal if the lower appellate court has placed the burden on the wrong party.[603] But where evidence is led by both the parties and is considered, no second appeal can lie on the ground that the onus was misplaced.[604] The question, however, whether a party has discharged the onus rightly placed on him is one of fact.[605] A second appeal will also lie where an unregistered document which requires registration is admitted in evidence.[606] Where the first appellate court has not applied its mind to the evidence in the case in a judicial manner and has omitted to take into consideration some important evidence, the high court can interfere in second appeal.[607] Though the high court cannot interfere with concurrent findings of fact in second appeal, where the lower appellate court has failed to record a finding, it can itself do so on a consideration of the evidence.[608]

Where the court of first instance grants a mandatory injunction for the demolition of a building, and the decree is reversed in appeal on an erroneous view of the law, a second appeal will lie.[609] Though a person may not have been duly appointed executor, he may render himself liable as an executor if he intermeddles with the estate of the deceased; misapplication of law on this point is a good ground for a second appeal.[610] The question whether a stipulation in a

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595. *Harihar Prasad v Mt Janak Dulari*, AIR 1941 Pat 118; *Duryodhan Kar v Braja Sunder De*, (1949) 1 Cut 186 : (49) A Ori 31; *Ishan Chunder v Bishu*, (1897) 24 Cal 825.
596. *Harihar Prasad v Mt. Janak Dulari (supra); Tara v Arun*, (1922) 36 Cal LJ 389, 395 : (1923) AC 261; *Balwant v Baldev*, (1921) 2 Lah 271 : (1921) AL 119; *Ramakrishna Mohaputra v Ganguli Mohapatra*, AIR (1958) Ori 26; *Dalu v Juharmal*, AIR (1952) Raj 91 : 1951 Raj 166.
597. *Latafat Husain v Onkar Mal*, (1935) 10 Luck 423 : (35) AO 41.
598. *Arjan Singh v Kartar Singh*, (51) ASC 193.
599. *Lachman Singh v Musummat Puna*, (1889) 16 IA 125 : 16 Cal 753.
600. *Sitaram v Nanku*, (1928) 50 All 145 : (28) AA 16.
601. *Kishanlal v Sohanlal*, AIR 1955 Raj 451955 Raj 900.
602. *Madamanchi Ramappa v Muthuluru Bajjappa, supra.*
603. *Madho Ram v Nandu Mal*, (1920) 1 Lah 429; *Ganga Ram v Rulia*, (1921) 2 Lah 249 : (21) AL 128; *Sheopujan v Maharaja*, (1923) 2 Pat 919 : (24) AP 310; *Ladli Parshad Jaisval v Karnal Distileries Co*, AIR 1963 SC 1279; *Jiban Chandra v Naren Kaliba*, AIR 1955 Gau 23 : 1954 Gau 242; *Abdul Sami v Mohammad Noor*, 1966 AA 39.
604. *Bhagwandas v Bilton*, (1945) All 148 : AIR 1945 All 227.
605. *JK Cotton Spg & Wvg Mills v CIT*, AIR 1967 All 513 : 64 ITR 444.
606. *Basawa v Kilkapa*, (1878) 2 Bom 489.
607. *Hirday Narain v Har Prasad*, (1948) AO 291; *Kishen Singh v Taru*, (1949) AEP 342; *Vedachala Chettiar v Ameena Bi Ammal*, (1944) AM 121 (FB); *Model Industries, Dayalbagh v Rambhau Narain Patel*, (1946) Nag 73 : (1946) AN 152; *Ram Shankar v Ram Manorath*, (1935) AO 86; *Shakila Banu v Gulam Mustafa*, 1971 714 : 72 Bom LR 623 : 1971 AB 166.
608. *Gurbaksh Singh v Nikka Singh*, 1963 (2) SCJ 285.
609. *Ram Bahadur v Ram Shankar*, (1905) 27 All 688.
610. *Maniram Seth v Seth Rupchand*, (1906) 33 Cal 1047 : 33 IA 165.

contract is by way of penalty is a question of law which renders a second appeal competent.[611] So also the question whether an agreement is in restraint of trade or not.[612] The question whether enquiries made for purposes of section 41 of the Transfer of Property Act were reasonable is one of law.[613]

Where an appeal which ought to have been preferred to the high court is preferred to a district court and the latter court hears and decides the appeal, the decision is contrary to law, and a second appeal will lie from the decree of the district court.[614] The High Court of Madras and Patna have held that where a court assumes jurisdiction which it would not have had if the facts necessary to determine the question of jurisdiction had been rightly decided, a second appeal lies from the findings of facts.[615] If an appeal is wrongly entertained, it is open to the party aggrieved to prefer a second appeal and take the objection that the appeal to the lower appellate court was incompetent.[616]

[s 100.8] Question of Proper Inference in Law From Findings of Fact; Mixed Question of Law and Fact

Even though under the unamended section a second appeal did not lie from a finding of fact, it was held that a second appeal lay under clause (a) of that section where a legal conclusion was drawn from a finding of fact if such conclusion was found erroneous.[617] The reason given was that whereas in determining a question of fact no application of any principle of law was involved in finding either the basic facts or in arriving at the ultimate conclusion, in the case of a mixed question of fact and law the ultimate conclusion has to be drawn by applying principles of law to the basic findings.[618] Accordingly, where the lower appellate court found that the plaintiff and his predecessors were not Hindu *Sanyasis* and therefore were incompetent to assume the office of the mahant for the reason that they had not performed the requisite ceremonies and had not uttered the required mantra, the factual part of the finding, that is, the non-performance of the ceremony and the omission to utter the *mantra* was a finding of fact, but the ultimate conclusion therefrom was a question of law.[619] Thus, the question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a mixed question of law and fact. Where the question of adverse possession is one of simple fact, no second appeal will lie; but a second appeal will lie from a finding as to adverse possession when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the findings as to simple facts.[620] Where the question in a suit was whether the defendant was bound by a mortgage executed by his mother, and it was held that he was, their Lordships of the Privy Council held that the findings was substantially

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611. *Rajagopala v Vardaraja*, (1924) 47 Mad LJ 605, 606 : (1925) AM 84.
612. *Daulat Ram v Dhan Chand*, ('34) AL 110.
613. *Sadiq Hussain v Co-operative Central Bank Ltd*, 1953 Nad 684 : (1952) AN 106.
614. *Lakpatlal v Makham Ram*, (1942) AP 369; *Bandiram v Puura Chandra*, (1918) 45 Cal 926.
615. *Lakpatlal v Makham Ram (supra)*; *Paddayya v Kishnamurthy*, (1927) 52 Mad LJ 674 : (1927) AM 653.
616. *Abdeali v Abdul Karim*, (1957) AMB 122; *Lakshmiveerappa v Varada*, 1958 Andh LT 896.
617. *Guljan Bibi v Zazir-ud-din Mia*, 1975 A Gauh 30.
618. *Krishnawati v Shri Hans Raj*, (1974) 1 SCC 289 : 1974 SC 280.
619. *Krishna Singh v Mathura Ahir*, AIR 1972 All 273 : 1972 All LJ 155.
620. *Lachmeshwar v Manowar*, (1892) 19 Cal 253 : 19 IA 48; *Balaram v Syama Charan*, (1920) 24 CWN 1057; *Jogendra Nath v Rajendra Nath*, (1922) 26 CWN 890 : (1922) AC 54; *Ram Chandra v Asa Ram*, AIR 1937 All 429; *Krishnayya v Udayalakhmamma*, 1953 (2) Mad LJ 241; *Janakirama Rai v Appalaswami*, 1954 Mad 980 : (1954) AM 772; *State of Andhra Pradesh v Kazubadi Fakruddin B*, (1962) AAP 518; *Gundhicha v Iswara*, 1965 A Ori 96; *Profulla Nalini v Dajendra*, 1968 A Tri 5; *Gundarmal v Bansilal*, 1971 A Raj 175.

one of law, and that it was, therefore, open to question in second appeal. In the course of their judgment their Lordships said: "The *facts* found (by the lower appellate court) need not be questioned. It is the *soundness of the conclusions from them* that is in question, and this is a matter of law."[621] As stated by their Lordships of the Privy Council in another case, "the proper legal effect of a proved fact is essentially a question of law", and the high court is, therefore, entitled to interfere in second appeal.[622]

Where the trial court granted injunction restraining respondent/defendants from dispossessing appellant-plaintiff from suit land but refused to grant decree of plaintiff's ownership of suit land based on adverse possession and the decree pertaining to preventive injunction was not challenged by defendants and thus same became final, in second appeal the high court, while denying relief of ownership by adverse possession, denied injunction earlier granted, and observed that owner of suit land being Gram Panchayat and appellant being in possession thereof without any right, it had no right to seek injunction against Gram Panchayat, it was held by the Supreme Court that this finding of the high court was perverse, unnecessary and beyond the scope of second appeal when respondents, by not challenging the decree pertaining to injunction, had accepted adverse possession of the suit land.[623]

It is not the practice of the Supreme Court to permit a mixed question of law and fact to be raised for the first time before it.[624]

[See also notes under sections 100, 46 mixed question of law and fact]

[s 100.9] Clause (c): Substantial Error or Defect in Procedure

A second appeal will lie where there is, as an English lawyer would express it, no evidence to go to the jury, because that does not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge.[625] It is settled law that if the findings of fact given by the first appellate court are based on appreciation of all the relevant evidence, the high court would not upset them. It is only when such findings are based on no evidence at all or where the evidence is disbelieved for no reason at all or if there is any substantial error or defect in procedure that its interference with such findings is called for in second appeal.[626] Thus, where the lower appellate court found that a deed of compromise was not for the benefit of a certain infant, and there was no evidence in the case upon which that Court could found its judgment, it was held by the Judicial Committee that the case was one of a substantial error or defect in the procedure of the first appellate court and that it was a ground for a second appeal to the high court.[627] Normally, court in second appeal will not disturb a concurrent finding of fact. However, where the lower court ignores material evidence with respect to the

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621. *Ram Gopal v Shamshkhaton*, (1893) 20 Cal 93, 98, 19 IA 228, 232; *State of Punjab v Bajaj Electricals*, (1968) 2 SCR 536 : 1968 SC 739 : 70 ITR 730.
622. *Nafar Chandra Pal v Shukur*, (1918) 45 IA 183, 187, 46 Cal 189, 195; *Dhannamal v Mod. Sagar*, (1927) 54 IA 178 : 8 Lah 573 : (1927) APC 102; *Gujarat Ginning etc. Co v Motilal Hirabhai, etc., Co*, (1936) 63 IA 140 : 38 Bom LR 353 : ('36) APC 77; *Mcleod & Co v Sixth Industrial Tribunal*, (1958) AC 273.
623. *Gurdwara Sahib v Gram Panchayat Village Sirthala*, (2014) 1 SCC 669.
624. *Banarsidas v Kanshiram*, 1963 SC 1165; *Narasimham v State of Orissa*, 1963 SC 1227; *Maddanappa v Chandramma*, (1965) 3 SCR 283 : 1965 SC 1812.
625. *Anangamanjari v, Tripura Sundari*, (1887) 14 Cal 740, 747 : 14 IA 101, 110.
626. *Moti Lal v Sardar Mal*, 1976 A Raj 40.
627. *Hemanta v Brojendro*, (1890) 17 Cal 875, 882 : 17 A1 65, 69; *Shivabasava v Sangappa*, (1905) 29 Bom 1 : 31 IA 154; *Damusa v Abdul Samad*, (1919) 46 IA 140 : 47 Cal 107 [fraud]; *Vishvanath v Dhondappa*, (1893) 17 Bom 475 [whether defendants were permanent tenants bound to pay a reasonable rent); *Lakhichand v Lalchand*, (1918) 42 Bom 352, 356 [whether the mortgage-debt was fully satisfied].

fact in issue, its finding can be interfered with even in second appeal. Presumption of truth is attached to the entries in the revenue records and to rebut such presumption, convincing and reliable evidence is required. Where in a suit seeking permanent injunction, the lower courts concurrently found that defendant was in possession of land as tenant, whereas entries in the relevant revenue records showed plaintiff as owner in possession of the land. In the absence of evidence to rebut the presumption of truth of entries in the revenue records, concurrent finding of lower courts that defendant was in possession of land, ignoring the entries in revenue records could not be sustained.[628] A finding of the first appellate court can set aside if it is not based on any evidence as it is an illegality.[629]

Pleas as to validity of notice and non-maintainability of suit under Panchayat Act can be allowed in second appeal, as they involve consideration of law points and interpretation of provisions of the Act.[630] Ordinarily a finding as to possession-must be regarded as a finding of fact, but even a finding of fact can be upset in second appeal on the score that there was no evidence to support it or that it was based on a misconception.[631] A finding of fact is not bending in second appeal if it does not consider the evidence on record and if it fails to appreciate the principles regarding the customary right of irrigation asserted by the plaintiff.[632] Lower appellate court reversed the finding of the trial court, believing the plaintiff's evidence and disbelieving the defendant's evidence. The judgment of the lower appellate court showed that its finding suffered from a substantial error of procedure in appraising the evidence. This error had materially affected the decision of the case on the merits. Such an error gives the high court jurisdiction to interfere on second appeal, under section 100(1)(c).[633] A finding of fact made by the first appellate court, which is the final court of facts can be interfered with in second appeal, *only when* the finding is without evidence or based on inadmissible evidence or is perverse, i.e. the finding is such that no reasonable and prudent man can come to it from the materials on record.[634]

A finding recorded with no reasoning, or a finding based on illogical or perverse reasoning is not binding on the high court under section 100. The burden of proving non-receipt of consideration was on the defendants, The contrary approach of the lower appellate court was erroneous and was not legally sound. It is not enough that the lower appellate court concurs with the finding, but the process of reasoning must also be sound.[635] The district judge, in appeal, decreed *A*'s suit for possession of whole disputed property against *B* and *C*, on the ground that they were not sons of *A*'s deceased father. He did not consider important oral and documentary evidence, which was material to prove the relationship of *B* with *A*'s father. It was held that the judgment could be interfered with in second appeal, as the district judge had ignored a very vital and important document in the case.[636] Where the first appellate court fails to consider the most material evidence in the case, and especially when it reverses the judgment of the trial court, the finding recorded by the first appellate court, is not binding on the high court, though it is true that every non-consideration of the reason given by the trial court in a

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628. *Sant Ram v Faquiro*, AIR 1985 HP 10 (HS Thakur, J).
629. *SushiI Kumar v Ram Chander Sharna*, AIR 1982 : All 129,133, para 11.
630. *Khusad Gram Panchayat v Managing Trustees of Mutawallis of Masjid of Khusad Village*. AIR 1981 Gu 254 : (AIR 1971 SC 2018 and AIR 1972 SC 2526 followed).
631. *M. Manoharan Chetti v C Coomaraswamy Naidu & Sons*, AIR 1980 Mad 212.
632. *Bibi Tahzibunnisa v Syed Aziz Rahman*, AIR 1980 Pat 89.
633. *Sohan Lal v Lala Mangilal*, AIR 1981 All 62.
634. *Naresh Chandra Roy v Saradendu Roy*, AIR 1981 Cal 285.
635. *G Hampamma v Kartiqi Sajjivalada Kalingappa*, AIR 1990 Kant 128 (Murlidher Rao, J).
636. *Braham Raj Singh v Braham Raj Devi*, AIR 1982 HP 57 (VP Gupta, J).

judgment of reversal will not attract this principle.[637] Even if the appreciation of evidence made is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error of defect in the procedure. However, when the first appellate court discarded the evidence as inadmissible and the high court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure. So also in a case where the court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, the high court would be justified in re-appreciating the evidence and coming to its independent decision.[638]

Findings of fact can be interfered with by the high court under certain circumstances, when the court is satisfied that on account of wrong approach to a matter, injustice has been done to one of the parties before it.[639] Lower court recorded finding of fact by wrongly misreading the evidence. It was held that it had committed an error of law, warranting interference. Appeal was allowed.[640] The error or defect in the procedure to which section 100 (l)(c) refers, is not an error or defect in the appreciation of evidence adduced by the parties on the merits. Even if the appreciation of evidence is patently erroneous and the finding of fact is in consequence grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure. However, when the first appellate court discarded the evidence as inadmissible and the high court was satisfied that the evidence was admissible that may introduce an error or defect in procedure. So also, where the court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, the high court would be justified in reappreciating the evidence and coming to its own independent decision.[641]

In a case where the lower appellate court had come to a finding of fraud, although, in point of law there was no evidence to support the finding, the Privy Council held that the Judicial Commissioner was within his powers in second appeal in deciding the case on the evidence in the record.[642] The high court in second appeal is not bound by a finding as to whether the defendants were permanent tenants liable to pay a reasonable rent when the finding was based neither on evidence nor admission.[643] Again, when the lower appellate court inferred from the fact that a mortgagee had delayed filing a suit until the last day allowed by the law of limitation that he had been receiving interest all the time and that the mortgage was satisfied, the high court held that the inference was not drawn from any evidence so that there was an error of law.[644] Where the lower appellate court had reversed a finding of fact arrived at by the court of first instance without considering the material facts on which the first court's finding was based the high court would interfere in second appeal on the ground that the judgment is not a proper judgment of reversal.[645] The Supreme Court has observed that if a finding of fact is arrived at ignoring important and relevant evidence, the finding is bad in law.[646] Similarly, where the lower appellate court disposes of a suit upon a case not raised by the parties land to which the evidence has not been directed, it is a substantial error or defect in procedure

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637. *Payare Gir v Mundari*, AIR 1981 Pat 45.
638. *Hiralal v Gajjan*, AIR 1990 SC 723 (KN Saikia and M Fathima Beevi, JJ).
639. *Giano Devi v Mangal Singh*, AIR 1985 HP 82 (DB).
640. *Ali Hasan v Matiullah*, AIR 1988 All 57.
641. *Hiralal v Gajjan*, AIR 1990 SC 723 (KN Saikia and M Fathima Beevi, JJ).
642. *Damusa v Abdul Samad*, (1919) 46 IA 140 : 47 Cal 107.
643. *Vishvanath v Dhondappa*, (1893) 17 Bom 475.
644. *Lakhichand v Lakhand*, (1918) 42 Bom 352, 356.
645. *Dr RP Ghosh v Bengal & North Western Railway Co*, (1942) 22 Pat 154 : (43) AP 177; *Biswanath v Chunilal*, AIR 1952 Gau 96.
646. *Damadilal v Parashram*, AIR 1976 SC 2229 : (1976) 4 SCC 855; *Radha Nath Seal v Haripada Jana*, AIR 1971 SC 1049 : 1970 UJ 874.

within the meaning of this section and a second appeal lies to the high court.[647] But where the court gives a finding on a question on which both parties go to trial, it is not liable to be disturbed on the ground that it was not raised in the pleadings.[648] The Bombay High Court has held that a finding based on a misconception of what the evidence is cannot be accepted in second appeal,[649] and this was followed by the Allahabad High Court in a case where the lower appellate court, in a perfunctory judgment which did not state correctly what the evidence was, found that a village officer's report was tainted with malice.[650] The Lahore High Court had held that where the court has not considered all the available evidence, a second appeal lies.[651] A second appeal will lie if the evidence has been misread or misunderstood,[652] or the lower appellate court has misdirected itself in point of law in dealing with the question upon the evidence,[653] or has overlooked or ignored material documentary evidence.[654] The same view has been taken also by the Supreme Court.[655] But the mere fact that the lower appellate court has made specific reference in its judgment to only some of the witnesses does not by itself mean that it was unmindful of the rest of the evidence.[656] Error in appreciation of evidence is not a substantial error in procedure within section 100(1)(c) of the Code.[657] When the finding of fact is based partly on conjectures, and partly on a misunderstanding of the evidence, a second appeal lies.[658] On the same principle a second appeal will lie where the finding of the lower appellate court, e.g., a finding on the existence of a usage, is based on irrelevant matters.[659] A second appeal also lies where the lower appellate court decides a question of fact not upon the evidence before it, but on the authority of a previous finding of a court of superior jurisdiction upon similar facts in a case between different parties.[660]

[s 100.9.1] Where the Courts Below Have Misconceived the Real Question They had, to Try

The high court has jurisdiction under this section to set aside the decree of the trial judge in favour of the plaintiff, affirmed on the facts by the first appellate Judge, on the ground that the evidence taken showed that the true question of fact which had not been considered and as to which no issue had been framed should have been answered in favour of the defendant.[661] A conclusion based on an erroneous understanding of the case that the plaintiff committed breach

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647. *Shivabasava v Sangappa*, (1905) 29 Bom 1 : 31 IA 154; *Mathar Singh v Rambaz Singh*, (1921) 19 All LJ 149, 150–151 : ('21) AA 212.
648. *Nanja Davaru v Rama Rao*, 1957 Mys 108.
649. *Govind v Vithal*, (1896) 20 Bom 753.
650. *Subedar v Jagat*, (1924) 46 All 773 : ('24) AA 848.
651. *Gobind Ram v Kaju Ram*, (39) AL 504; *Vedachala Chettiar v Ameena Bi Ammal*, ('44) AM 121 (FB), *Laxminarayan v Durgadevi*, 1966 Cut 887 : 1967 A Ori 92.
652. *Mathar Singh v Rambaz Singh*, AIR 1921 All 212 : (1921) 1 All LJ 149.
653. *Midnapur Zemindari Co Ltd v Uma Charan*, AIR 1923 PC 187 : (1923) 29 Cal WN 131; *Shepujan v Maharaja*, (1923) 2 Pat. 919, 921 : ('24) AP 310; *Ramakrishna Prasad v Mohamed Yahia*, (1960) AA 482.
654. *Maung Hlaing v Maung Chit*, (1923) 1 Rang 135, 136 : ('23) AR 196.
655. *Sonawati v Sri Ram*, (1968) 1 SCR 617 : 1968 SC 466.
656. *Bhagwan Das v Gaya Sah*, 1967 AP 254.
657. *Hiralal v Gajjan*, AIR 1990 SC 723 : (1990) 3 SCC 285 : 1990 SCR (1) 164.
658. *Ghulam Husain v Secretary of State*, ('39) AL 510.
659. *Dwijesh Chandra Roy v Naresh Chandra Gupta*, ('45) AC 492 : (1945) 49 Cal WN 791; *Palakdhari v Manners*, (1896) 23 Cal 179.
660. *Balunki Rout v Sri Kunja Behari Deb*, (1927) 6 Pat. 698 : ('27) AP 209 (FB).
661. *Sheikh Rahmat Ilahi v Mohamad Hyat Khan*, (1943) 70 IA 225 : ('43) A PC 208 : 48 Cal WN 109, *Damusa v Abdul Samad*, (1919) 46 IA 140 : 47 Cal 107.

of contract[662] or on a misinterpretation of pleadings[663] can likewise be challenged in a second appeal The Supreme Court has held that the high court could interfere with a finding of fact in second appeal when the courts below had misunderstood the point for determination.[664]

[s 100.9.2] Other Cases of Error or Defect in Procedure

Interference with a finding of fact would be warranted where there is a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force which has produced an error in the decision on merits. If the lower appellate court allows a new point of fact to be raised for the first time or permits a party to take up a new plea or make out a new case that may amount to an error in procedure.[665] Omitting to decide a material issue,[666] omitting to examine witness tendered,[667] refusing to receive documentary evidence which ought to have been accepted,[668] allowing the plaintiff in the lower appellate court to change the nature of his suit,[669] permitting the defendant in the first appeal to raise a new plea not taken in the written statement,[670] deciding an appeal without waiting for the return of a commission directed to be issued by the first appellate court,[671] rejecting an extract from the death register admissible under section 35 of the Evidence Act, 1872 and then holding that the date of death is not proved,[672] have all been held to be good grounds for special appeal. But disregard of an Amin's second report as to a boundary line does not constitute a substantial error or defect in procedure within the meaning of this section, and is no ground for second appeal.[673] The refusal by a lower appellate court to exercise the discretion vested in it by O XLI, rule 27, with respect to the admission of additional evidence, is a substantial error or defect in procedure, and affords a ground of special appeal. But where the Court has exercised its discretion in a sound and reasonable way, and in the exercise of its discretion refused to admit additional evidence, the case is not one of substantial error or defect in procedure.[674] The same is the position where the court after exercising its discretion properly accepts or rejects the commissioner's report[675] or admits an application for amending the plaint.[676] Admission by the lower appellate court of additional evidence tendered by the respondent without the consent of the appellant and without recording the reasons for its admission as required by O XLI, rule 27, is a substantial error in procedure, and is a good ground for second appeal.[677] Proceeding with a suit without the legal representatives of the deceased plaintiff being brought on the record is also a good ground for second appeal.[678] In a suit for restraining the defendant

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662. *Devendra v Sonubai*, 1971 A Mys 217.
663. *Raj Kumar v Gopinath*, AIR 1971 All 273.
664. *Kakumanu Pedda Subbiah v Kakamanu Akkamma*, 1959 SCR 1249 : 1958 SC 1042.
665. *Bagiammal v Kamalammal*, (1965) 2 Mad 556 : 1965 AM 205.
666. *Sheikh Rahmat Ilahi v Mohamad Hyat Khan (supra)*; *Ramkor v Gangaram*, (1892) 16 Bom 545.
667. *Monilal v Khiroda*, (1893) 20 Cal 470.
668. *Talewar Singh v Bhagwan Das*, (1908) 12 Cal WN 312.
669. *Terietput v Sudersan Das*, (1879) 4 Cal 46.
670. *Nanak v Basanta*, AIR 1976 All 157.
671. *Madho Singh v Kashi Singh*, (1894) 16 All 34.
672. *Begiammal v Kamalammal, (supra)*.
673. *Lukhi Narain v Jodu Nath*, (1894) 21 All 504 : 21 IA 39.
674. *Kamala Ranjan Ray v Baijnath Bajoria*, ('51) ASC 1; *Ram Piari v Kallu*, (1901) 23 All 121; *Durga Prasad v Jai Narain*, (1911) 33 All 379.
675. *Bibhuti Bhusan v S Chandra*, 1965 AC 199 : 68 Cal WN 1043.
676. *Reserve Bank of India v R G Morey*, AIR 1976 SC 830 : (1976) 1 SCC 803 : 1976 (8) UJ 220 SC; *Soham v Abdul Hameed*, AIR 1976 All 159.
677. *Arjan Singh v Kartar Singh*, ('51) A.SC. 193; *Kebal v Rajani*, (1924) 39 Cal LJ 261 : ('25) AC 98.
678. *Nathu v Amrao Singh*, (1928) 10 Lah LJ 497 : ('29) AL 119; *Asutosh Badri v Jatindra Mohan Seal*, (1954) AC 238.

from using and occupying an open space in front of his house, the burden to prove title to that space is on the plaintiff. If that is ignored, the high court would be justified in interfering with the finding even though such finding would be one of fact.[679]

The scope of this clause was considered in *Ramachandra v Ramalingam*.[680] After observing that it had reference not to error or defect in the appreciation of evidence but to error or defect relating to procedure, the Court went on:

> if in dealing with a question of fact, the lower Appellate Court has placed the onus on a wrong party and its finding of fact is the result, substantially of this wrong approach, that may be regarded as a defect in procedure; if in dealing with questions of fact, the lower Appellate Court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure. If the lower Appellate Court fails to consider an issue which had been tried and found upon by the trial Court and proceeds to reverse the trial Court's decision without the consideration of such an issue, that may be regarded as an error or defect in procedure; if the lower Appellate Court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact, or makes out a new case for a party, that may, in some cases, be said to amount to a defect or error in procedure. But the High Court cannot interfere with the conclusions of fact recorded by the lower Appellate Court, however erroneous the said conclusions may appear to be to the High Court, because, as the Privy Council has observed, however gross or inexcusable the error may seem to be, there is no jurisdiction under section 100 to correct that error.

[s 100.10] Main Effect of Amendment

The effect of the amendment, mainly, according to the amended section, was: (i) The high court would be justified in admitting the second appeal only when a substantial question of law is involved; (ii) The substantial question of law is to be precisely stated; (iii) A duty has been cast on the high court to formulate substantial question of law before hearing the appeal; (iv) another part of the section is that the appeal shall be heard only on that question.[681]

[s 100.11] Rationale Behind This Section

The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the state on important legal issues, so that within the area of the state, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of law.[682]

[s 100.12] Finality of Decision

In the 54th Report of the Law Commission of India, it is incorporated that it may be permissible to point out that a search for absolute truth in the administration of justice, however, laudable, must in the very nature of things be put under some reasonable restraint. In other words, a search for truth has to be reconciled with the doctrine of finality. In judicial

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679. *Parmar Gogji v Parmar Ganesh*, AIR 1968 Guj 287 : (1968) 0 Guj LR 1060; *Abdul Sami v Mohammad Noon*, AIR 1966 All 39; *Lila Ram v Mohar Chand*, AIR 1968 P&H 60.
680. *Ramachandra v Ramalingam*, 1963 SC 302; See also *Munnalal v JN Mathur*, (1960) AA 534.
681. *Mukund Deo v Mahadu*, AIR 1965 SC 703.
682. *Gurdey Kaur v Kaki*, AIR 2006 SC 1975 : (2007) 1 SCC 546.

hierarchy, finality is absolutely important, because that gives certainty to the law. Even in the interest of litigants themselves, it may not be unreasonable to draw a line in respect of the two different categories of litigation where procedure will say at a certain stage that questions of fact have been decided by the lower courts and the matter should be allowed to rest where it lies without any further appeal. This may be somewhat harsh to an individual litigant; but in the larger interest of the administration of justice, this view seems to be juristically sound and pragmatically wise. It is in the light of this basic approach that we will now proceed to consider some of the cases which were decided more than a century ago.[683]

[s 100.13] Administration of Justice as per Law

The analysis of cases decided by the Privy Council and the Supreme Court prior to 1976 clearly indicated the scope of interference under section 100, CPC, by the Supreme Court. Even prior to amendment, the consistent position has been that the courts should not interfere with the concurrent findings of facts.

Now, after 1976 Amendment, the scope of section 100 has been drastically curtailed and narrowed down. The high courts would have jurisdiction of interfering under section 100, CPC, only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the high court to formulate substantial questions of law and only then is the high court permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The high court would be justified in admitting the second appeal only when a substantial question of law is involved.

(ii) The substantial question of law is to be precisely stated;

(iii) A duty has been cast on the high court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the section is that the appeal shall be heard only on that question.

In a series of cases, the Supreme Court was compelled to interfere was because the true legislative intendment and scope of section 100 CPC have neither been appreciated nor applied. A class of judges, while administering law, honestly believe that if they are satisfied that, in any second appeal brought before them evidence has been grossly mis-appreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross mis-appreciation of evidence involves injustice and it is the duty of the high court to redress such injustice. It is reiterated that the justice has to be administered in accordance with law.[684]

[s 100.14] Principles Relating to This Section

The principles relating to section 100, CPC, may be summarised thus:-

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683. *Gurdey Kaur v Kaki,* AIR 2006 SC 1975 : (2007) 1 SCC 546.
684. *Gurdey Kaur v Kaki,* AIR 2006 SC 1975 : (2007) 1 SCC 546.

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The high court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that the high court will not interfere with concurrent findings of the courts below. But it is not an absolute rule. Some of the well recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.[685]

[s 100.15] Who Can File Appeal

Section 96 of the Code of Civil Procedure makes provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal, the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal.[686]

No appeal lies against a mere finding. It is significant to note that both sections 96 and 100 of the CPC provide for an appeal against decree and not against judgment.[687]

[s 100.16] Pleas Which may be Taken for the First Time in Second

An appellant will not be allowed to set up for the first time in second appeal a plea not taken by him in the lower court[688].But if the objection is one which goes to the very root of the case,

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685. *Hero Vinoth v Seshammal*, AIR 2006 SC 2234 : (2006) 5 SCC 545.
686. *Banarsi v Ram Phal*, AIR 2003 SC 1989 : (2003) 9 SCC 606; see also *Phool Chand v Gopal Lal*, (1967) 3 SCR 153; *Jatan Kanwar Golcha v Golcha Properties Pvt Ltd*, (1970) 3 SCC 573; *Ganga Bai v Vijay Kumar*, (1974) 2 SCC 393.
687. *Banarsi v Ram Phal*, AIR 2003 SC 1989 : (2003) 9 SCC 606.
688. *Krishnapasuba v Dattatraya*, 1966 SC 1024; *Hardayal Gir v Sohan Ram*, (1970) 3 SCC 635; *Champalal v Sumitramma*, AIR 1973 Mys 110 : (1972) 2 Mys LJ 424.

it may be taken for the first time in second appeal.[689] Plea of *bona fide* purchaser, in good faith from ostensible owner (section 41, Transfer of Property, Act) cannot be raised for the first time in second appeal.[690] Thus, an objection to jurisdiction may be taken for the first time in special appeal, if it is patent on the face of the record,[691] except, it is submitted, in those cases which fall within section 21 above. Similarly, the plea of *res judicata* may be taken for the first time in second appeal provided it can be decided upon the record before the court.[692] A change in the law which has come into force after the decision of the lower appellate court and which has been given retrospective effect also will be allowed to be raised for the first time in the second appeal.[693] So also the plea of want of notice in an ejectment suit[694], or vice versa termination of tenancy by valid notice where the fact of notice is not denied nor any issue is demanded by the defendant,[695] or a plea of lis pendens,[696] for a judicial pronouncement available only at the time of the hearing of the second appeal.[697] As to the plea of limitation, see notes to O XLI, rule 2. "Leave of Court: Limitation," which refer to first appeals, apply also to second appeals.[698]

The high court will entertain in second appeal a point of law although it has not been raised in any of the lower courts, provided the point of law arises on the findings of the lower court or on the issues as framed and on the evidence already recorded. Thus, where the lower appellate court awarded to the plaintiff a third share of the property in suit on the ground that remoter *gotraja sapindas* inherited *per stirpes* and the defendant preferred a second appeal to the high court on the ground that the plaintiff *was not entitled to any share at all*, the defendant was allowed to contend at the hearing of the second appeal that the plaintiff was not entitled in any event to more than a sixth share as remoter *gotraja sapindas* inherited per capita and not per stripes.[699] The Supreme Court has also laid down that a pure question of law can be raised for the first time in appeal.[700] See also the cases noted below.[701] But while the court will be acting within its powers in permitting a question of law to be raised for the first time in appeal, it is not bound to do so, and, may in its discretion, decline to do so, if that would

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689. *Nurul Hasan v Mahabub Bakh*, (1945) All 676 : (45) AA 202 (FB); *Kuppa v Dorasami*, (1883) 6 Mad 76.
690. *Drigpal Singh v Wife of Laldhari Ojha*, AIR 1985 Pat 110.
691. *Sarjerao Appajirao v Province of Bombay*, (1943) Bom 534 : ('43) AB 427 : 45 Beng LR 810; *Bapuji v Umedbhai*, (1871) 8 BHCAC 245; *Sidheshwar v Haribar*, (1888) 12 Bom 155 : *Sayad v Nana*, (1889) 13 Bom 424; *Velayudam v Arunachala*, (1890) 13 Mad 273; *Daulatia v Har Govind*, (1921) 43 All 18 : ('21) AA 219; *Narayana Rao Amruta Rao v Chunilal Sitaram*, 1952 Nag 150 : (1953) AN 236; *Asaram v Banudas*, (1956) AB 687; *Punkajkumar v Bank of India*, (1957) AC 560; *Kundan v Sardara Ramji Lal*, AIR 1959 P&H 206; *Digambar Parshwanath v Valu Bai*, (1961) AB 221; *Syed Mohammad v Mohd Jagar*, 1965 AA 589, *Town Area Committee, Sirsaganj v Churaman*, 1966 AA 370.
692. *Sha Shivraj Gopalji v Edappakath Ayissa Bi*, ('49) APC 302 : (1949) 54 Cal WN 55; *Kanahai Lal v Suraj Kunwar*, (1899) 21 All 446; *Baldev Singh v Sher Singh*, ('39) AL 556.
693. *Biswanath Chatterjee v AK Sarkar*, 1972 AC 52.
694. *Dodhu v Madhavrao*, (1893) 18 Bom 110.
695. *JC Chattcrjee v SK Tandon*, 1972 SC 2526.
696. *Bhup Narain Singh v Nawab Singh*, 36 Pat 1139.
697. *Ramayan Prasad v G Kuer*, 1967 AP 35.
698. *Shivapa v Dod Nagaya*, (1887) 11 Bom 114.
699. *Nagesh v Gururao*, (1893) 17 Bom 303; *Giriappa v Ningapa*, (1893) 17 Bom 100; *Gavdappa v Girimallappa*, (1895) 19 Bom 331, 676; *Nurimian v Ambica*, (1917) 44 Cal 47; *Digambar v Lahyadeo*, (1923) 25 Bom LR 245 : ('23) AB 254; *Kalappa v Kalappa*, (1924) 26 Bom LR 494 : ('24) AB 469; *Sheodan v Balkaran*, (1921) 43 All 193, 197 : ('21) AA 337.
700. *Ranganathan v Government of Madras*, (1955) 2 SCR 374 : AIR 1955 SC 604 : 1955 SCJ 515 : 1955 SCA 841; *State of Madras v Rajagopalan*, (1955) 2 SCR 541 : AIR 1955 SC 817 : 1955 SCA 1331 : 1956 SCJ 19.
701. *Kishorilal v Begraj*, 1952 Punj. 539 : (1952) A Punj 387; *Mahadebram v Tinkori Roy*, (1954) AC 539 : 58 CWN 651; *Sayid Mia v Abdul Sattar*, 1954 Assam 95 : AIR 1954 Ass 102; *Golap Gadi v Ram Pariksha*, (1958) AP 553; *Madhusudan Roy M.Anantacharan*, (1963) A Ori 183.

operate unfairly on the other side.[702] But the high court will not entertain a point of law raised for the first time in second appeal, if the point cannot be decided without remanding the case for further evidence,[703] nor will it take into account any subsequent development and allow additional evidence in regard to it to be taken.[704] When the question is one of mixed law and fact, the high court will not entertain it for the first time in second appeal.[705] A Full Bench of the Allahabad High Court has held that a point of law not taken in the lower appellate court cannot be raised in second appeal unless it is a point involving *res judicata*, jurisdiction, or a point the decision of which is necessary to prevent further litigation, and then only if the question does not necessitate the taking of further evidence.[706] A plea that a suit is barred by section 47 will not be entertained if raised for the first time in second appeal.[707] Similarly the Kerala High Court rejected the plea for awarding the value of improvements under Kerala Act XXIX of 1958 where such a plea was not taken in the lower appellate court though the Act had come into operation while the appeal before that court was pending.[708] The Privy Council quoted with approval in an appeal from Rangoon,[709] the following passage from a judgment of Lord Watson in *Connecticut Fire Insurance Co v Kavanagh:*[710]

> When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.

The Privy Council in a later case refused to allow a new point to be raised before it without any pleadings and evidence on it.[711] The Supreme Court has likewise declined to hear a new question of fact raised before it.[712] A custom neither pleaded nor sought to be established by evidence cannot be set up for the first time in second appeal;[713] nor a new case of agency, when the plea of partnership had failed;[714] nor a new plea that a suit is not maintainable as the partnership which was the foundation of the claim was unregistered as required by section 69 of the Partnership Act, 1932[715] nor a new plea as to the invalidity of registration of a document.[716] Nor can a point of law be taken for the first time in second appeal if it sets up a new right differing in *kind* from that asserted throughout the trial, and not merely in decree. Thus, where

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702. *Gopal v Laxminarayan*, 1962 Raj 815; *Rahmatullah v Ahsan Ali*, (1963) AA 117.
703. (1923) 25 Bom LR 245 : ('23) AB 254, supra; (1924) 26 Bom LR 494 : ('24) AB 469, supra; *Jarip v Jogendra Nath*, (1919) 24 Cal WN 53; *Kumar Rameshwar v Mahabir*, (1926) 5 Pat. 759 : ('26) AP 401; *Purshottam v Kasturbhai*, (1930) 32 Bom LR 1001; *Shaik Mongol v Pure Dishargash Colliery*, ('50) AC 328; *Banarsi Das v Kanshiram*, 1963 SC 1165; *Joharilal v Bihar State Co-operative Bank Ltd.* (1959) AP 477; *Batul Begum v Hem Chander*, (1960) AA 519; *Bharat Chandra v Rajendra*, (1961) AC 155; *Kasipati v Subba Rao*, (1961) A Mys 62; *Dasarath Gayan v Satyanath Ghosh*, 67 Cal WN 110.
704. *Thakkar Anandji v Dharamshi*, AIR 1972 Guj 70 : 1971 Guj 1165.
705. *Narayanaswami v Vellappa*, (1954) AM 829; *District Board, Karnal v MR Sharma*, AIR 1959 P&H 318; *Sikhdeo Maharaj v Gopal Lal*, (1960) AP 502; *Chiman Ram v Ganga Saha*, AIR 1961 Ori 94; *State v Gangadhar*, AIR 1967 Raj 199.
706. *Ram Kinkar v Tufani*, (1931) 53 All 65 : ('31) AA 35 (FB).
707. *Ram Rup v Special Manager*, (1934) 9 Luck 365 : ('34) AO 55.
708. *Ammu, v Krishnan*, AIR 1965 Ker 32.
709. *ME Moolla Sons, Ltd v Burjorjee*, (1932) 59 IA 161 : 10 Rang. 242 : ('32) APC 118; see *Dular Pandey v Nanda Budhai*, (1938) All 563 : ('38) A A 396 (FB); *Santa Singh v Rajender Singh*, (1965) 2 Punj 97 : AIR 1965 P&H 415.
710. *Connecticut Fire Insurance Co v Kavanagh*, (1892) AC 473.
711. *Chandrikamba v Viswanathamayya*, (1933) 64 Mad LJ 513 : ('33) APC 117; *Travancore Forward Bank v Subbaraya Aiyar*, (1954) A. Tr. Co 406 (FB).
712. *Braham Parkash v Manbir Singh*, 1963 SC 1607.
713. *Kirpal Kuar v Bachen Singh*, 1958 SCR 948 : 1958 SC 199 : 1958 SCJ 438.
714. *Govindraj v Kandaswami*, 1957 Mad 1245 : (1957) AM 186.
715. *Chiman Ram v Ganga Saha*, AIR 1961 Ori 94.
716. *Kasipati v Subba Rao*, AIR 1961 Mys 62.

the right claimed by one of the defendants was treated as one of maintenance only in the courts below, she was not allowed to contend in second appeal that, besides maintenance, she was entitled to a half *share* in the property.[717] The failure of the court to formulate the "substantial question of law" (while admitting the appeal) does not mean that the appeal cannot be heard. Such failure is an omission by court. Litigants cannot be penalised for it.[718]

[s 100.17] Admission of Appeal by Registrar, High Court — Validity

See matter under the same heading in section 96 *ante*.

[s 100.18] This Section and Section 18 of TRAI Act, 1997

Under section 18, the appeal would lie against any order of appellate tribunal to the Supreme Court only on the ground specified in section 100 of CPC and necessarily, therefore, it must be a substantial question of law.[719]

The power of Supreme Court under section 18 of the Act cannot be equated with the power of judicial review. Supreme Court will be concerned with a substantial question of law arising in the case, its jurisdiction would not be restricted to illegality, irrationality or procedural impropriety in the decision-making process.[720]

[s 100.19] This Section and Section 72 of the Bombay Public Trusts Act, 1950

A Full Bench of the Bombay High Court has after referring to section 18 of the TRAI Act, section 260A of the Income Tax Act, section 15-Z of the SEBI Act, 1992 and section 30 of the Employee Compensation Act, 1923, held that in section 72(4) of the Bombay Public Trusts Act, 1950, there is no such specification that the appeal from an appellate order of the district court, presented to the high court, shall be heard only if it involves any substantial question of law. Neither section 72(4) makes reference to section 100 of the CPC, nor specifically puts any restriction or limitation on the powers of the high court in entertaining the appeal. Since the provision itself does not limit the scope of the appeal nor puts any limitations on the court dealing with the appeal, it cannot be construed that appeal to the high court, as provided under section 72(4) is subject to any limitations as prescribed under section 100 of the CPC.[721]

Under section 125 of the Electricity Act, 2003, any person aggrieved by any decision or order of the appellate tribunal may file an appeal to the Supreme Court on any one or more of the grounds specified in section 100 of the CPC. In view of the said provision, the Supreme Court has held that unless the court is satisfied that the findings of fact recorded by the forum/ Tribunal below are perverse, irrational and based on no evidence, it would not interfere.[722]

[s 100.20] This Section, O XLI and O XLII

It is needless to say that O XLI, CPC deals with appeals from the original decrees. O XLII, CPC deals with appeals from the appellate court decrees. O XLII, rule 1, CPC, dealing with the procedure specifies that the rules of O XLI, shall apply, so far as may be, to

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717. *Rachawa v Shivayogapa*, (1894) 18 Bom 679.
718. *Sonubai v Bala Govind Yadav*, AIR 1983.
719. *Cellular Operators Association of India v UOI*, AIR 2003 SC 899.
720. *Cellular Operators Association of India v UOI*, AIR 2003 SC 899.
721. *Prabhakar Sambhu Chaudhary v Laxman Baban Mali*, 2016 (3) ABR 600 : 2016 (3) Mad LJ 202
722. *Tamil Nadu Generation & Distribution Corp Ltd v PPN Power Generating Co Pvt Ltd*, (2014) 11 SCC 53.

appeals from appellate decrees. The words "so far as may be" assume importance. In view of the said wording, it cannot be said that all the rules of O XLI, CPC can be made applicable in the case of second appeals and they are applicable only to the extent 'so far as may be'.[723]

[s 100.21] Section 100, Section 102, O XLI, Rule 11 and O XLII, Rule 2 — Harmonious Construction — Admission of Appeal

The court has the power to direct that the appeal be heard on the question formulated by it. At the time of making an order under rule 11 of O XLI for the hearing of a second appeal, the court shall formulate the substantial question of law as required by section 100, and in doing so, the court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the court, given in accordance with the provision of section 100.

While giving harmonious construction to section 100, O XLI, rule 11, O XLII, rule 2, CPC, if all these three provisions are read together, then, the appeal in which a substantial question of law is not formulated, cannot be heard finally and every such appeal in which the substantial question of law is not involved will be dismissed under O XLI, rule 11, CPC, and then there is no question of final hearing of the appeal. The essential requirement for further proceeding when the appeal is not dismissed under O XLI, rule 11, is formulation of substantial question of law. Until and unless the court is satisfied that any substantial question of law is involved in the appeal, such appeal cannot be entertained. In the circumstances, if in a second appeal substantial question of law is not formulated then it cannot be heard finally. In the circumstances, the formulation of substantial question of law is *sine qua non*. To give effect to section 102, newly amended, it can reasonably be held that until and unless substantial question of law is formulated, an appeal cannot be deemed to have passed through the stage of O XLI, rule 11, CPC. In the circumstances, the intention of legislature in section 102 is that when the substantial question of law is formulated as required under section 100, and O XLII, rule 2 of the CPC, appeal shall be deemed to be admitted. If before this, the court has issued notice to the other side, it is in the stage of determining whether in the appeal any substantial question of law is involved or not. Thereafter, the court will either formulate such substantial question of law and the appeal will proceed further, otherwise appeal shall be dismissed. Only after admission of appeal, will the provision of rule 16 of O XLI apply. In the circumstances, the word "admitted" used in section 16(2)(a) of the Code of Civil Procedure (Amendment) Act, 2002 will mean that the court, after hearing the appeal on formation of substantial question of law and being satisfied that a substantial question of law is involved, formulates such substantial question of law, only then would the appeal would be deemed to have been admitted. Merely from the fact that the court issued notice to other side in the process of admitting the appeal, it cannot be said that the appeal is admitted. In the circumstances, if an appeal is not admitted before 1 July 2002, the saving clause would not apply and the bar created under section 102 of the CPC would apply.[724]

[s 100.22] Section 100, Section 104 and O XLIII, Rule 1

The assumption that an appeal under O XLIII, rule 1, clause (u) should be heard only on the grounds enumerated in section 100, is incorrect as O XLIII, rule 1, CPC is only an enabling provision for regulating the procedure and prescribing the various orders from which

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723. *Parkanna v Veershetty*, AIR 2003 AP 191.
724. *Food Corp of India v Munnilal Singh*, AIR 2003 MP 66.

appeal would lie to an higher court. A rule prescribing the procedure can never be understood in law as circumscribing the powers of the higher court hearing the matter in appeal, unless the rule specifically speaks of it. Where an order of remand is questioned as being improper and uncalled for in an appeal provided against such an order, it would be always open to the court hearing the appeal to consider all questions, both of fact and law, to determine whether or not the order of remand is right in law. The learned judge, by taking such view of the matter, has equated an appeal under section 100, CPC whereunder the jurisdiction of the high court to entertain a second appeal after the 1976 amendment is confined only to such appeals which would involve a substantial question of law, with an appeal under section 104, CPC whereunder no such limitation is imposed on the powers of the high court. That is quite improper. In an appeal from an order of remand preferred under O XLIII, rule 1 clause (u), the high court is not confined on the question whether the order satisfies the requirement of the rule. It may also determine the correctness of the lower appellate court's decision on the point on which the trial court disposed of the case. Thus, where the trial court decrees a suit on rejection of the defence of perfection of title by adverse possession and the appellate court reverses the decree and remands the case under this rule, the high court has the power to determine whether the point of adverse possession was correctly decided on merits by the lower appellate court.[725]

In a suit for dissolution of partnership firm and accounts, the trial court appointed a court commissioner in the final decree proceedings. In the second appeal against the order allowing objections against the commissioner's report, the Supreme Court held that though a second appeal against the said order was not maintainable in view of rule 1 of O XLIII of the Code, but if the appeal has been entertained upon hearing both the parties, the court may not exercise its extra-ordinary jurisdiction to set aside that order. It was observed that the scope of an appeal under section 100 was narrowed and the one under. O XLIII, rule 1 is wider. What matters most is to see whether substantial justice has been done to the parties and not the technicalities involved therein.[726]

[s 100.23] Appeal and Revision — Respective Scope

The aspect that has to be considered is the respective scope of appeal and revision. It is fairly a well settled position in law that the right of appeal is a substantive right. But there is no such substantive right in making an application under section 115.[727]

Section 115 is essentially a source of power for the high court to supervise the subordinate courts. It does not, in any way, confer a right on a litigant aggrieved by any order of the subordinate court to approach the high court for relief. The scope for making a revision under section 115 is not linked with a substantive right.

Language of sections 96 and 100 of the CPC which deal with appeals can be compared with section 115. While the former two provisions specifically provide for right of appeal, the same is not the position *vis-a-vis* section 115. It does not speak of an application being made by a person aggrieved by an order of subordinate court. As noted above, it is a source of power

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725. *Mohandas D Prabhu v UFM Mukund Honnappa Naik*, AIR 2003 Kant 428.
726. *Soni Dineshbhai Manilal v Jagjivan Mulchand Chokshi*, AIR 2008 SC 887 : (2007) 13 SCC 293.
727. *Shiv Shakti Coop Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : (2003) 6 SCC 659 : 2003 (4) ALD 1 (SC).

of the high court to have effective control on the functioning of the subordinate courts by exercising supervisory power.[728]

An appeal is essentially continuation of the original proceedings and the provisions applied at the time of institution of the suit are to be operative even in respect of the appeals. That is because there is a vested right in the litigant to avail the remedy of an appeal. As was observed in *K Eapen Chako v The Provident Investment Co Pvt Ltd*,[729] only in cases where vested rights are involved, a legislation has to be interpreted to mean as one affecting such right to be prospectively operative. The right of appeal is only by statute. It is necessary part of the procedure in an action, but "the right of entering a superior court and invoking its aid and interposition to redress the error of the courts below. It seems to this paramount right, part of the progress of the inferior tribunal".[730] The appeal, strictly so called, is one in which the question is, whether the order of the court from which the appeal is brought was right on the materials which that court had before it'.[731] The right of appeal, where it exists, as a matter of substance and not of procedure.[732]

[s 100.24] Right of Second Appeal — Duty of High Court

It has been noticed by the Supreme Court time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the high courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under section 100, CPC. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section, the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts, howsoever erroneous, cannot be disturbed by the high court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact.[733]

Where the findings arrived at by the first appellate court affirming the judgment of the trial court was found by the high court as neither cryptic nor based on non-consideration of arguments advanced by parties, it was held by the Supreme Court that the approach of the high court was in compliance of the code and as such the judgment was not liable to be set aside.[734]

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728. *Shiv Shakti Coop Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : (2003) 6 SCC 659 : 2003 (4) ALD 1 (SC).
729. *K Eapen Chako v The Provident Investment Company Pvt Ltd*, AIR 1976 SC 2610.
730. Per Westbury, see: *AG v Sillem*, 33 J Ex 209.
731. Per Lord Devuil in *Ponnamal v Arumogam*, (1905) AC 390.
732. *Colonial Sugar Refining Company v Irtin*, (1905) AC 368; see also *Shiv Shakti Coop Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : (2003) 6 SCC 659 : 2003 (4) ALD 1 (SC).
733. *Sugani v Rameshwar Das*, AIR 2006 SC 2172 : (2006) 11 SCC 587.
734. *Nopany Investments Pvt Ltd v Santosh Singh (HUF)*, AIR 2008 SC 673 : (2008) 2 SCC 728.

[s 100.25] Interference of High Court in Second Appeal — When Improper

Where a plea was never raised in the lower courts nor such matter arose for consideration in the suit or in the appeal and neither any evidence was recorded on this aspect of the matter, nor were the courts called upon to record a finding on that question, in such a legal and factual position, the Supreme Court found no justification for the high court to interfere in appeal and modify the decree of the courts below on a question which did not arise for its consideration.[735]

Where the question formulated by the high court were neither questions of law nor substantial questions of law, it was held by the Supreme Court that the high court went into a dangerous area of appreciation of evidence on the basis of non-existent substantial questions of law. It was further held that in the absence of pleadings, the high court gravely erred in finding out an entirely new case on the basis of un-pleaded facts and non-existent rights. Hence the judgment of the high court was set aside.[736]

In an appeal filed by the Food Corporation of India against the order passed against it for alleged disobedience of interim direction by high court to deposit rent in court, the high court disposed the appeal summarily on the assumption that the appellant was trying to challenge only the order of interim direction in appeal against the alleged disobedience. It was held by the Supreme Court that the high court did not even bother to refer to the facts and merits and did not ensure that its process were not misused and abused by the respondent. As such the order of the high court was set aside.[737]

Where the high court proceeded on totally untenable premises and recorded findings which were contrary to materials on record, the directions issued by the high court was held to be indefensible and liable to be set aside.[738]

[s 100.26] Court Fee — Interest Accrued up to Decree to be Included

Going by section 52 of the Court Fees and Suits Valuation Act, 1958, the court fee payable in any appeal shall be the same as the fee that would be payable in the court of first instance on the subject matter of the appeal. Explanation (3) to section 52 says that in claims which include the award of interest subsequent to the institution of the suit, the interest accrued during the pendency of the suit till the date of the decree shall be deemed to be part of the subject-matter of appeal except where such interest is relinquished. The instant second appeal is obviously directed against the decree of the lower appellate court under which, as on the date of that decree, the appellant is obliged to pay interest from date of the trial court decree till date of the appellate court decree also.[739]

[s 100.27] Legal Representatives of Deceased Parties — Not Brought on Record — Effect

Where, undisputedly, the legal representatives of neither of the parties were brought on record in the second appeal, the decree passed by the high court in favour of the party who

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735. *Radha Ammar v Balakrishnan Nair,* AIR 2006 SC 3343 : AIR 2006 SCW 5081 : (2006) 8 SCC 546 : 2006 (8) Scale 239.
736. *Dharmarajan v Valliammal,* AIR 2008 SC 850 : (2008) 2 SCC 741.
737. *Food Corporation of India v Sukha Deo Prasad,* AIR 2009 SC 2330 : (2009) 5 SCC 665.
738. *Ramakrishna Rao v Rai Murari,* AIR 2008 SC 1182 : (2008) 3 SCC 175.
739. *Veebros Freight Carriers v Eshita Agency, Kochi,* AIR 2004 Ker 307.

was dead and against a party who was also dead was obviously a nullity as the second appeal stood abated.[740]

However, failure to bring the legal representatives of a deceased would not be fatal to the suit in all circumstances. Thus, where judgment was delivered in a mortgage suit after the death of one of the mortgages, it was held by the Supreme Court that setting aside the entire judgment for not bringing the entire body of legal heirs and legal representatives of the deceased on record would be too technical view when some of the legal heirs of the deceased were already on record.[741]

It was further held in the above case that the suit for redemption cannot be said to be not maintainable because of non-impleadment of married daughters of the deceased mortgagee, when one of the daughters was already dead and the other was neither in occupation of the suit premises nor resided with the mortgagee at the time of his death. More so when two sons of the mortgagee were already on record and representing the estate.[742]

[s 100.28] Recalling of Judgment in Second Appeal by High Court on Technical Ground and Later on Confirming it — Validity

The high court allowed second appeal by an order made on 9 March 1985 and the judgment and decree passed by the first appellate court was set aside and it was held that the appellant, as a co-owner of the suit land, is entitled to the relief claimed for recovery of possession over the entire suit land. Subsequently, the order made on 9 March 1995 allowing the second appeal was recalled on the technical objection of non impleading of legal representatives of one of the parties and the appeal was posted for fresh hearing. On 17 November 1997, the high court finally disposed of the appeal after referring to the judgment dated 9 March 1995 by stating that it concurs with the earlier order, but gave certain additional reasons.[743]

The order of high court did not find favour with the Supreme Court, which was of the view that if all the parties had not been present who could have been impleaded, then the judgment rendered thereto will not be one which was decided in the presence of all the parties. Therefore, when the earlier order dated 9 March 1995 was recalled, the entire judgment stood upset, and it is no longer available for the learned judge either to concur or accept that reasoning.[744]

[s 100.29] Substitution of Opinion of First Appellate Court by Second Appellate Court

The high court cannot substitute its own opinion for that of the first appellate court unless it finds that the conclusions drawn by the lower court were erroneous being (1) contrary to the mandatory provisions of applicable law, or (2) contrary to the law as pronounced by the Supreme Court; or (3) based upon inadmissible evidence or no evidence.[745]

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740. *Kishun v Bihari*, AIR 2005 SC 3799.
741. *Mohd. Hussain v Occharlal*, AIR 2008 SC 1462 : (2008) 3 SCC 233.
742. *Mohd. Hussain v Occharlal*, AIR 2008 SC 1462, at p 1465 : (2008) 3 SCC 233.
743. *Laxmappa Bhimappa Hulegeri v Hanamappa Shetteppa Korwar*, AIR 2004 SC 2445 : (2004) 7 SCC 391 : 2004 (4) Scale 761 : JT 2004 (5) 448.
744. *Laxmappa Bhimappa Hulegeri v Hanamappa Shetteppa Korwar*, AIR 2004 SC 2445 : (2004) 7 SCC 391 : 2004 (4) Scale 761 : JT 2004 (5) 448.
745. *Kondiba Dagadu Kadam v Savitribai Sopan Gujar*, AIR 1999 SC 2213 : (1999) 3 SCC 722; *Balwinder Kaur v Bawa Singh*, AIR 2002 P&H 378.

In a suit for specific performance of contract of sale, which was decreed by the trial court and the first appellate court, interference by the high court in second appeal without analysing evidence and without giving reasons for holding view contrary to those of the courts below. If the trial court had opportunity to observe the demeanour of witnesses, this cannot be a ground to hold that the first appellate court had pre-conceived notion.[746]

[s 100.30] First Appellate Court — Not Countering Reasoning of Trial Court — Effect

In several judgments,[747] it has been held that the first appellate court, which, even though a court of fact, has to counter the reasoning recorded by the trial court for disagreeing with its findings. If the first appellate court has not specifically countered the reasoning of the trial court while coming to a different conclusion, that alone cannot be a ground for acceptance of the second appeal. No doubt, the high court is not supposed to go into the question of fact, but in a situation like this where the first appellate court has failed to discharge its duty of countering the reasoning of the trial court, the high court, while exercising its power as second appellate court, can look into and reappraise the entire evidence with a view to satisfying itself whether the trial court's reasoning justified its finding or whether the first appellate court was right in coming to a conclusion different from that of the trial court.[748]

[s 100.31] Order of Lower Appellate Court Admitting/ Rejecting Additional Evidence

The order of the lower appellate court admitting/rejecting additional evidence can be questioned in an appeal from the appellate decree. The high court ordinarily would not interfere with the discretion of the lower appellate court in admitting or refusing to admit the additional evidence unless such court has not exercised its discretion in a judicial manner or in accordance with law.[749] But finding of the first appellate court rejecting the application for additional evidence is not binding in second appeal.[750]

The Privy Council in *Parsotim Thakur v Lal Mohar Thakur*,[751] while observing that the provisions of section 107 as elucidated by O XLI, rule 27 are clearly not intended to allow litigant, who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal, has observed as follows:

> Under cl. (1)(b) it is, only where the Appellate Court 'requires' it, (*i.e.*, finds it needful) that additional evidence can be admitted. It may be required to enable the court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent.

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746. *Janardhan Narasimha Nayak v Balwant Ventatesh Kulkarni*, AIR 2007 SC 2940 : (2007) 9 SCC 658.
747. *TD Gopalan v Commr of Hindu Religious and Charitable Endowments*, Madras, AIR 1972 Mad 1716; *Sawarni v Inder Kaur*, AIR 1996 SC 2823; *Santosh Hazari v Purushottam Tiwari*, AIR 2001 SC 965 : (2001) 3 SCC 179; *Sidheshwar Singh v Bajrangi Singh*, AIR 1984 Pat 287; and *HM Doyal & Co v Ram Nath Chitkara*, AIR 1986 Del 101.
748. *Mathi v Laiq Ram*, AIR 2006 HP 131.
749. *Khushi Ram v Findhi*, AIR 2003 HP 23; see also *Asha Sharma v Amar Nath*, AIR 2003 HP 32.
750. *Narada Maharana v Pramila Kumari Devi*, AIR 2002 Ori 33.
751. *Parsotim Thakur v Lal Mohar Thakur*, AIR 1931 PC 143.

A constitution Bench of the Supreme Court in *Venkataramaiah's* case,[752] while reiterating the above-mentioned observation of the privy council, pointed out that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause".

In *North Eastern Railway Administration's* case,[753] it has been observed as follows:

> There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment,' it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Thus, the question whether looking into the documents, bought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the court at the time of hearing of the appeal on merits.

When an application for acceptance of additional evidence under O XLI, rule 27 of the code is filed in appeal, the high court is duty bound to dispose of the application one way or the other. Thus, where a second appeal was disposed of while the petition under O XLI, rule 27 CPC remained pending, the case was remitted to high court for deciding the application first and then the appeal in accordance with law.[754]

[s 100.32] Order of First Appellate Court Appointing Local Commissioner for Effecting Partition — Validity

In a suit for partition, the appeal was filed at the instance of the appellant when the trial court dismissed the suit of the appellant (then plaintiff). But the lower appellate court decreed the suit with the directions that the local commissioner appointed by the trial court shall suggest mode of partition and that the possession of the parties shall not be disturbed unless it is essential for effecting the partition. The aforesaid directions given by the learned lower appellate court is not without jurisdiction, and the appellant cannot make grievance against the aforesaid directions and hence, second appeal is dismissed.[755]

[s 100.33] Scrutiny of Evidence

While scrutiny of evidence does not stand out to be totally prohibited in the matter of exercise of jurisdiction in the second appeal and that would, in our view, be too broad a proposition and too rigid an interpretation of law not worthy of acceptance. But, that does not also clothe the superior courts with jurisdiction to intervene and interfere in any and every matter. It is only in very exceptional cases and on extreme perversity that the authority to examine the same *in extenso* stands permissible — it is a rarity rather than a regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be bad in very exceptional circumstances and upon proper circumspection. This is, however, without expression of any opinion pertaining to section 100 of the CPC.[756]

Though their Lordships in *Jai Singh's* case[757] indicated that the said view is without expression of any opinion pertaining to section 100 of the CPC, but a series of decision of the Supreme

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752. *K Venkataramaiah v A Seetharama Reddy*, AIR 1963 SC 1526 : (1964) 2 SCR 35.
753. *North Eastern Railway Administration v Bhagwan Das*, AIR 2008 SC 2139 : (2008) 8 SCC 511.
754. *Jatinder Singh v Mehar Singh*, AIR 2009 SC 354 : (2008) 11 JT 30.
755. *RC Sood & Co Pvt Ltd v R Kant & Co*, AIR 2002 P&H 304.
756. *Jai Singh v Shakuntala*, AIR 2002 SC 1428 : (2002) 3 SCC 634.
757. *Jai Singh v Shakuntala*, AIR 2002 SC 1428 : (2002) 3 SCC 634.

Court indicated that the power of judicial scrutiny is to be exercised in case of perversity or in appropriate cases where it is found that the statutory mandate was not followed. In view of such cases, it was also viewed that findings based on surmises and conjectures or perverse findings not based on legally acceptable evidence cannot have any impunity from interference in the hands of the appellate authority. Considering all these aspects, it is concluded that the finding of the first appellate court deserves interference.[758]

[s 100.34] Proof of Execution and Cancellation of Will

Where the Will has been proved as duly executed, the fact of registration of the Will has been proved as the joint sub-registrar had issued a certificate that the witnesses have appended their signature in his presence and the thumb impression by the testator was also taken in his presence, these are findings of facts of the courts below and do not raise any substantial question of law for interference under section 100 of the CPC.[759] Where a pure finding of fact had been recorded by the courts below where it had been held that the execution of the will had not been proved, as neither its scribe nor its attesting witness has been examined and the Will was surrounded by suspicious circumstances and was unnatural. These findings recorded by the courts below regarding validity of Will are pure findings of fact, calling for no interference in second appeal.[760] The plea of execution of gift deed giving entire property to a party after cancelling prior execution of will in favour of another person having been examined by the courts below and finding of fact arrived at on the basis of evidence that no undue influence was played upon donor/testator by the defendant and the gift deed was valid, cannot be interfered in second appeal.[761] The question whether a Will can be believed or not is not a question of law. The high court will not re-appraise the evidence to ascertain whether Will should be believed or not.[762] But when the trial court has recorded a specific finding that execution of the Will which is a registered document has been proved by calling up attesting witnesses and the testator of the Will was in sound mental condition to execute the Will and the Will was cancelled simply on the ground that there was unequal disposition by the testator of the will, the cancellation of will is improper and it gives rise to substantial question of law warranting interference in second appeal.[763]

[s 100.35] Inadmissibility of Question of Facts

The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that the legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble".[764] The basic law pertaining to second appeal as reflected by under mentioned case-law[765] is that if no substantial question

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758. *Sahida Khatoon Bibi v Debilal Shaw,* AIR 2004 Cal 191.
759. *Surinder Kaur v Mohinder Singh Fauji,* AIR 2004 P&H 161.
760. *Anoop Kaur v Anup Singh Grewal,* AIR 2003 P&H 241.
761. *Roshan Lal v Kartar Chand,* AIR 2002 HP 131.
762. *Santosh Kumari v Vijay Kumari,* AIR 2002 HP 103; see also *Nalinakshi N Rai v Indira Shetty,* (1999) 9 SCC 248; *Sito v Amar Nath,* AIR 2004 HP 26.
763. *Jangi Singh v Raghubir Singh Chauhan,* AIR 2004 All 167.
764. *Gurdey Kaur v Kaki,* AIR 2006 SC 1975 : (2007) 1 SCC 546.
765. *Vishnu Prakash v Sheela Devi,* AIR 2001 SC 1862; *Kamti Devi v Poshi Ram,* AIR 2001 SC 2226; *Hamida v Md. Kahlil,* AIR 2001 SC 2282; *Padikal Madappa v CB Kariapa,* AIR 2001 SC 2695; *Mohan Lal v Nihal Singh,* AIR 2001 SC 2942; *Hameed v Kanhaiya,* AIR 2004 All 405; *Lala Sunder Chand Goel v Rakesh Kumar,* AIR 2002 All 82; *Krishna Mohan v Bal Krishna Chaturvedi,* AIR 2001 All 334;

[Footnote No. 765 contd.]

of law would have emerged, the findings of the first appellate court or concurrent findings of the courts below on the question of fact cannot be interfered with in second appeal. Where in the case of alleged oral partition, where the plaintiff claimed that he had purchased the suit property from one son as it fell to his share, and the defendant claimed that he purchased same property from another son as it fell to his share, such dispute had to be decided on basis of evidence on record. Finding of fact recorded by appellate court that plaintiff failed to prove his claim being pure finding of fact based on evidence on record should not be interfered with in second appeal.[766]

The Supreme Court has held that where the questions framed by the high court in second appeal under section 100 were essentially questions of fact and the second appeal did not involve any substantial questions of law, the high court was incorrect in remanding the case to the trial court for *de novo* trial in all the civil suits. It was further held that section 100 empowers the high court to decide the second appeal only on the questions framed. In other words, the jurisdiction of the high court to decide the second appeal is confined only to questions framed. When the high court did not frame any question on the question of remand, to the trial court a fortiori it had no jurisdiction to deal with such question much less to answer in the respondent's favour. The high court, it was held, further failed to see that if the first appellate court could decide the appeal on the merits without there being any objection raised for remanding of the case to the trial court, the high court should have decided the appeal on the merits and instead raised the issue of remand of its own and passed order to that effect.[767]

The finding of first appellate court regarding the form of adoption in dispute is a finding of fact which cannot be interfered in second appeal.[768]

The trial court and the first appellate court have noted that the plaintiff has not been able to produce any deed of title directly lending support to his claim for title and at the same time, the defendant too has no proof of his title, much less even an insignia of title. Being a civil case, the plaintiff cannot be expected to prove his title beyond any reasonable doubt;

[Footnote No. 765 contd.]
Anjali Debi Thapa v Sandhya Debi Thapa, AIR 2004 Gau 145; *Atul Chandra Kalika v Bano Ram Boro*, AIR 2004 Gau 174; *Paokhothang Haokip v Dozakhup Paite*, AIR 2003 Gau 44; *Dulal Chandra Biswas v Sailendra Nath Sadhukhan*, AIR 2001 Cal 209; *Jag Mohinder v Chander*, AIR 2004 Del 150; *Nathan v Nokhu Ram*, AIR 2004 HP 20; *Prabhat Lal Baruah v Kanak Chandra Baruah*, AIR 2002 Gau 54; *Amin Chand v Bhagta*, AIR 2003 HP 161; *Life Insurance Corp of India v Kiran Bala*, AIR 2003 HP 164; *Ram Swaroop v Mandir Thakran Kalyan Rai*, AIR 2002 HP 27; *Roshan Lal v Kartor Chand*, AIR 2002 HP 131; *Bhadan Singh v Jumivt*, AIR 2001 HP 9; *Surma Valley Saw Mills Pvt Ltd v Arati Das*, AIR 2002 Gau 108; *Ranjana Nagpal v Devi Ram*, AIR 2002 HP 166; *Sarwan Dass v Salam Jeet*, AIR 2003 HP 126; *R Lingarwami v D Kuber*, AIR 2004 Mad 397; *T Perummar v R Nesammal*, AIR 2004 Mad 37; *Institute of Education v SASE and SKHRM Endowment Trust*, AIR 2003 Kant 226; *NAS Ansari v T Ramalingam*, AIR 2003 Mad 286; *Lolo v Durghatiya*, AIR 2001 MP 188; *Pitambar Kar v Trilochan Kar*, AIR 2003 Ori 104; *Chanan Kaur v Pakhar Singh*, AIR 2004 P&H 14; *Darshan Kumar Sharma v Vimal Bansal*, AIR 2004 P&H 129; *Channo Devi v Ami Lal*, AIR 2004 P&H 130; *Subhadra Devi v Balbu Nath*, AIR 2004 P&H 341; *Rajinder Prashad Malik v Shanti Devi Malik*, AIR 2003 P&H 29; *Karam Singh v Nazir Singh*, AIR 2003 P&H 172; *Punam Chand v Sushil Kumar*, AIR 2003 P&H 189; *Gurwail Singh v Rajinder Singh*, AIR 2003 P&H 336; *Pritam Kaur v Chanan Singh*, AIR 2003 P&H 368; *Nirmal Singh v Mangal Singh*, AIR 2002 P&H 70; *H.M. Krishna Reddy v HC Narayana Reddy*, AIR 2001 Kant 442; *Keshav Prasad v Brijbushan*, AIR 2006 MP 207; *Chandeshwar Gope v Tejan Gope*, AIR 2006 Pat 153; *Takhat Singh v Municipal Council, Ajmer through its Administrator*, AIR 2006 NOC 1415 (Raj); *Ramji Kharya v Murlidhar*, AIR 2006 (NOC) 1154 (MP); *Balaram v Ashok Kumar*, AIR 2006 (NOC) 1363 (MP—DB).

766. *Christopher Barla v Basudev Naik*, AIR 2005 SC 1020 : (2005) 9 SCC 207.
767. *Syeda Rahimunnisa v Malan Bi*, AIR 2016 SC 4553 : (2016) 10 SCC 315 : JT 2016 (10) SC 14.
768. *Raj Gopal v Kishan Gopal*, AIR 2003 SC 4319 : (2003) 10 SCC 653 : (2003) 3 SCR 732.

a high degree of probability lending assurance of the availability of title with him would be enough to shift the onus on the defendant and if the defendant does not succeed in shifting back the onus, the plaintiff's burden of proof can safely be deemed to have been discharged. In the opinion of the two courts below, the plaintiff had succeeded in shifting the onus on the defendant and, therefore, the burden of proof which lay on the plaintiff had stood discharged. The high court, in exercise of its limited jurisdiction under section 100 of CPC cannot enter into the evaluation of evidence afresh. Thus, the interference with a pure and simple finding of fact based on appreciation of oral and documentary evidence, by the high court, would not be proper.[769]

Thus, the quantity of the extent of requirement in a petition for *bona fide* need and necessity has been held to be a question of fact not vulnerable in second appeal.[770] The findings about the mere wish or desire as opposed to need or requirement of the landlord, besides the findings about the comparative hardship, a finding of questions of fact and the high court under section 100 of the CPC in view of *Mattu Lal v Radhe Lal,*[771] could not have interfered with such findings.[772] The high court was not justified in second appeal under section 100, to interfere with the findings of facts unless there were facts established to hold that the alternative accommodation acquired after the decree of eviction in favour of the appellant was reasonably suitable.[773] In a suit for declaration of easement of right of passage, the concurrent finding by the trial court and the lower appellate court was that the plaintiff failed to establish prescriptive easement or easement of necessarily or easement by immemorial user. Such a finding is a finding of a fact and requires no interference in second appeal.[774]

Similarly, where on the face of clear pleadings and the evidence on record, the high court reached a conclusion that there was no pleadings and evidence regarding dispossession, therefore, the Supreme Court set aside the order of the high court in accepting the second appeal on the ground that there was no pleading and evidence regarding dispossession and as such, suit for possession was incompetent.[775]

Where the high court wrongly framed an issue whether appellant had purchased the property and on appreciation of evidence reversing findings of facts recorded by the first appellate court, it was held that the high court's interference with the findings of the first appellate court, which is the final court of facts, were unwarranted.[776] The views of the trial court were based on the misreading of the oral evidence. The lower appellate court drew logical conclusion from circumstantial evidence and upset the findings of the trial court. The interference drawn by the lower appellate court thereof, cannot be said to be merely based on conjectures and surmises. Such findings by the lower appellate court are wholly findings of fact and cannot be interfered with by the high court in exercise of its limited jurisdiction under section 100.[777]

In a suit for declaration of title and confirmation of possession on the basis of sale deed executed by *Karta* of Joint Hindu Family, it was held by the Orissa High Court that whether there is legal necessity to support an alienation is a question of fact and the courts below having concurrently held that there was legal necessity in the family, there is no scope for the high

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769. *RVE Venkatachala Gaunder v Arulmigu Viswerswami & VP Temple,* AIR 2003 SC 4548 : (2003) 8 SCC 752.
770. *Bikash Ch Ghosh v Dilip Kumar Mukherjee,* AIR 1997 Cal 363.
771. *Mattu Lal v Radhe Lal,* (1974) 2 SCC 365.
772. *Rajender Kumar v Jamna Das Kotewala,* (1990) 4 SCC 15.
773. *Saroj Kumar Das v Arjun Prasad Jogani,* (1987) 4 SCC 262.
774. *Hamir Ram v Varisng Raimal,* AIR 1998 Guj 165.
775. *Geeta Rani Paul v Dibyendra Kundu,* (1991) 1 SCC 1.
776. *Ninge Gowda v Linge Gowda,* (1997) 1 SCC 477.
777. *Ram Dev v Dulari Devi,* AIR 1996 All 253.

court in second appeal to interfere with the finding particularly when there is no perversity in the approach of the courts below.[778]

A plea by the appellant that they are the tenant in the disputed property is a question of fact, thus, they are debarred in a second appeal challenging the findings of the two courts below on the factum of tenancy. This was the view of the Supreme Court in *Raja Durga Singh of Solan v Tholu*.[779]

In a matter relating to the execution of a will, the high court ignored two important suspicious circumstances, those being:

(i) the legatee took active part in the execution of the Will; and

(ii) no provision was made in the Will for the two widows of the testator, when one of whom, the appellant, was not even related to the legatee

The pious wish expressed by the deceased that it was expected of the legatee to look after the welfare of the appellant was of no consequence. Had these two suspicious circumstances been kept in mind by the high court that the finding of fact disturbed by the high court would not have occasioned in the totality of circumstances. Thus, the decision of the high court was upset.[780]

The concurrent finding of fact that out of the two sale deeds executed in respect of a property, one is earlier in time and is genuine and valid. The findings are based on oral and documentary evidence. Such a finding was not open to any challenge in second appeal.[781] The concurrent finding as to the factum of adoption not having been proved, was not such a one, which could not be arrived at in any view of the matter. This finding, therefore, was unassailable in second appeal even under section 100 as it stood before 1976, and what was then a restricted area for the second appellate court has now become almost a prohibited area or no entry area under section 100 as amended in 1976.[782] The findings of facts regarding misrepresentation and fraud cannot be interfered with in second appeal.[783]

The entitlement of the plaintiff to receive damages from the defendants being an issue of fact as concluded by both the courts, has not been shown to be in any manner illegal or perverse. Hence, the said findings by both the courts below have to be upheld and the high court should not interfere with the finding of the facts.[784]

The findings on the questions of execution or entering into an agreement to sell, dated 18 June 1975 and that of possession are pure and simple concurrent findings of facts and it is well-settled that while exercising section 100 of CPC, the high court is not entitled to interfere with the findings of facts, however grossly erroneous it may be, except in cases where it may be said to be vitiated by substantial error of law.[785]

In a suit for declaration, the original owner had executed a power of attorney authorising the defendants to look after the house property. Defendants claimed that sale deed was executed

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778. *Jayadeb Swain v Santha Behera*, AIR 2007 Ori 15 : 2006 (2) Ori LR 286; See also *Umesh Chandra Karan v Shail Kumari Devi*, AIR 2007 Pat 10 : 2006 (3) Pat LJR 553.
779. *Raja Durga Singh of Solan v Tholu*, AIR 1963 SC 36; *Suraj Prakash v UOI*, AIR 1998 Del 236.
780. *Bhagwan Kaur v Kartar Kaur*, (1994) 5 SCC 135.
781. *Ramanuja Naidu v Kanniah Naidu*, AIR 1996 SC 3021.
782. *Amruta Babaji Mozar v Kondabai*, AIR 1994 Bom 293.
783. *K. Kanakavathnam v A. Perumal*, AIR 1994 Mad 247; *Karbalai Begum v Mohd Sayeed*, (1980) 4 SCC 396.
784. *Bapu Pillai v Supdt Engineer, Madurai Electricity System, TNEB, Madurai*, AIR 1999 Mad 246.
785. *Gavigowda v Kalegowda*, AIR 1996 Kant 131.

by the original owner on the same day the power of attorney was executed. Admittedly, the original owner died after two years from the date of the alleged sale letter.

It was held by the Jharkhand High Court that the concurrent finding of fact that the defendants have not perfected their title by adverse possession.[786]

MY Eqbal, J explained the point in the following words:

> 21 There is no pleading of the defendants/appellants that sale letter was executed on the same day but after execution of registered power of attorney. Here interesting question that comes to my mind is that if Mangal Khan agreed to sell the house property in favour of Most. Rajni then there was no occasion for executing registered power of attorney instead of executing a registered sale deed. Be that as it may, admittedly Mangal Khan died after two years from the date of alleged sale letter that is 02.09.1970. No evidence has been adduced by the defendants either orally or documentary to show that after the execution of sale letter any attempt was made by Most. Rajni to persuade Mangal Khan to execute a sale deed so long as he was alive. Even after the death of Mangal Khan his heirs and legal representatives were never informed by Most. Rajni about her continuation in possession on the basis of alleged transfer by virtue of a sale letter. Not a single chit of paper has been filed by the defendants/appellants to show that they were claiming hostile title in the suit property.[787]

In view of the admission in the title deed obtained by the respondent himself and a concurrent finding recorded by the courts below that the appellant has been in possession, the injunction shall follow. Under these circumstances, the trial court and the appellant court have rightly granted the perpetual injunction. The high court is, therefore, not right in reversing that finding.[788]

Where in a suit for declaration that plaintiff was adopted son, an entry in admission register was put forth in evidence and while rejecting such evidence, a finding, in fact, was given by lower court that the attestator identity was indicated in a different ink, it being a factual finding, not falling into category of perverse conclusion, there would be no scope for interfering with the conclusion.[789]

After considering the entire evidence on record, the court below have given a finding that the marriage between the plaintiff and defendant no 1 had taken place in the year 1968 and the marriage between defendant no 1 and defendant no 2 had taken place in the year 1978. This is the concurrent finding of the fact which has become final, which could not be subjected to the judicial scrutiny in second appeal.[790]

The appellate court considered the evidence elaborately and came to the conclusion that the court cannot direct the husband to return it, since there is no evidence as to the fact that the jewels were in the possession and custody of the husband when the wife left the husband's house. This is purely a question of fact and in a second appeal the high court is expected only to consider substantial questions of law and since the final fact finding court has found, on facts proved in the case, that the plaintiff is not entitled to recover the jewels it is unjustified on the part of the high court to interfere with that part of the judgment.[791]

The lower appellate court, before reversing the finding of the trial court on the issue of *bona fide* requirement of the land lady for starting a cloth business, failed to read the entire evidence

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786. *Iftekhar Ahmad Khan v Md. Sahabuddin*, AIR 2010 Jhar 26 : (2010) AIHC 1070.
787. *Iftekhar Ahmad Khan v Md. Sahabuddin*, AIR 2010 Jhar 26, at page 30 : (2010) AIHC 1070.
788. *Walter Louis Franklin v George Singh*, (1997) 3 SCC 503.
789. *Raghunath Behera v Balaram Behera*, AIR 1996 Ori 38.
790. *Birendra Bikram Singh v Kamala Devi*, AIR 1995 All 243.
791. *TC Chacko v Annamma*, AIR 1994 Ker 107 (DB).

and take into consideration all the documents placed before the trial court. In such a situation, the high court was justified in interfering of the finding of the first appellate court.[792]

In an Orissa case, the first contentions related to a question of fact and the appellate court as the final court of the fact having recorded the findings that the plain paper sale deed covers the suit land and such finding being not unreasonable, it is not permissible for the appellant to contend in the second appeal that the suit land is not covered by the plain paper sale deed.[793] Where the trial court and the first appellate courts on the facts found that the sale certificate which was the only piece of evidence relied on by the plaintiff, did not clearly connect the property covered by the certificate with the suit premises, the high court is not justified in interfering with such findings of facts in second appeal.[794]

The conclusions about limitation is a finding of fact and it is not open for interference in the second appeal.[795]

Where both the courts below, upon consideration of the evidence on record, have arrived at the concurrent finding that the plaintiff, an illiterate lady, executed the disputed deed of sale with necessary mental act of understanding the nature of the transaction. Such finding of fact cannot be interfered with in second appeal unless it is wholly absorbed or materially vitiated by some consideration of evidence to the contrary.[796]

Once an appeal had been admitted on the substantial question of law, there was no question of saddling it with any other subsequent conditions.[797]

No documentary evidence of title was available to prove that the suit lands belong to the deity of the temple of the other village *A* and the mere fact that one of the co-trustees belongs to a village *A*, was no ground to interfere with the findings that the land belongs to the temple of the village *M*, in which they were situated. In this view, the findings recorded by the courts below on the question of ownership of the said land to be perverse and on that basis treated as if there was an error of law.[798]

The vendee proved the ingredients of good management and the concurrent finding of the trial court and the first appellate court was that the impugned sale was an act of good management and it was essentially a finding of fact. The high court was, therefore, in error in setting aside the concurrent finding of fact in the fact and circumstance of the case.[799] In the face of the findings recorded by the trial court as also by the lower appellate court on the question of execution of sale deed by the second defendant in favour of the plaintiff, with the further finding that it was a valid sale deed which properly conveyed the title of the property in question to the plaintiff, it was not expected of the high court to set aside those findings merely on the ground that the circumstances which had already been considered by the lower courts appeared to suggest some other conclusions from proved fact.[800] The first appellate court was a court of facts and it had every right to view the facts from its own angle giving good reasons for its opinion. Simply because the trial court had described a particular document as a manipulated one, the first appellate court was not estopped from reopening that matter.

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792. *Mehrunnisa v Visham Kumari*, (1998) 2 SCC 295.
793. *Sadhu Meher v Rajkumar Patel*, AIR 1994 Ori 26.
794. *Chandra Bhagabai v Ramkrishnan*, (1998) 6 SCC 207.
795. *Saraswatidevi v Krishnaram Baldeo Bank Ltd*, AIR 1998 MP 73.
796. *Sita Bewa v Gandhar Bharati*, AIR 1995 Ori 154.
797. *Chandrakant SN Pednekar v Shaik Kassim Haider Alli*, AIR 1995 Bom 265.
798. *Murugayya Udayar v Kothampatti Muniyandavar Temple*, (1991) 1 Supp SCC 331.
799. *Bara Singh v Kashmira Singh*, (1990) 4 SCC 711.
800. *Vidhyadhar v Mankikrao*, (1999) 2 LRI 243.

Nothing was placed before the high court to infer any illegality in the approach of the courts below. Hence, there is no ground for interference in second appeal.[801]

In *Baldev*,[802] the Supreme Court has held that a second appeal does not completely bar determination of questions of fact, but must adhere to the "discipline" of only considering questions of law of substantial importance.

The high court rightly held that the finding of subletting or parting with possession of the premises in dispute was vitiated in law as it was primarily based on inadmissible evidence. Having found the finding vitiated, it was open to the high court to re-examine and re-appreciate the evidence on record.[803] From this point of view, the high court considered the various figures and entries in the originals in which such erasures and entries are alleged to have been made by the employee and therefore, the non-supply of these documents has caused prejudice. Having examined the findings arrived at by the high court, it cannot be said that the high court has committed any error which warrants interference under Article 136 of the Constitution.[804]

[s 100.36] Finding of Fact — When Liable to be Interfered in Second Appeal

As discussed above, the high court, in its jurisdiction under section 100 is only to consider the question of law and not interfere with the findings of facts arrived at by the courts below. At times, questions which are suggested as substantial questions of law turn out to be only question of facts which cannot be interfered with by the high court under normal circumstances. However, it is settled law that the high court can interfere in second appeal when finding of the lower appellate court is based on misconception or not supported by acceptable evidence.[805]

The position is well settled that when the judgment of the final court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence, the high court, in second appeal, is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the high court in second appeal.[806]

Though the scope for interference with concurrent findings of fact while exercising jurisdiction under section 100, CPC is very limited, and re-appreciation of evidence is not permissible where the trial court and/or the first appellate court misdirected themselves in appreciating the question of law or placed the onus on the wrong party, certainly there is a scope for interference under section 100, after formulating a substantial question of law.[807]

> While it is true that in a second appeal a finding of fact even if erroneous will generally not be disturbed but where it is found that the findings stands vitiated on wrong test and on the basis of assumption and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with

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801. *Ram Bhajan v Abdul Rahman,* AIR 1997 All 17.
802. *Baldev Krishan v Satya Narain,* (2013) 14 SCC 179 : (2013) 8 SCR 551 : (2013) 10 Scale 623 : JT (2013) 12 SC 23.
803. *Sri Chand Gupta v Gulzar Singh,* (1992) 1 SCC 143.
804. *UP State Road Transport Corp v Muniruddin,* (1990) 4 SCC 464.
805. *Natesan v Chinnachi Kandar,* AIR 1996 Mad 468.
806. *Yadarao Dayiba Shrawane v Nanilal Harakchand Shah,* AIR 2002 SC 2849 : (2002) 6 SCC 404.
807. *Hero Vinoth v Seshammal,* AIR 2006 SC 2234 : (2006) 5 SCC 595; *Krishna Mohan Kulus v Pratima Mrity,* AIR 2003 SC 4351 : (2004) 9 SCC 468 : (2003) 2 PLJ 520 : (2003) 10 JT 150.

> the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity *vis-à-vis* the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication—what is required is a categorical finding on the part of the High Court as to perversity. The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot be termed to be a question of law.[808]

When both the lower courts have concurrently erred in not appreciating the oral and documentary evidence properly, the high court is at liberty to re-appreciate the evidence and record its own conclusion for reversing the orders passed by the lower court.[809]

In a second appeal where there were concurrent finding of facts by the lower courts, the interference by the high court was held to be justified by the Supreme Court when there was error as to the onus of proof.[810] HS Bedi, J, speaking for the Supreme Court Bench in the above case, observed as follows:

> The High Court has also rightly observed that there was no presumption that the property owned by the members of the Joint Hindu Family could a fortiori be deemed to be of the same character and to prove such a status it had to be established by the propounder that a nucleus of Joint Hindu Family income was available and that the said property had been purchased from the said nucleus and that the burden to prove such a situation lay on the party, who so asserted it.[811]

In the above decision, the Supreme Court quoted with approval from its earlier decision in *DS Lakshmaiah v L Balasubramanyam*,[812] wherein it has been observed as under:

> 18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu Family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

Pasayat, J, speaking for the Supreme Court Bench, observed as follows in *Hero Vinoth's* case:[813]

> It is now well settled that an inference of fact from a document is a question of fact. But the legal effect of the terms or a term of a document is a question of law. Construction of a document involving the application of a principle of law, is a question of law. Therefore, when there is a misconstruction of a document or wrong application of a principle of law while interpreting a document, it is open to interference under section 100, CPC. If a document creating an easement by grant is construed as an 'easement of necessity' thereby materially affecting the decision in the case, certainly it gives rise to a substantial question of law.

Under Section 100 of the Code, the power of the high court to interfere with the findings of fact is limited, but it may not be limited in a case where the finding of fact had been arrived

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808. *Kulwant Kaur v Gurdial Singh Mann*, AIR 2001 SC 1273 : (2001) 4 SCC 262 : 2001 (1) PLJ 416; see also *Chewag Dorjee Lama v Kerap Dorjee Bhutia*, AIR 2006 Sikkim 37.
809. *Ramlal v Phagua*, AIR 2006 SC 623 : (2006) 1 SCC 168; *Balram Kinar v Ramkrishna*, AIR 2002 MP 139; *Mathuri Bewa v Prafulla Routsay*, AIR 2003 Ori 136.
810. *Makhan Singh v Kulwant Singh*, AIR 2007 SC 1808 : (2007) 10 SCC 602.
811. *Makhan Singh v Kulwant Singh*, AIR 2007 SC 1808, para 9 at p 1812 : (2007) 10 SCC 602.
812. *DS Lakshmaiah v L Balasubramanyam*, AIR 2003 SC 3800 : (2003) 10 SCC 310.
813. *Hero Vinoth v Seshammal*, AIR 2006 SC 2234 : (2006) 5 SCC 545.

at upon taking into consideration inadmissible evidence and based on presumptions which could not have been raised.[814]

An appeal under section 100, CPC, can be entertained by the high court only on a substantial question of law. There can be no quarrel with this legal proposition. The scope of powers of high court under section 100, CPC is a matter of settled law. If the finding of the subordinate court on facts are contrary to evidence on record and are perverse, such finding can be set aside by the high court in appeal under section 100. The high court cannot shut its eyes to perverse findings of the courts below. In the present case, the findings of fact arrived at by the lower appellate court were contrary to evidence on record and, therefore perverse, and the high court was fully justified in setting aside the same.[815]

On the question of interference in second appeal in cases of concurrent findings of fact, the Supreme Court has observed as follows:

> 17. The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refer to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.[816]

The Supreme Court further went on to observe in the above case,[817] as follows:

> **9.** It has been noted time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under section 100 of the Code. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of powers under this section in several cases, the findings of fact of the first Appellate Court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds.

Bona fide requirement, on a first look, appears to be question of fact. But in recording a finding on the question, the court has to bear in mind the statutory mandate incorporated in section 12(1),[818] if it is found that the court has not applied the statutory provisions to the evidence on record in its proper perspective then the finding regarding *bona fide* requirement would cease to be a mere finding of fact, for such erroneous finding illegally arrived at would vitiate the entire judgment. In such a case, the high court cannot be faulted for interfering with the finding in exercise of its second appellate jurisdiction under section 100 of the CPC.[819]

When the second appellate judge was able to indicate and highlight the serious infirmities and illegalities committed by the learned trial judge as well as the first appellate judge, and the

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814. *UR Virupakshaiah v Sorvamma*, AIR 2009 SC 1481 : (2009) 2 SCC 177.
815. *Bondar Singh v Nihal Singh*, AIR 2003 SC 1905 : (2003) 4 SCC 161.
816. *Kashmir Singh v Harnam Singh*, AIR 2008 SC 1749 : (2008) 12 SCC 796 (Dr Pasayat, J, speaking for the three-Judge Bench).
817. *Kashmir Singh v Harnam Singh*, AIR 2008 SC 1749, page 1751–1752 : (2008) 12 SCC 796.
818. Madhya Pradseh Accommodation Control Act 1961, section 12(1)(f).
819. *Deena Nath v Pooran Lal*, AIR 2001 SC 2655 : (2001) 5 SCC 705.

necessity for his interference to prevent total miscarriage of justice, with convincing reasons, the findings recorded by the trial court as well as the first appellate court were shown to be not only vitiated due to perversity of reasoning but also due to surmises and misreading of the materials on record. On a careful and critical scanning through the judgment in the second appeal, it could not be said that any findings of fact concurrently recorded were mechanically interfered with without justification or by transgressing the limitations on the exercise of jurisdiction under section 100, CPC, the reasons assigned by the learned judge in the high court for the conclusions arrived at did not suffer from any infirmity, warranting Supreme Court interference in appeal.[820]

When an admission by the defendant tenant in the reply notice in regard to the plaintiff's title and the description of the plaintiff as "owner" of the property signed by the defendant were not considered by the first appellate court while holding that the plaintiff had not proved his title, the high court interfered with the finding on the ground of non-consideration of vital evidence and Supreme Court affirmed the said decision.[821] That was upheld in *Jagdish Singh v Nathu Singh*[822] with reference to a second appeal in 1978, disposed of on 5 April 1991, Venkatachaliah, J (as he then was) held:

> Where the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings". Again in *Sundra Naicka Vediyar v Ramaswami Ayyar*[823] it was held that where certain vital documents for deciding the question of possession were ignored, such as a compromise, an order of revenue Court relying on oral evidence was unjustified. In yet another case in *Mehrunissa v Visham Kumari*,[824] arising out of Second appeal of 1988 decided on 15-1-1996, it was held by Venkataswami J that a finding arrived at by ignoring the second notice issued by the landlady and without noticing that the suit was not based on earlier notices, was vitiated and the High Court could interfere with such a finding. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the Appellate Court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In *Sri Chand Gupta v Gulzar Singh*,[825] it was held that the High Court was right in interfering in Second Appeal, as has been held by Hon'ble Supreme Court.[826]

If the high court in second appeal finds that the conclusions of the trial court regarding the genuineness of agreements for sale are based upon inadmissible evidence, or arrived at without evidence, the high court is certainly entitled to set aside the findings of fact recorded by the trial court and the first appellate court.[827]

However, where there is no material to show that the conclusions arrived at by the first appellate court was based on inadmissible evidence or that the findings arrived at are perverse, it is impermissible for high court to interfere in the findings of fact. Thus, in a suit relating to cancellation of sale deed, there was evidence to show that the sale deed was executed by the transferor when he was suffering from alcoholic psychosis and there was

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820. *Hafazat Hussain v Abdul Majeed*, AIR 2001 SC 3201 : (2001) 7 SCC 189 : 2001 (5) Scale 104 : II (2001) 6 591.
821. *Rasheed Ahmed v Karima Khatoon*, AIR 2002 All 195.
822. *Jagdish Singh v Nathu Singh*, AIR 1992 SC 1604 : 1992 AIR SCW 1747 : (1992) 1 SCC 647.
823. *Sundra Naicka Vediyar v Ramaswami Ayyar*, AIR 1994 SC 532 : 1993 AIR SCW 3978 : (1995) Supp 4 SCC 534.
824. *Mehrunissa v Visham Kumari*, AIR 1998 SC 427 : (1998) 2 SCC 295.
825. *Sri Chand Gupta v Gulzar Singh*, AIR 1992 SC 123 : (1992) 1 SCC 143.
826. *Ishwar Dass Jain v Sohan Lal*, AIR 2000 SC 426; *Kulsuma Bibi v Abdul Mannan*, AIR 2002 Cal 1.
827. *Ammisetti Chandram v Chodasani Suryanarayana*, AIR 2003 AP 269.

medical evidence to prove the fact and the sale deed also showed that valuable land was sold for a paltry amount. Under these circumstances the Supreme Court restored the findings of the first appellate court.[828]

It has been held by the Calcutta High Court that under section 100 of the Code the power of the Court while exercising the jurisdiction under second appeal is limited and the court will not disturb the concurrent finding of facts as a general principle of law but there are exceptions to that principle, namely, where both the Courts below failed to appreciate the oral and documentary evidence properly to reach their findings, which goes to the root of the matter. In the above case the high court placed reliance on the decision of the Apex Court in *Ramlal v Phagua*,[829] wherein the trial court and the first appellate court wrongly addressed the issue by not considering the evidence properly. The high court in that case interfered with the concurrent finding of fact by re-appreciating the evidence and the Supreme Court affirmed the view taken by the high court.[830]

In a case before the Supreme Court, there was divergence of views among Judges of the Bench on the point whether the facts of the case called for interference on the findings of fact. In that case, the plaintiff was allotted plot by corporation for setting up industry on the condition of starting production within 2 years. On the failure of the plaintiff, the Corporation resumed possession of the plot. The plea of the plaintiff that construction was impossible because of HT Pole on the plot which was agreed to be removed by the Corporation was accepted by the lower courts and confirmed by the high court. While Tarun Chatterjee, J, was of the view that the plaintiff's plea needs to be accepted, Balasubramanyan, J, held the finding of fact was perverse. Ultimately the matter was directed to be referred to larger Bench.[831]

No evidence is forthcoming from the either side as to whether use of the passage in question was discontinued even before the plaintiffs came into possession or before the defendants had acquired their plots of land. The fact mentioned in the 30 years old document as to the right of user in a piece of land shall be presumed to be correct in this case.[832]

Interference with the finding of fact arrived at by the first appellate court, as the final court of fact, is barred under section 100 CPC, but when such finding is based upon non-appreciation of the conduct of the parties in proper perspective and misapplication of the principles of law in declaring the deed void and collusive when such deed is very vital, constituting the foundation of title, the high court can interfere in second appeal under section 100 CPC.[833]

It can be said that non-consideration of material aspects which are absolutely necessary for coming to a decision on a particular point, is no doubt a substantial question of law which would depend upon facts and circumstances of every case.[834]

There is no second opinion that concurrent findings shall be subjected to interference if the same is vitiated due to perversity of the reasoning and also due to surmises and misreading of the materials available on record.[835]

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828. *Chacko v Mahadevan*, AIR 2007 SC 2967 : (2007) 7 SCC 363.
829. *Ramlal v Phagua*, AIR 2006 SC 623 : 2006 (1) SCC 168.
830. *Basanti Devi v Fulchand Mondal*, AIR 2007 Cal 8 : 2006 (2) Cal LJ 622.
831. *Haryana State Industrial Development Corporation v Cork Manufacturing Co*, AIR 2008 SC 56 : (2007) 8 SCC 120.
832. *Nirmal Das v Panchanan Banerjee*, AIR 2001 Cal 37.
833. *Bijan Kumar Barman v Bhaskar Chandra Barman*, AIR 2001 Cal 98.
834. *Kulsoma Bibi v Abdul Manna*, AIR 2002 Cal 1.
835. *Surma Valley Saw Mills Pvt Ltd v Arati Das*, AIR 2002 Gau 108.

Where the finding by lower courts as to the facts of the case were not based on evidence, it was held liable to be set aside.[836]

Where the parties have placed their case before the courts and adduced evidence documentary as well as oral in their support and the first appellate court perversely sets aside the trial court's judgment, in the second appeal, the evidence could be re-assessed and nothing prevents courts from doing so.[837]

Where the findings of the first appellate court were based upon certain facts which were not called upon to be decided or were not the subject-matter of the suit and such findings were also based on imagination and surmises and not based on legally acceptable evidence, such findings were held not entitled to be sustained.[838]

Nature of construction, though a pure question of fact, non-application of test prescribed in statute for reaching the conclusion, renders finding perverse and liable to be set aside in appeal under section 100, CPC.[839]

In a case from Tamil Nadu, the Supreme Court held that relief cannot be granted to a non-appellant party to a suit. In a suit for declaration of title, decree was passed against the State Government, but the State did not file appeal against the decree. It was held that the decree cannot be interfered with in appeal filed by a private co-defendant.[840]

HS Bedi, J, speaking for the Bench in the above case, explained it as follows:

> In paragraph 16 of the judgment that we have quoted above, the High Court was cognizant of the fact that it was perhaps over stepping its jurisdiction in the matter but chose to circumvent the requirement of law in the belief that it was justified in doing so as the plaintiff-appellant was attempting to swallow Government property. We are of the opinion, however, that the State Government had accepted the judgment of the trial court as no appeal had been filed by it. We accordingly allow the appeal set aside the judgments of the first Appellate Court and the High Court dated 21st November, 1988 and 10th January 2001 respectively and restore the judgment of the trial court.[841]

Where the law has laid down in clear terms the types of alterations of conversions which would constitute a material alteration and which alone could serve as the basis for an action under section 256 of the Cantonment Act, it is incumbent on the courts in the process of justifying the action proposed against the builder under the relevant provision of the Act to refer to those tests. The findings of the courts below stand vitiated because of non-application of the tests prescribed in law for arriving at a conclusion as to whether the basis for taking action under section 256 of the Act was available to the authorities under the statute. Where, on account of failure on the part of the courts below in applying the tests laid down in law while arriving at a finding of fact, the findings so recorded by them are rendered perverse, the question whether such finding of fact recorded by them without reference to the statutory tests is sustainable in law would itself be a question of law and a substantial one at that.[842]

Where in a suit for declaration of ownership of land, no ownership to the land was proved, and a cooperative society granted permissive possession of the land to the plaintiff and the said society was not competent to grant the land, no limitation was either specified or disclosed

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836. *Sarwan Dass v Salam Ject*, AIR 2003 HP 126; *S Ponnuthai v P Muthu Samy*, AIR 2004 Mad 450.
837. *Raju v Muthuammal*, AIR 2004 Mad 134.
838. *Ishari Lal v Solma*, AIR 2002 HP 175.
839. *Husenbi Sadroddin v Cantonment Board, Belgaum*, AIR 2003 Kant 281.
840. *Chokalingaswami Idol v Gnanapragasam*, AIR 2008 SC 2025 : (2008) 4 SCC 219.
841. *Chokalingaswami Idol v Gnanapragasam*, AIR 2008 SC 2025, para 4 at p 2026 : (2008) 4 SCC 219.
842. *Chokalingaswami Idol v Gnanapragasam*, AIR 2008 SC 2025 : (2008) 4 SCC 219.

in averments in plaint, on these facts, the finding of fact recorded by lower courts that the plaintiff had been in possession and enjoyment of land by adverse possession against interest of government was found erroneous in second appeal.[843]

Where, separate possession of room was given by father-in-law to his daughter-in-law after her marriage with his son, but the possession was continued by daughter-in-law even when her relations with her husband were strained, and even after death of her husband, her possession was thus hostile and open to true owner. The observation of the trial court that possession of daughter-in-law cannot be adverse against her father-in-law is erroneous. Further, the finding by the lower court that her possession would be adverse after death of her husband is also erroneous. It was held by the high court that possession of the daughter-in-law on room was adverse against the owner.[844]

On the question of adopting proper approach by court in relation to second appeals under section 100 of the Code, a three-Judge Bench of the Supreme Court has observed as follows:

> It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first Appellate Court. It is true that the lower Appellate Court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected accepted by the trial court, the same is no ground for interference in Second Appeal when it is found that the Appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower Appellate Court will not be interfered by the High Court in Second Appeal. Adopting any other approach is not permissible.[845]

Finding of fact arrived at without consideration of the entire pros and cons of the case can be interfered with by the high court in second appeal. The subordinate judge, who decided the suit recorded the evidence. He had thus occasion to have a look at the demeanour of the witnesses and form his own impressions about their truthfulness or otherwise. The additional district judge should have gone after the weight of evidence. He should not have picked up one sentence from here and one sentence from there in the statements of the witnesses and then recorded a finding of fact. He should have gone through the statements of the witnesses in their entirety and then formed his own impressions about the probabilities or improbabilities of each other's version. Appreciation of evidence in a manner that it leads to miscarriage of justice would be an error of law, which the high court has the duty to correct at the appellate stage.[846]

Where, sale of immovable property took place and evidence of independent witnesses established that vendor received balance consideration, the trial court gave the findings accordingly. The first appellate court placed reliance upon statement of the handwriting expert but failed to consider evidence of independent witnesses and therefore, reversed the finding of the trial court. The finding of the first appellate court being unsustainable is liable to be set aside in second appeal.[847]

Where, in fact it appears that the lower appellate court, while deciding the appeal did not care to even have a perfunctory glance at the record, which was available, in view of this, the finding of fact recorded by the lower appellate court, would have to be held to be not based on any evidence. Had the lower appellate court considered the evidence on the record, a

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843. *State of Karnataka v M. Muniraju,* AIR 2002 Kant 287.
844. *Balbir Kaur v Harinder Kaur,* AIR 2003 P&H 174.
845. *Kashmir Singh v Harnam Singh*, AIR 2008 SC 1749 : (2008) 12 SCC 796; (Dr Pasayat, J, speaking for the Bench).
846. *Rakha Singh v Babu Singh,* AIR 2002 P&H 270.
847. *Ajmer Singh v Nishi Kumar,* AIR 2004 P&H 85.

different conclusion would have been reached. When a finding of fact is recorded on the basis of no evidence, the same would give rise to a substantial question of law as envisaged under section 100, CPC.[848]

There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. This principle has been laid down in a series of judgments of the Supreme Court in relation to section 100, CPC, after the 1976 amendment.[849]

The court (the first appellate court) is under a duty to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises as of a magnitude that it gives birth to a substantial question of law, the high court is fully authorised to set aside the finding. This is the situation in the present case.[850]

In a suit for specific performance of agreement to sell property filed by prospective vendee, the trial court dismissed the suit since execution of agreement was not proved. In the appeal, the appellate court reversed the trial court's decision. The appellate court arrived at the finding without any evidence to sustain it and on gross misappreciation of evidence, therefore, the high court is entitled to set it aside in order to do justice.[851]

Finding of fact arrived at by the courts below on no evidence or on gross misappreciation of evidence can be interfered with in second appeal by the high court, because it will be also a substantial question of law whether a court of fact is entitled to return a finding of fact which is not sustainable at all on the evidence on record and whether such a finding shall be binding on the high court in second appeal. Finding of fact arrived at concurrently by the two courts below, if works havoc to the cause of justice, cannot be allowed to be sustained.[852]

The Allahabad High Court, while explaining what constitutes a void agreement, said that the plaintiff-vendor stated that the sale deed in question was got executed by the defendant, his nephew, by misrepresenting it to be a document of security indemnifying the defendant from repayment of the government dues. The element of fraud and misrepresentation was obvious in pleadings itself. The facts were misrepresented to the plaintiff by the defendant and taking plaintiff into his confidence and dominating him by his position as such, he got the fraudulent deed of sale executed. It renders deed as voidable document. The appellate court, while tracking these issues had interpreted the document to be a deed of gift without going into merits of evidence and attending circumstances. The judgment of appellate court had directly and substantially affected the right of parties and it has been rightly interpreted as substantial question of law. The judgment of the appellate court was set aside and the sale deed cancelled.[853]

According to the provisions of section 100 of the CPC, in second appeal, the high court has no jurisdiction to interfere with the finding of the first appellate court without formulating substantial question of law and cannot set aside the findings of the first appellate court on re-appreciation of the oral as well as documentary evidence available on record, unless the court

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848. *Darshan Singh Sahota v State of Punjab,* AIR 2002 P&H 305.
849. *Ishwar Dass Jain v SohanLal,* AIR 2000 SC 426 : (2000) 1 SCC 434.
850. *Dilbagrai Punjabi v Sharad Chandra,* AIR 1988 SC 1858 : (1988) SCC 710.
851. *Balwinder Kaur v Bawa Singh,* AIR 2002 P&H 378.
852. *Dalbir Singh v Dalbir Singh,* AIR 2001 P&H 216.
853. *Ramu Mahabir v Ghurhoo Samu,* AIR 2006 All 278.

finds that the findings of fact recorded by the first appellate court were perversely based on misreading of evidence or based on no evidence.[854]

Thus, the position of law is very clear that as a rule, the high court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be, or as a rule in second appeal, finding of fact should not be disturbed, but if, they are based on no evidence or in disregard of evidence or on inadmissible evidence or against the basic principles of law or on the face of it there appears error of law or procedure or when there is a complete variance between pleadings and proof, such findings can be disturbed.[855]

[s 100.37] Finding of Fact can be Interfered in Letters Patent Appeal

Of course, it is not open for the high court to interfere with the concurrent findings of the two courts sitting in second appeal. However, the Supreme Court in *Asha Devi v Dukhi Sao,*[856] has held that it will be open for the Letters Patent Bench to review and reverse the concurrent findings of fact entered by the two courts. It was further held that the Letters Patent Appeal from the judgment of a learned single judge in a first appeal, is not to be treated on a par with a second appeal preferred under section 100, CPC, and therefore, it cannot be held that the Letters Patent Appeal can only lie on a question of law and not otherwise. In *Andalammal v Rajeswari Vedachalam*,[857] it was held that the Letters Patent Bench has got powers to review even the concurrent findings of fact and the whole case is left open before the court.[858]

[s 100.38] Substantial Question of Law: Meaning of

The existence of a substantial is the *sine qua non* for the exercise of the jurisdiction under the amended provisions of section 100, CPC.[859]

There is a clear distinction between substantial question of law and question of law. Misconstruction of legal document or settled principle of law give rise to question of law. Following inferences can be considered as substantial question of law:

1. A debatable question of law which affects the rights of the parties and is not settled by the express provisions of the law or binding precedent.
2. A question of law which is settled by the provisions of law or binding precedent but has been decided contrary to such legal settled principle.

The high court can interfere with the concurrent findings of the courts below under section 100 if material evidence has not been taken into consideration, or there is an erroneous application of law on the facts of the case or the impugned orders wrongly cast the burden of proof or the evidence taken as a whole does not support the findings of the court.[860]

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854. *Jhagru Nonia v Bipti,* AIR 2006 Pat 135; *Uma Shankar Mishra v Pradeep Singh,* AIR 2006 (NOC) 1530 (Pat); *Phullan Mian v Jogendra Ram,* AIR 2006 Pat 183.
855. *Devi Shankar v Ugam Raj,* AIR 2002 Raj 330.
856. *Asha Devi v Dukhi Sao,* AIR 1974 SC 2048.
857. *Andalammal v Rajeswari Vedachalam,* AIR 1985 Mad 321.
858. *PSM Ahamed Abdul Khader v TK Mohammed Abubucker,* AIR 2002 Mad 213 (DB).
859. *Monicka Poosali v Anjalai Ammal,* AIR 2005 SC 1777 : (2005) 10 SCC 38.
860. *Nazir Mohamed v J Kamala*, AIR 2020 SC 4321; see also, *Mangayakarasi v M Yuvaraj*, Civil Appeal No. 1912-13 of 2020, decided on 3 March 2020 (SC); *Shanta Devi v Kaushalya Devi*, RSA No. 460 of 2012, decided on 1 October 2020 (Himachal Pradesh HC).

The jurisdiction of the high court is now confined to entertain only such appeals as involve a substantial question of law specifically set out in the memorandum of appeal and formulated by the high ccourt. In so formulating, the section does not require the high court to set out reasons for doing so. Dealing with that expression contained in Article 133(1) of the Constitution, the Supreme Court in *Sir Chunilal Mehta & Sons Ltd v The Century Spinning & Mfg Co,*[861] where the question involved was one as regards the interpretation of a managing agency agreement defined the expression "substantial question of law" to mean one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court,[862] or which is not free from difficulty or which calls for alternative views. In holding that the appeal involved a substantial question of law, the Supreme Court observed that the question involved was one of construction of the agreement which was not only one of law but that it was neither simple nor free from doubt and was therefore a substantial question of law. Similarly, the High Court of Madras has taken the view that where there is a point of law which is fairly arguable and where there is room for difference of opinion on it or where the court has thought it necessary to deal with that question at some length and discuss alternative views, the question would be a substantial question of law.[863] The view taken by the Bombay High Court in an earlier case that a question of interpretation of a decree, though a complicated one, is not a substantial question of law, was expressly dissented from in *Sir Chunilal Mehta's* case and is therefore not a correct view.[864] But once the Supreme Court has settled a question of principle, its application to the facts of a case is not a substantial question of law.[865] The words "substantial question of law" do not necessarily mean that the question of law involved must be of general importance. The condition is satisfied if there is a substantial question of law between the parties.[866] Misconstruing of evidence and acting without evidence is a substantial question of law between the parties.[867] The amended provision to section 100 provides that an appeal will lie to the high court by the appellate decree of the subordinate court only if the high court is satisfied that the case involves a substantial question of law. Thus, according to the amended provision, the question of law could not be ground for interference in the second appeal. The question of law should be a substantial question of law. The expression "substantial question of law" cannot be put in straightjacket. It depends upon each of the case whether the substantial question of law arises in the case or not.[868] The substantial question of law has to be distinguished from substantial question of fact. It is not within the domain of the high court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. The lower appellate court should not ordinarily reject witnesses accepted by the trial court, in respect of credibility but even where it has rejected, the witnesses accepted by the trial court, the same is not ground for interference in the second appeal where it is found that the appellate court has given satisfactory reasons for doing so.

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861. *Sir Chunilal Mehta & Sons Ltd v The Century Spinning & Mfg Co.* AIR 1962 SC 1314 : (1962) Supp 3 SCR 549.
862. *State of Assam v Basant Kumar,* (1973) 3 SCR 159.
863. *Rimmalapudi Subba Rao v Noony Veeraju,* AIR 1952 Mad 264.
864. *Kaikhushroo Pirojsha Ghaira v CP Syndicate Ltd,* (1948) 50 Bom LR 744.
865. *State of Kerala v Re D'Souza,* (1971) 3 SCR 711.
866. *Raghunath Prasad Singh v Dy Commr of Partabgarh,* 57 IA 126; *Gurvan Ditta v T Ram Ditta,* AIR 1928 PC 172.
867. *Secretary of Govt Home Dept v TV Hari Rao,* AIR 1978 Mad 42.
868. *Lal Babu Yadav v Ram Bilash Rai,* AIR 1997 Pat 131.

RV Raveendran, J, speaking for the Supreme Court Bench in the undernoted case,[869] has explained the meaning of "substantial question of law" in the following words:

> **9.1.** Second appeals would lie in cases which involve a substantial question of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100, CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a substantial question of law.

Explaining the point more explicitly, the Supreme Court went on to observe further as follows:

> Where there is a clear enunciation of law and the lower court has followed or rightly applied such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law by this court (or by the concerned High Court), but the lower court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by this court (or the concerned High Court) would have led to a different decision, the appeal would involve a substantial question of law as between the parties. Even where there is an enunciation of law by this court (or the concerned High Court) and the same has been followed by the lower court, it the appellant is able to persuade the High Court that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two view points, it can be said that a substantial question of law arises for consideration. There cannot, therefore, be a strait-jacket definition as to when a substantial question of law arises in a case. Be that as it may.[870]

If the question of law termed as substantial question, stands already decided by a larger bench of the high court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of fact, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest, the same can be adjudicated upon in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal.[871]

In *P Chandrasekharan v S Kanakarajan*,[872] Sinha, J, speaking for the Bench of Supreme Court, observed as follows:

> when thus the courts below misread and misinterpreted a document of title read with the plan for the identification of the suit lands whereupon the plaintiffs themselves relied upon, a substantial question of law arose for determination of the High Court in between the parties to the suit.

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869. *State Bank of India v SN Goyal*, AIR 2008 SC 2594 : (2008) 8 SCC 92.
870. *State Bank of India v SN Goyal*, AIR 2008 SC 2594, para 9.1 at page 2598–2599 : (2008) 8 SCC 92.
871. *Kondiba Dagadu Kadam v Savitri Bai Sopan Jugar*, (1999) 2 LRI 617; *Kasi Bai v Pravati Bai*, (1995) 6 SCC 213.
872. *P Chandrasekharan v S. Kanakarajan*, AIR 2007 SC 2306, para 19 at p 2310–2311.

Relying on several decisions of the Supreme Court, it was held by the Madhya Pradesh High Court as follows:

> **16.** The word 'substantial question of law' has not been defined in the Code of Civil Procedure but the said expression has been used in the constitution. The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the right of the parties and if so whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by Privy Council or by Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.[873]

In para 17 of the above judgment, the high court has enumerated basic ingredients constituting the substantial question of law although it has been stated that the list is not exhaustive. Similarly in para 18 some instances are enumerated which cannot be said to be a substantial question of law.[874]

It has been held by the Supreme Court that when there is misconstruction of document or wrong application of a principle of law in construing a document, it gives rise to a question of law.[875] It is a settled principle of law that the court has to formulate the substantial question of law while dealing with an appeal under section 100 CPC. The court ought to have formulated substantial question of law and proceeded with the arguments thereafter. A mere mention about the question having been formulated in the memorandum of appeal is not enough.[876]

It has been held that where a concrete finding was arrived at by the first appellate court after appreciating evidence on record that the relationship between the plaintiff and defendant as landlord and tenant existed and ground for eviction was a *bona fide* need of landlord for his personal use the interference by the high court under section 100 as the second appellate court was incorrect.[877]

In another case the Supreme Court has held that consideration of irrelevant facts and non-consideration of relevant fact would give rise to a substantial question of law. Also, reversal of a finding of fact arrived at by the first appellate court ignoring vital documents may also lead to a substantial question of law.[878]

The jurisdiction of the high court in terms of section 100 of the code is limited. It can interfere with the concurrent findings of two courts if any substantial question of law arises for its consideration. Where a lady a sale deed executed by her as being vitiated by misrepresentation, under influence, fraud and collusion on the part of her brother, it was held by the Supreme Court that whether the respondent despite the fact that he was the brother of the appellant was in a dominating position is essentially a question of fact per se it does not give rise, to a substantial question of law.[879]

Under section 100, the high court has the jurisdiction to interfere only when a substantial question of law is involved and even then, it is expected that such a question shall be so framed

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873. *Amar Bahadur Singh v Devendra Singh*, AIR 2007 MP 262 : (2008) 2 JLJ 327.
874. *Amar Bahadur Singh v Devendra Singh*, AIR 2007 MP 262 : (2008) 2 JLJ 327.
875. *Boodireddy Chandraiah v Arigela Laxmi*, AIR 2008 SC 380 : (2007) 8 SCC 155.
876. *KunjuMuhammed v Mariyumma*, Civil Appeal No. 2771 of 2020, decided on 17 July 2020 (SC); see also, *Pappusingh v Hazari*, SA No 302 of 2015, decided on 3 February 2020 (MP, Indore Bench).
877. *Tapas Kumar Samanta v Sarbani Sen*, (2015) 12 SCC 523.
878. *Abdul Raheem v Karnataka Electricity Board*, AIR 2008 SC 956 : (2007) 14 SCC 138.
879. *Bellachi v Pakeeran*, AIR 2009 SC 32 93 : (2009) 12 SCC 95.

although the court is not bound by that question as the proviso indicates. There may be some other substantial questions of law which may need decision and which can be so decided.[880]

The question concerning the sub-letting, assigning or parting with possession of the premised premises by the tenant father to his son (both living together in the same premises) and the nature of presumption that arises, are substantial questions of law, regarding which a second appeal to the high court may lie.[881]

The question, whether nationalised banks, obliged to charge interest as specified rate in accordance with the circulars and directives periodically issued by the Reserve Bank of India under the provisions of the Banking Regulation Act, 1949, can be taken out of the provisions of the Usurious Loans Act, 1918 is a question of law. Where such question is involved in a suit filed before court of small causes by a nationalised bank against an agriculturist, it being a question of law, appeal against the decree of the small causes would be maintainable.[882]

When the courts below had not taken into consideration the effect of all the documents such construction of documents being a question of law was open to be executed before the high court in the second appeal.[883] The Patna High Court relying upon a judgment of the Supreme Court in *K Chelliah Servai v M Muthu Sami Servai,*[884] held the plea about the limitation is a mixed question of fact and law. That need not be raised for the first time in the second appeal without there being a factual foundation including pleading and evidence.[885] The question whether the Respondent is in possession of open land or not is a pure question of fact and not of law much less a substantial question of law.[886]

The findings recorded regarding the appellant being not in adverse possession of the suit property are findings of fact concurrently recorded by the court below after due appreciation of evidence, therefore, on this ground also the appeal of the appellant must fail as there is no question of law much less a substantial question of law which calls for interference.[887]

After the amendment of 1976 a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the high court is obliged to satisfy itself regarding the existence of such a question.[888] As to what is a substantial question of law, Dr. Pasayat, J, speaking for the Bench of the Supreme Court in the above case, observed as follows:

> **11.** To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case.
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> An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on

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880. *Annapoorani Ammal v G Thangapalam,* (1989) 3 SCC 287.
881. *Chander Kishore Sharma v Kampawati,* AIR 1984 Del 14.
882. *Indian Bank, Thiruvannmalai v VA Balasubramania Gurukal,* AIR 1982 Mad 296 (DB).
883. *Gulab Chand v Babu Lal,* (1998) 9 SCC 211.
884. *K Chelliah Servai v M Muthu Sami Servai,* (1955) Pat LR 66.
885. *Haquik Mian v Rajendra Prasad,* AIR 1997 Pat 59; *Ragavendra Kumar v Prem Machinery & Co,* (2000) 1 LRI 6.
886. *Naval Ram Lakshmi Das v Vijayaben Jayvanvethai Chavda,* AIR 1998 Guj 17.
887. *Gauran Devi v Durga Das,* AIR 1996 HP 112; *Shakarlal Ganulal v Balmukund Surajmal Bharuka,* AIR 1999 Bom 260.
888. *Boodireddy Chandraiah v Arigela Laxmi,* AIR 2008 SC 380 : (2007) 8 SCC 155.

> the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.[889]

After setting aside the findings of fact the court had either to remand the matter to the first appellate court for a rehearing of the first appeal and decision in accordance with law after taking into consideration the entire relevant evidence on the records, or in the alternative, to decide the case finally in accordance with the provisions of section 103(b) of the CPC.[890]

If the courts below, fail in their duty to appreciate evidence and do not advert to vital evidence, be it oral or documentary, the same would lead to the conclusion that they have committed errors on substantial questions of law.[891] Finding by first appellate court that when horoscope is available, the fact that a different date is indicated in school record is of no consequence is improper. Since first appellate court acted on irrelevant material i.e., horoscope, and left out of consideration material that was relevant, i.e., school record, the matter involves question of law. Thus, second appeal cannot be dismissed on ground that there was no substantial question of law involved.[892]

Where a suit for eviction was dismissed by the lower appellate court on the ground of not being instituted before a particular date and the high court found that the ground to be not relevant to the issue of *bona fide*, it was held that the high court rightly interfered under section 100 of the CPC.[893]

Second appeal was against decree in a suit for specific performance. Plea that suit was barred by section 16 of the Specific Relief Act, 1963, was raised for the first time in second appeal. It was held that the plea, being in respect of a question of law, may be allowed to be raised.[894] The first appellate court came to a finding of possession in favour of the defendant (reversing the decree obtained by the plaintiff in the trial court) merely by drawing an interference from an unregistered *Hukamnama* executed in defendant's favour by the *Muthawalli*. It was held that it was substantial error of law, justifying interference in second appeal.[895]

Revenue records are not documents of title. The question of interpretation of a document which is not a document of title, is not a question of law.[896] The construction of a basic document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law.[897] The plaintiff, an illiterate woman who had been a widow for 30 years was persuaded by her three daughters to execute a deed in respect of all her property. Plaintiff (according to her version, wished to give the properties to them after her death, but was made to sign a deed of gift *inter vivos* by fraud. She sued to get the deed set aside, on the ground of fraud. She failed on the facts in the trial court, but succeeded in the first appellate court, which accepted the plaintiff's factual version. The first appellate court, while setting aside the deed on the ground of fraud, also held that as attestation (which is required in the case of a deed of gift under Transfer of Property Act, 1882), had not been proved, the deed did not confer any

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889. *Boodireddy Chandraiah v Arigela Laxmi*, AIR 2008 SC 380, para 11 at p 382 : (2007) 8 SCC 155.
890. *Bhagwan Sharma v Mani Ghosh* (1993) Supp 3 SCC 497.
891. *A Munuswami v R Sethuraman* AIR 1995 Mad 375; *Babu Singh v Babu Ram Sharma* AIR 1997 All 185.
892. *State of Punjab v Mohinder Singh*, AIR 2005 SC 1868 : (2005) 3 SCC 702.
893. *Vithaldas v Ramchandra* (1995) Supp 3 SCC 374; *Bapulal v Ramesh Chandra*, AIR 1995 Raj 121.
894. *Malkhan Singh v Raghubir Singh*, AIR 1981 All 96.
895. *Janki Dhobi v Sitaram Singh*, AIR 1985 Pat 140.
896. *Corp of Bangalore City v M Papaiah*, AIR 1989 SC 1809 : (1989) 3 SCC 612 : JT (1989) 3 SC 294, (1989) 2 Scale 182.
897. *Bai Sakinabai v Gulam Rasul Umarbhai Shaikh*, AIR 1981 Guj 142.

rights on the donee. In second appeal, the defendant (donee) argued that as the gift deed was void and could be ignored, the first apellate court committed an illegality in setting it aside. It was held that the first appellate court had not committed any manifest error in cancelling the gift deed.[898] In a second appeal against decree in suit for specific performance, a plea that the suit was barred by section 16 of the Specific Relief Act, 1963, was allowed to be raised for the first time, as it was a question of law.[899] Where the lower courts recorded a concurrent finding that the holding was vested in the *Gaon Sabha* and settled with the defendants, the case cannot be remanded on the ground that the question of possession was not decided by the lower courts.[900]

In an appeal arising out of a suit for specific performance of agreement for sale, the question whether the plaintiff was willing and ready to perform his part of the contract cannot be said to be a question of law. It was held by the Supreme Court that substantial question of law should be formulated relying on or on the basis of findings of fact arrived at by the trial court and the first appellate court.[901]

In interfering with the award of the district judge under the Land Acquisition Act, 1894, the high court adopted hyper-technical approach and upset the valuation without taking into consideration the aforesaid evidence on record. In such circumstances, the high court was not justified in interfering with the assessment of the market value of the vacant land made by the district court.[902]

[s 100.39] Point in Law, Proposition of Law and Substantial Question of Law

A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the high court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any list.[903]

The first appellate court did not discharge the duty cast on it as a court of first appeal, the high court having noticed failure on the part of the appellant in not discharging the statutory obligation cast on him by sub-section (3) of section 100 of the CPC, on account of the substantial question of law involved in the appeal having not been stated, much less precisely, in the memorandum of second appeal. Ordinarily, an opportunity to frame such question should have been afforded to the appellant unless the deficiency was brought to the notice

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898. *Mallo v Bakhtawat,* AIR 1985 All 160.
899. *Malkhan Singh v Raghubir Singh,* AIR 1981 All 96.
900. *Banshi Dhar v Ram Surat,* AIR 1985 All 10.
901. *Abdul Raheem v Karnataka Electricity Board,* AIR 2008 SC 956 : (2007) 14 SCC 138.
902. *Tej Ram v Collector, Jammu Tawi,* (1991) 1 SCC 108.
903. *Santosh Hazari v Purushottam Tiwari,* AIR 2001 SC 965 : (2001) 3 SCC 179 : 2001 (1) Scale 712.

of the appellant previously by the high court registry or the court and yet the appellant had persisted in his default.[904]

As per settled law, the scope of exercise of the jurisdiction by the high court in second appeal under section 100 is limited to the substantial questions of law framed at the time of admission of the appeal or additional substantial questions of law framed at a later date after recording reasons for the same. It was observed in *Santosh Hazari's* case[905] that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be a "substantial" question of law, it must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the court. As to what would be the question of law "involving in the case", it was observed that to be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the court of facts and it must be necessary to decide that question of law for a just and proper decision between the parties.[906]

What is a substantial question of law would certainly depend upon facts and circumstances of every case and if a question of law had been settled by the highest court of the country, that question, however important and difficult it may have been regarded in the past and however large may be its effect on any of the parties, would not be regarded as substantial question of law.[907]

Merely because of appreciation of evidence another law is also possible, would not empower the high court to assume jurisdiction by terming the questions as substantial questions of law, the learned district judge has exercised his discretion as a first appellate court in a judicial manner.[908]

[s 100.40] Determining Whether a Question of Law is Substantial

test for The proper test for determining whether a question of law raised in the case is substantial would, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or by the Federal Court or is not free from difficulty of calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.[909]

If the question of law termed as a substantial question stands already decided by a larger bench of the high court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, merely its wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere

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904. *Santosh Hazari v Purushottam Tiwari*, AIR 2001 SC 965 : (2001) 3 SCC 179 : 2001 (1) Scale 712.
905. *Santosh Hazari v Purushottam Tiwari*, AIR 2001 SC 965 : (2001) 3 SCC 179 : 2001 (1) Scale 712.
906. *Govindaraju v Mariamma*, AIR 2005 SC 1008 : (2005) 2 SCC 500.
907. *Pankaj Bhargava v Mohinder Nath*, AIR 1991 SC 1233 : (1991) 1 SCC 556; *Kulsoma Bibi v Abdul Mannan*, AIR 2002 Cal 1.
908. *Chitra Devi v Ram Dei*, AIR 2002 HP 59.
909. *Sir Chunilal v Mehta and Sons Ltd v Century Spg and Mfg Co Ltd*, AIR 1962 SC 1314 : (1982) Supp 3 SCR 549; *Sugani v Rameshwar Das*, AIR 2006 SC 2172 : (2006) 11 SCC 587.

appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference.[910]

Whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference.[911]

[s 100.41] Substantial Question of Law — *Sine Qua Non* for Exercise of Jurisdiction

The reading of section 100 makes it abundantly clear that if the appeal is entertained without framing the substantial question of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. In a number of judgments, it has been held by Supreme Court that the existence of the substantial question of law is the *sine qua non* for the exercise of jurisdiction under section 100 of the Code of Civil Procedure.[912]

Jurisdiction of the high court under section 100, CPC is limited to a substantial question of law framed at the time of admission of the appeal or at a subsequent stage if the high court is satisfied that such a question of law arises from the facts found by the courts below.[913]

A second appeal is entertainable only on substantial question of law. A judgment passed without formulation of such question is patently illegal. It was opined by RM Lodha, J, as under[914]:

> 11. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question.
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> 12. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears

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910. *Sugani v Rameshwar Das*, AIR 2006 SC 2172 : (2006) 11 SCC 587
911. *Reserve Bank of India v Ramkrishna Govind Morey* (1976) 1 SCC 803; *Sugani v Rameshwar Das*,AIR 2006 SC 2172 : (2006) 11 SCC 587; *Govindaraju v Mariamma*, AIR 2005 SC 1008 : (2005) 2 SCC 500;
912. *Manicka Poosali v Anjalai Ammal*, AIR 2005 SC 1777 : (2005) 10 SCC 38; *Kshitij Chandra Purkait v Santosh Kumar Purkait*, (1997) 5 SCC 438; *Panchugopal Barua v Umesh Chandra Goswami*, (1997) 4 SCC 413; *Kondika Dagadu Kadam v Savitribai Sopan Gujar*, (1999) 3 SCC 722; *Thiagarajan v VB Koil* AIR 2004 SC 1913 : (2004) 5 SCC 762.
913. *Manicka Poosali v Anjalai Ammal*, AIR 2005 SC 1777 : (2005) 10 SCC 38.
914. *Umerkhan v Bismillabi*, (2011) 9 SCC 684.

> that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where the High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position.

It is obvious and clear that unless and until a substantial question of law is shown to have been involved in the second appeal, there would not arise any question of interference by the second appellate court against the order of the first appellate court and the judgment and decree recorded thereof. Simply because some part of the procedural law has not been specifically or precisely observed or fulfilled, this, *ipso facto*, would not lead to a justification for interference in exercise of powers in second appeal in terms of the provision of section 100 of the CPC.[915]

[s 100.42] Sub-section (3) — Pleading of Substantial Question of Law in Appeal

It is expected of the appellant to frame substantial question of law in the memorandum of appeal. Sub-section (3) of section 100, CPC states that: "In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal".[916]

[s 100.43] Sub-section (4) — Formulation of Substantial Question of Law — Earlier View

The failure of the court to formulate the "substantial question of law" (while admitting the appeal) does not mean that the appeal cannot be heard. Such failure is an omission by court. Litigants cannot be penalised for it.[917]

[s 100.44] Sub-section (4) — Formulation of Substantial Question of Law — Current Position

After 1976 Amendment, the scope of section 100 has been drastically curtailed and narrowed down. The high courts would have jurisdiction of interfering under section 100, CPC, only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal.[918]

It is trite law that under section 100 of the CPC, a high court can entertain a second appeal only if it is satisfied that the case involves a substantial question of law. Sub-section (4) of section 100 provides that where the high court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. Sub-section (5) stipulates that the appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. The mandatory requirements of this provision of law have been totally flouted by the high court. The high court has not indicated in the long judgment as to which was the substantial question of law, if any, considered, nor has it formulated the substantial question of law on which the decision in the second appeal was being given. The high court has proceeded as if it were deciding a first

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915. *Ajit Ojha v Lallan Ojha*, AIR 2006 Pat 143.
916. *Balla Ram v Phoola*, AIR 2003 SC 2080 : (2003) 1 SCC 378 : 2003 (3) AWC 2059 (SC) : 2003 (2) SCCD 600.
917. *Sonubai v Bala Govind Yadav*, AIR 1983 Bom 156.
918. *Gurdey Kaur v Kaki*, AIR 2006 SC 1975 : (2007) 1 SCC 546.

appeal against a decree in original proceedings. On this ground alone, the judgment is liable to be interfered with in second appeal.[919] The setting aside of concurrent findings of the courts below in second appeal without formulating substantial question of law is not proper.[920] If a perusal of the impugned judgment passed by the high court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated, the judgment in second appeal cannot be maintained and so, is liable to be set aside.[921]

Where the high court had simply re-appreciated the evidence on record and allowed the second appeal and remanded the matter to the trial court without ascertaining a question of law (not even a substantial question of law), it was held by the Supreme Court that the high court cannot assume the jurisdiction by avoiding formulation of a substantial question of law.[922]

The following observation of the Supreme Court deserves particular attention in *Basayya Mathad's* case[923]:

> This Court, in a series of decisions, has held that allowing a second appeal without framing substantial question of law is clearly contrary to the mandate of Section 100, CPC vide:
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> (a) *Gian Dass v Gram Panchayat, village sunner Kalan and others,* (2006) 6 SCC 271;
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> (b) *Joseph Severance and others v Benny Mathew and others,* (2005) 7 SCC 667;
>
> (c) *Sasi Kumar and others, v Kunnath Chellappan Nair and others,* (2005) 12 SCC 588 : AIR 2005 SC 4395;
>
> (d) *Chadat Singh v Bahadur Ram and others,* (2004) 6 SCC 359;
>
> (e) *Kanhaiyalal and others v Anup Kumar and others,* (2003) 1 SCC 340;
>
> (f) Civil Appeal No. 2836 of 2001—*Town Planning Municipal Council v Rajappa.*, Dated 8-1-2007 (Dr. Justice Arijit Pasayat and Justice P. Sathasivam)
>
> In view of the settled legal position and of the fact that the High Court has not adhered to the same, failed to formulate substantial question of law thereby committed an error in allowing the second appeal. On this ground, the judgement and order of the learned Judge in R.S.A. 105 of 1997 is liable to be set aside.

It is abundantly clear from the analysis of section 100 that if the appeal is entertained without framing the substantial questions of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. The existence of substantial questions of law is the *sine qua non* for the exercise of jurisdiction under section 100 of the CPC.[924]

It has been observed by Supreme Court in several decisions that the high court must conform to the requirements laid down in sub-section (4) of section 100 CPC, formulation of such questions of law gives proper direction in which arguments have to be advanced by the parties. The facts and the questions of law are also appreciated in correct perspective.[925]

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919. *Commr, Hindu Religious and Charitable Endourments v P Shanmugama*, AIR 2005 SC 770 : (2005) 9 SCC 232.
920. *Punjab State Civil Supplies Corp Ltd v Sikander Singh*, AIR 2006 SC 1438 : (2006) 3 SCC 736.
921. *Madan Lal v Bal Krishan*, AIR 2006 SC 645 : (2005) 13 SCC 555 : 2006 (1) ALT 51 SC : 2006 (1) AWC 662 SC.
922. *Lisamma Antony. v Karthiyayani*, AIR 2015 SCW 2824 : (2015) 11 SCC 782 : 2015 (3) Scale 836.
923. *Basayya I Mathad v Rudrayya S Mathad*, AIR 2008 SC 1108 : (2008) 3 SCC 120.
924. *Govindaraju v Mariamman*, AIR 2005 SC 1008.
925. *K Raj v Muthalmme*, AIR 2001 SC 1720.

Bare perusal of section 100 makes it clear that the high court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal.[926]

If perusal of the impugned judgment passed by the high court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question if any, so formulated, the judgment cannot be maintained by the Supreme Court.[927]

In *Arsad Sheikh v Bani Prosanna Kundu*,[928] a judgment passed by the high court in second appeal was challenged before the Supreme Court on the ground that the high court did not frame a substantial question of law at the time of admission of the second appeal but instead formulated a question only in the impugned judgment after the arguments had been concluded. The Supreme Court, however, unconvinced, held that the omission of the court in formulating the substantial question of law while admitting the appeal does not preclude the same from being heard as litigants should not be penalised for an omission of the court. It was further held that in a second appeal, substantial question of law can be formulated at the initial stage and in some exceptional cases, at a later point of time. Even at the stage of arguments, such substantial question of law can be formulated subject to a condition that the opposite party is put on notice and given a fair or proper opportunity to meet out the point. It has also been laid down that the judgment of the high court can only be set aside on the ground of non-compliance with sub-section (4) of section 100 if some prejudice has been caused to the appellants by not formulating such a substantial question of law.

The stipulation under section 100 of the CPC as to the need to formulate a substantial question of law and the failure to do so vitiate the adjudication itself.[929] If the parties were not informed of the substantial questions of law, if formulated, that arose for consideration as required under section 100, so that they could address on such a substantial question of law, this is a serious informative being contrary to requirement of section 100 of CPC.[930] The Supreme Court has taken the view in several cases that in second appeals, substantial question or questions of law must arise for consideration and the appeals are to be heard on the substantial questions of law so formulated.[931] It is not permissible for the high court to reverse the judgment of the lower appellate court without formulating a substantial question of law.[932] Merely because the high court could reach a different conclusion, would not give rise to a substantial question of law.[933]

In *UOI v Ibrahim Uddin*[934] which was relied upon in *MB Ramesh*,[935] the Supreme Court after referring to various previous judgments, observed that a second appeal can be entertained even on question of fact, provided that the hich Court is satisfied that the findings of the courts below stood vitiated by non-consideration of relevant evidence or by showing the erroneous approach to the matter therefore, perverse. It must be noted that the Supreme Court in several

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926. *Manicka Poosali v Anjalai Ammal*, AIR 2005 SC 1777 : (2005) 10 SCC 38.
927. *Ram Sakhi Devi v Chantra Devi*, AIR 2005 SC 4196 : (2005) 6 SCC 181.
928. *Arsad Sheikh v Bani Prosanna Kundu*, AIR 2014 SC (Supp) 1295 : (2014) 15 SCC 405 : 2014 (3) SCR 847.
929. *Bashir Ahmed v Abdul Rahman*, AIR 2004 SC 3284 : 2003 (4) Scale 1.
930. *SMMKK Thangal v Badagara Jamayath Palli Dharas Committee*, AIR 2004 SC 4365 : (2004) 7 SCC 708.
931. *Kanhaiyalal v Anup kumar*, AIR 2003 SC 689 : (2003) 1 SCC 430 : (2003) 3 AWC 2098 SC : (2003) 1 UJ 345 SC.
932. *Gurmail Singh v Rajinder Singh*, AIR 2003 P&H 336.
933. *Gurmail Singh v Rajinder Singh*, AIR 2003 P&H 336.
934. *UOI v Ibrahim Uddin*, (2012) 8 SCC 148 : (2012) 6 Scale 476.
935. *MB Ramesh v K M Veeraje*, 2013 AIR SC 2088 : (2013) 7 SCC 490 : 2013 (8) SCR 573.

cases[936] has consistently held that the formulation of substantial question of law is *sine qua non* for the exercise of jurisdiction under section 100. Section 100 does not permit any departure from the rule.

[s 100.45] Sub-section (4) — Formulating Points for Consideration Instead of Substantial Question of Law — Permissibility

Where, in second appeal, the substantial question of law was not framed and the high court did not frame substantial question of law. However, for formulated points which arose for its consideration in second appeal were decided, the interference by the high court in second appeal, without framing substantial question of law, would be improper.[937]

When the question of law formulated as substantial question of law in the instant case cannot, in any way, be termed to be a question of law much less as substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible, would not clothe the high court to assume the jurisdiction by terming the question as substantial question of law.[938]

Where, the substantial question of law was not formulated by the high court in second appeal pertaining to suit for specific performance of contract, the only question framed was whether agreement can be executed even after increase or decrease in land, covered after consolidation, finding of the high court in second appeal on the question framed and on the finding of the fact as recorded by first appellate court was held improper.[939]

[s 100.46] Sub-section (4) — Formulation of Substantial Question of Law at Later Stage

If at the time of hearing, another substantial question of law comes into picture, the court can frame it, but for that there are some limitations. The first limitation is that the question to be framed must be as substantial question of law. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposed to decide even if such substantial question of law was not earlier formulated by it. Thus, the existence of a "substantial question of law" is *sine qua non* for the exercise of the jurisdiction under the amended provisions of section 100. The second limitation is that such a substantial question of law can be formulated at the initial stage and in some exceptional cases, at a later point of

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936. See – *Panchgopal Barua v Umesh Chandra Goswami*, AIR 1997 SC 1041 : (1997) 4 SCC 713; *Sheel Chand v Prakash Chand*, AIR 1998 SC 3063 : (1998) 6 SCC 683; *Kanai Lal Garari v Murari Ganguly*, (1999) 6 SCC 35 : 1999 (10) JT 45 : 2000 (3) RLW 404; *Ishwar Dass Jain v Sohan Lal*, AIR 2000 SC 426 : (2000) 1 SCC 434; *Roop Singh v Ram Singh*, (2000) 3 SCC 708 : (2001) 1 BLJR 488 : JT (2000) 3 SC 474; *Santosh Hazari v Purushottam Tiwari*, (2001) 3 SCC 179, *Chadat Singh v Bahadur Ram*, (2004) 6 SCC 359 : (2004) 6 Scale 423; *Sasikumar v Kunnath Chellapan Nair*, AIR 2005 (SC) 4395 : (2005) 12 SCC 588 : 2006 (1) ICC 759; *CA Sulaiman v State Bank Of Travancore, Alwayee*, AIR 2006 SC 2848 : (2006) 6 SCC 392; *Bokka Subba Rao*, (2008) 3 SCC 99; *Narayanan Rajendran v Lekshmy Sarojini*, (2009) 5 SCC 264 : (2009) 2 Scale 414; *Municipal Committee, Hosharpur v Punjab State Electricity Board*, (2010) 13 SCC 216 : (2010) 11 Scale 69; *Umerkhan v Bismillabi*, AIR 2012 SC 1646 : (2011) 9 SCC 684; *Shiv Cotex v Trigun Auto Plast Pvt Ltd*, (2011) 9 SCC 678; *Hardeep Kaur v Malkiat Kaur*, (2012) 4 SCC 344 : (2012) 3 Scale 501, *Baldev Krishan v Satya Narain*, (2013) 14 SCC 179.

937. *Muthu Gourder v Ammayee Ammal*, AIR 2002 SC 2481; *SM Mutanki v BM Mutanki*, AIR 2000 SCW 4960; *BK Dubey v GN Dubey*, AIR 2001 SCW 4595.

938. *Veerajee Ammal v Seeni Ammal*, AIR 2001 SC 2920 : (2002) 1 SCC 134.

939. *Phool Pata v Vishwanath Singh*, AIR 2005 SC 3079 : (2005) 6 SCC 40.

time even at the time of argument stage, such substantial question of law can be formulated provided the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet out the point.[940]

Where, substantial question of law was not formulated at the time of admission of appeal but after about 11 months of admission of appeal, and when counsel for appellants and respondents were heard at length on each of the substantial questions of law, no party thus suffered any prejudice by formulation of substantial question of law subsequent to admission of appeal and therefore, second appeal was not liable to be dismissed on that ground.[941]

The Supreme Court has held that the judgment of the high court should only be set aside on the ground of non-compliance of section 100 (4) of the Code if come prejudice is shown to have been caused to the affected party by not formulating the substantial question of law.[942] It has been observed in the case as follows:

> In our Opinion, this Court should not take an over technical view of the matter to declare that every judgment of the High Court in Second Appeal would be illegal and void, merely because no substantial question of law was formulated by the High Court. Such an over technical view would only result in remitting the matter of the High Court for a fresh decision, and thereafter the matter may again come up before us in appeal. The judiciary is already over-burdened with heavy arrears and we should not take a view which would add to the arrears.[943]

[s 100.47] Proviso to Sub-section (5)

The proviso to sub-section (5) of section 100 is applicable only when any substantial question of law has already been formulated and it empowers the high court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law which was not formulated earlier can be taken up by the high court for reasons to be recorded, if it is of the view that the case involves such question.[944]

When the second appeal has been admitted for hearing, any other substantial question of law which is involved can be raised at the time of hearing. Keeping in view the provision of law in the proviso to sub-section (5) of section 100, CPC, hardly there can be any dispute on that contention. But the same has to be accepted with a rider that in such a circumstance the court has to be satisfied that the case involves such a question of law which needs consideration and adjudication, even if not formulated as a substantial question of law at the stage of hearing under O XLI, rule 11, CPC.[945]

Thus, where the judgment of the high court did not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated, the judgment of high court cannot be sustained.[946]

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940. *Om Prakash v Manoharlal*, AIR 2002 Raj 386.
941. *Maheshpur Tea and Industries Pvt Ltd v Mantala Tea Co Ltd*, AIR 2001 Gau 152.
942. *Kannan v VS Pandurangam*, AIR 2008 SC 951 : (2007) 15 SCC 157.
943. *Kannan v VS Pandurangam*, AIR 2008 SC 951 : (2007) 15 SCC 157, para 13 at p 952.
944. *CA Sulaiman v State Bank of Travancore*, AIR 2006 SC 2848 : (2006) 6 SCC 392.
945. *Mukteswar Kak v Radhamohan Sahu*, AIR 2002 Ori 153.
946. *Patrick JJ Saldanha v Anthony M Saldanha*, AIR 2007 SC 2620 : (2006) 11 SCC 174; see also *Kanahaiyalal v Anup Kumar*, AIR 2003 SC 689 : JT (2002) 10 SC 98 : (2003) 1 SCC 430; *Roop Singh v Ram Singh*, AIR 2002 SC 1475 : (2000) 3 SCC 708; *Wjawahar and Sons v Madhukar Raghunath Bhare*, AIR 2007 SC 3037 : (2007) 9 SCC 614.

Where the high court did not deal with the substantial question of law formulated at the time of admission, but proceed to frame new or additional substantial questions of law as a subsequent stage without assigning any reason, it was held that the order was not proper.[947]

The jurisdiction of the high court to entertain a second appeal under section 100 of the CPC after the 1976 amendment, is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the high court. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a "substantial question of law" is thus, the *sine qua non* for the exercise of the jurisdiction under the amended provisions of section 100 of the CPC.[948] It is not every question of law that could be permitted to be raised in second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section 5 of section 100 of the CPC. Under the proviso, the court should be "satisfied" that the case involves a "substantial question of law" and not a mere "question of law". The reason for permitting the substantial question of law to be raised, should be "recorded" by the court. Further,

(i) it is the duty cast upon the high court to formulate the substantial question of law involved in the case even at the initial stage; and

(ii) that in (exceptional) cases, at a later point of time, when the court exercises its jurisdiction under the proviso to sub-section (5) of section 100 of the CPC in formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation or abdication of the duty cast on court; and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the high court has to exercise its jurisdiction under section 100 of the CPC should always be borne in mind.[949]

Where, after hearing the parties, the court is of the view that the substantial questions formulated at the time of admission of the second appeal requires slight modification, it was held by the Madhya Pradesh High Court that it was permissible in order to bring out the controversy on the forefront in view of the provisions of sub-section (5) of section 100 of the CPC.[950]

Where the order of the high court shows that no substantial question of law was formulated or that the second appeal was heard on the question, if any, so formulated, it was held by the Supreme Court that the judgment cannot be maintained. In this respect the proviso to sub-section (5) of section 100 is applicable only when any substantial question of law has already been formulated and it empowers the high court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated.[951]

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947. *UR Virupakshaiah v Sarvamma*, AIR 2009 SC 1481 : (2009) 2 SCC 177.
948. *Panchugopal Barua v Umesh Chandra Goswami*, (1997) 4 SCC 713.
949. *Kshitish Chandra Purkait v Santosh Kumar Purkait*, (1997) 5 SCC 438; *Sheel Chand v Prakash Chand*, (1998) 6 SCC 683; *Ram Prasad Rajak v Nand Kumar & Bros*, (1998) 6 SCC 748; *Ragavendra Kumar v Prem Machinary & Co*, (2000) 1 LRI 6; *Mohd Haroon v Central Bank of India*, AIR 1994 MP 24.
950. *Kamlabai v Rajesh Kalal*, AIR 2008 MP 125 : (2007) 10 SCC 493 (Indore Bench).
951. *Dharam Singh v Karnail Singh*, AIR 2009 SC 758 : (2008) 9 SCC 759.

The Supreme Court has held that an order admitting a second appeal is neither a final order nor an interlocutory/interim order. It does not amount to a judgment, decree, determination, sentence or even "order" in the traditional sense. It does not decide any issue but merely entertains an appeal for hearing.[952]

Explaining the application of sub-section (5) of section 100 CPC, Raveendran, J, speaking for the Supreme Court Bench in the above case, observed as follows:

> 3. Sub-section (5) of section 100 CPC provides that a second appeal shall be heard on the substantial questions of law formulated by the court. It also provides that the respondent, at the hearing of the second appeal, can argue that the case does not involve such questions. Thus the substantial questions of law formulated by the High Court are not final, and it is open to the petitioner herein (who is respondent in the pending appeal) to demonstrate during hearing that no substantial question of law arose for consideration in the case and that the second appeal should be dismissed.[953]

[s 100.48] Core Issue

The main issue around which the entire case evolves is: whether the agreement dated 5 July 1976 was a licence or a tenancy. This issue was there before the trial court and the agreement was held to be a licence. It was there also before the lower appellate court but it was not adjudicated upon. When the core issue is not adjudicated upon, it results in a substantial question of law under section 100.[954]

[s 100.49] Construction of Document is Substantial Question of Law

The second appellate court has categorically stated that there is a substantial question of law between the parties inasmuch as the construction of the documents and which the claim to property is made is a substantial question of law. The construction of documents would be a substantial question of law is now a well settled proposition. This proposition has been settled as far back as the judgment of the Privy Council.[955] It has since been reaffirmed by Supreme Court in the case of *Kochukakkada Aboobacker v Attam Kasim,*[956] and the case of *Neelu Narayani v Lakshmanan*.[957] In the light of the aforesaid judicial decision, it can be safely held that the question of construction of such documents itself is a substantial question of law.[958]

The construction of a document by the court deciding the issues between the parties raises a substantial question of law.[959]

[s 100.50] Interpretation of Document — When Question of Fact and When Question of Laws

It is now well settled that an inference of fact from a document is a question of fact. But the legal effect of the terms or a term of a document is a question of law. Construction of a document involving the application of a principle of law, is a question of law. Therefore, when

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952. *SB Minerals v MSPL Ltd*, AIR 2010 SC 1137 : (2010) 12 SCC 24.
953. *SB Minerals v MSPL Ltd*, AIR 2010 SC 1137, at p 1137 : (2010) 12 SCC 24.
954. *Achintya Kumar Saha v Nanee Printers*, AIR 2004 SC 1591 : (2004) 12 SCC 368.
955. *Guram Ditta v T Ram Dilta*, AIR 1928 PC 172.
956. *Kochukakkada Aboobacker v Attam Kasim*, AIR 1996 SC 311 : 1996 AIR SCW 1606 : (1996) 7 SCC 389.
957. *Neelu Narayani v Lakshmanan*, AIR 2000 SCW 1949 : (1999) 9 SCC 237.
958. *Ikram Hussain v Raman Nath*, AIR 2003 Han 24.
959. *Santakumari v Lakshmi Amma Janaki Amma*, AIR 2000 SC 3009; *Rukmanibai v Venkoba Rao*, AIR 2003 Kant 473.

there is a misconstruction of a document or wrong application of a principle of law while interpreting a document, it is open to interference under section 100, CPC. If a document creating an easement by grant is construed as an easement of necessity thereby materially affecting the decision in the case, certainly it gives rise to a substantial question of law.[960]

[s 100.51] Two Views

Where the appellate court, which is final court of fact, has accepted the interpretation which is quite plausible and acceptable, sitting in second appeal, the said judgment should not be interfered with where the interpretation of the lower appellate court is one of the two possible interpretation.[961]

Merely because the high court in second appeal could reach a different conclusion, would not give rise to a substantial question of law.[962] Merely because of appreciation of evidence another view is also possible would not empower high court to assume the jurisdiction by terming the question as substantial question of law.[963]

While deciding a second appeal, it is not open to the court to re-appreciate or re-assess the evidence. Jurisdiction of court in Second Appeal is confined to substantial question of law only and, as such, the finding of fact is not open to challenge. It is well settled that where two views are possible from the available evidence it is not open to the second appellate court to set aside a finding because the other view would be more appealing.[964] It is now well settled that concurrent findings of fact of trial court and first appellate court cannot be interfered with by the high court in exercise of its jurisdiction under section 100 of CPC. Re-appreciation of evidence can be done by the first appellate court while exercising the power under section 96 of the CPC. If the first appellate court has weighed each evidence adduced before reaching to a conclusion, and there is no cogent inference of suspicious circumstance, the high court is barred to interfere with the concurrent findings.[965]

[s 100.52] Mixed Question of Law and Fact

Normally, the second appellate court should not intrude into the question of facts. Though this is a basic principle of law, there is or cannot be any rigid rule in this respect. In deciding a second appeal in proper prospective, the second appellate court may have to enter into the questions of fact.[966] Similarly, mixed questions of fact and law cannot be permitted to be raised for the first time in second appeal.[967] It is not the practice of the Supreme Court to permit a mixed question of law and fact to be raised for the first time before it.[968] The reason given was that whereas in determining a question of fact no application of any principle of law was involved in finding either the basic facts or in arriving at the ultimate conclusion, in the case of a mixed question of fact and law the

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960. *Hero Vinoth v Seshammal*, AIR 2006 SC 2234 : (2006) 5 SCC 545.
961. *Shanmugham v Saraswathi*, AIR 1997 Mad 226.
962. *Gurmail Singh v Rajinder Singh*, AIR 2003 P&H 336.
963. *Chitru Devi v Ram Dei*, AIR 2002 HP 59.
964. *Sriram Jain v Manjubai Jain*, AIR 2009 Ori 104.
965. *Gurnam Singh (D) by LRs v Lehna Singh (D) by LRs*, AIR 2019 SC 1441; see also, *C Doddanarayana Reddy (Dead) by LRs v C Jayarama Reddy (Dead) by LRs*, AIR 2020 SC 1912.
966. *BB Lohar v Prem Prakash Goyal*, AIR 1990 Sikkim 11.
967. *Shamin Ahmad v Rashida Begam*, AIR 2001 All 302.
968. *Banarsidas v Kanshiram*, AIR 1963 SC 1165; *Narasimham v State of Orissa*, AIR 1963 SC 1227; *Maddanappa v Chandramma*, AIR 1965 SC 1812 : [1965] 3 SCR 283.

ultimate conclusion has to be drawn by applying principles of law to the basic findings.[969] Accordingly, where the lower appellate court found that the plaintiff and his predecessors were not Hindu *sanyasis* and therefore were incompetent to assume the office of the *mahant* for the reason that they had not performed the requisite ceremonies and had not uttered the required *mantra,* the factual part of the finding, that is, the non-performance of the ceremony and the omission to utter the *mantra* was a finding of fact, but the ultimate conclusion therefrom was a question of law.[970] Thus, the question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a mixed question of law and fact. Where the question of adverse possession is one of simple fact, no second appeal will lie; but a second appeal will lie from a finding as to adverse possession when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the findings as to simple facts.[971] The finding on question of readiness and willingness to perform contract is mixed question of law and fact, if the findings of fact recorded by courts below was that the plaintiff had failed to establish that he was ready and willing to perform his part of contract, the setting aside of this finding by second appellate court without reappreciating evidence is impermissible.[972] Where the question in a suit was whether the defendant was bound by a mortgage executed by his mother, and it was held that he was, their Lordships of the Privy Council held that the findings was substantially one of law, and that it was, therefore, open to question in second appeal. In the course of their judgment their Lordships said:

> *The facts* found (by the lower Appellate Court) need not be questioned. Even if, findings of facts by courts below are wrong or grossly inexcusable, held, that by itself would not entitle the High Court to interfere under s 100 in absence of clear error of law.[973] It is *the soundness of the conclusions from them* that is in question, and this is a matter of law.[974]

As stated by their Lordships of the Privy Council in another case, the proper legal effect of a proved fact is essentially a question of law, and high court is, therefore, entitled to interfere in second appeal.[975]

Discussing the true scope of the above observation, the Supreme Court has pointed out in *Sri Meenakshi Mills Ltd v CIT,*[976] that there is a distinction between a pure question of fact and a mixed question of law and fact and that the observation aforesaid had reference to the latter and not the former and went on to state:

> In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves

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969. *Krishnawati v Shri Hans Raj*, AIR 1974 SC 280 : (1974) 1 SCC 289.
970. *Krishna Singh v Mathura Ahir*, AIR 1978 All 273 : (1972) All LJ 155.
971. *Lachmeshwar v Manowar*, (1892) 19 Cal 253 : 19 IA 48; *Balaram v Syama Charan*, (1920) 24 Cal WN 1057; *Jogendra Nath v Rajendra Nath*, AIR 1922 Cal 54 : (1922) 26 Cal WN 890; *Ram Chandra v Asa Ram*, AIR 1937 All 429; *Krishnayya v Udayalakhmamma*, (1953) 2 Mad LJ 241; *Janakirama Rai v Appalaswami*, AIR 1980 Mad 772 : (1954) ILR Mad 980; *State of Andhra Pradesh v Kattubadi Fakrui Bi*, AIR 1962 AP 518; *Gundhicha v Iswara*, AIR 1965 Ori 96; *Profulla Nalini v Rajendra*, AIR 1968 Tri 5; *Gundarmal v Bansilal*, AIR 1971 Raj 175.
972. *HP Pyarejan v Dasappa*, AIR 2006 SC 1144 : (2006) 2 SCC 496.
973. *Bholaram v Ameerchand*, (1981) 2 SCC 414; *Sunni Central Board of Waqf, Lucknow v Pooran Chand*, (1990) SCC 541(1).
974. *Ram Gopal v Shamshkhaton*, (1893) 20 Cal 92 : 19 IA 228, 232; *State of Punjab v Bajaj Electricals*, AIR 1968 SC 739 : (1968) 2 SCR 536 : 70 ITR 730.
975. *Nafar Chandra Pal v Shukur*, 45 IA 183; *Dhannamal v Moti Sagar*, AIR 1927 PC 102 : 57 IA 178; *Gujarat Ginning and Manufacturing Co v Motilal Hirabhai Co*, AIR 1936 PC 77 : 63 IA 140 : 38 Bom LR 353; *Mcleod & Co v Sixth Industrial Tribunal*, AIR 1958 Cal 273.
976. *Sri Meenakshi Mills Ltd v CIT*, AIR 1957 SC 49 : (1956) SCR 691 : 1956 SCA 1139 : 1957 SCJ 1.

within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and. then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. To take an example, the question is whether the defendant has acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site, that the defendant is the owner of the adjacent residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse possession, the Court has firstly to find on an appreciation of the evidence what the facts are so far it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the fact established by the evidence, the requirements of law are satisfied. That is a question of law. The ultimate finding on the issue must, therefore be an inference to be drawn from the facts found, on the application of the proper principles of law, and it will be correct to say in such cases that an inference from facts is a question of law. In this respect, mixed questions of law and fact differ from pure questions of fact in which the final determination equally with the finding or ascertainment of basic facts does not involve the application of the proper principles of law. The proposition that an inference from facts is one of law will be correct in its application to mixed questions of law and fact but not to pure questions of fact.

and summing up the result of the authorities, the court stated:

(1) When the point for determination. is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court under Section 66(1).

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final, its decision as to the legal effect of those findings is a question of law which can be reviewed by the court.

(3) A finding on a question of fact is open to attack under Section 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

Now to refer to the decisions wherein the question as to what are mixed questions of law and fact has been considered; the question whether a transfer was made with intent to defeat creditors within the meaning of section 53 of the Transfer of Property Act, 1882,[977] or whether the plaintiff has made out his title to the property in suit[978] or whether a railway company took as much care of the goods delivered to the company as a man of ordinary prudence would under similar circumstances take of his own goods within the meaning of sections 151 and 152 of the Indian Contract Act, 1872,[979] or whether the plaintiff is entitled to the easement claimed by him,[980] or whether property is ancestral or self-acquired,[981] or whether a tenancy

977. *Ishan Chunder v Bishu*, (1897) 24 Cal 825.
978. *Vinayakrao v Bhondu*, AIR 1942 Ngp 102 : (1942) ILR Nag 349; *Rajaram v Ganesh*, (1897) 21 Bom 91.
979. *Phulchand Khandewal v Governor General of India*, AIR 1949 Pat 110; *Lakshmi Narain Baijnath v Secretary of State*, AIR 1924 Cal 92 : (1923) 27 Cal WN 1017; *Bindraban v GIP Rly Co*, AIR 1926 All 394 : (1926) 48 All 766.
980. *Diwan v Jagta*, (1920) 1 Lah 206.
981. *Lal Singh v Jagir Singh*, AIR 1950 EP 179; *Gurdi Singh v Ishar Kaur*, AIR 1922 Lah 392 : (1922) 3 Lah 257.

is permanent,[982] or whether a *shet-sanadi* service *inam* is *kadim* or *jadid*,[983] were held to be questions of law, and a second appeal will lie to the high court. It has been held by the High Court of Calcutta that where from a certain set of facts a court infers a lost grant, the process is one of inference of fact, and not of legal conclusion, and that it is not a ground for a second appeal.[984] The Allahabad High Court holds that negligence is a mixed question of law and fact, and that a second appeal lies if it is shown that the court has approached the question from a wrong stand-point, or that the evidence is such that there was no option but to draw the converse conclusion or that the finding is vitiated by so some other legal defect.[985] But the better opinion is that it is a pure question of fact.[986]

It has been held by the Supreme Court that whether the dedication of a temple is to the public or is private is a mixed question of law and fact,[987] and also the question as to whether a property is ancestral or not,[988] or whether, when a *raiyat* purchased the interest of the proprietor, there is a merger of the two interests.[989]

In a suit for permanent injunction, the questions of law formulated by the high court in second appeal were not pure questions of law, but mixed questions of law and fact, such as whether there was oral gift and whether the alleged oral gift was valid. There were no averments in the plaint in respect of any gift, oral or otherwise or about its validity. Therefore the defendant had no opportunity of denying the same in the written statement and consequently there was no issue in respect of them. It was held by the Supreme Court that no amount of evidence or arguments can be looked into in absence of pleadings and issues. The questions which could not be considered in the suit, could not also have been considered in the second appeal.[990]

Raveendran, J, speaking for the Bench in the above case, observed as follows:

> **27.** We are therefore of the view that the High Court exceeded its jurisdiction under section 100 CPC, firstly in re-examining questions of fact, secondly by going into the questions which were not pleaded and which were not the subject matter of any issue, thirdly by formulating questions of law which did not arise in the second appeal, and lastly, by interfering with the well reasoned judgment of the first Appellate Court which held that the plaintiffs ought to have filed a suit for declaration.[991]

Where the findings by the court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the high court is not precluded from recording proper findings.[992] Where the inferences of the courts below are perverse and it has

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982. *Dhannamal v Moti Sagar*, AIR 1927 PC 102 : 54 IA 178; *Ananda Charan v Kumar Manmathanath*, AIR 1934 Cal 51 : (1933) 57 Cal LJ 509; *Kumar Manmathanath v Pramathanath*, AIR 1934 Cal 288 : (1934) 61 Cal 32; *Debendra Nath Dang v Pasupati*, (1935) 35 Cal WN 1097; *Ram Lal v Bibi Zohra*, AIR 1941 Pat 228 : (1940) 20 Pat 115; *Sailendra Nath Bhattacharjee v Bijanlal Chakravarty*, AIR 1945 Cal 283 : (1944) 49 Cal WN 133; *Secretary of State v Krishna Rao*, AIR 1945 PC 165 : 72 IA 211 : (1946) ILR Mad 225; *Dondi Thukaram v Dadoo Piraji*, AIR 1954 Bom 100 : (1953) ILR Bom 969.
983. *Secretary of State v Rajaram*, AIR 1935 Bom 47 : (1934) 36 Bom LR 1055.
984. *Kasi Nath v Murari*, (1920) 31 Cal LJ 501; *Bhojai v Salim Ullah*, AIR 1967 All 221.
985. *Sumnat Prasad v Ram Swarup Sastri*, (1945) All 685; *BB & CI Rly v Dwarka Nath*, AIR 1936 All 771 : (1936) 58 All 771.
986. *Kothari & Sons v Krishna Rao, supra.*
987. *Deoki Nandan v Muralidhar*, AIR 1957 SC 133 : [1956] SCR 756 : 1956 SCJ 75 : 1957 SCA 85.
988. *Gopal Singh v Ujagar Singh*, AIR 1954 SC 579 : [1955] 1 SCR 86 : 1954 SCJ 562.
989. *Jyotish Thakur v Tarakant Jha*, AIR 1963 SC 605; *Minakshisundarammal v Subramania*, AIR 1955 Mad 369 : 68 LW 70.
990. *Anathula Sudhakar v P Buchi Reddy*, AIR 2008 SC 2033 : (2008) 4 SCC 594.
991. *Anathula Sudhakar v P Buchi Reddy*, AIR 2008 SC 2033, para 27 at p 2041-2042 : (2008) 4 SCC 594.
992. *Jagdish Singh v Natthu Singh*, (1992) 1 SCC 647; *JB Sharma v State of Madhya Pradesh*, (1998) SCC 451; *Dilbagrai Punjabi v Sharad Chandra*, (1988) Supp SCC 710.

reached an inference contrary to and/or based on misreading of evidence on record, such errors can certainly be corrected by the high court in the second appeal.[993] The question whether a female had acquired the right under section 14 of the Indian Succession Act, 1925 and as such she became full owner hence, could not be divested of that right is a question of fact which would require evidence to be decided.[994] When the courts below had rejected and disbelieved the evidence on the ground that the propounder had not properly discharged his duty, it is the duty of the high court to consider whether the reasons given by the courts below were sustainable in law.[995]

It has been held in some cases that the question whether the relationship of landlord and tenant subsists between the plaintiff and the defendant is a mixed question[996] but in view of the decision of the Supreme Court in *Raja Durga Singh v Tholu*,[997] the correctness of these decisions is open to question. It has been held in *Bhagat Singh v Nikka*,[998] that the question whether a decree was obtained by fraud is one of law, as that is a matter of inference from facts. But a number of decisions[999] have laid down that fraud is a question of fact and this, it is submitted, is the better view. It has been held in *Bhattacharjee v Sentinel Assurance Co*,[1000] that waiver is a mixed question of law and fact but the weight of judicial opinion is against this view.[1001] Whether a *patta* requires to be registered has been held to be a mixed question,[1002] as also whether on the facts proved, a partner could be said to have abandoned his interest in the firm or whether a partnership could be held to have been dissolved.[1003]

[s 100.53] Usage Having the Force of Law

The words, "usage having the force of law", mean a local or family usage as distinguished from the general law.[1004]

[s 100.54] Custom

The Privy Council in *Palaniappa v Devasikamony*[1005] said that "questions of the existence of an ancient custom are generally questions of mixed law and fact". But in several cases, the question of the existence of a custom has been referred to by the Privy Council as a mere question of fact. Thus, when a custom of lineal primogeniture in an impartible raj was pleaded, the Privy Council observed that the high court was right in considering the question as merely

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993. *SB Chatteerjee v Meena Ahuja*, AIR 1996 Del 156; *Sri Kanth v Sheela Debi*, AIR 1995 HP 124; *Nalini v Padmanabhan Krishnan*, AIR 1994 Ker 14.
994. *Prabhu Dayal v Suwa Lal*, AIR 1994 Raj 149.
995. *Major Singh v Rattan Singh*, (1997) 3 SCC 546.
996. *Medhavarup v Medhavarup*, AIR 1935 Mad 268; *Ram Prakash v Shambhu Dayal*, AIR 1960 All 395.
997. *Raja Durga Singh v Tholu*, AIR 1963 SC 361.
998. *Bhagat Singh v Nikka*, AIR 1925 Lah 357 : 7 Lah LJ 68.
999. *Kala v Javaramma*, AIR 1952 Mys 47 : (1952) Mys 151; *Bhusanchandra v Hirnmay*, AIR 1957 Tri 1; *Tilakdhari v Jagat Rai*, AIR 1961 Pat 76.
1000. *Bhattacharjee v Sentinel Assurance Co*, AIR 1955 Cal 594.
1001. *Bapurao v Waman*, AIR 1963 Bom 179 : (1963) Bom 629 : 64 Bom LR 541; *Sarwar Shaw v Abdulla Shah*, AIR 1963 J&K 14.
1002. *Bachh Raj v Sunder Mal*, AIR 1963 Raj 119.
1003. *Venkatlal v Kanhiyalal*, AIR 1963 MP 155; *Wazir Bhai v Gadmal*, AIR 1940 Bom 263.
1004. *Ram Gopal v Shamskhaton*, (1893) 20 Cal 93 : 19 IA 228; dissenting from the observations of Petheram CJ, in *Nivath Singh v Bhikhi Singh*, (1885) 7 All 649.
1005. *Palaniappa v Devasikamony*, 44 IA 147, 157–58; *Lakshmidhar Misra v Rangalal*, AIR 1950 PC 56 : 76 IA 271 : (1949) 29 Pat 1 : 54 Cal WN 154.

a question of fact.[1006] In another case, the existence of a custom excluding females from inheritance was said by the Privy Council to be a question of fact.[1007] A step-brother alleged a family custom in derogation of the *Mitakshara* by which he was entitled to an equal share with a brother of the whole blood and the judicial committee observed that no evidence was forthcoming of any instance in which the custom was followed and that the question involved was one of fact only.[1008] Again, the existence of a custom by which a tenant was relieved of rent of land allowed to lie fallow, was said by the Privy Council to be one of fact.[1009] A Full Bench of the Allahabad High Court has explained that these cases are consistent, for while the prevalence of a practice is a question of fact, yet the question whether the practice is legally binding is a question of law.[1010] Accordingly, the same high court has held that a finding that a custom, which would displace the operation of the personal law governing a Hindu widow's right to succession has not been established, is a finding of fact and cannot be reviewed in a second appeal.[1011] In *Palaniappa v Devasikamony,*[1012] the Privy Council said that the judge must first find what are the things actually done in alleged pursuance of the custom and then decide whether these facts satisfy the requirements of law. The first is a question of fact and the second is a question of law. Thus, in a case where a *mirasdar's* right under an alleged local custom was in question, the Madras High Court held that findings as to what things were actually done in alleged pursuance of the custom were questions of fact with which the high court could not interfere; but the inference as to the existence and the decision as to the validity of the custom were matters of law subject to revision by the high court in second appeal.[1013] The Madras High Court made the same distinction in a case where the question was whether a holding was transferable by a local custom;[1014] and so have the Allahabad[1015] and Bombay[1016] High Courts. In two cases, the Allahabad High Court has said that it will interfere if the lower appellate court has acted upon illegal evidence or evidence legally insufficient,[1017] but this refers to the legal requirements necessary to establish a valid custom.[1018] In another case, where a custom of *Dharadhura* was alleged in cases of alluvion and diluvion the Allahabad High Court held that a wrong construction of *wajib-ul-arz* coupled with a wrong inference from certain facts constituted an error of law which justified interference in second appeal.[1019]

1006. *Mahesh Chandra v Satrughun*, 29 IA 62.
1007. *Mahomed v Imtiaz*, 36 IA 210, 220.
1008. *Anant Singh v Durga Singh*, 37 IA 191.
1009. *Raja of Ramand v Mangalam*, AIR 1930 PC 234 : 57 IA 264 : ILR 53 Mad 597.
1010. *Yashpal Singh v Jagannath*, AIR 1946 All 410; *Municipal Board v Kanhaiya Lal*, AIR 1931 All 499 : (1932) 54 All 6; *SK Wodeyar v Ganpati*, AIR 1935 Bom 371 : (1935) 37 Bom LR 584.
1011. *Sukhni v Sukhbasi*, AIR 1967 All 423.
1012. *Palaniappa v Devasikamony*, 44 IA 147; *Jogesh Chandra v Dhakeswari Mata*, AIR 1942 Cal 26 : (1941) 2 Cal 258 : (1941) 45 Cal WN 809 : 73 Cal LJ 544.
1013. *Jogesh Chandra v Dhakeswari Mata*, *supra*; *Kumarappa v Manavala*, (1918) 41 Mad 374; overruling *Kakarka v Raja Venkata*, (1906) 29 Mad 24; and approving *Pankajammal v Secretary of State*, (1917) 40 Mad 1108; *Chidambara v Vedayya Thevar*, AIR 1967 Mad 164 : (1967) 3 Mad 582 : (1968) 1 Mad LJ 110; *Janardhanan v Kaliamma*, AIR 1968 Mad 105 : (1968) 1 Mad 548 : (1968) 2 Mad LJ 94.
1014. *Kailas v Padmakisor*, (1917) 25 Cal LJ 613.
1015. *Tajammul v Banwari Lal*, AIR 1926 All 43 : (1926) 48 All 77; *Shamsher v Pyare Lal*, AIR 1922 All 88 : (1922) 20 All LJ 57; *Ram Saran v Peary Lal*, AIR 1931 All 104 : (1931) 53 All 308.
1016. *Desai Rathboddas Rawal*, (1897) 21 Bom 110; *Sursingji v Manilal*, AIR 1931 Bom 167 : (1931) 32 Bom LR 1679.
1017. *Hashim Ali v Abdul Rahman*, (1906) 28 All 698; *Ram Bilas v Lal Bahadur*, (1908) 30 All 311.
1018. *Municipal Board v Kanhaiya Lal*, AIR 1931 All 499 : (1932) 54 All 6; *Nathua v Raghubar*, AIR 1934 All 890.
1019. *Shamsher v Pyare Lal*, AIR 1922 All 88 : (1922) 20 All LJ 57.

As to certificates under section 41(3) of the Punjab Court Act, 1918, in cases of custom, see the undermentioned cases.[1020]

[s 100.55] Refusal by Court of First Appeal to Extend Time for Filing Appeal

Where an application is made to a court of first appeal to admit an appeal from the original decree after the expiration of the period of limitation, that court has the power, on sufficient cause being shown, to admit the appeal. If the lower appellate court refuses to admit the appeal, holding in the exercise of its discretion that there was no sufficient cause for not presenting the appeal within the prescribed time, there is no ground for a second appeal. The principle is that where a court has exercised its discretion in a sound and reasonable way, the high court has no power to interfere in second appeal. But if the lower appellate court does not exercise its discretion at all, or exercises it capriciously and arbitrarily, or without proper legal material to support its decision, a second appeal will lie under clause (a) of the section.[1021] In a matter decided by the Delhi High Court, the question about the maintainability about a second appeal arose in view of the fact that there was a delay of 385 days in filing of an appeal by a public authority. A legal branch of the public authority was conscious of the period of limitation and accordingly intimated the necessity of the decision of filing the appeal being taken on priority basis. The officials, instead of filing the appeal, decided to await the decision of other cases. In such a situation, the authority is not only negligent but appearing to be lease, bothered about law of land; accordingly, the delay was not condoned and appeal was dismissed.[1022] By reason of the dismissal of the appeal, the appellant stands relegated to the position as was the original suit.[1023]

[s 100.56] Dismissal of First Appeal as Barred by Limitation—Revision and not Second Appeal is Remedy

The Supreme Court, in *Kalavati v Durga Prasad,*[1024] has observed with approval the decision in *Karasondos Dharamsey v Gangabai,*[1025] holding that an order of the high court refusing to admit an appeal after the period of limitation expired would not be a decree passed on appeal by the high court and held that it is only where the appeal is heard and judgment delivered thereafter, the judgment can be said to be a judgment of affirmance and if appeal is not entertained on the preliminary ground that it was not maintainable or for any other reason, the decision cannot be said to be decision in appeal. This judgment of three judges of the Supreme Court was followed by a Division Bench of Karnataka High Court in *Kanji Moorarji v SV Hegde,*[1026] by holding that dismissal of appeal on the ground that it had abated against respondent, would not be a decision in appeal affirming the decree of the trial court and would not be decree passed in appeal and hence, no second appeal would lie and revision was maintainable. Full Bench of the Calcutta High Court in *Mamuda Khateen v Beniyan Bibi,*[1027] held that order rejecting time barred memorandum of appeal consequent upon refusal

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1020. *Mikhi v Punni*, AIR 1921 Lah 77 : (1921) 2 Lah 348; *Nathu v Banna*, AIR 1922 Lah 426 : (1922) 3 Lah 344; *Ram Mehr v Pali Ram*, AIR 1924 Lah 455 : (1924) 5 Lah 268.
1021. *Parvati v Ganpati*, (1899) 23 Bom 513; *Tulsa v Gajraj*, (1903) 25 All 71; *Hanid v Gayadin*, (1904) 26 All 327.
1022. *Delhi Development Authority v Sushil Kumar*, AIR 1997 Del 104.
1023. *M Veerappa v Evelyn Sequeira*, (1988) 1 SCC 556.
1024. *Kalavati v Durga Prasad*, AIR 1975 SC 1272 : (1976) 1 SCC 696.
1025. *Karasondos Dharamsey v Gangabai*, (1907) ILR 32 Bom 108 : 9 Bom LR 566.
1026. *Kanji Moorarji v SV Hegde*, (1979) 1 Kant LJ 249 : (1979) ILR 1 Kant 1189.
1027. *Mamuda Khateen v Beniyan Bibi*, AIR 1976 Cal 415.

to condone delay is not a decree nor an appealable order, however, such order is revisable. Same view has been taken by Madhya Pradesh High Court in *Ajit Singh v V Bhagwan*,[1028] Rajasthan High Court in *Chhelaram v Manak*,[1029] Orissa High Court in *Ainthu v Sitaram*.[1030] However, Full Bench of the Kerala High Court took a contrary view in *Thambi v Mathew*.[1031]

A high court cannot dismiss a second appeal on merit where the appellant is unrepresented on the date fixed for hearing.[1032]

The question as to whether dismissal of appeal consequent upon dismissal of application for condonation of delay would amount to decree has been specifically considered and decided by the Supreme Court in *Ratansingh v Vijay Singh*,[1033] wherein after referring to "decree" as defined in section 2(2) CPC in para 10, the Supreme Court has observed as follows in para 11 and it would answer the question to be determined in this reference:

> In order that decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for condonation of delay will not amount to a decree. Consequently, dismissal of an appeal as time barred is also not a decree. We are aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the meaning of the said definition. We are also aware of the contrary decisions rendered by High Courts on the same point. Dealing with some of those decisions a Full Bench of the Calcutta High Court (SP Mitra, CJ, SABYASACHI MUKHERJEE, J. (as he then was and SK Datta, J) has held in *Mamuda Khateen v Beniyan Bibi*,[1034] that "if the application under Section 5 of the Limitation Act was rejected the resultant order cannot be decree and the order rejecting the memorandum of appeal is merely an incidental order." The reasoning of the Full Bench was that when an appeal is barred by Limitation, the appeal cannot be admitted at all until the application under Section 5 of the Limitation Act is allowed and until then the appeal petition, even if filed, will remain in limbo. If the application is dismissed the appeal petition becomes otiose. The order rejecting the memorandum of appeal in such circumstances is merely an incidental order. We have no doubt that the decisions rendered by the High Courts holding the contrary view do not lay down the correct principle of law.

In view of the above decision of the Supreme Court, the question for reference is answered by holding that an order rejecting the memorandum of appeal following rejection of application for condonation of delay in filing the appeal under section 5 of the Limitation Act, 1963, would not be a decree passed in appeal and hence, second appeal would not lie under section 100 CPC and order would be revisable under section 115 CPC. When once it is held that order dismissing appeal as barred by time, is not a decree, the question of drawing a decree under O XLI, rule 35 would not arise and mere drawing of decree in the prescribed form would not make such an order a decree and any decree drawn pursuant to such an order is immaterial and would not debar the aggrieved party to file revision.[1035]

In view of the decision of the Supreme Court in *Ratansingh's* case as stated above, rejection of an application for condonation of delay will not amount to a decree and consequently, dismissal

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1028. *Ajit Singh v V Bhagwan*, AIR 1989 MP 302.
1029. *Chhelaram v Manak*, AIR 1997 Raj 284.
1030. *Ainthu v Sitaram*, AIR 1984 Ori 230.
1031. *Thambi v Mathew*, AIR 1988 Ker 48.
1032. *Sri Prabodh Ch Das v Mahamaya*, AIR 2020 SC 178 : (2020) 1 Cal LJ 12.
1033. *Ratansingh v Vijay Singh*, AIR 2001 SC 279 : (2001) 1 SCC 469.
1034. *Mamuda Khateen v Beniyan Bibi*, AIR 1976 Cal 415.
1035. *Commr, Hubli, Dharwad Municipal Corp v Shrishail*, AIR 2004 Kant 75 (FB).

of an appeal as time barred is also not a decree. The answer to the question is that no second appeal lies and the order would be revisable.[1036]

The court was required to ascertain whether to set aside *ex-parte* decree, the time spent in the proceedings can be regarded as "sufficient cause" within the meaning of section 5 of the Indian Limitation Act, 1908 so as to condone the delay in preferring an appeal against the *ex-parte* decree on merits? The court in regard to this question said that there cannot be strait-jacket formula to say that "the remedies provided simultaneous cannot be converted into consecutive remedies". Court said that it would depend on the facts and circumstances of the case and only where it is found out that the defendant has used dilatory tactics or where there is lack of *bona fide* then only the court may decline to condone the delay in filing the first appeal.[1037]

The expression "sufficient cause" used in section 5 of the Limitation Act, 1963 enable the courts to apply the law in a meaningful manner which serves the ends of justice. There are no hard and fast rules laid down for deciding the applications for condonation of delay and over the years courts approach has been liberal so that substantive rights of the parties are not defeated. Court in the instant case considered "sufficient cause" as to the time spent in pursuing the application to set aside *ex-parte* order and condoned the delay in filing the first appeal.[1038]

[s 100.57] Dismissal of Appeal for Default

Though a second appeal may lie from an appellate decree passed *ex parte*, no second appeal lies from an order dismissing an appeal for default. Such an order is not a decree.[1039]

[s 100.58] New Case in Second Appeal

An appellant should not be allowed to set up a new case in second appeal,[1040] nor should he be allowed to raise a new issue not supported by the evidence on the record.[1041] An appellant would also not be allowed to amend the plaint to convert for the first time in a second appeal, his suit for redemption of a mortgage and possession of the mortgaged property into one for possession based on paramount title.[1042]

In a suit for declaration of title, the plea under the Easement Act had not been set up by the defendant, nor there was any foundation and material in the written statement as well as oral evidence. The new plea of adverse possession cannot be considered by the high court sitting in second appeal jurisdiction to grant any relief to defendant.[1043]

The observation of the court in the above case in para 24 of the judgment is worth noticing:

1036. *Commr, Hubli, Dharwad Municipal Corp v Shrishail*, AIR 2004 Kant 75 (FB).
1037. *Bhivchandra Shankar More v Respondent: Balu Gangaram More*, Civil Appeal No. 4669 of 2019, decided on 7 May 2019 (SC).
1038. *Bhivchandra Shankar More v Respondent: Balu Gangaram More*, Civil Appeal No. 4669 of 2019, decided on 7 May 2019 (SC).
1039. See O XLI, rule 11(2), and see clause (2), sub-clause (z); *Anwar Ali v Jaffar Ali*, (1896) 23 Cal 827.
1040. *Gopal v Hanumant*, (1882) 6 Bom 107; *Mahomed v Sitaramayyar*, (1892) 15 Mad 50; *Kanhia v Mahin Lal*, (1888) 10 All 495; *Narinjan Singh v Charan Das*, AIR 1922 Lah 363 : (1922) 3 Lah 239.
1041. *Chandbhai v Hasanbhai*, AIR 1922 Bom 150 : (1922) 46 Bom 213; *Badri Narain v Chander Mauleshwar*, AIR 1942 Pat 152.
1042. *DS Thampi v Charles D'Cruz*, AIR 1969 Ker 19.
1043. *Basanti Devi v Fulchand Mondal*, AIR 2007 Cal 8 : (2006) 2 Cal LJ 622.

> It is also a settled law that plea of adverse possession is not sustainable when an alternative plea for retention of possession by operation of section 53-A of Transfer of Property Act is made as a first plea by a plea of part performance of contract on basis of argument (*sic*). Adverse possession plea being totally inconsistent with the second plea of retention of possession by operation of section 53-A of Transfer of Property Act.[1044]

In a suit for declaration of title and injunction where no plea as to easementary rights were raised, making out a new case and conversion of the suit into one for enforcement of easementary rights and grant of injunction by the high court was held to be improper by the Supreme Court.[1045] Commenting on the manner in which the high court dealt with the second appeal, Raveendran, J, speaking for the Bench in the above case, observed as follows:

> 16. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant a relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings.[1046]

[s 100.59] New Plea/Objection as to Question of Fact in Second Appeal

An appellant will not be allowed to set up, for the first time in second appeal, a plea not taken by him in the lower court.[1047]

Plea of *bona fide* purchaser in good faith from ostensible owner[1048] cannot be raised for the first time in second appeal.[1049] In a second appeal, a plea was raised that in view of clause 18 of the insurance contract, the dispute between the parties ought to have been referred to arbitrator, instead of filing a suit. The contention was rejected by the court on the ground that this plea was not raised by the respondent in the written statement. No issue was also framed by the trial court. In such a situation, the respondent shall not be allowed to raise the question of maintainability of the suit at the appellate stage. The question as to want of jurisdiction or maintainability of the suit should be raised at the earliest point of time.[1050] The objection as to the maintainability of the suit in view of section 47 of the CPC was not urged before the lower court, nor was it urged in the memorandum of appeal. The high court, in second appeal, cannot consider the objection.[1051] The issue of *benami* was not raised before the courts below, hence the high court did not permit this issue to be raised for the first time in second appeal.[1052]

As to the plea of limitation, see notes to O XLI, rule 2, "Leave of court: Limitation," which refer to first appeals, apply also to second appeals.[1053] An objection was raised that no notice under O XXI, rule 66(2) of the CPC, was issued to the decree-holder and the judgment-debtor. It was held to be question of fact and such an objection having not been raised before

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1044. *Basanti Devi v Fulchand Mondal*, AIR 2007 Cal 8, para 24 at p 14 : (2006) 2 Cal LJ 622.
1045. *Bachhaj Nahar v Nilima Mandal*, AIR 2009 SC 1103 : (2008) 17 SCC 491.
1046. *Bachhaj Nahar v Nilima Mandal*, AIR 2009 SC 1103, para 16 at p 1108 : (2008) 17 SCC 491.
1047. *Krishnapasuba v Dattatraya*, AIR 1966 SC 1024; *Hardayal Gir v Sohna Ram*, (1970) 3 SCC 635; *Champalal v Sumitramma*, AIR 1973 Mys 110 : (1972) 2 Mys LJ 424.
1048. Transfer of Property Act, 1882, section 41.
1049. *Drigpal Singh v Wife of Laldhari Ojha*, AIR 1985 Pat 110.
1050. *Sujir Ganesh Nayak & Co, Quilon v National Insurance Co Ltd, Calcutta*, AIR 1996 Ker 49.
1051. *Laxminarayana Rao v Janrdhana Shettigara*, AIR 1994 Kant 105.
1052. *Minan Sain v Kalipada Ganguli*, AIR 1997 Cal 386; *Ajit Chopra v Sadhu Ram*, (2000) 3 LRI 42.
1053. *Shivapa v Dod Nagaya*, (1887) 11 Bom 114.

the executing court, it cannot be permitted to be raised for the first time in second appeal.[1054] When the plea, whether the price agreed to is or has been adequate in respect of a sale deed was not raised before the courts below, nor any issue had been pressed to the effect that the sale consideration was too inadequate to entitle the plaintiff for decree claimed, it is not open to the appellants to raise this issue in second appeal.[1055]

A plea that the licensee raised permanent construction on the property by incurring expenditure and therefore the license became irrevocable cannot permitted to be raised for the first time in second appeal as this plea was not taken in the written statement.[1056] A dispute about validity of marriage cannot be raised for the first time in second appeal.[1057] When the defendant himself has not taken the plea regarding repayment of loan in his written statement, there was no justification for the high court in second appeal to make non-disclosure by the plaintiff as a ground to set aside the decree a specified performance of an agreement to sell.[1058]

Similarly, the Kerala High Court rejected the plea for awarding the value of improvements under Kerala Act, 1958 where such a plea was not taken in the lower appellate court, though the Act had come into operation while the appeal before that court was pending.[1059]

The Privy Council, in a later case, refused to allow a new point to be raised before it, without any pleadings and evidence on it.[1060] The Supreme Court has, likewise, declined to hear a new question of fact raised before it.[1061] A custom, neither pleaded nor sought to be established by evidence cannot be set up for the first time in second appeal;[1062] nor a new case of agency, when the plea of partnership had failed;[1063] nor a new plea that a suit is not maintainable as the partnership which was the foundation of the claim was unregistered as required by section 69 of the Partnership Act, 1932[1064] nor a new plea as to the invalidity of registration of a document.[1065]

Novation under section 62 of the Indian Contract Act, 1872 requires a clear plea issue, and evidence. Such a question cannot be raised or accepted under section 100 of the CPC, for the first time in second appeal.[1066] Since no issue was framed to the effect that the plaintiff was not a money-lender within the meaning of Rajasthan Money Lending Act, 1963 by the trial court when other issues were framed and in the absence of which the appellant was not entitled to raise this objection in second appeal before the high court.[1067] A submission was sought to be raised in a second appeal whether the bill of exchange were inadmissible as they were not stamped. This issue was not allowed to be raised by the high court on the ground that no such stand has been taken at any stage by the respondent ante or *post lite* or in the pleadings.[1068]

1054. *Raminder Kaur v Kharaiti Lal*, AIR 1999 P&H 56 (DB).
1055. *Godhan v Ram Bilas*, AIR 1995 All 357.
1056. *Sahab Ram v Banarsi*, AIR 1997 All 222.
1057. *Biddika Haddi v Sidika Batnalu*, AIR 1996 Ori 80.
1058. *Ramachandra Kulkarni v Dinkar*, (1993) 3 SCC 549.
1059. *Ammu v Krishnan*, AIR 1965 Ker 32.
1060. *Chandrikamba v Viswanathamayya*, AIR 1933 PC 117 : (1933) 64 Mad LJ 513; *Travancore Forward Bank v Subbaraya Aiyar*, AIR 1954 Tr & Coch 406 (FB).
1061. *Braham Prakash v Manbir Singh*, AIR 1963 SC 1607.
1062. *Kirpal Kaur v Bachen Singh*, AIR 1958 SC 199 : 1958 SCJ 438 : [1958] SCR 948.
1063. *Govindraj v Kandaswami*, AIR 1957 Mad 186 : (1957) ILR Mad 1245.
1064. *Chiman Ram v Ganga Saha*, AIR 1961 Ori 94.
1065. *Kasipati v Subba Rao*, AIR 1961 Mys 62.
1066. *Babu Ram v Indra Pal Singh*, (1998) 6 SCC 358.
1067. *Nizamuddin v Jugal Kishore*, AIR 1996 Raj 207.
1068. *Indian Bank v Euro International Pvt Ltd*, AIR 1999 Cal 200 (DB).

There being no issue between the parties regarding the title of plot no 605, the appellants cannot be permitted to raise a new plea and go against their pleadings.[1069] Plea taken for first time by defendant in second appeal that plaintiff had only pleaded customary right and had not pleaded easementary right was found not tenable.[1070] Plea of non-framing of issue cannot be raised for the first time at the stage of second appeal.[1071] When the plea that the sale deed is in valid is not pressed before the trial court nor before the first appellate court, it amounts to waiver of the plea and the same cannot be allowed to be raised in second appeal.[1072] Pleading as to part performance of contract cannot be taken for the first time in second appeal.[1073] Plea of adverse possession or non-framing of issue cannot be raised for the first time in second appeal.[1074] Plea of the party that he became the owner of the suit land by lapse of time when not raised before, cannot be allowed to be raised in second appeal.[1075] The plea that the respondent himself is not sure of his actual or formal possession, when was not raised before the courts below cannot for the first time be raised in second appeal.[1076] Plea of tenancy cannot be taken for the first time in the second appeal if not taken earlier.[1077] Nor the plea that plaintiffs had filed earlier suit which was decided in favour of the defendants on the same pleas as in the present suit can be taken for the first time in second appeal.[1078] When in the objection petition to the execution of decree the objection did not set up case to determine his share, the said ground could not be raised in second appeal after 30 years.[1079] Plea as to declaration of title cannot be allowed to be raised as substantial question of law for first time in second appeal.[1080]

[s 100.60] New Plea/Objection as to Mixed Question of Facts and Law in Second Appeal

When the question is one of mixed law and fact, the high court will not entertain it for the first time in second appeal.[1081]

A new plea was raised for the first time before the high court, whether mortgagee became a deemed tenant by operation of section 2A of Bombay Tenancy Act. Since it was a mixed question of law and fact requiring investigation of fact, the high court did not permit it to be raised for the first time in second appeal.[1082]

The question of application of section 4 of the Partition Act is a mixed question of fact and law and cannot be permitted to be raised in second appeal.[1083]

1069. *Jagnarain v Radhey Shyam Singh*, AIR 2004 All 215.
1070. *Vipin Krishna Garg v Shyam Lal Garg*, AIR 2004 All 386.
1071. *Samdani Begum v Dir Mohd Khan*, AIR 2004 AP 272.
1072. *Murari Ganguly v Kanarlal Garai*, AIR 2003 Cal 105.
1073. *Sham Lal v Mathi*, AIR 2002 HP 66.
1074. *Mahendra Kar v Babul Kumar Ghosh*, AIR 2001 Gau 29.
1075. *Bhadar Singh v Jumi*, AIR 2001 HP 9.
1076. *Harbans Singh v Mohinder Singh*, AIR 2003 P&H 294.
1077. *Ham Chand v Ved Prakash*, AIR 2004 P&H 53.
1078. *SS Khurana v Mahaveer Prasad*, AIR 2004 Raj 107; see also *Purna Chandra Gaur v Luthi Gaur*, AIR 2006 Jhar 107.
1079. *Dulichand v Bhandari Das*, AIR 2004 Raj 70.
1080. *Rohini Devi v Babaji Jagannath Das*, AIR 2006 Ori 141.
1081. *Narayanaswami v Vellappa*, AIR 1954 Mad 829; *District Board, Karnal v MR Sharma*, AIR 1959 P&H 318; *Sukhdeo Maharaj v Gopal Saha*, AIR 1961 Ori 94; *State of Rajasthan v Gangadhar*, AIR 1967 Raj 199.
1082. *Pathan Murtazakhan Dadamkhan v Pathan Pirkhan Amdumiyan*, (1993) Supp 2 SCC 518; *Govind Ramji Jadhav v State of Maharashtra*, (1990) 4 SCC 718; *Pathan Murtazakhan Dadamkhan v Pathan Pirkhan Amdumiyan*, (1993) Supp 2 SCC 518.
1083. *Golaka Chandra Nayak v Gobinda Nayak*, AIR 1996 Ori 189.

Similarly, mixed questions of fact and law cannot be permitted to be raised for the first time in second appeal.[1084]

[s 100.61] New Plea as to Question of Law in Second Appeal is Permissible

The Privy Council quoted, with approval in an appeal from Rangoon,[1085] the following passage from a judgment of Lord Watson in *Connecticut Fire Insurance Co v Kavanagh*:[1086]

> When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.

Thus, an objection to jurisdiction may be taken for the first time in second appeal, if it is patent on the face of the record,[1087] except, it is submitted, in those cases which fall within section 21 above. Similarly, the plea of *res judicata* may be taken for the first time in second appeal provided it can be decided upon the record before the court.[1088] A new plea was allowed to be raised for the first time in second appeal where if the plea was not allowed the appellant will not be able to raise these points in any subsequent suit in as much as raising of these new pleas will be barred by the principle of constructive *res judicata*.[1089] A change in the law which has come into force after the decision of the lower appellate court and which has been given retrospective effect, also will be allowed to be raised for the first time in the second appeal.[1090] The question whether the rights and interest of the mortgagor should extinguish on coming into force of MB Abolition of Jagirs Act, 1951 was raised for the first time in the second appeal. The point was allowed to be raised as it is a pure question of law patent on record based on admitted facts. Such a pure question of law can be raised for the first time in second appeal.[1091] So also the plea of want of notice in an ejectment suit,[1092] or vice versa termination of tenancy by valid notice where the fact of notice is not denied, nor any issue is demanded by the defendant,[1093] the high court permitted the respondent to raise the plea about the notice being invalid on the basis of section 110 of Transfer of Property Act, 1882 for the first time in second appeal. Having regard to the facts of the case, the Supreme Court was of the view that high court was in error in non-suiting the appellant on this ground,[1094] or a plea of *lis pendens*,[1095] for a judicial pronouncement available only at the time of the hearing of the second appeal.[1096]

1084. *Shamin Ahmad v Rashida Begum*, AIR 2001 All 302.
1085. *ME Moolla Sons Ltd v Burjorjee*, AIR 1932 PC 118 : 59 IA 161 : ILR 10 Rang 242; *Dular Pandey v Nanda Budhai*, AIR 1938 All 396 (FB); *Santa Singh v Rajender Singh*, AIR 1965 P&H 415 : (1965) 2 Punj 97.
1086. *Connecticut Fire Insurance Co v Kavanagh*, AIR 1992 Cal 473.
1087. *Sarjerao Appajirao v Province of Bombay*, AIR 1943 Bom 427 : (1943) Bom 534 : 45 Bom LR 810; *Bapuji v Umedbhai*, (1871) 8 BHC 245 (AC); *Sidheshwar v Harihar*, (1888) 12 Bom 155; *Sayad v Nana*, (1889) 13 Bom 424; *Velayudam v Arunachala*, (1890) 13 Mad 273; *Daulatia v Har Govind*, AIR 1921 All 219 : (1912) 43 All 18; *Narayana Rao Amruta Rao v Chunilal Sitaram*, AIR 1953 Ngp 236 : (1952) ILR Nag 150; *Asaram v Banudas*, AIR 1956 Bom 687; *Punkajkumar v Bank of India*, AIR 1957 Cal 560; *Kundan v Sardara Ramji Lal*, AIR 1959 P&H 206; *Digambar Parshwanath v Valu Bai*, AIR 1961 Bom 221; *Syed Mohammad v Mohd Jagar*, AIR 1965 All 589; *Town Area Committee, Sirsaganj v Churaman*, AIR 1966 All 370.
1088. *Sha Shivraj Gopalji v Edappakath Ayissa Bi*, AIR 1949 PC 302 : (1949) 54 Cal WN 55; *Kanahai Lal v Suraj Kunear*, (1889) 21 All 446; *Baldev Singh v Sher Singh*, AIR 1939 Lah 556.
1089. *Khema v Shri Bhagwan*, AIR 1995 Raj 94.
1090. *Biswanath Chatterjee v AK Sarkar*, AIR 1972 Cal 52.
1091. *Balkrishnan v Mohsin Bhai*, AIR 1999 MP 86.
1092. *Dodhu v Madhavrao*, (1983) 18 Bom 110.
1093. *JC Chatterjee v SK Tandon*, AIR 1972 SC 2526 : (1972) 2 SCC 461.
1094. *M Vijayalaxmi v G Goverdhan Reddy*, (1997) 11 SCC 358.
1095. *Bhup Narain Singh v Nawab Singh*, 36 Pat 1139.
1096. *Ramayan Prasad v Gulabo Kuer*, AIR 1967 Pat 35.

The high court will entertain, in second appeal, a point of law although it has not been raised in any of the lower courts, provided the point of law arises on the findings of the lower court or on the issues as framed and on the evidence already recorded. In a second appeal, it is not open to the high court to go into questions which are neither pleaded nor raised nor dealt with by the trial court and the lower appellate court.[1097] Thus, where the lower appellate court awarded to the plaintiff, a third share of the property in suit on the ground that remoter *gotraja sapindas* inherited *per stripes* and the defendant preferred a second appeal to the high court on the ground that the plaintiff was not entitled to any share at all, the defendant was allowed to contend at the hearing of the second appeal that the plaintiff was not entitled in any event to more than a sixth share as remoter *gotraja sapindas* inherited per capita and not per stirpes.[1098] The Supreme Court has also laid down that a pure question of law can be raised for the first time in appeal.[1099]

But if the objection is one which goes to the very root of the case, it may be taken for the first time in second appeal.[1100]

[s 100.62] New Plea as to Question of Law in Second Appeal—When not Permissible

A Full Bench of the Allahabad High Court has held that a point of law not taken in the lower appellate court cannot be raised in second appeal unless it is a point involving *res judicata*, jurisdiction, or a point the decision of which is necessary to prevent further litigation, and then only if the question does not necessitate the taking of further evidence.[1101] A plea that a suit is barred by section 47, will not be entertained if raised for the first time in second appeal.[1102]

Nor can a point of law be taken for the first time in second appeal if it sets up a new right differing in kind from that asserted throughout the trial, and not merely in decree. Thus, where the right claimed by one of the defendants was treated as one of maintenance only in the courts below, she was not allowed to contend in second appeal that, besides maintenance, she was entitled to a half share in the property.[1103]

But while the court will be acting within its powers in permitting a question of law to be raised for the first time in appeal, it is not bound to do so, and may, in its discretion, decline to do so, if that would operate unfairly on the other side.[1104] But the high court will not entertain a point of law raised for the first time in second appeal, if the point cannot be

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1097. *K Chelliah Servai v P Muthusami Servai*, (1995) Supp 1 SCC 202.
1098. *Nagesh v Gururao*, (1893) 17 Bom 303; *Giriappa Ningapa*, (1893) 17 Bom 100; *Gavdappa v Girimallappa*, (1895) ILR 19 Bom 331, 676; *Nurimian v Ambica*, (1917) 44 Cal 47; *Digambar v Lahyadeo*, AIR 1923 Bom 254 : (1923) 25 Bom LR 245; *Kalappa v Kalappa*, AIR 1924 Bom 469 : (1924) 26 Bom LR 494; *Sheodan v Balkaran*, AIR 1921 All 337 : (1921) 43 All 193, 197.
1099. *Ranganathan v Govt of Madras*, AIR 1955 SC 604 : [1955] 2 SCR 374 : (1955) SCJ 515; *State of Madras v Rajagopalan*, AIR 1955 SC 817 : [1955] 2 SCR 541 : (1956) SCJ 19. *Kishorilal v Begraj*, AIR 1952 P&H 387 : (1952) Punj 539; *Mahadebram v Tinkori Roy*, AIR 1954 Cal 539 : 58 Cal WN 651; *Sayid Mia v Abdul Sattar*, AIR 1954 Assam 102 : (1954) ILR Assam 95; *Golap Gadi v Ram Parikha*, AIR 1958 Pat 553; *Madhusudan Roy v Anantacharan*, AIR 1963 Ori 183.
1100. *Nurul Hasan v Mahabub Bakh*, AIR 1945 All 202 (FB); *Kuppa v Korasami*, (1883) 6 Mad 76.
1101. *Ram Kinkar v Tujani*, AIR 1931 All 365 (FB) : (1931) 53 All 65.
1102. *Ram Rup v Special Manager*, AIR 1934 Oudh 55 : (1934) 9 Luck 365.
1103. *Rachawa v Shivyogapa*, (1894) 18 Bom 679.
1104. *Gopla v Laxminarayan*, AIR 1962 Raj 875; *Rahmatullah v Ahsan Ali*, AIR 1963 All 117.

decided without remanding the case for further evidence,[1105] nor will it take into account any subsequent development and allow additional evidence in regard to it to be taken.[1106]

[s 100.63] Interim Order in Second Appeal—No Interference in Article 136

The interim order passed in pending second appeal need not be interfered with in exercise of discretionary jurisdiction under Article 136 of the Constitution.[1107]

The Supreme Court has held that no interim order/interim relief can be granted unless second appeal is duly admitted upon formulation of substantial question of law.[1108]

[s 100.64] Appeal Against Interlocutary Order

The Delhi High Court, following *Uttar Pradesh Cooperative Federation Ltd v Sunder Brothers*,[1109] held:

> In dealing with the matter raised before it at the appellate stage the Appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner's the fact that the Appellate Court would have taken a different view may not justify interference with the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the Appellate Court to interfere with the trial court's exercise of discretion. The principle is well established.[1110] When once the discretion has been exercised in a particular way by the trial court, it is not open to the Appellate Court to interfere lightly unless it is shown that the discretion has been exercised arbitrarily or against judicial principles.[1111] The question of title that has been gone into by the Consolidation Authorities was without jurisdiction and it is a nullity, therefore, the decree granted by the courts below are clearly illegal. The consolidation proceedings. The decree of perpetual injunction is illegal. It does warrant interference by the High Court as the foundation on which the decree was granted is knocked off its bottom. Though the grant of injunction is discretionary, the same must be exercised on settled principles of law to advance the cause of justice. It is subject to correction by the Appellate Court.[1112]

[s 100.65] Disposal of Second Appeal—Effect on Interim Order

The interim orders lose efficacy on disposal of appeal, such orders cannot also be revived subsequently.[1113]

1105. *Digambar v Lahyadeo*, AIR 1923 Bom 254 : (1923) 25 Bom LR 245; *Kalappa v Kalappa*, AIR 1924 Bom 469 : (1924) 26 Bom LR 494; *Jarip v Jogendra Nath*, (1919) 24 Cal WN 53; *Kumar Rameshwar v Mahabir*, AIR 1926 Pat 401 : (1926) 5 Pat 759; *Purshottam v Kasturbhai*, (1930) 32 Bom LR 1001; *Shaik Mongal v Pure Dishargash Colliery*, AIR 1950 Cal 328; *Banarsi Das v Kanshiram*, AIR 1963 SC 1165; *Joharilal v Bihar State Co-op Bank Ltd*, AIR 1959 Pat 477; *Batul Begum v Hem Chander*, AIR 1960 All 519; *Bharat Chandra v Rajendra*, AIR 1961 Cal 155; *Kasipati v Subba Rao*, AIR 1961 Mys 62; *Dasarath Gayan v Satyanath Ghosh*, 67 Cal WN 110.
1106. *Thakkar Ananjdi v Dharamshi*, AIR 1972 Guj 70 : (1971) ILR Guj 1165.
1107. *M Ramakrishnan v Hindustan Petroleum Corp Ltd*, AIR 2005 SC 2652 : (2005) 10 SCC 674.
1108. *Raghvendra Swamy Mutt v Uttaradi Mutt*, (2016) 11 SCC 235.
1109. *Uttar Pradesh Co-op Federation Ltd v Sunder Brothers*, AIR 1967 SC 249.
1110. *BN Mullick v Sita Ram Mullick*, AIR 1999 Del 153 (DB).
1111. *Matadin Agarwal v Syed Abdul Razack*, AIR 1997 AP 103.
1112. *Surya Nath Singh v Khedu Singh*, (1994) Supp 3 SCC 561.
1113. *Bimlendu Kumar Chatterjee v Dipa Chatterjee*, AIR 2002 SC 2528 : (2001) 8 SCC 5.

[s 100.66] Long Delay in Delivery of Judgment—Effect

The Supreme Court in *Bhagwandas Fatechand Daswani v HPA International,*[1114] dealing with the contention that the long delay in delivery of judgment is sufficient to set aside the judgment under appeal without going into this broad question, set aside the judgment under appeal on the ground of delay in delivery of judgment without expressing any opinion on the merits of the case and remitted the case to the high court for deciding the appeal afresh on merits. While doing so the Supreme Court had observed:

> However, it is correct to this extent that a long delay in delivery of judgment gives rise to unnecessary speculations in the minds of parties to a case. Moreover, the appellants whose appeals have been dismissed by the High Court may have the apprehension that the arguments raised at the Bar have not been reflected or appreciated while dictating the judgment—nearly after, five years. We, therefore, on this short question, set aside the judgment under appeal.

In a subsequent decision where the arguments in second appeal were heard in November 1990 and the high court pronounced judgment on 7 May 1993, the Supreme Court set aside the said judgment of the high court due to long delay in disposal of second appeal after hearing arguments.[1115]

[s 100.67] Liberty to Mention After Pronouncement of Judgment

Liberty to mention cannot be used as a means to achieve an advantage which is not otherwise available in law—a question which stands finally decided cannot be reopened, and the court does not have any further jurisdiction after the signature been appended on the judgment by oral mention. The issue stands concluded as soon as the judgment is pronounced and the same is signed. Be it noted however, that the words "liberty to mention" have been, as a matter of fact, a phraseology, which did come through judicial process without any definite legal sanction for the purpose of clarification, if needed, but not otherwise. It is a legal process which has been evolved for convenience and for shortening the litigation so that the parties are not dragged into further and further course of litigation, that the submissions that the court has no jurisdiction to reopen the issue on the ground of availability of the legal phraseology of liberty to mention cannot be brushed aside. As noticed herein before, the insertion of the above noted legal phraseology is to obliterate any confusion or any difficulty being experienced in the matter—it does not give the right anew to the party to agitate the matter further nor does it confer jurisdiction on the court itself to further probe the correctness of the decision arrived at: review of a judgment cannot be had on the basis of this liberty. The circumstances, under which review can be had is provided under O XLVII of the CPC. In any event, law is well settled on this, that the power to review is not any inherent power and it must be conferred by law either specifically or by necessary implication.[1116]

[s 100.68] Provincial Insolvency Act, 1920

Section 75 of the Provincial Insolvency Act, 1920, allows a second appeal from a decision of a court subordinate to a district court under section 4 of that Act on the grounds mentioned

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1114. *Bhagwandas Fatechand Daswani v HPA International*, (2000) 2 SCC 13.
1115. *Kanhaiyalal v Anupkumar*, AIR 2003 SC 689 : (2003) 1 SCC 430.
1116. *Kewal Chand Mimani v SK Sen*, AIR 2001 SC 2569 : (2001) 6 SCC 512.

in sub-section (1) of this section.[1117] The scope of appeal conferred under that section is wider than under this section[1118] even before its amendment in 1976.

[s 100.69] Dismissal of Appeal in Absence of Counsel

It cannot be gain said that an advocate has no right to remain absent from the court when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in court without "sufficient cause" cannot be excused. However, when a party engages an advocate, who is expected to appear at the time of hearing but fails to appear, normally, a party should not suffer on account of default or non-appearance of the advocate.[1119] Thus, in a case, where the high court heard the matter and reserved orders but on a subsequent date noticed that a substantial question of law has not been framed, it was held by the Supreme Court in the above case that hearing the appeal after framing the new substantial question of law in the absence of the appellant's advocate should have been avoided by the high court by adjourning the matter. It was further held that once an appeal is admitted and is placed for hearing i.e. hearing on merits, it can be dismissed for default but cannot be decided on merits in absence of appellant or his advocate.[1120]

The Supreme Court quoted with approval a passage from its earlier decision in *Rafiq v Munshi Lal*,[1121] Wherein it has been observed as follows:

> The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party heaving done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed.

The Supreme Court in the above case further went on to sound a word of caution:

> The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter,. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted.[1122]

[s 100.70] Power of Court

[See notes under the same heading under section 47.]

1117. *Shree Radhakrishna v Officical Receiver*, AIR 1932 Cal 642 : (1932) 59 Cal 1135.
1118. *Malini Naicker v Seth Manghraj*, AIR 1969 SC 1344 : (1969) 1 SCC 688.
1119. *Secretary, Dept of Horticulture, Chandigarh v Raghu Raj*, AIR 2009 SC 514 : (2008) 13 SCC 395.
1120. *Secretary, Dept of Horticulture, Chandigarh v Raghu Raj*, AIR 2009 SC 514 : (2008) 13 SCC 395.
1121. *Rafiq v Munshi Lal*, AIR 1981 SC 1400 : (1981) 2 SCC 788.
1122. *Rafiq v Munshi Lal*, AIR 1981 SC 1400 : (1981) 2 SCC 788.

[s 100.71] State Amendments

The following sub-clause was inserted in clause (a) by the Travancore Cochin Act, 17 of 1951:

(d) The finding of the lower Appellate Court on any question of fact material to the right decision of the case on the materials being in conflict with the finding of the Court of the first instance on such question.

This clause was repealed and re-enacted by Kerala Act, 13 of 1957.

The provisions of the two U.P. Acts relevant to section 100, particularly in relation to Letters Patent Appeals are extracted below.

U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962 (U.P. Act No. 14 of 1962)

Prefatory Note—Statement of Objects and Reasons.—1. Before 1962, an appeal could be filed under the Letters Patent before a Division Bench of the high court against every judgment of a single Judge. By the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962, it was provided that no appeal would be filed in the high court against the judgment of one judge of the high court given in exercise of his appellate jurisdiction in respect of decrees and orders of subordinate civil courts.

2. Therefore, in 1962, it was provided in the aforesaid Act that no appeal would be filed in the high court against the judgment of one judge of the high court in respect of cases decided by the Board of Revenue under the U.P. Land Reforms Act, 1901 or the U.P. Tenancy Act, 1939 or the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 or by the Director of Consolidation under the Uttar Pradesh Consolidation of Holdings Act, 1953.

3. With a view to reducing the arrears in the high court, it was considered necessary to make a similar provision in regard to decision of one Judge of the high court in exercise of the jurisdiction conferred by Article 226 or 227 of the Constitution, in respect of appellate or revisory decisions of a district judge, additional district judge, civil judge or additional civil judge under any Uttar Pradesh Act.

4. As the State Legislature was not in session, the Uttar Pradesh High Court (Abolition of Letters Patent Appeal Amendment) Ordinance, 1975 was promulgated for this purpose.

1. *Short title and commencement.*—(1) This Act may be called the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962, (2) It shall come into force at once.[1123]

2. *Definition of High Court.*—In this Act, "High Court" means the High Court of Judicature at Allahabad as constituted by the U.P. High Court's (Amalgamation) Order, 1948.

3. *Abolition of appeals, from the judgment or order of one Judge of the High Court made in the exercise of appellate jurisdiction.*—(1) No appeal, arising from a suit or proceeding instituted to commence, whether prior or subsequent to the enforcement of this Act, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the superintendence of High Court, anything to the contrary contained in clause 10 of the Letters Patent of Her Majesty, dated the 17th March, 1866, read with clause 17 of the U.P. High Court's (Amalgamation) Order, 1948, or in any other law notwithstanding.

(2) Notwithstanding anything contained in sub-section (1), all appeals pending before the High Court on the date immediately preceding the date of enforcement of this Act shall continue to lie and be heard and disposed of as hereto before, as if this Act had not been brought into force.

1123. The Act received the assent of the President on 7 November 1962 and the English translation of the Act was published in the U.P. Gazette, Extra, dated 13 November 1962.

The Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976

(U.P. Act 57 of 1976)

Chapter I

Preliminary

1. *Short title, extent and commencement.*—(1) This Act may be called the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976.

(2) It extends to the whole of Uttar Pradesh.

(3) It shall come into force on such date[1124] as the State Government may by notification appoint in this behalf.

Transitory Provisions

"**36.** *Disposal of pending civil cases.*—A civil suit, or proceeding in which the Code of Civil Procedure, 1908 applies, pending on the date of commencement of this Act shall be disposed of in accordance with the provisions of the said Code as amended by this Act.

33. [1125]Abolition of appeals from the judgment or order of one Judge of the High Court made in the exercise of writ jurisdiction in certain cases.—

(1) No appeal, arising from a superior proceeding instituted or commenced whether prior or subsequent to the commencement of this section shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of judgment, decree or order made or purported to be made by the Board of Revenue under the United Provinces Land Revenue Act, 1901 or the U.P. Tenancy Act, 1939 or the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or the Uttar Pradesh Urban Area Zamindari Abolition and Land Reforms Act, 1956, or the Jaunsar Bawar Zamindari Abolition and Land Reforms Act, 1956, or the Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 or by the Director of Consolidation (including any other officer purporting to exercise the powers and so perform the duties of Director of Consolidation) under the U.P. Consolidation of Holdings Act, 1953 anything to the contrary contained in clause 10 of the Letters Patent of Her Majesty, dated March 17, 1866, read with clauses 7 and 17 of the U.P. High Court's (Amalgamation) Order, 1948 or in any other law notwithstanding.

(2) Notwithstanding anything contained in sub-section (1), all appeals pending before the High Court on the date immediately preceding the date of commencement of this section shall be heard and disposed of as if this section had not been enacted.

34. [1126]*Abolition of appeals from the judgment or order of one Judge of the High Court made in the exercise of writ jurisdiction in certain other cases.*

(1) No appeal, arising from an application or proceeding instituted or commenced, whether prior or subsequent to the commencement of this section, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of a judgment or order made or purported to be made in the exercise or purported exercise of appellate or revisory jurisdiction by a District Judge, Additional District Judge, Civil Judge or Additional Civil Judge under any Uttar Pradesh Act (including any Central Act as amended by the Uttar Pradesh Act) anything to the contrary contained in clause 10 of the Letters Patent of Her Majesty, dated March 17, 1866 read with clauses 7 and 17 of the U.P. High Court's (Amalgamation) Order, 1948 or in any other law notwithstanding.

(2) Notwithstanding anything contained in sub-section (1), all appeals pending before the High Court on the date immediately preceding the date of commencement of this section shall be heard and disposed of as if this section had not been enacted.

1124. 1 January 1977 *vide* Notification No. 7071/VII-A.N.-559/76, dated 31 December 1976.
1125. Ins. by U.P. Act No. 33 of 1972.
1126. Ins. by U.P. Act No. 31 of 1975 (w.e.f. 23.5.1975).

[1127]**[S 100A] No further appeal in certain cases.**—Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided, by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge.]

SYNOPSIS

[s 100A.1]	Scope	1264	[s 100A.6]	Malimath Committee	1269
[s 100A.2]	Unamended Section 100A.—Section 100A—No further appeal in certain cases	1265	[s 100A.7]	Right to appeal—Five propositions	1272
[s 100A.3]	Changes in this Section	1265	[s 100A.8]	Specific exclusion of Letters Patent Appeal	1272
[s 100A.4]	Pending appeal, accrued right of appeal and filing of appeal—Effect of Amendment	1266	[s 100A.9]	"No further appeal shall lie" and "heard and decide"	1274
[s 100A.5]	Constitutional Validity	1269	[s 100A.10]	Special Enactments	1274
			[s 100A.11]	Special Law and General Law	1279

[s 100A.1] Scope

This section is new, its object being to minimise delay in the finality of decisions.

Section 100A deals with two types of cases which are decided by a single judge of the high court. One is where the single judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the high court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not. Even at present depending upon the value of the case, the appeal from the original decree is either heard by a single judge or by a Division Bench of the high court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases where the value is not substantial, that the rules of the high court may provide for the regular first appeal to be heard by a single judge. In such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. No prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved is large. In such a case, the high court bye-rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision section 100A.[1128]

The newly incorporated section 100-A of the Code of Civil Procedure, 1908 (CPC) in clear and specific terms prohibits further appeal against the decree and judgment or order of a learned single judge to a Division Bench notwithstanding anything contained in the Letters Patent. The Letters Patent which provides for further appeal to a Division Bench remains intact, but the right to prefer a further appeal is taken away even in respect of the matters arising under the special enactments or other instruments having the force of law—be it against an original or appellate decree or order heard and decided by a single judge.[1129]

1127. Section 100A [as substituted by section 10 of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999)] substituted by Act 22 of 2002, section 4 (w.e.f. 1-7-2002). Earlier section 100A was inserted by Act 104 of 1976, section 38 (w.e.f. 1-2-1977).
1128. *Salem Advocate Bar Association, Tamil Nadu v UOI*, AIR 2003 SC 189 : (2003) 1 SCC 49.
1129. *Gandla Pannala Bhulaxmi v MD, APSRTC*, AIR 2003 AP 458 (FB).

While deciding the maintainability of Letters Patent Appeal before a Division Bench against the judgment of a Single Judge, the Supreme Court noticed an apparent contradiction in section 100-A as amended in 2002. While in one part of section 100-A it is stated, "where any appeal from an original or appellate decree or *order* is heard and decided by a Single Judge of a High Court" (emphasis supplied), in the following part it is stated, "no further appeal shall lie from the judgment and decree of such Single Judge". Thus while one part of section 100-A refers to an order, which would include even an interlocutory order, the latter part of the section mentions judgment and decree. Attributing the said apparent contradiction to bad drafting, it was observed by the Supreme Court that not much can be made out of it once the purpose of section 100-A is understood. Therefore, to resolve this conflict, the Supreme Court adopted a purposive interpretation. The whole purpose of introducing section 100-A was to reduce the number of appeals as the public in India was being harassed by the numerous appeals provided in the statute. Looking at the matter from that point of view, it was held that in such a situation, an LPA was not maintainable because if it is held to be maintainable then it would result in two appeals against an interlocutory order of the district judge, first to the learned Single Judge and then to the Division Bench of the high court, but against a final judgment of the district judge there can be only one appeal. This would be strange, and against the very purpose of section 100-A, that is, to curtail the number of appeals.[1130]

[s 100A.2] Unamended Section 100A.—[1131]Section 100A—No further appeal in certain cases

Notwithstanding anything contained in any Letters Patent for any high court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a high court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal.

[s 100A.3] Changes in this Section

Section 100A of the CPC was inserted by the Amendment Act of 1976 with effect from 1 February 1977 in order to bar a "third" appeal before the Division Bench of the high court against the decision of a single judge in the second appeal. It was only recently by the Amendment Acts of 1999 and 2002, that section 100A has been amended to bar even a "second" appeal against the judgment or order of a single judge of the high court, in cases where such appeal is decided by the single judge on or after 1 July 2002.[1132] Section 100A was also amended earlier by the Act of 1999, however before the same could be enforced, it was substituted by the Amending Act of 2002. The reasons for amending the Act of 1999 by that of 2002 were two-fold. The first being the recommendation of the Law Commission and the second being the objections raised by the Bar Council of India.

The Amending Act of 1999 provided that notwithstanding anything contained in any Letters Patents for any high court or in any other instrument having the force of law or in any other law for the time being in force, no further appeal shall lie from the judgment, decision or order of single judge of high courts, where any appeal from an original or appellate decree or order is heard and decided. Further, the appeal shall also not lie where any writ, direction or

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1130. *Mohd Saud v Dr (Maj) Sk Mahfooz*, (2010) 13 SCC 517.
1131. Added by the Amendment Act 1976.
1132. *Nasik Hing Supplying Co v Annapurna Yruh Udyog Bhandar*, AIR 2003 Guj 275 (FB).

order is issued or made on an application under Article 226 or Article 227 of the Constitution of India.

By virtue of the Amendment Act of 1999, the Letters Patent Appeal against the judgment and decree of a single judge made in an appeal preferred under section 96 of the Code as well as the Letters Patent Appeal preferred against the judgment and order of a single judge in an application made under Article 226 or Article 227 of the Constitution was sought to be done away with altogether.

The Law Commission in its 163rd report was of the opinion that so far as the proposal to abolish Letters Patent Appeal against the judgment and order, whether interim or final of a single judge made on an application under Article 226 or Article 227 is concerned, it is neither advisable nor desirable. Many of the writ petitions disposed of by single judges in various high courts involve substantial stakes and have serious consequences both for the state as well as the citizens. Very often, the writ petition is an original proceeding. At any rate, it is an original proceeding in a civil court, that is, the high court. There ought to be at least one appeal against the order made by the single judge on application preferred under Article 226. The proposed move is not in public interest because in many cases the public interest may suffer if such a proposal is given effect to. The Law Commission accordingly recommended against the move to abolish the Letters Patent Appeal against the judgment and orders made by a single judge on an application made under Article 226 or Article 227, wherever it is available at present.

Keeping in view the recommendation of the Law Commission of India and objections of Bar Council of India, the provisions pertaining to appeal against the order of the single judge of the high court with regard to applications under Article 226 or Article 227 were deleted in the Amending Act of 2002. The amending act of 2002 brought in, additionally, the appeal from an original decree (that is under section 96 of the Code) within its ambit, which was not covered in section 100A, prior to the amendments brought in by the Amending Acts of 1999 and 2002. This addition signifies that the first appeal to the high court, against the order of the trial court, cannot be appealed against in Letters Patent Appeal.

It is submitted that Letters Patent Appeal against the interim/interlocutory orders made by a single judge in first appeal should be done away with, though the Letters Patent Appeal against the final judgment/decree should be retained in a restricted fashion. It would have been desirable if the appeal was permitted against the final order of a single judge on the lines of section 100 of the Code. It must be appreciated that not many Letters Patent Appeal are filed against the judgment and decrees of a single judge in first appeals and the even among those filed, a majority are dismissed at the stage of admission itself. Be that as it may, the restrictions of the Letters Patent Appeal to substantial questions of law alone would not only reduce and restrict the number of such appeals but also would drastically cut out the admission rate of such appeals.

[s 100A.4] Pending appeal, accrued right of appeal and filing of appeal—Effect of Amendment

The question which arises for consideration is whether the substituted section 100A should be construed in such a manner as to hold that the Letters Patent Appeals which are pending are not maintainable. It is well settled that the right of appeal is a substantive right and there is a prohibition against raising a presumption of retrospectivity that substantive rights are intended to be taken away by retrospective effect of a legislation. A perusal of section 100A as substituted by 1999 Act would show that no Letters Patent Appeal was to lie from the original or appellate

decree or order of a single judge where any writ, order or direction is issued under Articles 226 or 227 of the Constitution. Clause (g) of sub-section (2) of section 32 protected those Letters Patent Appeals which have already been admitted and were pending for decision. Such Letters Patent Appeals were to be decided as if section 100A of 1999 Act was not enacted. In other words, in 1999, the legislature in its wisdom preferred to save both types of pending Letters Patent Appeals which were admitted before the enforcement of 1999 Act on the assumption that section 100-A of 1999 Act substituting section 100A had never come into force.

A perusal of section 4 of the 2002 Act shows that clause (b) of section 100A substituted by section 10 of 1999 Act prohibiting the remedy of appeal from the writ, order or direction issued or made by a learned single judge on an application under Article 226 or 227 of the Constitution was omitted. It has been made explicit by section 4 of 2002 Act that any writ, order or direction issued by a single judge of the high court under Article 226 or 227 of the Constitution can be challenged before the Letters Patent Bench and such an appeal would be competent. It has further been made clear by section 15 that clause (g) of sub-section (2) of section 32 of 1999 Act would stand omitted. Therefore, the intent of the legislature has become absolutely clear that no appeal could be maintained from an original or appellate decree or order passed by a learned single judge. It is further evident from 1999 Act and 2002 Act that legislature did not intend to operate substituted section 100A of 2002 Act retrospectively. It is absolutely misconceived to infer legislative intendment from clause (g) of sub-section (2) of section 32 of the 1999 Act that only those appeals were intended to be protected which were directed against the order passed by a learned single judge on a petition filed under Articles 226 and 227 of the Constitution, on the ground that no such protection was accorded to the appeals arising from the judgment and decree passed by the learned single judge in an appeal from an original or appellate decree or order. Such a legislative intendment could have possibly been inferred had clause (g) of sub-section (2) of section 32 of 1999 Act continued to apply and was kept alive. However, the aforementioned provision itself has been omitted by sub-clause (i) of clause (b) of section 15 of 2002 Act. Both 1999 Act as well as 2002 Act have been enacted by notification of the same date i.e., 6 June 2002 and enforced with effect from 1 July 2002. The legislature, by omitting those clauses, has made its intention explicit.[1133]

Section 100-A of the Code, as substituted by the Amendment Act of 2002 will not have retrospective effect so as to bring within its fold even appeals preferred prior to coming into force of the said amendment with effect from 1 July 2002. Thus, a Letters Patent Appeal, which was filed prior to the coming into force of the said amendment would be maintainable.[1134]

Where an intra-court Special Appeal was filed prior to the 2002 amendment, the Court would have jurisdiction to decide the Special Appeal on merits, notwithstanding the bar contained in s100-A. The use of expression "heard and decided by Single Judge of High Court" in section 100-A suggests that only those appeals which are heard and decided by Single Judge on and after 1 July 2002 would be hit by the bar contained in s100-A.[1135]

Appeal to Division Bench under the Kerala High Court Act, 1959, section 5 (ii) against judgment of the single Judge is not maintainable on the plea that the proceeding from which

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1133. *Parshotam Dass v State of Haryana*, AIR 2003 P&H 301 (FB).
1134. *Kamla Devi v Khushal Kanwar*, AIR 2007 SC 663 : (2006) 13 SCC 295; *Dr John George v Stewards Association in India*, AIR 2007 Ker 57 : (2006) 4 Ker LT 405 (FB).
1135. *Datta Ram Ramesh Kumar v DIG, BSF, Jodhpur*, AIR 2011 Raj 76 : 2011 (1) Raj LW 800.

the appeal arises was initiated prior to 1 July 2002. Provisions of section 100-A of CPC, would prevail over section 5 (ii) of the Kerala Act.[1136]

Where the Letters Patent Appeals against the order passed by the high court were filed much after the coming into effect of the amendment of 2002, it was held that the appeals were not maintainable.[1137] AK Ganguly, CJ (as he then was) explained the proposition in the following words:

> **19.** But the legal position in the present appeals is totally different. It is an accepted legal position in view of the propositions formulated in Garikapati[1138] that a right of appeal, even though a vested one, can be taken away by law and it can affect, depending on the statutory mandate, appeals to be filed from suits which are pending when the law has come. The question whether it will affect such a right of appeal depends, as noted above, on the statutory provision in question. The statutory provision in this case, namely Section 100A, as introduced by 2002 amendment of the code has been set out herein above and it starts with a *non-obstante* clause.
>
> **20.** The purpose of a *non-obstante* clause is to give the enacting part of the statute an overriding effect in the case of a conflict with the laws mentioned in the *non-obstante* clause. This amounts to expressing a legislative intent that in spite of the enactment mentioned in the *non-obstante* clause, the law enacted following it will have full operation and the provisions mentioned in the *non-obstante* clause will not be an impediment.[1139]

A Division Bench of the Rajasthan High Court has held that intra-court appeal, filed against the judgment of Single Judge of the high court passed in exercise of appellate powers, in view of the provisions enacted in section 100A of the Code, is not maintainable.[1140]

It is further advantageous to point out that mere existence of a right to appeal on the date of repeal of a statute cannot be considered a vested right or an accrued right. An available right would become vested right only when it is exercised, otherwise, it would continue to embryological rights. Therefore, the Letters Patent Appeals which have already been filed before 1 July 2002 are the only appeals which are intended to be protected. The Letters Patent Appeals which are to be filed on or after 1 July 2002 would not be maintainable because the bar created by section 100A of 2002 Act would become operational. In other words, section 100A of 2002 Act would not affect the accrued right of appeal vested in a suitor who has actually filed the appeal before 1 July 2002, but those who are yet to file the appeal on or after 1 July 2002, would not be entitled to maintain the same.[1141]

The legislature has provided for a specific exclusion. It must be stated that now by virtue of section 100A, no Letters Patent Appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. If at the relevant time neither section 100A nor section 104(2) barred a Letters Patent Appeal, the pending Letters Patent appeal is maintainable, which is filed prior to 1 July 2002 before amendment to CPC.[1142]

1136. *Dr John George's* case (*Supra*).
1137. *Ramesh Chandra Das v Kishore Chandra Das*, AIR 2007 Ori 146 (DB).
1138. *Garikapati Veeraya v N Subbiah Choudhary*, AIR 1957 SC 540 : 1957 SCR 488.
1139. *Ramesh Chandra Das* case (*Supra*).
1140. *Raga Ram v Smt Kokali*, AIR 2008 Raj 151 : (2008) 3 Raj LW 2409 (DB).
1141. *Parshotam Dass v State of Haryana*, AIR 2003 P&H 301 (FB).
1142. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152 : (2004) 11 SCC 672. See also the matter under the heading "Code of Civil Procedure (Amendment) Acts of 1999 (46 of 1999) & 2002—Constitutional Validity" under section 27, *ante*.

[s 100A.5] Constitutional Validity

No fault can be found with the amended provision of section 100A. The provisions of Code of Civil Procedure Amendment Acts 1999 and 2002 are not in any way ultra vires the Constitution and the provisions by which the amendments have been made do not contain any constitutional infirmity.[1143]

BN Kirpal, CJI, speaking for the three—Judge Bench in the above judgment, observed as follows:

> **15.** Section 100-A deals with two types of cases which are decided by a single Judge. One is where the single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial Court, a question may arise whether any further appeal should be permitted or not. Even at present depending upon the value of the case, the appeal from the original decree is either heard by a single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-Court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provide for the regular first appeal to be heard by a single Judge. In such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-Court appeal, even where the value involved is large. In such a case, the High Court by Rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus be found with the amended provision Section 100-A.[1144]

[s 100A.6] Malimath Committee

It clearly emerges that right of appeal is a substantive right. The vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise. Thus, while examining the retrospectivity, it is advisable to know the object behind introducing of provision in the statute. The Justice Malimath Committee examined the issue of further appeal against the judgment of the single judge exercising the first appellate jurisdiction. Committee recommended for suitable amendment of section 100A of the CPC with a view to provide that further appeal in this regard shall not lie. The Committee also recommended for suitable enactment by Parliament for abolition of appeal to Division Bench against the decision and order rendered by the single judge of the high court in a proceeding under Article 226 or 227 of the Constitution of India. However, by Amendment Act of 2002, appeals to Division Bench under Articles 226 and 227 of the Constitution of India have been restored. Section 10 of the Code of Civil Procedure (Amendment) Act, 1999 has abolished the appeal against the judgment of single judge of the high court in all cases.[1145]

The report of Justice Malimath Committee (Arrear Committee) in Chapter II at pages 15–16 states as follows:

> **CHAPTER II**
>
> **LETTERS PATENT APPEALS/APPEALS AGAINST JUDGMENTS OF SINGLE JUDGES**
>
> Recommendations of the Satish Chandra Committee—Broadly Agreed.

1143. *Salem Advocate Bar Association, Tamil Nadu v UOI*, AIR 2003 SC 189 : (2003) 1 SCC 49.
1144. *Salem Advocate Bar Association, Tamil Nadu v UOI*, AIR 2003 SC 189, at p 193 : (2003) 1 SCC 49.
1145. *UCO Bank v Roopa Ram*, AIR 2003 Raj 222 (DB).

(1) The Satish Chandra Committee has in Chapter IX of its report elaborately considered various aspects bearing upon Letters Patent Appeals and Appeals provided by the various instruments constituting the respective High Courts under the judgments of Single Judges to a Bench of two Judges of the High Court. The following recommendations were made by the committee in the light of such consideration:

Appeals Against Judgments of Single Judges in Exercise of the Ordinary Appellate Jurisdiction

(i) Where the First Appeal is decided by a Single Judge of the High Court in exercise of the appellate jurisdiction, a further appeal against such decision to a Division Bench of the High Court should be abolished by suitable amending section 100A of the Code of Civil Procedure;

(ii) Central or State Legislation should be enacted in *pari materia* with the provisions of the Uttar Pradesh High Court (Abolition of Letters Appeals) Act, 1962 as amended up-to-date which provides for the abolition of appeals to a Division Bench from the judgment or order of a Single Judge of the High Court made in exercise of the appellate jurisdiction in a matter arising from a suit or proceeding instituted or commenced under certain specified local law; and

(iii) Legislation should be enacted to abolish Letter Patent Appeals against the judgment of a Single Judge of the High Court in a writ petition directed against an appellate or revisional forum below. [Para 2.1]

(2) We have also examined the matter in great depth keeping in view, inter alia, the observations and recommendations made in the said report. As we are broadly in agreement with the recommendations and the reasons in support thereof, it is not necessary to burden this report by reiterating the same. [Para 2.2]

(3) No Further Appeal Against Decrees of Single Judge exercising even the first appellate jurisdiction, we endorse the recommendation of the Satish Chandra Committee that the following sub-section (2) be added to section 100A of the Code of Civil Procedure:

100A (2). Notwithstanding anything contained in any Letters Patent of any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any first appeal has been decided by a Single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal.

(4) Abolition of Appeals Against judgment of Single Judge of the High Court made under specific local laws in exercise of the appellate jurisdiction in matter arising from a suit or proceeding instituted or commenced under specified local laws, we agree with the recommendation made is in that regard by Satish Chandra Committee and are also of the view that suitable legislation should be enacted by the appropriate legislature in that behalf.

No Appeal Against Judgment of Single Judge in Writ Jurisdiction.

(1) In so far as abolition of appeals from judgment or order of a Single Judge of the High Court made in exercise of the Writ jurisdiction under Articles 226 and 227 of the Constitution is concerned, we are of the opinion that no appeal should be permitted at all against the decision or order of a single Judge of the High Court rendered in any such proceeding to a Division Bench of the High Court. A Large portion of the litigation in the High Court these days consists of Writ Petitions under Articles 226 and 227 of the Constitution. Many of such cases are simple in nature and do not involve any points of importance of difficulty. By and large, they do not involve questions having an effect or impact beyond the parameters of the case. These case can, therefore, be safely left to be finally decided by a Single Judge. To allow a further appeal in such category of cases would not only add to the burden of arrears since such appeal would entail the attention of the

High Court twice over, once before a Single Judge and thereafter before a division Bench. [Para 2.5]

Hearing of Specified Writ Matters by Division Bench—Discretion to Refer to Larger Bench.

(1) We are, however, conscious of the fact that there may be certain categories of Writ Cases which having regard to the importance and complexity of the questions therein involved may require consideration at the hands of a Division Bench, particularly when finality as the stage of the High Court is sought to be achieved. This problem could be solved either by providing an appeal against such decisions or by ensuring that such cases are heard by a Division Bench. Providing an appeal, as we have already pointed out, would result in protraction of litigation and add to the burden of arrears. There are other ways in which hearing of cases involving important questions can be secured before a Division Bench. [Para 2.6]

(2) As pointed out in the Satish Chandra Committee Report, under the Rules of all the High Courts, if a Judge sitting singly takes the view that a case before him is one which should be heard by a Division Bench, the case is directed by the Chief Justice to be heard by such a Bench. This may be done by the Single Judge, either in exercise of his own discretion or on the application of either of the parties, if the importance or the difficulty of the case justifies such a course. Normally, the Single Judge would not refuse such an application, if he is satisfied that the case is of sufficient importance to be dealt with by two Judges. Thus, cases of complexity or importance, notwithstanding the abolition of Letter Patent Appeals, can still be heard by a Division Bench. If the Rules of any High Court do not contain such a provision, similar provision should be incorporated. [Para 2.7]

(3) Besides, certain categories of cases, may be identified which deserve to be heard by a Division Bench. The identification of such cases should be left to the discretion of each High Court which may make suitable provision in that regard in its Rules and Orders. In the rules and Orders framed by some of the High Courts like Bombay and Gujarat, a specific categorisation of cases under Articles 226 and 227 of the Constitution to be heard by a Single Judge or a Division Bench, as the case may be, is found to have been made. There is no reason why such a practice or procedure cannot be adopted in other High Courts. We are, however, of the view that case like application for issue of Writ of *Habeas Corpus* and issue of appropriate Writs in externment and deportation cases, cases arising under Fiscal Acts, Labour Legislation and Public Interest Litigations, deserve to be heard by a Division Bench [Para 2.8]

(4) We find, however, that in some of the States a provision has been made by legislation requiring that petitions under Articles 226 and/or 227 of the Constitution should be heard by a Single Judge or by a Division Bench, as the case may be. In the face of such a legislation, the High Court in those States cannot frame Rules and Orders, prescribing the respective jurisdiction of the Single Judge and the Division Bench in regard to different categories of writ cases. [Para 2.9]

Enactment of Law Recommended

(1) Against the aforesaid background, we are of the opinion that for achieving uniformity throughout the country, Parliament should enact a law providing for:

  (i) abolition of an appeal to a Division Bench against the decision of order rendered by a Single Judge of the High Court in a proceeding under Article 226 or 227 of the Constitution; and

  (ii) conferment of power on the High Court in the matter of deciding which category of cases under Articles 226 and 227 of the Constitution should be heard by a Single Judge or a Division Bench, as the case may be. [Para 2.10]

(2) The law to be enacted by the Parliament may be in the following terms:

(i) Notwithstanding anything contained in any Letters Patent of any High Court or in any other instrument having the force of law, where any decision or order has been rendered in a proceeding under Articles 226 and 227 of the Constitution of India by a Single Judge of a High Court, no further appeal shall lie from such decision, judgment or order to a Division Bench of High Court.

(ii) Notwithstanding anything contained in any law for the time being in force, the High Court may by its own Rules or Orders specify the categories of cases under Article 226 and 227 of the Constitution of India which shall be heard by a Single Judge or a Division Bench, as the case may be. [Para 2.11]

[s 100A.7] Right to appeal—Five propositions

A Constitution Bench of the Supreme Court, after referring to a large number of earlier judgments of the Supreme Court, Privy Council and various high courts, has formulated the following five propositions:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.[1146]

[s 100A.8] Specific exclusion of Letters Patent Appeal

It is to be seen that when the legislature wanted to exclude a Letters Patent Appeal it specifically did so. The words used in section 100A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002, a specific exclusion is provided, as the legislature knew that in the absence of such words, a Letters Patent Appeal would not be barred. The legislature was aware that it had incorporated the saving clause in section 104(1) and incorporated section 4 in the CPC. Thus now a specific exclusion was provided, after 2002 in section 100A.[1147]

Variava, J, speaking for the majority view in the above noted judgment of the Constitution Bench, explained the specific exclusion of Letters Patent appeals in the following words:

> It is thus to be seen that when the Legislature wanted to exclude a Letters Patent Appeal it specifically did so. The words used in Section 100A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the Legislature knew that in the absence of such words a Letters Patent Appeal would not be barred. The

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1146. *Garikapati Veeraya v N Subbiah Choudhry*, AIR 1957 SC 540; see also *Parshotam Dass v State of Haryana*, AIR 2003 P&H 301 (FB).

1147. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152 : (2004) 11 SCC 672.

> Legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 in the CPC. Thus now a specific exclusion was provided.[1148]

After quoting section 100A as it stands after the Amendment of 2002, it was observed as follows:

> To be noted that here again the Legislature has provided for a specific exclusion. It must be stated that now by a virtue of Section 100A no Letters Patent Appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100A not Section 104(2) barred a Letters Patent Appeal.[1149]

In *Kamal Kumar Dutta's* case[1150], it was observed by the Supreme Court as follows;

> So far as the general proposition of law is concerned that the appeal is a vested right there is no quarrel with the proposition but it is clarified that such right can be taken away by a subsequent enactment either expressly or by necessary intendment. The Parliament while amending Section 100A of the Code of Civil Procedure, by amending Act 22 of 2002 with effect from 1-7-2002, took away the Letters Patent power of the High Court in the Matter of appeal against an order learned Single Judge to the Division Bench. ...

A Full Bench of the Orissa High Court has held that section 100-A of the Code starts with a *non-obstante* clause. The purpose of such clause is to give the enacting part of an overriding effect in the case of a conflict with the laws mentioned with the *non obstante* clause. The legislative intent is thus very clear and there would be no impediment.[1151]

It has been observed by the Full Bench in the above case, as follows:

> 45. We have already noticed that the newly incorporated s 100-A, CPC in clear and specific terms prohibits further appeal against the decree and judgment or order of a learned single Judge to a Division Bench notwithstanding anything contained in the Letters Patent. The Letters Patent which provides for further appeal to a Division Bench remains intact, but the right to prefer a further appeal is taken away even in respect of the matters arising under the special enactments or other instruments having the force of law—be it against original/appellate decree or order heard and decided by a learned single Judge.[1152]

It would be pertinent to refer to a decision of the Supreme Court in *Vinita Khanolkar's* case.[1153] In that case a Single Judge of the Bombay High Court had passed an order under sub-section (1) of section 6 of the Specific Relief Act, 1963. When an appeal against the said order was filed before the Division Bench, a preliminary objection was taken on the point of maintainability of the said appeal in view of sub-section (3) of section 6 of the Act which barred an appeal or revision against any order passed under section 6 of the Act. The Division Bench dismissed the appeal as not maintainable.

In appeal, the Supreme Court held the appeal before the Division Bench as maintainable holding that a statutory enactment like the Specific Relief Act cannot exclude the powers of the high court which flows from the paramount charter under which it functions.[1154] Majumdar, J and Venkataswami, J, speaking for the Supreme Court Bench, observed as follows:

> Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the

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1148. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152, para 30 as p 5177 : (2004) 11 SCC 672.
1149. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152, para 30 as p 5177 : (2004) 11 SCC 672.
1150. *Kamal Kumar Dutta v Ruby Gereral Hospital Ltd*, (2006) 7 SCC 613 : (2006) 7 Scale 668 : (2006) CLC 1297.
1151. *Mahammad Saud v Dr (Maj) Shaikh Mahfooz*, AIR 2009 Ori 46 : (2008) 2 Ori LR 725 (FB).
1152. *Mahammad Saud v Dr (Maj) Shaikh Mahfooz*, AIR 2009 Ori 46, at p 55 : (2008) 2 Ori LR 725 (FB).
1153. *Vinita M Khanolkar v Pragna M Pai*, AIR 1998 SC 424 : (1998) 1 SCC 500.
1154. *Vinita M Khanolkar v Pragna M Pai*, AIR 1998 SC 424, at p 425 : (1998) 1 SCC 500.

> paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under letters patent. No such bar is discernible from Section 6 (3) of the Act. It could not be seriously contended by learned counsel for the respondents that if clause 15 of the Letters Patent is invoked then the order would be appealable. Consequently, in our view, on the clear language of clause 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by the learned Single Judge of the High Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed.[1155]

A Full Bench of the Bombay High Court[1156] was seized of the question that whether an appeal under the provisions of clause 15 of the Letters Patent, against an order passed by the learned Single Judge of the Bombay High Court in a civil suit in an application filed in that civil suit because of the provisions of section 8 of the Arbitration and Conciliation Act, is maintainable or not ? It was held that an appeal against an order in an application under section 8 is not maintainable under clause 15 of the Letters Patent on principle and also on authority.

[s 100A.9] "No further appeal shall lie" and "heard and decide"

The net result of Amendment Acts of 1999 and 2002 is that where an appeal from original or appellate decree where order is heard and decided by single judge of the high court, no further appeal shall lie to the Division Bench of high court. In the amending Act, the words "no further appeal shall lie" is of great significance. It clearly means that no further appeal shall be entertained in respect of appeal filed after the cut off date. Looking to the object of introducing the provision, any other interpretation would be anathema to the provision. Reading the words "heard and decided" and the words "no further appeal shall lie" conjointly, clearly indicates that vested right of appeal has been taken away by the legislature from the cut off date i.e., 1 July 2002. It is in consonance with the intention of the legislature to curtail the second appeal in the third court. The legislature, in its wisdom, has considered the right of appeal to a singular one. Thus, the legislature has expressly stated that no further appeal shall lie after the appeal has been heard and decided against the judgment and decree of original court. Thus, we are of the view that the substitution of section 100A of the CPC does not permit the Division Bench to entertain special appeal against the judgment and decree of the learned single judge rendered in first appeal after the cut off date i.e., 1 July 2002.[1157]

[s 100A.10] Special Enactments

The right of appeal available under the Letters Patent is taken away by section 100A of the CPC, even in respect of the matters arising under the special enactments or other instruments having the force of law.[1158]

B Sudarshan Reddy, J (as he then was), speaking for the Full Bench of the high court, observed as follows:

> 14. We have already noticed that the newly incorporated Section 100-A of the code in clear and specific terms prohibits further appeal against the decree and judgment or order of a learned single Judge to a Division Bench notwithstanding anything contained in the

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1155. *Vinita M Khanolkar v Pragna M Pai*, AIR 1998 SC 424, at p 425 : (1998) 1 SCC 500.
1156. *Conros Steels Pvt Ltd v Lu Qin (Hong Kong) Co Ltd*, AIR 2015 Bom 106 : (2015) 1 MhLJ 434.
1157. *UCO Bank v Roopa Ram*, AIR 2003 Raj 222 (DB).
1158. *Gandla Pannale Bhulaxmi v MD, APSRTC*, AIR 2003 AP 458 (FB).

> Letters Patent. The Letters Patent which provides for further appeal to a Division Bench remains intact, but the right to prefer a further appeal is taken away even in respect of the matters arising under the special enactments or other instruments having the force of law—be it against the original or appellate decree or order heard and decided by a single Judge.[1159]

The Andhra Pradesh High Court in the above decision placed reliance on a Supreme Court judgment in *Sharda Devi v State of Bihar.*[1160] Wherein it has been observed as follows:

> 9. A Letters Patent is the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus where a Letters Patent grants to the High Court a power of Appeal against a judgment of a single Judge, the right to entertain the appeal would not get excluded unless the concerned statutory enactment excludes an appeal under the Letters Patent.

However, the Supreme Court which was considering a case under the Land Acquisition Act, 1894, held in that case that section 54 of the said Act does not exclude an appeal under the Letters Patent.

A Division Bench of the Rajasthan High Court held that an order passed by a single judge in appeal under section 173 of the Motor Vehicles Act is a judgment and as such no further appeal under Letters Patent lies to Division Bench of the same high court in view of section 100-A of the Code.[1161] RM Lodha, J (as he then was), speaking for the Division Bench of the high court observed as follows:

> Even if it be assumed that the Motor Vehicle Accident Claims Tribunal is not a Court as the term is ordinarily understood, it is beyond doubt that such Tribunal has all the trapping of a Court. Though the Tribunals occupy a special position of their own under the scheme of the Courts and Tribunals and special matters and questions are entrusted to them for their decision yet they share with the Courts one common characteristic *viz.*; both the Courts as well as Tribunals are constituted by the State and are invested with judicial functions as distinguished from purely administrative or executive functions. It is the State's inherent judicial power which is discharged by the Courts and Tribunals. If the Company Law Board constituted under the Companies Act in its adjudicatory powers has the trappings of a Court and an appeal under Section 10F of the Companies Act from its order to the single Judge is not amendable to further appeal (Letters Patent) to the same Court because of Section 100A of the Code of Civil Procedure, a *fortiori*, an order passed by the Single Judge in appeal under Section 173 of the Motor Vehicles Act from the order/award of the Motor Accident Claims Tribunal shall not be subject to intra-Court appeal in view of the bar created by section 100A of the Code of Civil Procedure effective from 1st July, 2002.[1162]

It has been held by the Supreme Court that, as there is no provision in section 10-F of the Companies Act, 1956 akin to the provision of section 100 of the CPC, therefore the failure of the high court to frame a substantial question of law in proceedings under the Companies Act to hear the appeal before it cannot invalidate the order so passed.[1163]

The intention of the legislature is to abolish an intra-court appeal to the bench of two judges of the very same high court from a decision rendered by a single judge, since a litigant

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1159. *Gandla Pannale Bhulaxmi v MD, APSRTC*, AIR 2003 AP 458, at p 460 (FB).
1160. *Sharda Devi v State of Bihar*, AIR 2002 SC 1357 : (2002) 3 SCC 705, at p 1359–1360 (of AIR); Variaua, J speaking for the three-Judge Bench.
1161. *RSRTC v Vaibgav Kumar*, AIR 2007 Raj 147 (DB) (Jaipur Bench); See also *Raga Ram v Smt Kokali*, AIR 2008 Raj 151 : (2008) 3 Raj LW 2409.
1162. *Raga Ram v Smt Kokali*, AIR 2008 Raj 151, para 23 at p 151–152 : (2008) 3 Raj LW 2409.
1163. *Tin Plate Dealers Association v Satish Chandra Sanwalka*, AIR 2016 SC 4705 : (2016) 10 SCC 1 : (2016) 9 Scale 758.

who files an appeal against the decree and judgment of the civil court is denied the opportunity of filing a further appeal. No prejudice will be caused to a litigant who files an appeal under a special statute also by taking away the right of intra-court appeals to a bench of two judges.[1164]

In *ITC Ltd v State of Karnataka,*[1165] the Supreme Court held as follows:

> Where however, the Central and the State legislation cover the same field then the Central legislation would prevail. It is also well settled that where two Acts, one passed by Parliament and the other by a State Legislature, collide and there is no question of harmonising them, then the Central legislation must prevail.

In *Kulwant Kaur v Gurdial Singh Mann,*[1166] the Supreme Court held as follows:

> Special or local laws would remain functional only as long as there is no specific provision to the contrary legislated by Parliament- The moment such law comes into conflict with Central legislation it becomes inapplicable and is deemed to be repealed.

It was further held:

> Incorporation of the Civil Procedure Code (Amendment) Act in the statute-book is by virtue of conferment of power under Entry 13, List III of the Seventh Schedule of the Constitution. The Constitution is the parent document and is supreme which has a binding effect on all and by virtue of the provisions of the Constitution, parliamentary supremacy in regard to the adaptation of laws if within the area of operation as provided under List I or List III is recognised.

In view of the principles discussed above, it is clear that the provisions contained in section 100A of the CPC will prevail over the provisions contained in section 5(ii) of the Kerala High Court Act regarding a further appeal to a bench of two judges from the decision of a single judge. A decision rendered by single judge is to be treated as a decree, judgment or order passed by the single judge under section 3(13) (b) of the Kerala High Court Act and not as one rendered under the Land Acquisition Act, 1894 or Motor Vehicles Act, 1988. There is no justification in limiting the applicability to section 100A to the appeals filed under the provisions of the CPC alone.[1167]

Undisputedly, section 100A of the CPC is a piece of legislation enacted by the competent legislature, i.e., the Parliament. The *non obstante* clause contained in section 100A of the CPC, as amended by 2002 Act, has the effect of taking away the right of appeal which may earlier be available either under the Letters Patent or any provision of law, including the CPC. The use of the expression "in any Letters Patent for any high court or in any other instrument having the force of law or in any other law for the time being in force" in section 100A is clearly indicative of the legislature's intention to bar Letters Patent Appeal against the judgment rendered by a single bench in an appeal arising from an original or appellate decree or order. The language of section 100A does not suggest that the exclusion of the right of appeal available under the letters patent is confined only to the matters arising under the CPC and not other enactments. Therefore, full effect deserves to be given to the legislative intendment enshrined in the *non obstante* clause contained in section 100A and it must be held that an appellate judgment rendered by the single bench in matters arising out of the CPC, as also other enactments, is expressly barred with effect from 1 July 2002.[1168]

1164. *Kesava Pillai Sreedharan Pillai v State of Kerala*, AIR 2004 Ker 111 (FB).
1165. *ITC Ltd v State of Karnataka,* (1985) SCC 476.
1166. *Kulwant Kaur v Gurdial Singh Mann,* AIR 2001 SC 1273 : (2001) 4 SCC 262.
1167. *Kesava Pillai Sreedharan Pillai v State of Kerala*, AIR 2004 Ker 111 (FB).
1168. *United India Insurance Co Ltd v S Surya Prakash Reddy*, AIR 2006 (NOC) 1424 (AP).

A full Bench of the Kerala High Court has held that Letters Patent Appeals against judgment/decree/order passed by a single Judge of high court are not maintainable. Orders passed under O XLIII, rule 1 of the Code are to be construed as judgment or decree and cannot be assailed in Letters Patent Appeal.[1169] AS Naidu, J, speaking for the Full Bench, observed as follows:

> 45. We have already noticed that the newly incorporated s 100-A, CPC in clear and specific terms prohibits further appeal against the decree and judgment or order of a learned single Judge to a Division Bench notwithstanding anything contained in the Letters Patent. The Letters Patent which provides for further appeal to a Division Bench remains intact, but the right to prefer a further appeal is taken away even in respect of the matters arising under the special enactments or other instruments having the force of law—be it against original/appellate decree or order heard and decided by a learned single Judge. It has to be kept in mind that the special statute only provide for an appeal to the High Court. It has not made any provision for filing appeal to a Division Bench against the judgment or decree or order of a learned single Judge.[1170]

However, in writ petitions the matter stands at a different footing. In a writ application filed under Articles 226 and 227 of the Constitution, if any order/judgment/decree is passed in exercise of jurisdiction under Article 226, a writ appeal will lie, whereas no writ appeal will lie against judgment/order/decree passed by a single Judge exercising powers of superintendence under Article 227 of the Constitution.[1171]

An interesting question as to the maintainability of letters patent appeal arose for consideration before the Supreme Court in *LIC v Nandini J Shah*[1172]. In this case, an order passed by the estate officer under sections 5 and 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 was challenged before the appellate officer under section 9 of the said Act. As per section 9, it is pertinent to note, the "appellate officer" shall be the district judge of the district, where the public premises in question is situated or such other judicial officer in that district with not less than 10 years' experience designated by the district judge for the purpose. The appellate officer upheld the order passed by the estate officer. The orders passed by the eviction officer and the appellate officer both came to be challenged before the single judge of the High Court of Bombay in a writ petition filed under Articles 226 and 227 of the Constitution of India. The said writ petition got dismissed. The said order of dismissal was challenged in a letters patent appeal filed before the Division Bench. The LIC raised the preliminary objections on maintainability of letters patent appeal. The Division Bench rejected the said preliminary objection and also allowed the appeal on merit. The decision of the Division Bench came be assailed before the Supreme Court on both counts. As regards the maintainability of letters patent appeal against the order of the single judge, it was contended that section 9, when read with sections 3, 8 and 10 of the Act, made it amply clear that jurisdiction exercised by the appellate officer (the designated judicial officer) under section 9 of the Act was in his capacity as a civil court and not as *persona designata*. Thus, the petition under Article 227 is the only provision under which such orders can be challenged. Even though the petition filed before single judge was labeled as one under both Articles 226 and 227, looking at the nature of it, it is clear that such a petition could have been filed and entertained only under Article 227 of the Constitution. The appellant referred to plethora of judgments to substantiate its contentions. Based on the same, it was submitted that the letters

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1169. *Mahammed Saud v Dr (Maj) Shaikh Mahfooz*, AIR 2009 Ori 46 : (2008) 2 Ori LR 725 (FB).
1170. *Mahammed Saud v Dr (Maj) Shaikh Mahfooz*, AIR 2009 Ori 46, para 45 at p 55 : (2008) 2 Ori LR 725 (FB).
1171. *Mahammed Saud v Dr (Maj) Shaikh Mahfooz*, AIR 2009 Ori 46, para 47 at p 55 : (2008) 2 Ori LR 725 (FB).
1172. *LIC v Nandini J Shah*, AIR 2018 SC 1197 : (2018) 15 SCC 356.

patent appeal was not maintainable against the order passed by the single judge in exercise of supervisory jurisdiction under Article 227. The Division Bench committed manifest error in entertaining it. The respondents on the other hand contended that the district judge or his designate exercises power under section 9 only as *persona designata* and not as a civil court and, thus, the Division Bench has not committed any error in entertaining the letters patent appeal. The Apex Court rejected the contention of the respondents and held, relying on principles laid down in earlier cases, that the appellate officer referred to in section 9 of the Act acts in his capacity as a pre-existing judicial authority. S/he, thus, acts as a court and not as a *persona designata*. The order passed under section 9 of the Act is an order of the subordinate court, which can be challenged by invoking the supervisory jurisdiction of the high court under Article 227 of the Constitution. The Apex Court also reiterated that order passed by the single judge in exercise of supervisory jurisdiction under Article 227 of the Constitution cannot be assailed in a letters patent appeal.

Section 173 of the Motor Vehicles Act, 1988 provides for an appeal against an award made by the Motor Accident Claims Tribunal under section 166 of the Motor Vehicles Act, 1973. Section 54 of the Land Acquisition Act, 1894 provides for an appeal against the award of the reference court. Section 30 of the Workmen's Compensation Act, 1923 provides for an appeal against an order made by the Commissioner. Similar provisions are available in other enactments for an appeal against an award or order passed by the competent authority or court. As per the high court rules, all such appeals are heard by single bench. There is no provision in these enactments under which an appeal can be preferred against the judgment rendered by the single bench in a matter arising out of an award or order made by the competent authority or court. Such appeal could be filed only under clause 15 of the Letters Patent. However, by virtue of the *non obstante* clause contained in section 100A, with reference to Letters Patent and all other statutory enactments, no appeal can now be maintained under clause 15 of the Letters Patent against the judgment rendered by a single bench in an appeal arising out of these enactments.[1173]

The high court is under a legal obligation, while hearing an appeal under section 173 of the Motor Vehicles Act, 1988, to decide all issues arising in a case both on law as well as facts after appreciating the entire evidence. The appeal under the aforesaid provision is essentially in the nature of first appeal under section 96, CPC, therefore, the high court shall dispose of the said appeal as required under O XX, rule 4 (2) read with O XLI, rule 31, CPC. The judgment passed, while disposing of such appeal, shall contain a "concise statement of the case, points for determination, decision thereon and the reasons."[1174]

A Division Bench of the Allahabad High Court has held that in the case of an order passed by a single Judge of the high court in appellate proceedings under rule 164 of the company (Court) Rules, 1959, further appeal against the said order under section 483 of the Companies Act, 1956 as also Letters Patent appeal would be barred. It was held that the words "any other law for the time being in force", used in section 100-A also covers appeal under section 483 of the Companies Act.[1175] It was observed as under:

> In view of the foregoing discussions, it is clear that even if under Section 483, there was no condition prohibiting an appeal against an order of the learned single Judge passed in

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1173. *United India Insurance Co Ltd v S Surya Prakash Reddy*, AIR 2006 (NOC) 1424 (AP).
1174. *Sudarsan Puhan v Jayanta Mohanty*, (2018) 10 SCC 552 : (2018) 11 Scale 357.
1175. *Uttar Pradesh Cement Vetanbhogi Sahkari Rin Samiti Ltd v Official Liquidator in the Matter of Uttar Pradesh State Cement Corp, Allahabad*, AIR 2010 All 82 : 2010 (2) All LJ 483 (DB).

> appellate exercise of jurisdiction, the said exclusion has been now specifically provided in by the Legislature under Section 100-A, C.P.C.[1176]

Section 37(3) of the Arbitration and Conciliation Act, 1996, prohibits filing of second appeal against the appellate order passed under that Act. The expression "second appeal" has been held by the Gujarat High Court to include Letters Patent appeal. Consequently Letters Patent appeal against judgment of single judge in first appeal arising out of a proceeding under the Arbitration Act would not be maintainable.[1177]

[s 100A.11] Special Law and General Law

The question is whether section 100A inserted by Amendment Act, 1976 bars any appeal before the Division Bench under section 109(5) of the Trade and Merchandise Act, 1958 (Trade and Merchandise Act) (Now repealed by the Trade Marks Act, 1999). Apart from the fact that sub-section (8) of section 109, Trade and Merchandise Act makes the provisions of the CPC applicable to appeals under the Trade and Merchandise Act expressly "subject to the provisions of the Trade and Merchandise Act and the rules made thereunder", the Trade and Merchandise Act is a special law on the subject of trademarks whereas the CPC is a general rule of procedure. Section 97 of the Trade and Merchandise Act merely confers powers of a civil court on the Registrar of Trade Marks for the purpose of receiving evidence and for other procedural matters, but there is no indication in any provision of the Trade and Merchandise Act to make appeals under it, dependent upon their availability under the CPC. Once it is held that the Trade and Merchandise Act is a special law and CPC is a general law, the settled legal position is that a prior particular or special law is not readily held to be repealed by a later general enactment. The particular or special law deals only with a particular subject and, therefore, the reconciliation is normally possible between a prior particular Act and a later general Act, and so the particular Act is construed as an exception or qualification of the general Act.[1178]

In *Nicolle v Nicolle*,[1179] Lord Philimore laid down the following principles:

> It is a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases, of which the particular law is but one. This, as a matter of jurisprudence, as understood in England, has been laid down in a great number of cases, whether the prior law be an express statute, or be the underlying common or customary law of the country. Where general words in a later Act are capable of reasonable and sensible application without extending it to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

The above principle came to be applied by the Supreme Court in *Paradip Port Trust v Their Workmen*.[1180]

Section 36(4) of the Industrial Disputes Act, 1947 provides that a party cannot be represented by a legal practitioner before a labour court or tribunal except with the consent of the other parties and with the leave of the labour court or tribunal. Section 30 of the Advocates

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1176. *Uttar Pradesh Cement Vetanbhogi Sahkari Rin Samiti Ltd v Official Liquidator in the Matter of Uttar Pradesh State Cement Corp, Allahabad*, AIR 2010 All 82, para 20 at p 88–89 : 2010 (2) All LJ 483 (DB).
1177. *Vishal Retail Ltd v Kataria Automobiles Ltd*, AIR 2010 Guj 115 (DB).
1178. *Nasik Hing Supplying Co v Annapurna Gresh Udyog Bhandar*, AIR 2003 Guj 275 (FB).
1179. *Nicolle v Nicolle*, [1922] 1 AC 284.
1180. *Paradip Port Trust v Their Workmen*, AIR 1977 SC 36 : (1977) 2 SCC 339.

Act, 1961 provides that every advocate shall be entitled as of right to practise in all courts and before any tribunal. There is, therefore, an apparent conflict between the two provisions. The Supreme Court applied the aforesaid principle and held that the Industrial Disputes Act, 1947 is a special statute dealing with the industrial disputes and, therefore, the prohibition contained in section 36(4) of the Industrial Disputes Act, 1947 is not done away with by section 30 of the Advocates Act, 1961.

Thus expression "notwithstanding anything contained in any other law for the time being in force" in section 100A, CPC does not take away the substantive right of appeal before the Division Bench of the high court where such right is conferred by a special law conferring an express right of such appeal against the decision of a single Judge in exercise of his appellate jurisdiction over the decision of a tribunal or a quasi-judicial authority.[1181]

In the decision of the Supreme Court in *Municipal Corp of Brihanmumbai v State Bank of India,*[1182] against the assessment order passed by the municipal corporation, an appeal lies before the Small Causes Court under section 217 of the Bombay Municipal Corporation Act. Against the decision of the Small Causes Court in such appeal, an appeal lies to the high court under section 218D of the Act. The question arose whether a further appeal could lie against the decision of a single judge in an appeal under section 218D(1) of the Act before the Division Bench of the high court under the Letters Patent. The Bombay High Court held that such an appeal before the Division Bench was barred by section 100-A of the CPC. Confirming the said decision, the Supreme Court observed as under:

> It is obvious that the appeal filed by the respondent under Section 218-D of the Act was a second appeal against the appellate order made by the Addl. Chief Judge, Small Causes Court. Under the Bombay Municipal Corporation Act, no further appeal has been provided against the judgment of a learned single Judge of the High Court deciding the second appeal under Section 218-D of the Act against an appellate order of the Chief Judge of the Small Causes Court passed under Section 217(1) of the Act. Section 100-A of the Code of Civil Procedure, which was introduced by the Amendment Act, 1976, specifically bars any further appeal in such cases.

This section has been introduced to minimise the delay in finality of a decision. Prior to the enactment of the above provision, under the Letters Patent, an appeal against the decision of a single judge in a second appeal was, in certain cases, held competent, though under section 100 of the CPC, there was some inhibition against interference with the findings of fact. The right of taking recourse to such an appeal has now been taken away by section 100A of the CPC. Since, an appeal under section 217(1) of the Act is a first appeal in a second forum/court and an appeal under section 218D of the Act is the second appeal in the third forum/court, no further appeal would be competent before the fourth forum/court in view of section 100A of the CPC.

This decision necessarily proceeds on the principle that in absence of any right of appeal conferred by a special statute, the provisions of section 100A of the CPC will hold the filed to bar any further appeal, notwithstanding anything contained in the Letters Patent or any such general law, but where the special Act itself provides for a further appeal against the judgment of a single judge of the high court, such appeal would not be barred by the provisions of section 100A of the CPC, notwithstanding the *non-obstante* clause with which the said section 100A begins.[1183]

1181. *Nasik Hing Supplying Co v Annapurna Gresh Udyog Bhandar*, AIR 2003 Guj 275 (FB).
1182. *Municipal Corp of Brihanmumbai v State Bank of India*, AIR 1999 SC 380 : (1999) 7 SCC 123
1183. *Nasik Hing Supplying Co v Annapurna Gresh Udyog Bhandar*, AIR 2003 Guj 275 (FB).

Section 100A, CPC will not take away the Letters Patent jurisdiction of the high court, as the tribunal under the Motor Vehicles Act, 1988 is not a civil court as contemplated under the CPC. The provision contained under section 100A, CPC is applicable to only decree or order passed by a civil court, even those arising under the special enactments but not the orders passed by the tribunals. Even the use of words "notwithstanding anything contained in any other law for the time being in force" does not take away the substantive right of appeal before a Division Bench of the Rajasthan High Court where such appeal is against the decision of the single judge in exercise of the appellate jurisdiction or decision of the tribunal or *quasi*-judicial authority.[1184]

In *Kandla Export Corp v OCI Corp*[1185], 93 the Supreme Court dealt with the question whether an appeal not contemplated under section 50 of the Arbitration and Conciliation Act, 1996 is maintainable under section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015? The court answered the said question in the negative. It was held that the Arbitration and Conciliation Act, 1996 is a self – contained code and, thus, section 50 contained therein is exhaustive as regards appealable orders. Section 50 is the only provision that provides for appeal on specified grounds in arbitration proceedings seeking enforcement of foreign awards. The appeals, which are not explicitly provided for therein, are not permissible. Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 is a general provision, thus, it cannot override provision contained in the Arbitration and Conciliation Act, 1996, which is a special law relating to arbitration. The said section 13(1) gets attracted only if the appeal is permitted under section 50 of the Arbitration and Conciliation Act, 1996 in the first place and not otherwise.

[S 101] Second appeal on no other grounds.—No second appeal shall lie except on the grounds mentioned in section 100.

SYNOPSIS

[s 101.1]	Scope 1281	[s 101.3]	Second appeal or revision 1282
[s 101.2]	This section; Section 100 and Section 41 of Punjab Courts Act, 1980 1282		

[s 101.1] Scope

A combined reading of sections 100 and 101 of the Code of Civil Procedure, 1908 (CPC), providing the grounds for second appeal and providing further that no second appeal can be entertained on any other ground, will make it clear that the second appellate court has no jurisdiction in the matter.[1186] For example, in a particular case, in the absence of a clear error of law, even the ground of erroneous finding of facts by the lower courts by itself does not allow the high court jurisdiction in the matter.[1187] The issue relating to subsistence or otherwise of mortgage was left open to be decided later as agreed upon by counsels for both the parties. The suit was accordingly decided by the trial court. The grievances that the high court ought not to have decreed the suit since the plaintiff's right to redeem the mortgage was not adjudicated

1184. *Fazal Ali v Amna Khatun*, AIR 2004 Raj 39 (DB).
1185. *Kandla Export Corp v OCI Corp*, (2018) 14 SCC 715 : (2018) 2 Scale 368.
1186. *Tata Press Ltd v MTNL*, AIR 1995 Bom 107 (DB).
1187. *Bhola Ram v Amir Chand*, (1981) 2 SCC 414.

by the trial court, were expressly left open. The Hon'ble Supreme Court held that the decree passed by the high court was plainly untenable and set aside the same[1188] Thus, the high court can record proper findings, even of facts, where the lower courts findings are marked by non-consideration of relevant evidence or by an essentially erroneous approach,[1189] but in second appeal it cannot interfere with finding of fact by appellate court.[1190] The appellate court cannot partly admit and partly reject an appeal.[1191]

[s 101.2] This section; Section 100 and Section 41 of Punjab Courts Act, 1980

The mandatory requirement of section 100 cannot be obliterated by reason of a state legislature, where the requirement is not otherwise such. Hence, section 41 of the Punjab Courts Act, 1980, cannot be termed to be repugnant to section 100 and as such, cannot have its effect, since parliamentary supremacy renders section 41 of the Punjab Courts Act, 1980 devoid of any such effect. More so, by reason of the clarification rendered by the legislature in section 101 of the CPC, which provides that no second appeal shall lie except on the ground mentioned in section 100, indicating thereby the further reinforcement to the legislative intent to be obtained from section 101, as regards the issue of a substantial question of law.[1192]

[s 101.3] Second appeal or revision

The question whether a second appeal lies or whether a civil revision petition lies to the high court against the appellate order passed on an application under O XXI, rule 58, depends upon the construction of the amended provision of O XXI, rule 58. Under the provision itself, an appeal lies to the appellate court under the CPC and the question that falls for determination is, whether a second appeal also lies, which is not a right expressly conferred by the said provision. It is well-settled that even though no right of appeal is specifically conferred, yet, if a question is referred to an established court, then all incidents attached to the procedure of that court (including the right of appeal) are attracted. As such, when the right of appeal is conferred by the provision itself, i.e., O XXI, rule 58(4), there cannot be any doubt regarding the right of further appeal according to the High Court of Andhra Pradesh.[1193]

Unless the court comes to the conclusion that the appeal is a proper remedy and not revision, the withdrawal of appeal and its consequential dismissal will not merge the decree with the order of the appellate court and hence, the revision will be competent and will survive. However, if, on the other hand, the court concludes that the proper remedy was revision and not appeal, any order passed in the appeal will be without jurisdiction and inconsequential. Such an order cannot effect the pending application.[1194]

[1195][**S 102] No second appeal in certain cases.**—No second appeal shall lie from any decree, when the subject-matter of the original suit is for recovery of money not exceeding twenty-five thousand rupees].

1188. *State of Punjab v Balwant Singh*, (1992) Supp 3 SCC 108.
1189. *Jagdish Singh v Natthu Singh*, (1992) 1 SCC 647.
1190. *Karbalai Begum v Mohd Sayeed*, (1984) SCC 396.
1191. *Ramji Bhagala v Krishan Rao Karirao Bagra*, AIR 1982 SC 1223 : (1982) 1 SCC 433.
1192. *Kulwant Kaur v Gurdayal Singh Mann*, [2001] 2 LRI 678.
1193. *Bollapalli Venkat Rao v Chaturvedula Subbhaiah*, AIR 1983 AP 166(DB).
1194. *Chittranjan Crochet Pvt Ltd v Lakshmoni Dass*, (1994) Supp (1) SCC 101.
1195. Section 102 [as substituted by section 11 of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999)] substituted by Act 22 of 2002, section 5 (w.e.f. 1-7-2002).

SYNOPSIS

[s 102.1] Changes in the section 1283
[s 102.2] Aim of law 1284
[s 102.3] Accrual of Right of Appeal prior to 1 July 2002 1285
[s 102.4] Filing of Second appeal after 30 June 2002 1285
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[s 102.1] Changes in the section

The words "Rs 1,000" were substituted for "Rs 500" by the Code of Civil Procedure (Amendment) Act, 1956 (Act 66 of 1956).

The 1976 Amendment Act substitutes the words "Rs 3,000" for the words "Rs 1000" and brings the section—in line with the sub-section (4) of section 96. Sub-section (4) of section 96 provides that no first appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by the court of small causes when the amount or value of the subject matter of the original suit does not exceed Rs 3,000. This section, after 1976 Amendment Act, barred a second appeal even where—a question of law arose if the amount or value of the subject matter of such a suit did not exceed Rs 3000.

Now after Code of Civil Procedure Amendment Acts 1999 and 2002, no second appeal lies to the high court even on a question of law if the subject-matter of suit for recovery of money does not exceed Rs 25,000. Even first appeal is not maintainable on a question of law from the decree of small causes court, if the value of the subject-matter of the suit does not exceed Rs 10,000 as per section 96(4).

The Amending Act of 2002, substituted section 102. The amendment comes into force with effect from 1 July 2002. Section 102 was first amended by the Amending Act of 1999, however, before the same could be enforced it was again amended by the Act of 2002.

By the Amending Act of 1999, not only the value of the subject matter was sought to be raised from Rs 3,000, but also the existing restriction as to the nature and character of the suit was also sought to be done away with. In other words, according to the substituted section 102, by the Amending Act of 1999, there shall be no second appeal at all where the amount or value of the subject matter of the original suit does not exceed Rs 25,000.

In the opinion of the authors, the enhancement of the value of the subject matter from Rs 3,000 to Rs 25,000 is a step in the right direction. It keeps in view the rate of inflation in the economy and makes the provision suited to the present day's requirement. However, there are certain problems with regard to restriction as to the nature and character of the suit. The Amending Act of 1999 did not permit a second appeal against any decree when the amount or value of the subject matter of the original suit did not exceed Rs 25,000. This was a dangerous step keeping in view the provision of section 11 of the Code incorporating the rule of *res judicata*. It is possible that many decrees made by the courts in suits, the value of the subject matter whereof is less than Rs 25,000, may operate as *res judicata* even in the matters of for higher value. In this connection, it may be recalled that suits for mere permanent injunction are valued at a low figure unrelated to the value of the subject matter of the suit. This is indeed

permitted by the various Court-Fees Acts. Therefore, a provision of this nature proposed may result in grave injustice in such cases.

The Law Commission in its 163rd report recommended that the amount or value of the subject matter of the original suit in section 102 be raised from Rs 25,000 to Rs 50,000. The reason for this recommendation is that generally speaking, money suits are comparatively simpler suits which are recognised and affirmed by the fact that the legislature has thought it fit to enact O XXXVII providing for summary procedure in many money suits irrespective of the monetary value thereof. The situation may be different in case of other types of suit.

The proposed removal of restriction as to the nature and character of the suits was recommended to be dropped. It may be remembered that the second appeal is not available to all points but is restricted only to substantial questions of law. In such a situation, abolition of second appeal altogether in all matters the value of subject matter whereof does not exceed Rs 25,000, may not be an appropriate step.

Keeping in view the recommendations of the Law Commission, the Amending Act of 2002 again substituted section 102 of the Code. The restrictions on second appeal on the suits of any nature when the amount of the value of the subject matter of the original suit is not exceeding Rs 25,000 is removed. The new substituted section 102 restricts second appeal only in suits of the nature of recovery of money, where the amount of the value of the subject matter of the original suit is not exceeding Rs 25,000. The suits of all other kinds are subject to second appeal provided the provisions of section 100 are complied with.

[s 102.2] Aim of law

The aim of the law is clearly to curtail litigation, which has assumed high proportions, and people are litigating over trifle matters to the highest court leaving no time with the courts to devote to important issues. With this aim in sight by 1976 amendment, the second appeals were limited on the point of "substantial question of law" only. Again, by section 102, CPC, by present amendment, right of second appeals have been taken away in certain class of cases. Therefore, policy of law is to minimise the second appeals and the second appeal cannot be accepted for the reason that the right accrued prior to the amendment was enforced. Even if the right accrued, the court will take the view in accordance with the policy of law that the right of appeals should be curtailed.[1196]

The Supreme Court has held that the purpose behind enacting section 102 is to reduce the quantum of litigation so that courts may not have to waste time where the stakes are meagre and not of much consequence. It was further held that to avail advantage of the provisions of section 102, the subject matter of the original suit should only be recovery of money and that too not exceeding Rs 25,000. If the subject matter of the suit is anything other than recovery of money or something more than recovery of money, the provisions of section 102 cannot be invoked. In the instant matter though the amount sought to be recovered was only Rs 11,006.07, the consequences of the final outcome of the litigation were far reaching. Nevertheless, the court held that as the original suit was not only for recovery of money, but also for a declaration and permanent injunction, the provisions of section 102 could not have been applied and the matter was therefore remanded back to the high court.[1197]

1196. *Jagdish Chandra v Arvind Singh*, AIR 2003 All 119.
1197. *Nagar Palika Thakurdwara v Khalil Ahmed*, (2016) 9 SCC 397.

[s 102.3] Accrual of Right of Appeal prior to 1 July 2002

Section 6 of the General Clauses Act, 1897 is not relevant.

The first reason being that it is not a case of repeal, and on the other hand section 102, CPC has been substituted by the Amending Act and the said section 6 may not be applicable to the same. Apart from this, clause (c) protects any right, privilege, obligation or liability. It cannot be interpreted to include the right to file repeal or revision. Clause (e) also does not protect the right of institution of a proceeding under the repealed Act.

It is an established principle that procedural law can be amended with retrospective effect and will also apply to pending cases. Therefore, the right of second appeal could be taken away with retrospective effect in pending cases also.[1198]

From the perusal of this provision, it is clear that the pending appeals and the appeals which have been admitted before the commencement of section 102 only have been saved from the mischief of section 102. Therefore, the legislative intent is clear that the right to appeal accrued prior to the enforcement has not been saved.[1199]

[s 102.4] Filing of Second appeal after 30 June 2002

The question, therefore, is whether there is anything in the Amendment Act which takes away the vested rights of the plaintiff to take the matter in second appeal, as on the date of the filing of the suit, he had that right. Section 16(2)(a) of the Code of Civil Procedure (Amendment) Act, 2002, reads as follows:

> The provisions of Section 102 of the principal Act as substituted by Section 5 of this Act, shall not apply to or affect any appeal which had been admitted before the commencement of Section 5; and every such appeal shall be disposed of as if Section 5 had not come into force.

Therefore, by necessary intendment, the amendment has taken away the vested right of the plaintiff to file a second appeal on and after the commencement of the Amendment Act.[1200]

Restriction brought by section 102 is only from 1 July 2002.[1201]

In *Haryana Dairy Development Co-op Federation Ltd v Jagdish Lal*,[1202] the Supreme Court came heavily on the practice of filing special leave petition (SLP) against the order passed in second appeal by the high courts in trivial matters. In the instant case, an amount of Rs 8724 is to be paid to the respondent employee as reimbursement of his medical claim and the petitioner came up to the Supreme Court to deny the said claim. While dismissing the SLP, the court observed that in spite of the fact that Parliament has amended the CPC altering the provisions of section 102 providing that money recovery suit involving less than Rs 25,000 shall not be entertained in the second appeal, the court is burdened with such cases.

1198. *Nagar Palika Thakurdwara v Khalil Ahmed*, (2016) 9 SCC 397.
1199. *Jagdish Chandra v Arvind Singh*, AIR 2003 All 119.
1200. *Leela Mathew v PV Krishnamoorthy*, AIR 2003 Ker 25. See also *Clara v Augustine*, AIR 1985 Ker 186 : 1984 Ker LT 377.
1201. *Koderi Valappil Nabeessa v Acheriyathu Abdul Majeed*, AIR 2006 Ker 381; *Kunnappadi Kalliani v Lekharaj*, (1996) 2 Ker LT 106.
1202. *Haryana Dairy Development Co-op Federation Ltd v Jagdish Lal*, (2014) 3 SCC 156 : (2014) 1 Scale 502.

[s 102.5] Admitted appeals

The question arises whether any appeal which was pending on 1 July 2002 will be governed by the aforesaid section 102 of the Code of Civil Procedure (Amendment) Act, 2002, under section 16 provides for repeal and savings. The relevant provision is section 16(2)(a), which reads as under:

> 16(2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1887— (a) the provisions of section 102 of the principal Act as substituted by section 5 of this Act, shall not apply to or affect any appeal which had been admitted before the commencement of section 5; and every such appeal shall be disposed of as if section 5 had not come into force.

The aforesaid clause provides that the appeals which are pending on 1 June 2002 and already admitted before commencement of section 5 (substitution of section 102) are to be disposed of as if section 5 has not come into force. The word "admitted" is not used in the CPC. In O XLI under the heading "Procedure on admission of appeal", rule 9 onwards up to rule 37, are given.[1203]

Though under rule 11 word "admit" is not used but when this rule is seen with section 100 and O XLII of CPC, the position becomes clear.[1204] To appreciate section 100(4), it is necessary to read O XLII, rule 2 of the CPC.[1205]

A bare reading of section 16 (2)(a) of the CPC (Amendment) Act, 2002 (Act 22 of 2002) would show that the provision saves such appeals from the bar created by section 102 of the Code wherein the subject matter of the suit for recovery of money is not more than Rs 25,000/- only if such appeals have been admitted before the effective date of the amendment. Thus, appeals not yet admitted but listed for admission would not be saved from the bar.[1206]

The Amendment introduced in 2002 is not retrospective in operation and therefore would not be applicable to appeals pending on 1 July 2002. Thus, where a second appeal for a sum of Rs 10,000/- was pending since 1994, its maintainability would not be affected by the amendment.[1207]

[s 102.6] This Section bars appeal in money suits only

What is postulated by the section is that subject-matter of the original suit should be one for recovery of money. In such cases alone, the bar applies. If the suit is one for injunction, coupled with a claim for recovery of articles as well as for recouping loss suffered, the bar under section 102 is not attracted.[1208] Section creates an absolute bar that no second appeal will lie in the cases dealing with execution of money decree not extending the amount of Rs. 25000.[1209]

[s 102.7] Suits cognizable by Courts of Small Causes

Whether a suit is or is not cognizable by a court of small causes, is to be determined in the light of the provisions of the Provincial Small Cause Courts 1887 (see sections 15, 16 and 27).

1203. *Food Corp of India v Munnilal*, AIR 2003 MP 66.
1204. *Food Corp of India v Munnilal*, AIR 2003 MP 66.
1205. *Food Corp of India v Munnilal*, AIR 2003 MP 66.
1206. *Pratap Singh v Smt Satya Devi*, AIR 2005 HP 37 : (2005) 2 Shim LC 31.
1207. *Western Coalfields Ltd v Pradeep Kumar Soni*, AIR 2009 (NOC) 2009 (MP).
1208. *Koderi Valappil Nabeessa v Acheriyathu Abdul Majeed*, AIR 2006 Ker 381.
1209. *Boramma v BV Krishnaiah*.

If a suit is of the nature cognizable by a small cause court, and the value of the subject-matter of the suit does not exceed Rs 500, now Rs 25,000, no second appeal will lie, though the suit has not been tried in a small cause court, or though the small cause court returns the plaint under section 23 of the said Act to be presented to another court on the ground that it involves a question of title and is not, therefore, cognizable by that court. The reason is that it is the nature of the suit, and not the court in which it is tried, that determines the right of appeal.[1210] The words "any suit of the nature cognizable by courts of small causes" mean any suit relating to a subject-matter over which a court of small causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction.[1211] In determining whether a second appeal lies under this section, the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the court.[1212] Regard should not be had to the mode of trial of the suit. Thus, a suit which is cognizable by a court of small causes is nonetheless so because instead of being tried under the summary procedure it has been tried in the ordinary manner.[1213] In applying this section it makes no difference that the decree sought to be appealed from was passed by the lower appellate court in review.[1214] In a particular case, suit cognizable by a small cause court was decreed by a first class subordinate judge in his small cause court jurisdiction and it was transferred for execution against immovable property to his regular jurisdiction. The order passed on an objection to attachment was appealable to the district judge by virtue of the provisions of section 42 above, as execution was in the regular jurisdiction, but no second appeal lay as the suit was of the nature cognizable by a court of small causes.[1215] When a claim is partly within the jurisdiction of the regular court and partly within the jurisdiction of small cause courts, the plaintiff is entitled to consolidate both and file a suit in the regular court.[1216] Whether a second appeal lies under the section must be decided with reference to the nature of the suit as originally brought, and not to the valuation in the appeal.[1217]

It has been held by the Chhattisgarh High Court that it is the nature of the suit as disclosed in the plaint which is the determining factor for the application of section 102 of the Code. Merely because the pecuniary jurisdiction of small causes court having been curtailed, the nature of the suit remains one triable by a small cause court. Therefore, a suit for the recovery of Rs 2000/- is not excepted in the second schedule of the Provincial Small Causes Courts Act, 1887.[1218] It is the character of the suit as originally framed and presented which

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1210. *Kalian v Kalian*, (1885) 9 Bom 259; *Mahadoo v Budhai Ram*, (1904) 26 All 358; *Sada v Brij Mohan*, (1898) 20 All 480; *Lala Kandha v Lala Lal*, (1898) 25 Cal 872; *Kali v Izzatannissa*, (1897) 24 Cal 557; *Amamalai v Subramanyan*, (1892) 15 Mad 298; *Muttu Karuppan v Sellan*, (1892) 15 Mad 298; *Ramkrishna v President of the Vengurla Municipality*, (1917) 41 Bom 367; *Mohini v Sankar Das*, AIR 1924 Cal 487 : (1924) 398 Cal LJ 532; *Santosh Singh v Jageswar Chapole*, AIR 1954 VP 16; *Rajbai v Meghji Manshi*, AIR 1954 Kutch 28; *Gilani v Pateshwari*, AIR 1956 P&H 233; *Digambar Parshwanath Jain Mandir v Valubai*, AIR 1961 Bom 221 : 63 Bom LR 58; *Veena Padda Kasireddy v Yeruva Rami Reddy*, AIR 1995 AP 332.
1211. *Soundaram v Sennia*, (1900) 23 Mad 547.
1212. *Lakshmandas v Anna*, (1908) 32 Bom 356; *Sankar v Shriniwas*, AIR 1935 Bom 254 : (1935) 37 Bom LR 335.
1213. *Balwant Rao v Biswanath Missir*, AIR 1945 Pat 417 : (1945) 24 Pat 307; *Indra Chandra v Sarish Chandra*, (1913) 40 Cal 537; *Shankarbhai v Somabhai*, (1901) 25 Bom 417; *Abdeali Ali Mohomed v Fida Hussain Abdul Karim*, AIR 1957 MB 122; *BP Gautam v RK Agarwal*, AIR 1977 All 103.
1214. *Kanshi Ram v Karan Narain*, AIR 1921 Lah 124 : (1921) 3 Lah LJ 166.
1215. *Maria Ursula v Pana*, AIR 1928 Bom 534 : (1928) 30 Bom LR 1447.
1216. *Satischandra v Panchumani*, AIR 1952 Cal 195; *Ramasami Aiyar v Govindar Aiyar*, AIR 1917 Mad 128; *Bharadhwaja v Arunachala*, AIR 1918 Mad 366.
1217. *B Sreeramulu v K Venkateswar Rao*, AIR 1959 AP 92 : (1958) ILR AP 836 : (1959) Andh WR 148.
1218. *Ashok Kumar v Sant Singh*, AIR 2008 Chhat 44.

would determine the nature of the subject-matter of the original suit within the meaning of section 102 of the Code.[1219]

[s 102.8] Suit for mesne profits

Section 15 of the Provincial Small Cause Courts Act, 1887 gives jurisdiction to courts of small causes to take cognizance of all suits of a civil nature of which the value does not exceed that specified in that section except such suits as are set out in the second schedule to that Act. The said schedule consists of several articles of which Article 31 is the most important for the purposes of the present section. That article excludes from the jurisdiction of small causes courts "any other suit for an account including ... a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant." This article contemplates cases in which the plaintiff claims an account of moneys which the defendant has received. The plaintiff is entitled to such an account as the moneys received belonged to him. It has been held by a majority of the Full Bench of the Calcutta High Court that a suit for mesne profits does not fall under this article, in other words, it is cognizable by small cause courts. Such a suit is not a suit "for the profits of immovable properties belonging to the plaintiff which have been wrongfully received by the defendant." A suit for mesne profits is a suit for damages in which the defendant is liable even if no profits have been actually received by him during the period of dispossessions as defined in sub-section 12 of section 2 of the CPC, mesne profits are profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom.[1220]

On the other hand, it has been held by a Full Bench of the Madras High Court,[1221] that a suit for mesne profits does come within Article 31 of the said Act, and is, therefore, not cognizable by a small cause court.

Bombay decisions are difficult to reconcile but the general effect of them is that a suit for mesne profits is a "suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant" within the meaning of Article 31,[1222] but, that it does not come within the said article if the amount claimed is an ascertained sum so that no account has to be taken.[1223]

[s 102.9] Suit for rent

A suit for the rent of agricultural land is excepted from the jurisdiction of a small causes court unless expressly invested with such jurisdiction by the local government. If the court is so invested, it exercises the jurisdiction not as a small causes court but because of its special jurisdiction. The section, therefore, does not apply and a second appeal lies.[1224] But the contrary view has been taken in the undermentioned cases.[1225]

1219. *P Ram Reddy v Jatling Rajeshwar Rao*, 2008 (1) Andh LD 46.
1220. *Kunjo Behary Singh v Madhub Chundra*, (1896) 23 Cal 884.
1221. *Savarimuthu v Aithurusu*, (1902) 25 Mad 103.
1222. *Antone v Mahadev*, (1901) 25 Bom 85.
1223. *Girjabai v Raghunath*, (1906) 30 Bom 147; *Vinayak v Krishnarao*, (1901) 25 Bom 625: as explained in *Vasudev v Damodar*, (1904) 6 Bom LR 370.
1224. *Maung Po Kyun v Ma Shue*, AIR 1935 Rang 386 (FB) : (1935) 13 Rang 633; overruling *Ma Pon v Maung Ne U*, AIR 1926 Rang 19 : (1925) Rang 390; *Sahadara v Nabin*, (1915) 42 Cal 638; *Balwant Rao v Biswanath Missir*, AIR 1945 Pat 417 : (1945) 24 Pat 307.
1225. *Soundaram v Sennia*, (1900) 23 Mad 547 (FB); *Ramkrishna v The President, Vingurla Municipality*, (1916) 41 Bom 367; *Shankar v Shriniwas*, AIR 1935 Bom 254 : (1935) 37 Bom LR 355.

[s 102.10] Suit for title

A small causes court has no jurisdiction to entertain a suit for title relating to immovable property. However, a suit, which is otherwise cognizable by a small cause court does not cease to be so merely because it incidentally involves a question of title.[1226]

[s 102.11] Suit for declaration

A small cause court has no jurisdiction to entertain a suit for a declaratory decree. However, the mere fact, that there is a prayer for a declaration will not prevent a suit from being cognizable by a small cause court, if the other reliefs claimed in the suit could be obtained without asking for a declaration.[1227]

[s 102.12] Suit to enforce a call

Under section 457 of the Companies Act, 1956 no claim founded on the liability of a contributory is cognizable by a small causes court. A second appeal, therefore, lies in a suit against a shareholder to enforce a call for unpaid capital even though the claim is less than Rs 500.[1228]

[s 102.13] Execution

The expression "suit" in this section includes execution proceedings,[1229] from which it follows that if a suit is cognizable by a small causes court, no second appeal will lie from an order made in execution of the decree passed in the suit unless the value of the suit exceeds Rs 500, (now Rs 25,000). It is immaterial that the order in execution is made by a court other than a small causes court or a court vested with the powers of a small causes court, as where the property attached in execution of the decree is immovable property and the order in execution is made by a first class subordinate judge in his ordinary jurisdiction. The test lies in determining the nature of the suit in which the decree is sought to be executed was passed, and not the nature of the proceedings in execution.[1230] It is also immaterial that the amount sought to be recovered in execution exceeds Rs 500, (now Rs 25,000). For the test is not the amount claimed in execution proceedings but the amount of the subject-matter of the suit.[1231] An order of remand made by an appellate court in an appeal from an order of the court executing a decree in a suit cognizable by a small causes court is also not appealable.[1232]

Where the plaintiff decree-holder applied under O XXI, rule 71, to recover Rs 360 which was the deficiency of price from a defaulting purchaser, and both the lower courts disallowed the plaintiff's claim, it was held that no second appeal lay to the high court. The reason given being that but for the provisions of rule 71, a suit would have to be filed for that amount, in

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1226. *Vinayak v Krishnarao*, (1901) 25 Bom 625; *Kesrisang v Naransang*, (1908) 32 Bom 560.
1227. *Ramachendraiyar v Noorulla Sahib*, (1907) 30 Mad 101.
1228. *Pabna Dhanabhandar Co v Foryezuddin*, AIR 1932 Cal 716 : (1932) 59 Cal 1186.
1229. *Goraachand v Baykanto*, (1874) 12 Beng LR 261 (FB); *Din Dayal v Patrakhan*, (1896) 18 All 481; *Aithala v Subbanna*, (1889) 12 Mad 116; *Muthukaruppa v Paiya*, AIR 1924 Mad 32 : (1923) 45 Mad LJ 210; *Shyama v Debendra*, (1900) 27 Cal 484.
1230. *Janki Sahu Trust v Ram Palat*, AIR 1950 All 550; *Narayan v Nagindas*, (1906) 30 Bom 113.
1231. *Mavula Ammal v Mavula Maracoir*, (1907) 30 Mad 212; *Bullov Bhattacharji v Baburam*, (1885) 11 Cal 169; *Mohna Mal v Tulsi Ram*, AIR 1922 Lah 200 : (1922) 3 Lah 141.
1232. *Amba Prasad v Mushaq*, AIR 1921 All 55 : (1920) 42 All 200; *Veerarayan v Ayyakutti*, AIR 1925 Mad 742 : (1925) 48 Mad LJ 499.

which case it would have been a small causes court suit, and the application, therefore, must be treated as one made in execution of a small causes court decree.[1233]

[s 102.14] Conversion of second appeal into revision—permissibility

To appreciate plea of permission to convert the appeal into civil revision, it is necessary to consider the relevant provisions for necessary contents in memorandum of second appeal and memo of revision. As per sub-rule (2) of rule 1 of O XLI, memorandum of appeal shall set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively. In second appeal, memorandum of appeal shall concisely set forth substantial question of law involved in appeal. In the aforesaid circumstances, the contents for memorandum of appeal in second appeal are based on different requirements, while the memorandum of revision has to contend the facts of the case and specific averments that the court either have exercised jurisdiction not vested in it by law or have failed to exercise a jurisdiction so vested, or have acted in the exercise of its jurisdiction illegally or with material irregularity, without such averments in memo of revision it will be incomplete, and the revisional court may not entertain a revision. In the circumstances, memo of appeal and memo of revision are based on different requirements. In the circumstances, memo of appeal cannot be treated as a memo of revision. Similar is the position under O XLI, rule 3 of the CPC. If the memorandum of appeal is not drawn up in the manner prescribed under rule 1 of O XLI, CPC, it shall be rejected or returned to the appellant for the purpose of being amended within a time to be fixed by the court or be amended then and there. In the circumstances, it will not be just and proper to convert the memorandum of appeal into revision. However, appellants who had filed appeal much before of the amendment in section 102, CPC, can be permitted to withdraw this appeal with liberty to file a revision or other proceeding as they choose in accordance with law. If the appellants find that the order is revisable as per section 115, CPC, they may file such a revision before the court by taking all the grounds as required for revision, by drafting appropriate memorandum of revision within a period specified. In the abovesaid peculiar circumstances their revision will not be dismissed on the ground of limitation and will be heard and decided in accordance with law. But the appeal cannot be permitted to convert into civil revision.[1234]

In the Code of Civil Procedure (Amendment) Act, 2002 there is no such provision directing refund of court-fee. Even in the Code of Civil Procedure (Amendment) Act, 1999, section 34 inserted a new section 16 in the Court Fees Act, 1870, in which the refund of court-fee is provided only in case the court refers the parties to the suit to any one of the mode of settlement of dispute referred to in section 89 of the CPC the plaintiff shall be entitled to a certificate from the court authorising him to receive back from the Collector, the full amount of the fee paid in respect of such plaint, but no such provision has been made when the appeal is held to be not maintainable. In the circumstances, the provision of Court Fees Act, 1870 can be seen. The refund of court-fee is envisaged in sections 13, 14 and 15 of the Court Fees Act, 1870. Under section 13 of this Act, the refund of court fees of memorandum of appeal can be ordered in the circumstances when an appeal or plaint, which has been rejected by the lower court on any of the grounds mentioned in the CPC, is ordered to be received or if a suit is remanded in appeal, on any of the grounds mentioned in section 35 (now O XLI, rule 23 of the Code) of the same Code, for a second decision

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1233. *Rajacharya v Chemanna*, AIR 1921 Bom 229 : (1921) 45 Bom 223.
1234. *Food Corp of India v Munnilal*, AIR 2003 MP 66.

by the lower Court, the appellate court is authorised to grant the appellant a certificate for refund. Section 14 provides refund of court-fee on application for review of judgment and section 15 provides for refund of court-fee where the court reverses or modifies its former decision on the ground of mistake. But the right of appeal which was available prior to 1 June 2002 has been taken away by the Code of Civil Procedure (Amendment) Act, 2002 without making any such provision of refund of court-fee. In the circumstances, prayer made by for refund of court-fee cannot be accepted.[1235]

[s 102.15] State Amendments

By the Uttar Pradesh Act 24 of 1954, the words "Rs 2,000" were substituted for the words "Rs 500." It has been held that this amendment is not affected by the subsequent amendment made by the Central Civil Procedure Code Amendment Act 66 of 1956, and that no second appeal lies, if the valuation of the suit did not exceed Rs 2,000.[1236] The state amendment has no relevance now in view of the value having been enhanced by the new amendment.

[1237][**[S 103] Power of High Court to determine issue of fact.**—In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Court by reason of a decision on such question of law as is referred to in section 100.]

SYNOPSIS

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[s 103.1] Changes in the section

The changes are best seen by setting out here the section as it stood before its amendment.

In any second appeal, the high court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100.

The following judgment may be looked in to determine the position prior to amendment.[1238]

1235. *Food Corp of India v Munnilal*, AIR 2003 MP 66.
1236. *Shri Ram v Gauri Shankar*, AIR 1961 All 320 : (1961) All LJ 4.
1237. Substituted by CPC (Amendment) Act 104 of 1976, section 40, for section 103 (w.e.f. 1-2-1977).
1238. *Ram Das v Gandia Bai*, (1993) 1 SCC 74.

[s 103.2] Scope of the section

Under this section, before its amendment in 1976, the high court in second appeal had the power to determine issues of fact (1) where such issues had not been determined by the lower appellate court; or (2) where they had been wrongly determined by that court provided the evidence on record was sufficient to enable the high court to determine such issues. The expression "wrongly determined" meant wrongly determined by reason of any illegality, omission, error or defect in procedure. If the evidence on record was not sufficient, the proper course was to refer such issues for trial under O XLI, rule 25. In view of the restrictions placed on the power of the high court in second appeals by the new section 100, this section has been correspondingly altered and restructured, so as to formulate it in two clauses, i.e., (a) and (b). The words "of fact" after the words "any issue" in the main part of the section are dropped, though the marginal note of the section still retains the words "issue of fact." The fact that the section itself has dropped the words "of fact" and simply speaks of "any issue" indicates that the words "any issue" mean any issue of fact or of law. The jurisdiction of the high court to decide a question of fact not determined by the lower appellate court is confined to evidence on record which is sufficient to determine such question of fact necessary for disposal of the appeal. It does not extend to the appreciation of additional evidence being led before it—a function which is more appropriately performed by the lower courts.[1239]

Section 103, authorises the high court to determine any issue which is necessary for the disposal of the appeal provided the evidence on it is sufficient, in any of the following two situations (1) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court, or (2) when both the trial court as well as the lower appellate court have wrongly determined issue on a substantial question of law which can properly be the subject matter of second appeal under section 100 of Code of Civil Procedure, 1908 (CPC).[1240]

A bare perusal of section 103 of CPC makes it clear that this section appears to be proviso and Explanation to section 100 of CPC and empowers the high court to determine any issue on two contingencies:

(i) when determination of such issue is necessary for the disposal of the appeal and the evidence on record is sufficient and yet it has not been decided by the trial Court or by the lower appellate courts; or

(ii) when an issue has been wrongly determined either by the trial Court or by the lower appellate court or by both the Courts by reason of a decision on substantial question of law.[1241]

If, in a case, on the issues on account of its erroneous approach the first appellate court did not determine the relevant issues, the high court was well within its jurisdiction in recording the afore-mentioned findings of fact for which the evidence was on record as section 103 of the CPC empowered the high court to determine such issues of fact.[1242]

Where a finding is based on misappreciation of oral and documentary evidence on record, it is not binding in second appeal. For example, a plaintiff asserted customary right of irrigation but the lower appellate court failed to appreciate the principles regarding such a

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1239. *Balai Chandra v Shewdhari Jadav*, AIR 1978 SC 1062 : (1978) 2 SCC 559.
1240. *Jadu Gopal Chakravarty v Pannalal Bhow*, AIR 1978 SC 1329 : (1978) 3 SCC 215.
1241. *Amar Bahadur Singh v Devendra Singh*, AIR 2007 MP 262 : (2008) 2 JLJ 327.
1242. *Leela Soni v Rajesh Goyal*, AIR 2001 SC 3601 : (2001) 7 SCC 494.

right and hence, could not consider evidence on record in the correct background. The case was remanded.[1243]

A suit was filed for injunction against the defendant by three plaintiffs. The dispute was regarding the land title. The court found plaintiff no 1 in possession of the land, but in view of amendment of plaint in suit for injunction, plaintiff no 1 was found to be an agent of plaintiff no 3. It was held that there was no error of law. The jurisdiction of the high court could not be exercised in second appeal.[1244]

A high court cannot set aside a finding of the first appellate court, as to limitation, where questions of fact are involved in second appeal.[1245]

A finding of partition based on detailed consideration of legal evidence on record cannot be altered in second appeal. The high court cannot reappraise the evidence and substitute its own conclusion on a fact in lieu of that reached by the trial court and the first appellate court.[1246]

For instance, a suit for declaration of title was dismissed by the trial court but decreed by the first appellate court, which, in doing so, ignored material evidence. The findings of fact so arrived at, were not considered binding in second appeal.[1247] In another case, the findings of the lower court were that the landlord, who was a foreigner, intended to come back to India and settle in Calcutta, but was not in a position to do so for want of accommodation and would reasonably require the suit premises for such accommodation. These were findings of fact. They were not shown to be based on no evidence or to be palpably unreasonable. Hence, they could not be interfered with under section 110.[1248]

A plea of part performance can be taken for the first time in first appeal, provided the sufficient and necessary facts have been placed on the basis of which plea of part performance could be legitimately raised.[1249] For instance, a delay in filing an appeal by a railway board cannot be excused merely on the ground that it had to defend too many suits. In any case, it does not stand in a privileged position in regard to limitation.[1250]

Where the plaintiff claims a declaration of his right to the trees under dispute, the burden is not wholly the plaintiff's to prove, as a primary fact crucial to the claim, that he had sown and grown the trees and he had, therefore, right to the trees. The concurrent findings of the courts below that the plaintiff had failed to prove that he had sown and grown the trees entitling him to a right therein, would be final and conclusive. The high court cannot in such a case, interfere with the findings in second appeal.[1251]

A certified copy of the sale deed was admitted by the trial court, as the original had been lost. It was held that there was no reasonable ground to assail the admissibility of the document in appeal.[1252]

A question that the first appellate court was not competent to entertain an appeal against an order of the trial court dismissing a suit for default is a question of law. It goes to the root

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1243. *Bibi Tahzibunnisa v Dr Syed Aziz Rahman*, AIR 1980 Pat 89.
1244. *Kishnalal Biharilal Maheshwari v Ram Rao Humumant Rao Patil*, AIR 1981 SC 1183.
1245. *Daudh Nath Pandey v Suresh Chandra Bhatt*, AIR 1986 SC 1509 : (1986) 3 SCC 360.
1246. *E Mahboob Saheb v N Sabbarayan Chowdhry*, (1982) 1 SCC 180.
1247. *State v Subimal Kumar*, AIR 1982 Cal 251.
1248. *AK Mukherji v Prodip Ranjan Sarbadhikary*, AIR 1988 Cal 259.
1249. *Shesh Mal v Harak Chand*, AIR 1983 Raj 109.
1250. *Chiranjib Prasad Roy v UOI*, AIR 1983 Cal 21.
1251. *Sukh Lal v Ram Kali*, AIR 1988 MP 318.
1252. *Ram Chandra v Hambari*, AIR 1989 Ori 27.

of the case. It can be disposed of on the materials on record. The second appellate court cannot be debarred from entertaining it.[1253]

The finding of a court that the money was advanced as loan is a finding on question of fact. The high court cannot interfere with it in the second appeal when it was not vitiated by any error of law. A high court cannot re-appreciate the evidence and find out what is the weight of evidence on a particular point.[1254]

Under section 103, the high court in a second appeal can determine: (a) issues which have not been determined by the lower appellate court; or (b) issues not determined both, by the court of first instance and the lower appellate court. This can be done, only when there is sufficient evidence on record for the purpose of pronouncing a judgment.[1255]

As the section empowers the high court to decide an issue of fact where it has not been determined by the lower courts,[1256] it is inconceivable that the high court would not have the power to determine an issue of law which has been left undetermined by the lower appellate court or by both the lower appellate courts and the court of first instance. Since interference by the high court in second appeals is now restricted to questions which are substantial questions of law under the amended section 100, the latter part of this section has been correspondingly altered and the words "by reason of any illegality, omission, error or defect" in procedure are omitted. No question would henceforth arise on the ground of any issue having been wrongly determined by reason of any illegality or defect or omission in procedure. The decision in such cases of the lower appellate court is made final even if it has been determined in a manner contrary to the procedure. This is so because under the new clause (b), a wrong determination can be challenged in second appeal, provided it is a decision on such question of law as is referred to in the amended section 100.

The high court is certainly entitled to go into the question as to whether the findings of the facts recorded by the first appellate court, which was the final court of facts, were vitiated in the eyes of law on account of non-consideration of admissible evidence of vital nature. It may do so after setting aside the findings of facts on the ground that the court had either to remand the matter to the first appellate court for a re-hearing of the first appeal and decision in accordance with law after taking into consideration the entire relevant evidence on the record, or it may in the alternative, decide the case finally in accordance with the provisions of section 103 (b) of the CPC.[1257]

[s 103.3] This Section and Section 102

For the purpose of section 102 the nature of the suit matters. The fact that it was tried on the regular side is immaterial.[1258] Section 103 is attracted only if a specific issue is raised, there is sufficient evidence on record thereon and that issue remains undecided (or is wrongly decided) by the trial or lower appellate court. When, in a case of injunction, alleging interference by the defendant with the plaintiff's possession of suit property, though there is evidence of commission, omission etc. of the defendant, there is no specific issue framed in view of the

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1253. *Suprintendent of Police, Cachar v Abdul Rashid*, AIR 1980 Gau 8.
1254. *Kartey Singh v Iftikhar Ahmad*, AIR 1981 All 386.
1255. *Kewal Krishan v JK Stone & Co (India) Pvt Ltd*, AIR 1981 Del 199.
1256. *Jadu Gopal v Pannalal*, AIR 1978 SC 1329 : (1978) 3 SCC 215.
1257. *Bhagwan Sharma v Bani Ghosh*, (1993) Supp 3 SCC 497.
1258. *Shah Vardhilal Amritlal v Bhuralal*, AIR 1987 Guj 50.

defendant's commitment of leaving no intention of such interference. Therefore, there is no question of the high court deciding the issue in terms of section 103.[1259]

[s 103.4] Waiver and estoppel

Although the expression "waiver" is freely and frequently used in the field of law, the principle governing it is often misunderstood and the term is confused with "estoppel". Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right whereas estoppel is a rule of evidence. An objection to jurisdiction cannot be waived.[1260]

[s 103.5] Matter should be examined as a whole

Injustum est nisi tota lege inspecta, de una aliqua ejus particula proposita judicare vel respondere. It is unjust to decide or respond to any particular part of a law without examining the whole of it.[1261] This may be further explained by the maxim.

Festinatio justitiae est noverea informateeni which means hasty justice is the stepmother of misfortune. Before reversing a finding of fact of the trial court, the first appellate court must consider all the reasons given by the trial court for coming to a different conclusion.[1262]

[s 103.6] Change in law

A change in the law has to be taken into account while an appeal is pending. If the new law, by its express language or clear intendment, takes in even pending matters, the trial court as well as appellate court may give effect to such a law, even after the judgement of the court of first instance.[1263] Although a high court can take notice of changes in the law, the right obtained by a party under decree should not be allowed to be defeated by delay, if it is possible to save the decree by moulding it to conform to the statutes subsequently coming into play.[1264] Where the high court does not examine the facts of the case in light of the laws prevailing at the time of the sales, such a matter can be interfered with under section 103 of the CPC.

[s 103.7] Determining question of fact

In second appeal by landlord, the high court modified the judgment of the first appellate court confirming the judgment and decree of the trial court and decreed the suit of the landlord for eviction of the tenant from the suit accommodation in view of findings that averments made in the application made by the landlord under section 13(6) of the Act remained unrebutted and uncontroverted and recorded the finding that the rent remained unpaid during the pendency of the appeal. As on both the issues relating to clauses (a) and (o),[1265] on account of its erroneous approach, the first appellate court did not determine the relevant issues, the high court, in second appeal, was well within its jurisdiction in recording

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1259. *RG Janthakal v Bharat Parikh & Co*, AIR 1981 Kant 208.
1260. *Ganesh Ram v Ramlal*, AIR 1981 Pat 36 (FB).
1261. *Mithlesh Kumari v Fateh Bahadur Singh*, (1991) 2 SCC 236.
1262. *Jibunnissa v Abdul Ghafoor*, AIR 1984 Pat 257.
1263. *Lakshmi Narayan Guin v Niranjan Modak*, AIR 1985 SC 111 : (1985) 1 SCC 270.
1264. *Bai Daosbai v Mathuradas*, AIR 1980 SC 1332.
1265. Sub-section (1) of section 12 of Madhya Pradesh Accomodation Control Act, 1961.

the afore-mentioned findings of fact for which the evidence was on record as section 103 of the CPC empowers the high court to determine such issues of fact.[1266]

In an appeal filed against the decision of learned district judge remanding back the matter to the trial court for fresh consideration on the basis of material evidence present on record. The trial court has passed the decree of ejectment in favour of the respondent. The high court held that there is no need to interfere with the decree of ejectment passed by the trial court and there is no need for fresh consideration. Ownership of the plaintiff was admitted and the defendant was aware about that and the defendant was licensee of the property and thus the impugned judgment suffers from illegality and devoid of merit. Thus, set aside and that of trial court is restored.[1267]

In a suit for declaration filed by the plaintiff, it was claimed that the plaintiff was senior to defendants and that the promotion of defendants was illegal. The defendant-corporation took the plea that promotion was as per merit-cum-seniority basis. The issue as to mode/manner of promotion was not framed in the suit at any stage and the question, though vital for the determination of the controversy, was not decided even in second appeal. Under these circumstances, the Supreme Court remanded the matter to the high court to re-hear the matter and decide the aforesaid question.[1268] Laying emphasis on the importance of the mode of promotion, AK Ganguly, J speaking for the Bench observed as follows:

> **8.** The Court is of the opinion that the principle of Merit-cum-Seniority and that of Seniority-cum-Merit are two totally different principles. The principle of Merit-cum-Seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. However, seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted. On the other hand, insofar as the principle of seniority-cum-merit is concerned it gives greater importance to seniority and promotion to a senior person cannot be denied unless the person concerned is found totally unfit on merit to discharge the duties of the higher post. The totality of the service of the employee has to be considered for promotion on the basis of Seniority-cum-Merit.[1269]

Section 103 deals with the power of the high court to determine issues of fact. A suit was filed for specific performance of an agreement of reconveyance of land. There was non-incorporation of "readiness and willingness" clause in the pleadings as required by law and the entire consideration for reconveyance was deposited by the plaintiff in court on the date of suit. An amendment to incorporate such a clause in the plaint was allowed on consent of parties. No objection was taken, in the memorandum of appeal, that the defendant's advocate had not given consent. The first appellate court set aside the order allowing amendment. A second appeal was filed which succeeded. The decree passed by the lower appellate court was set aside and the decree for specific performance passed by the trial court was restored by the high court.[1270]

[s 103.8] Core issue

The main issue around which the entire case evolves is "whether the agreement dated 5 July 1976 was a license or a tenancy". This issue was there before the trial court and the

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1266. *Leela Soni v Rajesh Goyal*, AIR 2001 SC 3601 : 2001 AIR SCW 3404 : (2001) 7 SCC 494.
1267. *Rina Dey v S Jagannath Rao*; see also, *Annasaheb Venkatrao Desai v Raghavendara Ramachan*, RSA No. 100196 of 2016 (SP), decided on 18 December 2020 (Karnataka HC); *Kasturevva v Shankrappa*, RSA No 5285/2012 (DEC1 & INJ), decided on 20 November 2020 (Karnataka HC); *Kesar Pralha Pali v Ramesh Chaitram Newa*, Second Appeal No. 463 of 2017, decided on 5 March 2020 (Bombay HC).
1268. *Haryana State Electronics Development Corp Ltd v Seema Sharma*, AIR 2009 SC 2592 : (2009) 7 SCC 311.
1269. *Haryana State Electronics Development Corp Ltd v Seema Sharma*, AIR 2009 SC 2592, para 8 at p 2593 : (2009) 7 SCC 311.
1270. *Dagadau v Vasant*, AIR 1988 Bom 22.

agreement was held to be a license. It was there also before the lower appellate court but it was not adjudicated upon. When the core issue is not adjudicated upon, it results in a substantial question of law under section 100, CPC.[1271]

Although the core issue of tenancy arose before the first appellate court the same was not adjudicated upon and in the circumstances, the high court was right in invoking section 103, CPC.[1272] In the case of *Santosh Hazari v Purushottam Tiwari*,[1273] it has been held that whether a question of law is a substantial question of law in a case will depend on facts and circumstances of each case, the paramount consideration being the need to strike a balance between obligation to do justice and necessity to avoid prolongation of any dispute. In that matter, the Supreme Court found that an important issue had arisen for determination before the first appellate court whether dependent had made out the case of adverse possession and whether the suit filed by the plaintiff was liable to be dismissed as barred by time under Article 65 of the Limitation Act, 1963, which issue was decided by a cryptic order passed by the first appellate court, and in the circumstances, the Supreme Court took the view that failure to decide the core issue gives rise to a substantial question of law.

[s 103.9] Concurrent findings

Concurrent findings recorded by the trial court and the first appellate court cannot be interfered with in second appeal by wrongly attributing perversity to the findings where the findings are amply supported by reasons.[1274] Where the attitude of lower courts about the non-existence of tenancy is not found to be perverse, the high court cannot set aside the finding in second appeal.[1275]

In a concurrent finding of fact, whereas recorded on the basis of the commissioner's plan and report that water from a stream was not diverted into the well, it was held that being a concurrent finding, it would not be interfered with in the second appeal.[1276]

It has been reiterated that interference in second appeal is not permissible unless such findings are based on no evidence or are perverse where there are concurrent findings of the courts below on a pure question of fact.[1277]

A concurrent finding of fact based on a discussion of evidence that there was no unity of title and possession in favour of the plaintiff cannot be disturbed in second appeal.[1278] Similarly, a finding of the trial court that the tenant had not tendered the rent and, therefore, there was a consequent default for the purpose of Bihar Rent Act, 1947 cannot be re-opened in second appeal.[1279] Finding of the lower court that the marriage had broken down irretrievably and should be dissolved under section 2(ix) of the Dissolution of Muslim Marriages Act, 1939 cannot be also interfered with in second appeal.[1280]

1271. *Achintya Kumar Saha v Nance Printers*, AIR 2004 SC 1591 : (2004) 12 SCC 368 : (2004) 2 SCR 28.
1272. *Achintya Kumar Saha v Nance Printers*, AIR 2004 SC 1591 : (2004) 12 SCC 368 : (2004) 2 SCR 28.
1273. *Santosh Hazari v Purushottam Tiwari*, AIR 2001 SC 965.
1274. *Bhairab Chandra v Randhir Chandra*, (1988) 1 SCC 383; *Ram Singh v Ajay Chawla*, (1988) 1 SCC 364; *Bholaram v Amir Chand*, AIR 1981 SC 1209 : (1981) 2 SCC 414.
1275. *Sachindra Nath v Santosh Kumar*, AIR 1987 SC 409 : (1986) 1 SCC 657 : (1986) JT 1115.
1276. *K Anantha Bhat v KM Ganapathy Bhatta*, AIR 1981 Ker 102.
1277. *Damodar Lal v Sohan Devi*, (2016) 3 SCC 78.
1278. *Janki Ram v Amir Chand Ram*, AIR 1984 Pat 191.
1279. *Gulab Chand v Budhwanti*, AIR 1985 Pat 327 (FB).
1280. *Mohammad Usman v Sainaba Umma*, AIR 1988 Ker 138.

[s 103.10] Non-examination of plaintiff

However, where the plaintiff was not examined and there was no cogent explanation for the non-examination, the matter will fall under section 103(b) of the CPC. Such a finding of fact which has been wrongly determined by both the courts below by reason of a decision on a question of law as is referred to in section 100, can definitely be looked into by the high court in exercise of its power under section 103 read with section 100 of the CPC.[1281]

[s 103.11] Plea for first time in second appeal

In a suit for eviction, the tenant did not controvert ending of tenancy month on the last day of the calendar month either in his reply to the notice or in the two courts below. It was held that the high court could not permit the tenant in the second appeal to challenge that basis and try the issue of fact itself.[1282]

The question of legal necessity is purely a question of fact. Where specific grounds affecting the validity of a sale have been pleaded at the stage of trial, but the absence of legal necessity has not been pleaded, the parties cannot raise a stand on the question of legal necessity for the first time in appeal. The appellate court cannot allow such a plea to be raised before it for the first time without the same having been advanced in the pleadings.[1283]

[s 103.12] Reopening of Issue

In a suit for specific performance of a contract of sale, the trial court found that possession had not been delivered. However, the lower appellate court wrongly assumed that the trial court had found that the possession had been delivered. It was held that the high court in second appeal could reopen the issue as the decision of the first appellate court was obviously wrong.[1284]

[s 103.13] Bhumiswami

In a particular case the finding of the appellate court that the suit land was mortgaged by the defendant was not based on evidence, as it was the plaintiff who was recorded as *"Bhumiswami"* in respect of the land and the defendant was never recorded as *Bhumiswami* in relation to it. Secondly, as regards findings of adverse possession of defendants for more than 12 years, no material was pointed out to show that the defendant was in adverse possession. It was held that the findings could not be sustained in law.[1285]

[s 103.14] Executing Court

The question whether appellants were only liable to pay decretal amount was not considered to be subject matter of a suit under O XXI, rule 63 and it was not allowed to be raised in second appeal in that suit. The courts felt it should have been raised before the executing court.[1286]

1281. *Sri Adhir Kumar Dass v Juthika Sen*, AIR 1995 Cal 129.
1282. *Potoluri Subbareddi P Seshagirirao & Co v Kalabai Rathi*, AIR 1982 AP 186.
1283. *Kangalupadhan v Mishra*, AIR 1982 Ori 126.
1284. *Saheblal Rasulkhan v Nanubikasim Sahib*, AIR 1982 Bom 382.
1285. *Gulab Bai v Mancu*, AIR 1985 MP 138.
1286. *Dhan Singh v Baboo Ram*, AIR 1981 All 1.

Appeals from Orders

[S 104] Orders from which appeal lies.—(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—

[1287][***]

[1288][(*ff*) an order under section 35A;]

[1289][(*ffa*) and order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;]

(*g*) an order under section 95;

(*h*) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(*i*) any order made under rules from which an appeal is expressly allowed by rules:

[32][*Provided* that no appeal shall lie against any order specified in clause (*ff*) save on the ground that no order, or an order for the payment of a less amount, ought to have been made].

(2) No appeal shall lie from any order passed in appeal under this section.

SYNOPSIS

[s 104.1] Section to be read as a whole..... 1299
[s 104.2] Section 100, Section 104 and O XLIII, Rule 1 1300
[s 104.3] Appealable order 1300
[s 104.4] Special Statutes 1300
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[s 104.6] Clauses (a)—(f) 1301
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[s 104.1] Section to be read as a whole

Section 104 has to be read as a whole. Merely reading sub-clause (2) by ignoring the saving clause in sub-section (1) would lead to a conflict between the two sub-clauses. Read as a whole and on well-established principles of interpretation it is clear that sub-clause (2) can only apply to appeals not saved by sub-clause (1) of section 104. The finality provided by sub-clause (2) only attaches to orders passed in appeal under section 104, i.e., for those orders against which

1287. Clauses (a) to (f) omitted by Act 10 of 1940, section 49 and Sch III.
1288. Inserted by Act 9 of 1922, section 3.
1289. Inserted by Act 104 of 1976, section 41 (w.e.f. 1-2-1977).

an appeal under "any other law for the time being in force" is not permitted, section 104(2) would not thus bar a Letters Patent Appeal.[1290]

[s 104.2] Section 100, Section 104 and O XLIII, Rule 1

See matter under the same heading in section 100.

[s 104.3] Appealable order

This section and O XLIII, rule 1, contain a full list of appealable orders. The words, "save as otherwise expressly provided in the body of this Code or by any law for the time being in force", were added in 1908.[1291]

The right of appeal given under clauses (ff), (g) and (h) is independent of the one conferred by O XLIII, rule 1, under clause (i) and is not controlled by it.[1292] Order XLIII, rule 1 provides for an appeal from certain orders under the provisions of section 104, CPC. Thus, appeals under O XLIII, rule 1 are appeals under the provisions of section 104.[1293]

In a case relating to religious trust under section 92 of the Code permission to sell the property of the *Math* was sought which was accorded by the district judge. An appeal against the said order granting permission was filed before high court. The appeal was dismissed by the high court on the ground that the appellant had no *locus standi* as he was a stranger to the said application. It was held by the high court that the appellant was in-charge of another *Math* and as such cannot be said to be person who is not aggrieved.[1294]

[s 104.4] Special Statutes

By reason of section 104 of the CPC, the bar of appeal under a special statute is saved. A plain reading of section 104 would show that an appeal shall lie from an appealable order and no other order save as otherwise expressly provided in the body of this Code of or by any law for the time being in force. Section 104 of the CPC merely recognises appeals provided under special statute. It does not create a right of appeal as such. It does not, therefore, bar any further appeal also, if the same is provided for under any other Act, for the time being in force. Whenever the statute provides such a bar it is so expressly stated, as would appear from section 100A of the CPC.[1295]

Sub-section (2) of section 104 of the CPC provides that no appeal shall lie from any order passed in appeal under "this Section". This also shows that if appeal is provided for under any other law, section 104 of the CPC would have no application.[1296]

[s 104.5] From no other order

An order which amounts to a decree within section 2(2) does not fall within this section and is open to appeal under section 96. Thus, an order pronouncing abatement of a suit is a decree

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1290. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152 : (2004) 11 SCC 672.
1291. See notes below under the head "Letters Patent appeal".
1292. *Girjadhari v Sanwal Das*, AIR 1958 All 639; *Suresh Dutta v Randhir Singh*, AIR 1958 All 641.
1293. *Rameshwar Nath Sinha v Narsingh Sahai*, AIR 2002 All 113.
1294. *Swami Shankavanand v Mahant Sri Sadguru Sarnanand*, AIR 2008 SC 2763 : (2008) 14 SCC 642.
1295. *Subal Paul v Malina Paul*, AIR 2003 SC 1928.
1296. *Subal Paul v Malina Paul*, AIR 2003 SC 1928.

and is, therefore, appealable under section 96.[1297] However, where it is not a decree within section 2(2), no appeal lies against it except as provided in this section. The following orders have thus been held to be not appealable:

(i) an order under O I, rule 3, holding that the suit is bad for multifariousness and asking the plaintiff to elect;[1298]

(ii) an order holding that the court has jurisdiction to try the cause;[1299]

(iii) an order appointing a commissioner to ascertain mesne profits;[1300]

(iv) an order under O XXXVII, rule 3, granting, or refusing to grant, leave to defend;[1301]

(v) an order made in execution proceedings on objection raised by the judgment-debtor under O XXI, rule 90;[1302]

(vi) an order passed under section 151, since such an order is not included in the category of appealable orders;[1303]

(vii) an order disposing of a miscellaneous appeal.[1304]

(viii) Interlocutory order passed under O XXII, rule 10 in a revision, substituting party in execution proceedings.[1305]

(ix) Order declining to review the final order passed by single judge in writ proceedings.[1306]

(x) Order granting or rejecting injunction.[1307]

(xi) Interlocutory order in civil miscellaneous appeal under section 104 of the CPC.[1308]

[s 104.6] Clauses (a)—(f)

Clauses (a)–(f) have been annulled by the Arbitration Act, 1940 (Now repealed by the Arbitration & Conciliation Act, 1996). They were:

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order filing or refusing to file an agreement to refer to arbitration;

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(f) an order filing or refusing to file an award in an arbitration without the intervention of the court.

1297. *TK Amma v MKR Nair*, AIR 1965 Ker 303 : (1965) 1 Ker 178.
1298. *Ramkrishna Das v Bindeshwar Prasad*, AIR 1951 Pat 364.
1299. *Manash Ranjan Chakravatry v Tropical Accumulators Ltd*, AIR 1957 Cal 135 : 60 Cal WN 591.
1300. *Re Badrajala Naidu*, (1958) 1 Mad LJ 99.
1301. *Bunwarhal Roy v Sohan Lal Daga*, (1955) 1 Cal 299.
1302. *Uma Datt v RK Sardana*, AIR 1970 Del 56.
1303. *Nandal M v & Co v Gordhandas*, AIR 1965 Cal 547.
1304. *Kamta Prasad v Behari Lal*, AIR 1977 All 109.
1305. *Rameshwar Nath Sinha v Narsingh Sahai*, AIR 2002 All 113.
1306. *BF Pushpaleela Devi v State of Andhra Pradesh*, AIR 2002 AP 420 (FB).
1307. *Motilal Ramdev v Bhandari*, AIR 2002 CHG 6.
1308. *Sree Narayana Dharma Samajam v VP Mohandas*, AIR 2001 Ker 56.

[s 104.7] Clause (ff)

This clause was inserted in the section by Act 9 of 1922. (See the proviso to sub-section (1)).

[s 104.8] Clause (ffa)

This clause has been added in the section by the Amendment Act, 1976 to incorporate consequential changes in view of the amendments effected in sections 91 and 92.

[s 104.9] Clause (h)

An appeal lies from an order of arrest before judgment.[1309]

[s 104.10] Clause (i)

Section 104 of the CPC has to be read in juxtaposition with O XLIII of the Code. While section 104 provides for appeal from orders passed under the Code, rule 1 of the O XLIII enumerates those orders from which an appeal lies. Explaining the ambit of section 104 of the Code, a Full Bench of the Andhra Pradesh High Court observed as follows:

> 33. Section 104, on the other hand, is neither, general, not residuary in nature. It is only those orders, which answer the descriptions contained in its class, that are appealable under it. Section 104, as it stands now, provides for appeals against five categories of orders. There is no dispute that an order under Rule 158 does not fall into clauses (ff), (ffa), (g), and (h). An effort can certainly be made to bring it within the purview of clause (i) of sub-section (1), since it is an order made under a Rule. This effort would certainly have been successful, had the clause been "any order made under Rules", without anything further. The subsequent part of the clause, which obviously refers to Order 43, CPC, restricts its scope. In none of the clauses contained in Rule 1 of Order 43, an order passed under Rule 58 of Order 21, finds place.[1310]

Thus, it is clear that every order passed under the Rules cannot be brought within the ambit of section 104.

Therefore, a question arises, whether an order passed under rule 58 of O XXI would be appealable under O XLIII. Sub-rule (4) of rule 58 of O XXI directs that the orders passed under sub-rule (3) thereof shall have the force of a decree. An interpretation to the contrary would have the effect of setting at naught, the intention of the Parliament in attributing characteristics of a decree to an order.[1311]

The above-mentioned Full Bench decision further went on to observe as follows:

> 32. Once it emerges that an order passed under Rule 58 of Order 21 is conferred the status of a decree, in the particular context of appeal, Section 96 gets attracted. Section 96 does not enumerate the types of decrees that can fall into its fold. Once the outcome of adjudication partakes the character of a decree, it gains an entry into the realm of Section 96.[1312]

An order abating a suit against one legal representative in its entirety against the rest of the legal representatives, in fact, determines the rights of parties conclusively and as such

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1309. *Syed Hoosen v Chettiar*, AIR 1924 Rang 361 : (1924) 2 Rang 362. See O XVI, rules 10, 12, 17 and 21 summoning and attendance of witnesses; O XXVI, rule 17 (attendance and examination of witnesses before commissioner); O XXXIX, rule 2, sub-rule (3) (disobedience of injunction).
1310. *Gurram Seetharam Reddy v Gunti Yashoda*, AIR 2005 AP 95 : (2004) 6 Andh LT 111 (FB).
1311. *Gurram Seetharam Reddy v Gunti Yashoda*, AIR 2005 AP 95 : (2004) 6 Andh LT 111 (FB).
1312. *Gurram Seetharam Reddy v Gunti Yashoda*, AIR 2005 AP 95, at p 104 : (2004) 6 Andh LT 111 (FB).

falls within the definition of "decree" and is appealable under section 96 of the Code. Even otherwise if no finding is recorded regarding rights of parties finally, it can be treated as an "order dismissing suit as abated". So it will be appealable under section 104 CPC.[1313]

No appeal shall lie under O XLIII, rule 1(r) against order rejecting application under O XXXIX, rule 2-A. Sub-rule (r) has been substituted by a new sub-rule wherein rule 2-A has been omitted by the amendment introduced by Bombay High Court by notification dated 15 September 1983.[1314]

Section 104 (1) (i) CPC clearly states that an appeal will lie from any order made under rules. Thus, the words, "order made under rules" clearly takes one to O XLIII, rule 1 CPC O XLIII, rule 1 (u) permits the filing of an appeal against an order remanding the case under rule 23 A of O XLI CPC In this view of the matter, an appeal would lie against an order remanding the case under section 104 CPC. Hence, an appeal would certainly lie to the Board under section 225 of the Rajasthan Tenancy Act, 1955 from an order of the RRA remanding the case to the Assistant Collector.[1315]

The recall application has been filed on the ground that the second appeal is not maintainable against a remand order in view of the provisions of O XLIII, rule 1 (u) of the CPC. The appeal under O XLIII, rule 1(u) can only be heard on the grounds a second appeal is heard under section 100. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. Thus, second appeal is not maintainable against the remand order.[1316]

[s 104.11] Proviso

The proviso was inserted in the section by Act 9 of 1922.

[s 104.12] Sub-section (2)

In case an appellate court, while dealing with an appeal filed under section 104(1) read with O XLIII rule 1 of the CPC, against an order passed by the trial court in a pending suit passes an order, and such order passed by the appellate court in such an appeal is covered under any of the clauses (a) to (w) of rule 1 of O XLIII then no further appeal under section 104(1) read with O XLIII, rule 1 of the CPC will lie against such an order of the appellate court in view of the bar created by sub-section (2) of section 104 of the CPC.[1317]

Thus, if an appeal is preferred under O XLIII, rule 1(a), to an order under O VII, rule 10 returning a plaint to be presented to the proper court, and an order is made in appeal remanding the case under O XLI, rule 23 no appeal lies from such order,[1318] neither does it lie from an order by the appellate court setting aside an *ex parte* decree,[1319] nor from an order of ad interim injunction passed by an appellate court during the pendency of an appeal against rejection of

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1313. *BG Thimmaiah v KA Narayana Shetty*, 2007 AIHC 1155 : (2007) 4 Kant LJ 611.
1314. *Bholeshankar Awas Gruha Nirman Sahakari Sanstha Maryadit v Om Prakash Malviya*, (2008) 5 All MR 584 : (2008) 5 Mah LJ 952.
1315. *Kastoori v Board of Revenue for Rajasthan*, AIR 2010 Raj 34 (Jaipur Bench).
1316. *Ashok Kumar Sharma v Beena Sharma*, (2019) 12 ADJ 435.
1317. *Mohd Tahir Khan v Mohd Yunus Khan*, AIR 2006 (NOC) 1393 (All) : (2006) 5 All LJ 393.
1318. *Naubat Singh v Baldeo Singh*, (1911) 33 All 149; *Chhubu Mian v Harcharan Das*, (1912) PR No 119, 406; *Bhawani v Harbans*, (1920) 2 Lah LJ 587; *Nilkanth v Balvant*, AIR 1925 Bom 431 : (1925) 27 Bom LR 635.
1319. *Bhim Rao v Girdhari Lal*, AIR 1954 Ngp 125.

an application for temporary injunction by the trial court.[1320] Where the appellate court, while dealing with an appeal filed under section 104 (1) read with O XLIII, rule 1, clause (r) of the CPC passes an order allowing the appeal, setting aside the order of the trial court and granting injunction in favour of the appellant, such an order passed by the appellate court will apparently be covered under section 104(1) read with O XLIII, rule 1, clause (r) of the CPC and therefore, such an order will be appealable under the said provisions. However, in view of the bar created by sub-section (2) of section 104 no further appeal may be filed against the said order passed by the appellate court.[1321]

When an application is made under O IX, rule 13 of the CPC for setting aside an *ex parte* decree, if such an application is rejected then alone an appeal would lie under O XLIII, rule 1(d) of the CPC. Section 104 of the CPC which is a charging section for preferring an appeal from orders, makes it clear that an appeal would lie from the following orders "save otherwise expressly provided in the body of the Code or by any law for the time being in force", from no other order and section 104 (2) of the CPC prohibits that no appeal shall lie from any order passed in appeal under this section.[1322]

Where an application is filed under O XXI, rule 58, read with section 151 of the Code was dismissed and instead of filing regular appeal against the said order, civil miscellaneous appeal was filed, it was held by the Andhra Pradesh High Court that the filing of the miscellaneous appeal was misconceived and no further second appeal would be maintainable.[1323]

Where the appellate court during the pendency of the regular first appeal before it under section 96 of the CPC, passes an order of the nature mentioned in any of the clauses (a) to (w) of rule 1 of O XLIII, then an appeal will lie against such an order under section 104(1) read with O XLIII, rule 1 of the CPC. Such an appeal will lie to the high court in view of the provisions of section 106 of the CPC. In case a regular first appeal has been filed under section 96 of the Code, and the appellate court passes an order during the pendency of such a regular first appeal, then such an order will not be covered under sub-section (2) of section 104 of the CPC. This is because, sub-section (2) of section 104 of the CPC is confined only to an order passed in an appeal filed under section 104. And the bar created by sub-section (2) of section 104 will not apply to such an appeal. Thus, where in a suit for partition. during pendency of first appeal an injunction order was passed by the lower appellate court under O XXXIX, rules 1 and 2 read with section 107(2) of the CPC and subsequently by the impugned order, the order of injunction was vacated, such an order vacating the injunction order and rejecting the application for recall of that order would evidently be an order under O XXXIX, rule 4 read with section 107(2) of the CPC passed by the lower appellate court during the pendency of the regular first appeal under section 96. Hence, an appeal would lie under O XLIII, rule 1(r) to the high court against the impugned order passed by the lower appellate court vacating the injunction order and rejecting the recall application.[1324]

Though reference to this section is made in O XLIII, rule 1, the right of appeal given against orders enumerated in O XLIII, rule 1 is subject to the stipulation contained in this sub-section. Where, however, the order amounts to a decree within section 2(2), a second appeal will lie under section 100 of the CPC.[1325] This should now be read subject to the restrictions

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1320. *Kalashasti v PC Munuswami Chetti*, AIR 1975 Mad 3; *Hari Damu v P Pereira*, AIR 1975 Goa 15.
1321. *Mohd Tahir Khan v Mohd Yunus Khan*, AIR 2006 (NOC) 1393 (All) : (2006) 5 All LJ 393.
1322. *M Radheshyam Lal v Shailesh*, AIR 2005 Mad 93 : (2004) 4 Mad LJ 535 (DB).
1323. *Tadkapalli Shankar v Ramaswamy*, (2009) 3 Andh LD 639.
1324. *Mohd Tahir Khan v Mohd Yunus Khan*, AIR 2006 (NOC) 1393 (All) : (2006) 5 All LJ 393.
1325. *Batta Ramiah Latchayya v Veeriah*, AIR 1961 AP 112 : (1960) 2 Andh WR 4 : (1960) Andh LT 557; *Hiral Lal v Champa*, AIR 1955 All 226.

placed on the right of second appeal under section 100 as amended by the Amendment Acts 1999 and 2002. This sub-section did not take away until recently the right of appeal conferred by clause 15 of the Letters Patent.[1326]

[s 104.13] Section 154

There are some orders which were appealable under section 588 of the repealed CPC but which are not appealable under this section. As to these, it is provided by section 154 that where the right to appeal has already accrued to a party before the commencement of this CPC, such right shall not be affected by anything contained in this Code. But section 154 has been repealed by section (2) and Sch I of the Repealing and Amending Act (48 of 1952).

[s 104.14] Interlocutory Order

No appeal is competent against an interlocutory order of an Accidents Claims Tribunal (for example, refusal to set aside an *ex parte* order) because its interlocutory orders are not made appealable and section 104 or O XLIII, rule 1 have not been made applicable to such tribunals under rule 21 of the UP Motor Accidents Claims Tribunals Rules 1967.[1327]

Appellate court passed an interim injunction in appeal against the decree of the trial court. It was held that the order was appealable under O XLIII, rule 1(r), read with section 104(1) and was not hit by section 104(2). The case was not where, against the order under O XXXIX, rules 1 and 2 by the trial court, an appeal was preferred to the district court and, as against the orders of the district court, the matter was carried to the high court. Therefore, the case did not come within the mischief of section 104(2) of the CPC, but fell squarely under O XLIII, rule 2(r).[1328]

[s 104.15] Order granting injunction

It is pertinent to note that under clause (a) of sub-section (2) of section 2 of the CPC "any adjudication from which an appeal lies as an appeal from an order" is specifically excluded from being a decree. Since an order passed under O XXXIX, rules 1 and 2 of the CPC is an appealable order under section 104 read with O XLIII, rule 1(r) of the CPC, it comes within the purview of the exclusion under clause (a) of section 2(2) and consequently it cannot be treated as a "decree" within the meaning of section 2(2) of the CPC. Therefore the irresistible conclusion is that O IX, rule 13 of CPC cannot be invoked for setting aside an order of *ex parte* temporary injunction passed under O XXXIX, rules 1 and 2.

However, it is open to the respondents to file an application under O XXXIX, rule 4 of the CPC seeking to set aside the *ex parte* order under O XXXIX, rule 1.[1329]

Clause (i) of sub-section (1) of section 104 provides that an appeal shall lie against an order made under rules from which an appeal is expressly allowed by rules. An appeal under O XLIII, rule 1 shall lie against the first order because the rule says that such an appeal shall be permissible. The law nowhere says that even against appellate order granting or rejecting the

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1326. *Ruldu Singh v Sanwal Singh*, AIR 1922 Lah 380 : (1922) 3 Lah 188. See notes below "Letters Patent Appeal".
1327. *Om Prakash v Pukmini Devi*, AIR 1982 All 389.
1328. *K Gangulappa Naidu v K Gangi Naidu*, AIR 1982 AP 284.
1329. *Metta Chandra Sekhara Rao v Ganga Ram*, AIR 2003 AP 378.

injunction, a second appeal is maintainable in the high court under sub-rule (2) above clearly bars an appeal against the appellate order.[1330]

[s 104.16] Order under O XXXIX, Rule 2A

An appeal shall lie from any order passed under O XXXIX, rule 2A of the CPC and there is no limitation whatsoever in the rule itself as to the nature of the order passed under this rule. The restricted meaning that in case where the trial court has refused to initiate action under O XXXIX, rule 2A of the CPC does not flow from the provision of the above noted rule.[1331]

[s 104.17] Orders under the Hindu Marriage Act, 1955

Section 28 of the Hindu Marriage Act, 1955 provides that all decrees and orders passed under the Act "may be appealed from under any law for the time being in force". It has been held that this section does not itself confer a right of appeal against orders passed in proceedings under the Act, that is governed by the "law for the time being in force", which is the CPC; that when the order amounts to a decree, it is appealable as a decree; and that in other cases there is no right of appeal unless the order falls within this section of O XLIII, rule 1, and that accordingly no appeal lies against an order granting or refusing to grant interim maintenance *pendente lite*.[1332] It has, however, been held that for purposes of court fees an appeal under the Act cannot be equated with one under the CPC.[1333]

[s 104.18] Order Substituting Party Under O XXII, Rule 10

Section 104(2) creates a bar against filing an appeal against an order passed in appeal under that section. In other words, if an order under O XXII, rule 10, CPC, is passed in an appeal under the provisions of section 104 no further appeal against that order would lie in view of the bar created under section 104(2). There is no such bar created specifically in the CPC in respect of such an order passed in a revision. However, a revision is a part of the ordinary appellate jurisdiction of the court. Both appeals as well as revisions are creatures of statute and they are maintained before a superior court against an order passed by a subordinate court.[1334]

It was held by the Hon'ble Supreme Court that the revisional jurisdiction is a part of the general appellate jurisdiction of a court. It is inconceivable that while the legislature precluded an appeal from an appellate order, it permitted an appeal from an order passed in revision.[1335]

There is a second aspect of the matter. A Full Bench of the Allahabad High Court in *Chandra Deo Pandey v Sukdeo Rai and others* has taken a view that the provisions of O XXII are not applicable to revision.[1336]

Applications for substituting a party would therefore be maintainable in the case of a revision under the provisions of section 151, CPC. The effect of this legal position would be that appeals under O XLIII, rule 1(1) can logically be filed only if an order under rule 10 of O XXII

1330. *Motilal Ramdev v Bhandari*, AIR 2002 CHG 6.
1331. *Rajinder Kaur v Sukhbir Singh*, AIR 2002 P&H 12.
1332. *Prithivi Raj Sinhji v Bai Shiv Prabhakumari*, AIR 1960 Bom 315 : 62 Bom LR 47; *Saraswati v Krishnamurthi*, AIR 1960 AP 30 : (1959) 2 Andh WR 449; *Mohan Rani v Mohan Lal*, (1965) J&K 88.
1333. *Antala Gope v Sarbo Gopain*, AIR 1962 Pat 489.
1334. *Rameshwar Nath Sinha v Narsingh Sahai*, AIR 2002 All 113.
1335. *Shankar Ramchandra Abyankar v Krishnaji Dattatreya*, AIR 1970 SC 1 : (1969) 2 SCC 74.
1336. *Chandra Deo Pandey v Sukdeo Rai*, AIR 1972 All 504; see also *Sonu v Bhagwandeen Upadhyay*, 1989 All LJ 705.

is passed in a suit pending trial. No such appeal would lie against an order under rule 10 of O XXII in a pending appeal on account of the bar created under section 104(2) of CPC. Thus, the provisions of O XLIII, rule 1(1) have to be read as being applicable only to an order under rule 10 of O XXII passed in a suit at the trial stage.

There is a third aspect of the matter. Against a final order passed in a revision, no appeal lies. Even a revision will not lie. As such, it is not conceivable that even though an appeal does not lie against the final order in the revision, an appeal would lie against an interlocutory order disposing of an application under O XXII, rule 10 of CPC in a revision.[1337]

[s 104.19] Order Remanding Case for Fresh Decision by Trial Court

The order in appeal passed by the learned additional district judge remanding the case to the learned civil judge for a decision on merit in accordance with law. An appeal from this order falls within the category of an appeal from an order as described in O XLIII, rule 1(u) of the CPC. There was no dispute that had the learned additional district judge confirmed the decree, a second appeal could have been filed to the high court. Since the decree passed by the learned civil judge was not confirmed but was in fact set aside and the matter remanded for a decision in accordance with law, it would squarely be covered by the aforesaid provision of O XLIII of the CPC. Reference in this context may also be made to section 104(1)(i) of the CPC whereby an appeal is provided from any order made under the rules from which an appeal is expressly allowed. There is, therefore, no difficulty in holding that the appeal filed by the appellants against the said remand order is maintainable whether the registry chooses to call it a first appeal or a second appeal or give it some other nomenclature is not the concern of the appellants. For convenience, the registry has described the appeal as a first appeal. As long as it is maintainable in the high court, its description is of no consequence.[1338]

[s 104.20] Letters Patent Appeal

If a right of appeal is provided for under the Act, the limitation thereof must also be provided therein. A right of appeal which is provided under the Letters Patent cannot be said to be restricted. Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred.[1339]

While determining the question as regards clause 15 of the Letters Patent, the court is required to see as to whether the order sought to be appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, clause 15 of the Letters Patent would be attracted.[1340]

The orders passed under section 299 of the Indian Succession Act, 1925, may be an interlocutory order determining the rights of the parties or a final order. When a final order is passed in a contentious suit, as would be evident from the provisions contained in section 295 of the Act, the procedures of the CPC are required to be followed. Therefore, a final order passed between the parties adjudicating upon the rights and obligations which are binding between the parties thereto and are enforceable, although may not be, *stricto sensu*, a decree

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1337. *Rameshwar Nath Sinha v Narsingh Sahai*, AIR 2002 All 113; see also *Jaipur Chit Fund Pvt Ltd v Dwarka Dinesh Dayal*, AIR 1979 All 218 : 1979 All LJ 685 (FB).
1338. *Rajinder Singh v Pushpa Devi Bhagat*, AIR 2004 Del 228.
1339. *Subal Paul v Malima Paul*, AIR 2003 SC 1928 : (2003) 10 SCC 361.
1340. *Subal Paul v Malima Paul*, AIR 2003 SC 1928 : (2003) 10 SCC 361.

within the meaning of section 2(2) of the CPC but it is beyond any cavil that the same would be a judgment within the meaning of section 2(9) thereof.[1341]

An order of removal of executor under section 301 of the Succession Act, 1925 is not a discretionary order since it requires finding of misconduct. It amounts to judgment and therefore Letters Patent Appeal against the same would be maintainable.[1342]

Clause 15 of the Letters Patent provides that an appeal lies from every "judgment" of a single judge of the high court in the exercise of its original civil jurisdiction to other judges of the court. There was a conflict of decisions under the Code of Civil Procedure, 1882 as to the effects of section 588 upon section 15 of the Letters Patent. The High Courts of Calcutta, Madras and Bombay held, following a decision of the Privy Council,[1343] that section 588 did not take away the right of appeal given by clause 15 of the Letters Patent.[1344] On the other hand, it was held by the Allahabad High Court, on a different reading of the Privy Council case referred to above, that section 588 took away the right of appeal given by the Letters Patent.[1345] It is submitted that the words "save as otherwise expressly provided by any law for the time being in force" include the Letters Patent, and that they were added into the present section to give effect to the Calcutta, Madras and Bombay decisions. This is the view taken by the Lahore[1346], Madras[1347] and Nagpur High Courts[1348]. The High Court of Allahabad, however, adhered for a time to its previous view even in cases under the present Code.[1349] But it has been subsequently held by the Allahabad High Court that under clause (10) of the Letters Patent as amended in 1929, an appeal lies from the order of the single Judge passed in appeal from order.[1350] However the new section 100A inserted in the Code by the Amendment Act, 1976 debars any Letters Patent appeal from any judgment, decision or order passed by a single Judge of the high court in a second appeal heard and decided by him. Section 104 (2) applies to Letters Patent appeals also.[1351] Section 104 applies to internal appeals in the high court.[1352] Section 104 (2) applies to Letters Patent Appeals also. However, where an appeal is filed before a single Judge of the high court under O XLIII, rule 1 (s) read with section 104 (1) no Letters Patent appeal is maintainable.[1353] Where an order under O XXXIX or O XL, CPC is passed by a single Judge of the high court in appeal under section 104, CPC, then section 104 (2) bar a Letters Patent Appeal. The order contemplated by section 104 (2) need not be an order finally disposing of the appeal. Section 104 (2) does not speak of "an order disposing of an appeal". Court cannot re-write the section in that manner.[1354] Effect must also be given to legislative intent of introducing section 4, CPC and the words "by any law for the time being in force" in section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that section 104 did not bar a Letters Patent. As appeals under "any other law

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1341. *Subal Paul v Malima Paul*, AIR 2003 SC 1928 : (2003) 10 SCC 361.
1342. *Tara Chand Sharma v Smt Uma Aggarwal*, AIR 2010 P&H 30 : (2010) 1 Punj LR 737 (DB).
1343. *Hurrish Chunder v Kalisunderi*, (1883) 9 Cal 482 : 10 IA 4.
1344. *Toolsee Money v Sudevi*, (1899) 26 Cal 361; *Sabhapathi v Narayanasami*, (1902) 25 Mad 555; *Chappan v Moidin*, (1899) 22 Mad 68; *Secretary of State v Jehangir*, (1902) 4 Bom LR 342.
1345. *Banno Bibi v Mehdi Hussain*, (1889) 11 All 375; *Muhammad v Ishanullah*, (1892) 14 All 226 (FB).
1346. *Ruldu Singh v Sanwal Singh*, AIR 1922 Lah 380 : (1922) 3 Lah 188.
1347. *Parmasivan v Ramasami*, AIR 1933 Mad 570 : (1933) 56 Mad 915.
1348. *Ganpati Wadgoo v Pilaji Kothuji*, AIR 1956 Ngp 211.
1349. *Piari Lal v Madan Lal*, (1916) 39 All 191.
1350. *Ram Sarup v Kaniz Ummehani*, AIR 1937 All 165 : (1937) All 386.
1351. *Obedur Rahman v Ahmedali*, AIR 1983 Bom 120 (DB).
1352. *Shah Babulal Khimji v Jayaben Kania*, AIR 1988 SC 1786 : (1989) 4 SCC 8.
1353. *Charity Commr v Rajendra Singh*, AIR 1984 Bom 478 (DB); *Obedur Rahman v Ahmedali*, AIR 1983 Bom 120 (followed).
1354. *KY Shirodkar v SK Patel*, AIR 1989 Bom 68 (p 71, 72, para 14, 15) (DB).

for the time being in force" undeniably include a Letters Patent Appeal, such appeals are now specifically saved. Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in sub-clause (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a Letters Patent Appeal. However, when section 104(1) specifically saves a Letters Patent Appeal then the only way such an appeal could be excluded is by express mention in section 104(2) that a Letters Patent Appeal is also prohibited.[1355]

A specific exclusion may be clear from the words of a statute, even though no specific reference is made to Letters Patent. But where there is an express saving in the statute/ section itself, then general words to the effect that "an appeal would not lie" or "order will be final" are not sufficient. In such case, i.e., where there is an express saving, there must be an express exclusion. Sub-clause (2) of section 104 does not provide for any express exclusion.[1356]

[s 104.21] Letters Patent Appeal—Relative Position Under Section 100 A and Section 104

The present section 100A was amended in 2002 from the earlier section 100A, introduced in 1976.

See "Specific exclusion of Letters Patent Appeal" under section 100A, Syn. 8

Now by virtue of section 100A, no Letters Patent Appeal would be maintainable.

However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time, neither section 100A nor section 104(2) barred a Letters Patent Appeal.

Applying the above principle, the appeal under clause 15 of the Letters Patent is an appeal provided by a law for the time being in force. Therefore, the finality contemplated by sub-section (2) of section 104 did not attach to an appeal passed under such law.[1357]

[s 104.22] Supreme Court Appeal

The provision in sub-section (2) dealt with internal appeals within the limits of India. It did not take away the general right of appealing to the Supreme Court given by section 109. A applies to the district judge of East Berar under Sch II, para 20 to file an award in Court. B opposes the application. The district judge makes an order refusing to file the award. An appeal from the order [see clause (f)] to the Judicial Commissioner. The Judicial Commissioner makes an order filing the award. B appeals to the King in Council from this order of the Judicial Commissioner. Was the appeal to the King competent? Yes, for though no second appeal would lie to the high court by reason of the provisions in sub-section (2), an appeal would lie before the King in council under section 109 of Code.[1358] Similarly though no second appeal lies from an order passed on appeal from the order specified in O XLIII clause (i), an appeal would have laid to the King in Council under section 109 of the Code.[1359] These decisions would, it is submitted, apply to appeals to the Supreme Court but subject to the conditions prescribed in section 109. (See Articles 133 and 134A of the Constitution).

1355. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152 : (2004) 11 SCC 672.
1356. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152 : (2004) 11 SCC 672.
1357. *PS Sathappan v Andhra Bank Ltd*, AIR 2004 SC 5152 : (2004) 11 SCC 672.
1358. *Ramlal v Kishanchand*, AIR 1924 PC 95 : (1924) 51 IA 72 : 51 Cal 361.
1359. *Ramlal v Kishanchand*, AIR 1924 PC 95 : (1924) 51 IA 72 : 51 Cal 361.

[S 105] Other orders.—(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (*1*), where any party aggrieved by an order of remand [1360][* * *] from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

SYNOPSIS

[s 105.1]	Changes in the Section	1310	[s 105.7]	Interlocutory Orders in Execution Proceedings	1315
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[s 105.1] Changes in the Section

This section corresponds with section 591 of the Code of Civil Procedure 1882, except in the following particulars:

(a) Sub-section (2) was added in 1908.[1361]

(b) Section 591 contained the words "in any such order" after the word "irregularity" in sub-section (1). The word "such" was omitted in 1908 as the expression "such order" gave rise to a contention in some cases before the Privy Council that section 591 applied to non-appealable orders only, a contention that was overruled by the Privy Council.[1362]

(c) The Amendment Act, 1976 has deleted the words "made after the commencement of this Code" occurring after the words "by an order of remand" in sub-section (2) on the ground that they are no longer necessary.

[s 105.2] Scope of the Section

An interlocutory order made in a suit is either appealable (section 104) or not appealable. This section, like the corresponding section 591, applies *to* any order, that is, to appealable as well as non-appealable order. Where an interlocutory order is appealable, the party against whom the order is made is not bound to prefer an appeal against it, but he may make the irregularity in the order a ground of objection in the memorandum of appeal where an appeal is preferred from the decree in the suit in which the order was made. In other words, section 105 allows an appealable order, which has not been appealed from, to be made the subject of appeal in an appeal from the decree. There is no law prevailing in India which renders it imperative

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1360. The words "made after the commencement of this Code" omitted by Act 104 of 1976, section 42 (w.e.f. 1-2-1977).

1361. See notes below under "sub-section (2)": appeal from order of remand.

1362. *Satyadhyan v Deorajin Debi*, AIR 1960 SC 941; *Sankara Menon v Gouriamma Amma*, AIR 1978 Ker 211.

upon a party to appeal from every interlocutory order by which he may conceive himself aggrieved under the penalty and if he does not do so, of forfeiting forever the benefit of the consideration of the appellate court. Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon a party the necessity of appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other, inflict upon his opponents similar calamities. It was so observed by their Lordships of the Privy Council in *Moheshwar Singh v The Government of Bengal*[1363] and in subsequent cases,[1364] and it is this principle that underlies the present section. The present section makes it quite clear that an order appealable under section 104 may be questioned under section 105 in an appeal from the decree in the suit, although no appeal from the order has been preferred under section 104.[1365] Sub-section (2) is an exception to this rule.[1366] Even where the interlocutory order is one from which no appeal lies, an error, defect or irregularity in that order may be set forth as a ground of objection in the memorandum of appeal, where an appeal is preferred from the decree in the suit in which the order was made.[1367] It has been held by the Supreme Court that though the principles of *res judicata* will apply to different stages of the same litigation, they do not preclude a party from questioning the correctness of an interlocutory order in an appeal against the decree, except where it falls within sub-section (2).[1368] In a Letters Patent appeal also, the Letters Patent Bench could go into all the points decided in an interlocutory order in an appeal against the judgment or decision of the single judge of the high court in a second appeal.[1369] This has now become academic in view of section 100A precluding such a Letters Patent appeal.

In a suit for possession, the defendant wished to exhibit a will of the last owner of the property. The court rejected his prayer for the same and, in revision, the high court passed a one-word order "Dismissed". The suit was decreed against the defendant. In first appeal, the defendant argued that the trial court was in error in not granting the above permission. But the first appellate court held that this point had already been decided by the high court by dismissing the revision petition and the point could not be re-agitated. It was held, on second appeal, that the high court order did not amount to *res judicata* as there was no speaking order.[1370] The following cases were relied upon: (i) *Roop Kishore v Firm Raghbir Singh*;[1371] (ii) *Ishar v Sudesh Kumar*.[1372] Interlocutory order can be challenged in revision (section 115) if there is a failure of justice. The fact that, under section 105, the order can be a ground of challenge in appeal later does not bar such a challenge.[1373] In a Madras case, the landlord sued for ejectment of the tenant. The tenancy was governed by the Madras City Tenants Protections Act, 1922. In the course of the suit, the tenant applied for purchase of the premises under

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1363. *Moheshwar Singh v Govt of Bengal*, (1859) 7 MIA 283.
1364. *Forbes v Ammeeroonissa Begum*, (1865) 10 MIA 340; *Sheonath v Ramnath*, (1965) 10 MIA 413; *Shah Mukhum Lall v Sree Kishen Singh*, (1868) 12 MIA 157.
1365. *Narayan Nambissan v Krishnan Nair*, AIR 1943 Mad 3; *Marjnaba Dasi v Kumar Surjendu Narayana Deb*, (1956) 1 Cal 197; *Sheo Nath v Ram Din*, (1896) 18 All 19; *Natabar Das v Braja Kishore Raha*, AIR 1999 Ori 33.
1366. See note *infra*, "Sub-section (2): Appeal from Order of Remand".
1367. *Anandrao v Parvatibai*, AIR 1941 Ngp 308; *Jamsetji v Dadabhoy*, (1900) 24 Bom 302 and *Godavari v Gajapati*, (1900) 23 Mad 494.
1368. *Satyadhyan v Deorajin Devi*, AIR 1960 SC 941 : [1960] 3 SCR 590 : (1961) 1 SCA 10 : (1962) 1 SCJ 268.
1369. *Dewaji v Ganpatlal*, AIR 1969 SC 560 : (1969) 1 SCR 573.
1370. *Karam Singh v Jagta*, AIR 1982 P&H 51.
1371. *Roop Kishore v Firm Raghbir Singh*, (1970) ILR 1 Punj 533.
1372. *Ishar v Sudesh Kumar*, AIR 1973 P&H 392.
1373. *Yaquob Ali v Fim Haji Taj Khanji Ibrahim*, AIR 1984 Raj 1 (DB).

section 9 of the Act. The application was dismissed. It was held that such a dismissal was an interlocutory order and its correctness could be challenged in an appeal against the judgment in suit.[1374]

[s 105.3] Sub-Section (1)

Section 105(1) of the CPC enables a party to set forth any error, defect, or irregularity in any order affecting the decision of the case as a ground of objections in the memorandum of appeal. The remedies available under O XLI, rule 21 of the CPC and as envisaged under section 105 are not mutually exclusive and sometimes may be overlapping.[1375]

[s 105.4] "Affecting the decision of the case"

It has been held by almost all the high courts that the words "affecting the decision of the case" mean affecting the decision of the case on its merits. It has accordingly been held that an order cannot be attacked in appeal from a final decree, unless the error, defect or irregularity in the order is the one affecting the decision of the case on the merits.[1376] It has also been held by the High Courts of Allahabad, Calcutta and Lahore that an order under O IX, rule 13, setting aside an *ex parte* decree, is not an order that affects the merits of the case. Such an order merely ensures a hearing upon the merits, hence, the order cannot be attacked in an appeal from the decree in the suit.[1377] But there are cases in which this reason does not apply for an order setting aside an *ex parte* decree may not have the effect of securing a hearing on the merits. Thus, when an application is made to set aside an *ex parte* final decree in a suit on a mortgage with a view to raising a point of limitation which would render the preliminary decree futile, the order setting aside the *ex parte* decree may be attacked in the appeal from the final decree.[1378] Again, if the *ex parte* decree has been set aside as against two defendants at the instance of one defendant by a mistaken application of O IX, rule 13, the error affects the decision on the merits and the order may be attacked in the appeal of the other defendant.[1379] Conversely, if an *ex parte* decree has been set aside as against two defendants and the proviso to O IX, rule 13, has not been applied so that the necessary parties are not on the record, the error affects the decision on the merits and the order may be attacked in appeal.[1380] In a Full Bench case,[1381] the Rangoon High Court has, overruling its earlier decision, held that it must be shown that the error, defect or irregularity has affected the decision of the case on merits.

In a suit for declaration, interlocutory order was passed by the trial Court refusing to summon witnesses. The said interlocutory order related to valuable right of the appellant but

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1374. *Janardhan Raju v Thailammal*, AIR 1993 Mad 176.
1375. *Tikeshwar Sahoo v Ambika Sahuani*, AIR 1995 Ori 185.
1376. *Radha Mohan v Abbas Ali*, AIR 1931 All 294 (FB) : (1931) 53 All 612 : (1931) 53 All 612; *Tasaddug v Hayatunnissa*, (1903) 25 All 280; *Niddha Lal v Collector of Bulandshahr*, (1916) 14 All LJ 610, 164; *Chintamony v Raghoonath*, (1895) 22 Cal 981; *Mohamed v Monohar*, AIR 1925 Cal 711 : (1924) 40 Cal LJ 588 : (1925) 41 Cal LJ 186; *Sayma Bibi v Madhusudan*, AIR 1925 Cal 766 : (1925) 52 Cal 472; *Fazal v Hashmati*, (1916) Punj Rec No 40 P 115; *Sundar Singh v Nighaiya*, AIR 1925 Lah 466 : (1925) 6 Lah 94; *Dhondu v Vaman*, AIR 1927 Bom 455 : (1927) 51 Bom 495; *Talyarao v Shrikrishna*, AIR 1936 Ngp 8.
1377. *Radha Mohan v Abbas Ali*, AIR 1931 All 294 (FB) : (1931) 53 All 612; overruling *Nandram v Bhopal Singh*, (1912) 34 All 592 :.
1378. *Athamsa v Ganesan*, AIR 1924 Mad 890 : (1924) 47 Mad LJ 641.
1379. *Gopala Chetti v Subbier*, (1903) 26 Mad 604.
1380. *Baldeo Lal v Matisara*, AIR 1930 Pat 266.
1381. *Yuk Lee v Ahoor Bibi*, AIR 1937 Rang 334 (FB); overruling in effect *MS Mahomed v Collector*, AIR 1927 Rang 150 : (1927) 5 Rang 80.

not challenged in revision. It was held by the Madhya Pradesh High Court that the appellants are entitled to summon records and examine witnesses in second appeal. It was held that section 105 gives the appellant right to challenge the interlocutory order at the stage of appeal along with other grounds.[1382]

An order accepting or rejecting a document would not be an appealable order, but its correctness, validity and propriety can be challenged before the appellate court with the help of section 105 of the Code. The Gujarat High Court held that the appellate court was absolutely unjustified in holding that in absence of a revision challenging the correctness of the order passed by the trial Court, it would not be open to appellate court to examine the validity/ correctness of the order.[1383]

An order under O IX, rule 9, restoring a suit dismissed for default cannot be questioned in an appeal against the decree in the suit, as it cannot affect the decision of the case on its merits.[1384]

An order remanding an appeal from an order returning a plaint for presentation to the proper court is not an order affecting the decision of the case and cannot be challenged in second appeal.[1385]

An order under O XLI, rule 19, re-admitting an appeal which has been dismissed for default, is not one which affects the decision of the case on the merits, and it cannot, therefore, be attacked in an appeal from the final decree.[1386]

An order setting aside an abatement under O XXII, rule 9 does not affect the decision of the case on its merits, rather, it re-opens the bearing of the case on its merits, and it cannot, therefore, be challenged in appeal. from the final decree.[1387] But, there is a difference of opinion whether an order setting aside an abatement may be so attacked if it is made simultaneously with the final decree in the suit. It has been held by the High Court of Allahabad that it may be so attacked if passed simultaneously with the final decree.[1388] On the other hand, it has been held by the High Court of Calcutta that an order setting aside an abatement cannot be challenged in an appeal from the final decree, whether it is passed before or simultaneously with the final decree.[1389] The High Court of Lahore followed the decision of the High Court of Calcutta.[1390]

An order refusing leave under section 20(b) cannot be attacked in an appeal from an order returning a plaint for presentation to the proper court.[1391]

In a summary suit conditional leave to defend was granted to the defendant, but the defendant did not fulfil the condition and decree was passed in the summary suit. It was held by the Supreme Court that the order granting conditional leave can be challenged in appeal against the decree though revision against such order of conditional leave was maintainable.

Sinha, J, speaking for the Bench in the above case, observed as follows:

1382. *Ram Dayal v State of Madhya Pradesh*, AIR 2006 MP 172 : (2006) 1 MPLJ 506.
1383. *Bhagwanji and Kalyanji v Punjabhai Hajabhai Rathod*, AIR 2007 Guj 88 : (2007) 3 Civil Court Cases 400.
1384. *Radha Ballah v Jawaharlal*, AIR 1956 All 216; *Manik Mandal v Bharosi Singh*, AIR 1959 Pat 225 : (1958) 37 Pat 1236.
1385. *Venkatanarasu v Kotayya*, AIR 1926 Mad 900 : (1926) 51 Mad LJ 119.
1386. *Gulab v Thakur*, (1902) 24 All 464.
1387. *Mohamed v Monohar*, AIR 1924 Cal 473 : (1924) 40 Cal LJ 588; *Babu Ram v Banke*, AIR 1925 All 426 : (1925) 47 All 555.
1388. *Hem Kunwar v Amba Prasad*, (1900) 22 All 430.
1389. *Mohamed v Mohohar*, AIR 1924 Cal 473 : (1924) 40 Cal LJ 588; *Sayma Bibi v Madhusudan*, AIR 1925 Cal 766 : (1925) 52 Cal 472.
1390. *Bhola Ram v Arjan Das*, AIR 1933 Lah 152 : (1933) 14 Lah 361.
1391. *Allen Bros v Aruri*, AIR 1925 Lah 338 : (1925) 7 Lah LJ 66.

> 18. A statutory right conferred on an litigant cannot ordinarily be taken away. A civil revision application might have been maintainable as against the order dated 27-11-2002 granting conditional leave. The said remedy was also available where leave to defend a suit is refused. Leave to defend a suit, as noticed hereinbefore, should ordinarily be granted. It was, therefore, permissible for the defendant to raise the said contention in the appeal although it had asked for time to comply with the conditions.[1392]

However, the Supreme Court in an earlier decision held that for challenging an earlier interlocutory order, specific challenge has to be raised against the interlocutory order in the memorandum of appeal. Thus, where neither revision was filed against the interlocutory order nor they were challenged specifically in the Memorandum of Appeal, it was held that each of those orders attained finality.[1393]

It has been held that the following orders could be questioned in an appeal against the decree in the suit: an order wrongly casting the burden of proof on a party;[1394] an order refusing leave to defend;[1395] an order striking out defence;[1396] an order holding that an application to set aside an award under section 33 of the Arbitration Act is maintainable, and not barred by limitation;[1397] an order rejecting an application for amendment on the ground of limitation.[1398] It has also been held that where an application to treat a suit filed under the summary chapter as an ordinary suit is dismissed, and leave to defend is refused, the correctness of the order can be challenged in an appeal against the decree.[1399] Findings of the court fixing the liability of partners in proceedings consequential on a preliminary decree in a suit for dissolution of partnership can be attacked in an appeal against the final decree.[1400]

[s 105.5] Error, Defect or Irregularity

The Supreme Court, in the matter of *Achal Misra v Rama Shanker Singh,* [1401] held as under:

> In *Sheonath v Ramnath* (1865) 10 MIA 413 the Privy Council reiterated that a party is not bound to appeal from every interlocutory order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory order.

Where it appeared from the order sheet of trial court dated 8 December 1987, the application, which was supported with an affidavit, for calling the record and examining the concerning *Patwari* filed by appellants, was dismissed without considering the merits of it. As per its contention, on non-availability of the copies of relevant revenue record it was filed in order to prove material facts in favour of appellants but by dismissing this application they were deprived to adduce material evidence on record. Although then, this was not challenged by revision, but, on dismissal of the suit, such interlocutory order was assailed in appeal along with other grounds. But the appellate court did not examine the correctness of this order by saying that it was revisable but the revision was not filed, thus, it could not be considered in

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1392. *Wada Arun Asbestos Pvt Ltd v Gujarat Water Supply & Sewerage Board*, AIR 2009 SC 1027 : (2009) 2 SCC 432.
1393. *Soni Dinesh Bhai Manilal v Jagjivan Mulchand Chokshi*, AIR 2008 SC 887 : (2007) 13 SCC 293.
1394. *Nagori Ibrahim v Shabji Babumal*, AIR 1954 Raj 83.,
1395. *Bunwarilal v Sohan*, (1955) 1 Cal 299.
1396. *Amarsingh v Chaturbhuj*, AIR 1957 Raj 367.
1397. *Radha Krishan v Natmal Bubna*, AIR 1963 Raj 193.
1398. *Nanak Chand v Amin Chand*, AIR 1970 Cal 8 : 74 Cal WN 390.
1399. *Simrathmull v Jugraj*, AIR 1954 Mad 334 : (1953) 2 Mad LJ 354 : (1954) ILR Mad 354.
1400. *Abdul Azeez v Kader Mohideen*, (1963) 2 Mad LJ 220; *Nallasivam v Arudayammal*, AIR 1958 Mad 462.
1401. *Achal Misra v Rama Shanker Singh*, (2005) 5 SCC 531.

appeal and ground was answered in the negative against the appellants. But in view of the provisions of section 105 of the CPC, such approach cannot be sustained.[1402]

The appellate court committed grave error in not considering the merits of the interlocutory order while it was related with the valuable right of the appellants. In view of this, the said high court has two options— either this question be decided itself or it be sent back to the appellate court for considering the merits of the said application.[1403]

The error, defect or irregularity referred to in this section must be an error, defect or irregularity in law or procedure, and not in matters of fact.[1404] The order setting all the respondents *ex-parte* without calling on the appeal for hearing amounting to an error effecting the decision of the case which can be raised in the appeal from the ultimate decrees.[1405]

Order IX rule 13 of CPC and section 96(2) of CPC work in different spheres. Court observed that in the regular appeal filed under section 96(2) of CPC, the appellate court had got wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions, i.e., O IX, rule 13 and section 96(2) was entirely different. Just because the party pursued the remedy under O IX rule 13 of CPC, it does not prohibit him from preferring an appeal even if the application under O IX, rule 13 CPC is dismissed. Court said that right of appeal under section 96(2) of CPC is a statutory right and the party cannot be deprived of its statutory right merely because the application preferred to set aside *ex-parte* order is dismissed.[1406]

[s 105.6] Where a Decree is Appealed From

This section contemplates two things namely: (i) regular appeal from a decree; and (ii) the insertion in that appeal of a ground of objection relating to an interlocutory order. The High Court of Allahabad has held that no appeal will lie where the appeal is ostensibly against the decree passed in the suit, but the grounds of appeal are solely directed against an interlocutory order made in the suit.[1407] On the other hand, the High Courts of Calcutta and Madras have held that such an appeal will lie, though the only reason for the appeal is an erroneous decision in regard to an interlocutory order.[1408]

It should be noted that in order to take advantage of the provisions of this section the ground of objection must be set out in the memorandum of appeal.[1409]

[s 105.7] Interlocutory Orders in Execution Proceedings

The rule enacted in this section applies to orders passed in the course of execution proceedings. Where an order is interlocutory in character, its correctness can be assailed in an appeal against an order, which is appealable as a decree.[1410]

1402. *Ram Dayal v State of Madhya Pradesh*, AIR 2006 MP 172.
1403. *Ram Dayal v State of Madhya Pradesh*, AIR 2006 MP 172.
1404. *Sankali v Murlidhar*, (1890) 12 All 200.
1405. *Tikeshwar Sahoo v Ambika Sahuani*, AIR 1995 Ori 185.
1406. *Bhivchandra Shankar More v Balu Gangaram More*, (2019) 6 SCC 387 : (2019) 7 Scale 551.
1407. *Sheo Nath v Ram Din*, (1896) 18 All 19; *Sher Singh v Diwan Singh*, (1990) 22 All 366.
1408. *Raja Dhamara v Bukkapatnam*, (1911) 34 Mad 228; *Googlee v Premlal*, (1881) 7 Cal 148.
1409. *Tilak v Chakardhari*, (1893) 15 All 119; *Mohamad Ali v Abdul Rahiman*, AIR 1952 TC 316 : (1952) Ker LJ 65.
1410. *Alagappa Chetty Annamalai*, AIR 1917 Mad 404; *Chittar Singh v Lachmi Narayan*, AIR 1932 All 396; *Muthayyan Swaminathan v Narayanaswami*, AIR 1936 Mad 936; *Chandrabala Debi v Prabodh Chandra Roy*, 36 Cal 422; *Mohamad Ali v Abdul Rahman*, AIR 1952 TR 316 : (1952) Ker LR 65. But see section 2(2) as altered.

[s 105.8] Sub-section (2): Appeal from Order of Remand

It is well settled in law that the order of remand cannot be passed by the appellate court or any statutory authority as a matter of course. One will have to make out a case for remand of the case to show any material evidence was either ignored, misread or misconstrued by the appellate court.[1411]

Sub-section (2) of section 105 of the CPC provides that where any party is aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. The provision is not without exceptions and limitation. First is, when the order of remand is illegal, and more so, if it is without jurisdiction. The high court had, in exercise of second appellate jurisdiction, illegally reversed the concurrent findings of fact and ordered remand. It was held, in an appeal to the Supreme Court from the final order of the high court after remand, challenge even to the first order of the high court making remand, and, all the proceedings taken thereafter as a result of the illegal order of remand, was available to be laid. When the matter reaches a forum superior to one which had made the order of remand earlier, it can go into the question of legality or validity of the order of remand. The bar enacted by section 105(2) applies up to the level of that forum which had remanded the matter earlier. Secondly, section 105(2) has no applicability to the jurisdiction exercisable by the Supreme Court by reference to Article 136 of the Constitution. This, for the reason that no appeal lies to the Supreme Court against an order of remand, an appeal under Article 136 of the Constitution is only by special leave granted by the Supreme Court. It is settled law that section 105(2) has no applicability to the Privy Council and to the Supreme Court. In the present appeal preferred against the judgment and decree passed by the high court in the proceedings held pursuant to the earlier order of remand dated, the correctness of the order of remand can be examined and gone into by the Supreme Court.[1412]

An order under O XLI, rule 23, remanding a case, is appealable, where an appeal would lie from the decree of the appellate court [O XLIII, rule 1, clause (u)]. Such an order was also appealable under the Code of Civil Procedure, 1882 [section 588, clause (28)].[1413] Sub-section (2) has been added to preclude an appellant from taking, on an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand.[1414] The effect of this sub-section has been said by RANKIN CJ, to be that "a litigant, aggrieved by an order of remand from which an appeal lies, must appeal therefrom directly, or be precluded from disputing its correctness".[1415] This has also been restated by the Supreme Court.[1416]

Correcting an order of remand is not within the inherent power under section 151 since there is a remedy provided against such an order and has not been used by the aggrieved party (*ibid*). Where an appeal is actually filed and disposed of that decision is final and cannot be agitated at a subsequent stage either before the trial court to which the case is remanded or before the appellate court.[1417]

1411. *Kashi Nath v Board of Revenue, Allahbad*, AIR 2001 All 275.
1412. *Krishna Pillai Rajasekharan Nair v Padmanabha Pillai*, AIR 2004 SC 1206 : (2004) 12 SCC 754; See also *Kshitij Chandra Bose v Commr of Ranchi*, (1981) 2 SCC 103; *Satya-dhvan Ghosal v Acorajin Debi*, [1960] 3 SCR 590.
1413. *Savitri v Ramji*, (1890) 14 Bom 232; *Subba v Bala Chandra*, (1895) 18 Mad 421; *Rameshur Singh v Sheodin*, (1890) 12 All 510; but see *Jammalamadaka Subba v Jammalal Venkatarayadu*, (1909) 32 Mad 318.
1414. *Karam Singh v Vir Singh*, AIR 1921 Lah 154 : (1921) 2 Lah 252.
1415. *Telebali v Abdul Aziz*, AIR 1929 Cal 659 : (1929) 57 Cal 1013, 1027.
1416. *Nain Singh v Koonwarjee*, AIR 1970 SC 997 : (1970) 1 SCC 732.
1417. *K Nagayya v K Hamumiah*, AIR 1969 AP 45.

An order of remand, which is appealable as a judgment under the Letters Patent and has not been appealed against cannot be questioned under this section at later stages of the litigation,[1418] but it can be questioned, if it is not appealable.[1419] A special provision is made in section 105(2) as regards orders of remand. But even under section 105(2) the correctness of an order or remand can be challenged in appeal from the final decision provided the order of remand is not appealable.[1420]

It has been held that the finality, which attaches to an order or remand, extends to all findings on which the order is based[1421] including directions which form part of the order.[1422] But an issue about which nothing is said in the order of remand can be agitated at a subsequent stage when the case comes up on appeal from the order or decree passed after remand.[1423]

An order, which is appealable under O XLIII of the CPC, if not appealed against, becomes final and its correctness is no more open to examination in view of the provisions of section 105(2).[1424] As to whether an appeal lies from an order of remand which does not strictly fall within the purview of O XIV, rule 23, though the judge passing it purports to act in accordance with said provision, the opinion is divided. One view is that the order is appealable.[1425] The other view is to the contrary.[1426]

[s 105.9] Non-Appealable Orders of Remand

When an order of remand is not open to appeal, it is well settled that its correctness can be impugned in an appeal against the revised decree that might be passed pursuant to it on remand,[1427] but that can only be in a superior court, the court which made the order being bound by it.[1428]

[s 105.10] Privy Council Appeal: Supreme Court Appeal

This sub-section did not apply to Privy Council appeals,[1429] nor does it apply to appeals to the Supreme Court.[1430]

[S 106] What Courts to hear appeals.—Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

1418. *Jagarnath Ram v Thakur Prasad*, AIR 1963 Pat 165.
1419. *Budhilal v Jagannath Das*, AIR 1963 MP 344.
1420. *Sankarnarayan Potti v K Sreedevi*, (1998) 3 SCC 751.
1421. *Bai Bai v Mahadu Maruti*, AIR 1960 Bom 543 : 62 Bom LR 641.
1422. *Ethiraja Mudali v Muthu Reddi*, AIR 1961 Mad 410 : (1961) 1 Mad LJ 482.
1423. *Prabhu Halwai v Fulchand*, AIR 1969 Pat 16.
1424. *Om Prakash v Amarjeet Singh*, (1988) SCC Supp 780.
1425. *Mohammad Ali v Karam Ali*, AIR 1935 Cal 134 : (1935) 38 Cal WN 1202.
1426. *Sheolal v Jugal Kishore*, AIR 1940 Ngp 349 : (1940) Nag 538. (See note to O XLI, rule 23, under the heading "Appeal from remand under the inherent power" and note under the heading "clause (b)" in section 107 and "order of remand" in section 109).
1427. *Satyadhyan v Deorajin Debi*, AIR 1960 SC 941; *Pragash Singh v Madan Mohan*, AIR 1960 Pat 47.
1428. *Budhilal v Jagannath Das*, AIR 1963 MP 344.
1429. *Ahmad Husain v Gobind Krishna*, (1911) 33 All 391; *Venkataranga v Narasimha*, (1915) 38 Mad 509.
1430. *Satyadhyan v Deorajin Debi*, AIR 1960 SC 941. See note to section 109, "Final Order".

[s 106.1] Forum of appeal

Sections 104 to 106 of the Code deal with "Appeals from Orders". Rule 1 of O XLIII enumerates certain orders from which an appeal is permitted. The purpose of this section is to identify the forum in which appeals from orders would lie. The plain meaning of the section is that where an appeal from any order is permitted in terms of section 104 and O XLIII, rule 1 of the Code, the same would lie in the Court in which an appeal would lie from the decree passed in the suit in which that order was made. The second part of the section further lays down that where the Court passing an order in its appellate jurisdiction is not a high court, then the appeal from the order of that Court would lie to the high court.

However, where a suit was transferred to the Original Side of the high court, the appellate court which admitted the appeal loses its jurisdiction to hear the appeal. It is only the appellate forum in the Original Side of the high court which can hear the appeal.[1431]

(See notes under the same head to section 96 above for further discussion).

General Provisions Relating to Appeals

[S 107] Powers of Appellate Court.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

(*a*) to determine a case finally;

(*b*) to remand a case;

(*c*) to frame issues and refer them for trial;

(*d*) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

SYNOPSIS

[s 107.1] Scope 1318
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[s 107.1] Scope

The appeal is considered to be an extension of the suit because under section 107 of the CPC, the appellate court has the same powers as are conferred by the CPC on courts of original jurisdiction in respect of suits instituted therein. Such a power can be exercised by the appellate court "as nearly as may be" exercised by the trial court under the CPC, if the powers conferred upon the trial court are under a specified statute and not under the Code. It has to

1431. *Fiona Roy v Sipra Roy*, AIR 2008 (NOC) 1227 (Cal) : (2008) 64 All Ind Cas 520.

be ascertained as to whether such a power intended to be exercised by the appellate court as well. Such a position can be ascertained by having a reference to the specified law by keeping in mind the legislative intention of conferment of power on the appellate court either expressly or by necessary implication.[1432]

The appellate court or the Supreme Court has power to take *suo motu* judicial notice and exercise power conferred under section 105 of the CPC to set aside a sale even after the expiry of limitation period prescribed therein.[1433]

[s 107.2] Power of High Court

The high court although has a wide power in terms of section 107 of the CPC, but it cannot go outside the pleadings and make out a new case.[1434]

[s 107.3] Preliminary Objections Regarding Condonation of Delay and Maintainability

The impugned order for appointing receiver was passed on 29 September 2000 and at the time of passing of the order, the high court had taken note of the fact that it still had not decided the application for condonation of delay, yet it passed the order because of the urgency involved in the matter and because of the urgency involved in the matter and because of the fact that it was not in a position to decide the appeal finally. As a matter of fact, the high court had decided to dispose of the appeal finally, which it could not do so because of the impending vacation of the court at that time. Hence, it thought it fit to make the impugned interim order without considering the preliminary questions.

Where the second appeal was filed within time, but the refiling after curing defects was done after a delay of 3412 days and the high court had dismissed it on the ground of delay, the Supreme Court restored the appeal but directed enquiry and action against the responsible officers.[1435]

In view of the peculiar facts of this case without going into the merits of the contentions raised by the counsel for the appellants, the Supreme Court thought it is just and fair that they should not, at this point of time interfere with the impugned order, though the high court could have avoided passing such orders in proceedings where the maintainability itself was being seriously questioned. It directed the high court to consider the question of condonation of delay and the objection of the appellants in regard to maintainability of the appeal first, before proceeding with the appeal any further. The Supreme Court thought it to be just and proper that any further interim orders, if necessary, in the appeal before the high court in regard to the suit property should be made only after deciding the question of delay and maintainability of the appeal and the order already made should be confined to the appointment of a receiver and filing of his report only, meaning thereby, that the impugned order be confined to the appointment of receiver for the purpose of filing his report as directed by the court and nothing beyond that, at that stage.[1436]

1432. *Vasant Ganesh Damle v Shrikant Trimbak Doctor*, AIR 2002 SC 1237 : (2002) 4 SCC 183 : (2002) 2 SCR 198.
1433. *Nani Gopal Paul v T Prasad Singh*, (1995) 3 SCC 579; *State of Punjab v Bakshish Singh*, (1998) 8 SCC 222.
1434. *Ishwar Dutt v Land Acquisition Collector*, AIR 2005 SC 3165 : (2005) 7 SCC 190 : (2005) 6 Scale 11.
1435. *State of Tamil Nadu v Anbai Kingston Philips*, (2015) 15 SCC 208.
1436. *Gagandeep Pratishthan Pvt Ltd v Meehano*, AIR 2002 SC 204 : (2002) 1 SCC 475 : (2001) 8 Scale 205.

[s 107.4] Prescribed

"Prescribed" means prescribed by the Rules contained in the First Schedule or made under section 122 or section 125 of the CPC, see section 2, clauses (16) and (18).

[s 107.5] Appellate Court

"Appellate court" includes appellate tribunals exercising judicial functions in civil proceedings, such as the Labour Appellate Tribunal.[1437] In a writ appeal, the high court has power under this section to remand the case to the trial court for rehearing.[1438]

The Supreme Court has held that section 107 empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Order XLI, rule 24 provides that where evidence on record is sufficient, the appellate court may determine the case finally. The Supreme Court held that it is not a healthy practice to remand a case to the trial court until and unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, a case should be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues.[1439]

However, the appellate court cannot interfere with the order passed by the trial Court in a mechanical manner without recording reasons as to how and in what manner the findings of the trial Court were perverse or unsustainable. Thus where the trial Court had granted injunction in favour of the plaintiff on the basis of demarcation report of Commissioner and revenue records, interference by the appellate court without assigning any reason was held to be improper.[1440]

[s 107.6] Sub-section (1)

Note that the powers of the appellate court referred to in clauses (a) to (d) are limited by the rules as appears from the opening words of the section.[1441]

[s 107.6.1] Clause (a)

See O XLI, rules 24, 33. Where a revision application against an order granting *ex parte* divorce under section 13(1)(ib) is filed by the respondent before the high court, it should be treated as substance by way of miscellaneous appeal. Once the high court has appellate jurisdiction over the impugned order of the trial judge, it is fully competent to interfere with the order by re-appreciating the facts of the case. In this case, since the husband had died after the grant of an *ex parte* decree of divorce, the application of the wife under O IX, rule 13 was set aside and the matter was determined finally as no useful purpose would be served by directing the trial court to proceed with the Hindu marriage petition by restoring it to its file.[1442] The power of the appellate court, as also indicated in section 107 of the CPC, provides

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1437. *Upper Ganges Electric Employees' Union v Upper Ganges Valley Electric Supply Co*, AIR 1956 All 491.
1438. *Mahadeo v Srivastava*, AIR 1963 Cal 152.
1439. *Zarif Ahmad v Mohd Farooq*, AIR 2015 SC 1236 : (2015) 13 SCC 673 : (2015) 1 SCR 779 : (2015) 1 Scale 690.
1440. *Waheed Khan v Gyani Bai*, AIR 2005 MP 232 : 2005 MPLJ 213 (Gwalior Bench).
1441. *Mani Mohan v Ramratan*, (1916) 43 Cal 48.
1442. *Yallawwa v Shantavva*, (1997) 11 SCC 159.

that the appellate court shall have the same powers as are conferred on the original court. If the trial court could dispose of a case finally, the appellate court could also, by virtue of clause (a) of sub-section 10 of section 107 determine a case finally.[1443]

A suit for redemption of mortgaged property was filed before the expiry of the term of mortgage. The suit was dismissed as premature and the dismissal was confirmed by the first appellate court. The high court by an erroneous order allowed the appeal and remanded. But the order of remand was not challenged at that time and it was challenged after the final judgment. It was held by the Supreme Court that it being an interlocutory order which did not terminate the proceedings; it is open to the aggrieved party to challenge it after final judgment.[1444]

BN Srikrishna, J, speaking for the Bench in the above case, explained the legal position as follows:

> The trial court and the first Appellate Court had held that the suit for redemption brought by the plaintiff was premature and rightly dismissed. It is the High Court by its judgment dated 18-1-1966 in Second Appeal No. 3033/58, which took an erroneous view that because the plaintiff's advocate had stated that he would not seek delivery of possession before stipulated time (26-1-1968), the suit could be continued. It was on this wrong understanding of the legal position that the remand order dated January18, 1966 come to be made by the High Court pursuant to which the appeal and further proceedings continued. If this remand order was bad in law, then all further proceedings, consequent thereto would be non est and have to be necessarily set aside.[1445]

[s 107.6.2] Clause (b)

(See O XLI, rule 23, text under the heading "sub-section (2): Appeal from order of remand" in section 105 and "order of remand" in section 109). In a particular case, the high court dismissed the appeal by one word order "dismissed". As numerous points both of law and fact appear to have been raised in appeal, which again was sought to be canvassed before the Hon'ble Supreme Court. The Supreme Court remitted the matter to the high court as in its opinion it was a fit case which ought to have been admitted and disposed off on merits.[1446]

An order of remand, being an interlocutory order which did not terminate proceedings, it is open to aggrieved party to challenge it after final judgment.[1447]

A question in second appeal was also formulated, i.e., whether the lower appellate court is justified in dealing with issues other than those framed by the trial court and deciding the same in favour of the plaintiff depriving the defendant the opportunity to counter the plaintiff's evidence. It has been clearly stated that there was no issue framed regarding the adverse possession. The lower appellate court was not justified in deciding issues which were not framed. The high court took a view that there was no direct reference to the issue of adverse possession. But that is really of no consequence when the specific stand of the appellant was that there was no issue framed relating to adverse possession and, therefore, the first appellate court should not have recorded any finding on that regard. The trial court had not specifically framed any issue relating to adverse possession. This being the position, the judgment could not be maintained and was set aside. The matter was remitted by the Supreme Court to the

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1443. *State of Punjab v Bakshish Singh*, (1998) 8 SCC 222.
1444. *Mangal Prasad Tamoli v Narvedshwar Mishra*, AIR 2005 SC 1964 : (2005) 3 SCC 422.
1445. *Mangal Prasad Tamoli v Narvedshwar Mishra*, AIR 2005 SC 1964, para 16 at p 1967 : (2005) 3 SCC 422.
1446. *Kiranmal Zumerlal Borana Marwadi v Dnyanoba Bajirao Khot*, (1983) 4 SCC 223; *Mithlesh Kumari v Fateh Bahadur Singh*, (1991) 2 SCC 236.
1447. *Mangal Prased Tamoli v Narvedeshwar Mishra*, AIR 2005 SC 1964 : (2005) 3 SCC 422 : (2005) 2 Scale 384.

high court for fresh consideration and it was made clear that the Supreme Court did not express any opinion on the merits of the case.[1448]

It has been held by the Orissa High Court, that remand of a case by appellate court is not necessary in every case of illegality of the trial Court. Thus, where order was passed by the trial Court without revocation of the stay order was held to be erroneous, it was felt that the remand of the suit would be an exercise in futility as the same would result in starting another round of litigation.[1449]

The Rajasthan High Court has held that appellate courts should not remand a suit from the appellate stage to the trial Court when the case can be decided at the appellate stage itself.[1450] A word of caution has been sounded by the Court to curb the growing tendency to remand a case which has the effect of prolonging the litigation:

> 22. The purpose behind the Rules is not to initiate a *de novo* trial. The purpose is also not to prolong the dispute between the parties. Since the judiciary must endeavour to decide the dispute as soon as possible, the Appellate Court is expected to decide the case at the appellate stage itself. Therefore, the tendency to remand the case in to after setting aside the judgment of the trial Court and the tendency to direct a *de novo* trial is against the tenor of law.[1451]

It will be seen that O XLI, rules 23 to 26A deals with power of remand. In the above-noted case, the first appellate court by judgment dated 8 September 1998, allowed the appeal, re-framed the issues and remanded the case back to the trial Court to take fresh evidence on the newly framed issues and to decide the case. The high court noted that the defendants claimed the suit land to be Government property and have right to demolish the construction made on it, but failed to produce any oral or documentary evidence in order to substantiate its stand. It was further found by the high court that the issue whether the land in dispute belonged to Government or was the ancestral property of the plaintiff was long settled by the high court. Under these circumstances it was held that remand of the matter after the lapse of almost two decades to enable the defendants to fill lacuna would be improper.[1452]

The observations of the high court in the above case deserve notice:

> Therefore, no fruitful purpose would be served in reopening the said issue. The learned judge should also have been alive to the conduct of the U.T.I. The suit was filed on 21-3-1977 and the trial Court decided the case on 30-9-1993. During this period of over sixteen years, the U.T.I. decided not to contest the case. A litigant, who sleeps over his rights for sixteen years, cannot be permitted to re-open the Pandora's Box after a lapse of almost two decades. To do so is to inflict grave injustice on the appellant.[1453]

[s 107.6.3] Clause (c)

Under section 107 of the CPC, the appellate court has power to frame issue other than those framed by the trial court. But here again, the requirement is to refer them for trial. Consequentially, the defendant would have got opportunity to adduce evidence in that regard.[1454] The first appellate court is also competent as per the provisions of section 107 read

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1448. *Viswanatha Achari v Kanakasabapathy*, AIR 2005 SC 3109 : (2005) 6 SCC 56 : (2005) 1 SCR 817.
1449. *Dattusing Giridhar Singh Rajput v Bhagwant Devasthan, Barshi*, AIR 2005 Bom 86 : (2005) 2 Mah LJ 743.
1450. *Niranjan Lal v UIT, Alwar*, AIR 2007 Raj 18 : (2007) 1 Raj LW 350.
1451. *Niranjan Lal v UIT, Alwar*, AIR 2007 Raj 18, para 23 at p 22 : (2007) 1 Raj LW 350.
1452. *Niranjan Lal v UIT, Alwar*, AIR 2007 Raj 18 : (2007) 1 Raj LW 350.
1453. *Niranjan Lal v UIT, Alwar*, AIR 2007 Raj 18, para 27 at p 23–24 : (2007) 1 Raj LW 350.
1454. *Niranjan Lal v UIT, Alwar*, AIR 2007 Raj 18 : (2007) 1 Raj LW 350.

with relevant rules of the CPC to frame issues and decide matters as if it is the trial court.[1455] (See O XLI, rule 25).

In an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence, it does not enjoy the advantage which the trial court has in having the witness before it and of observing the manner in which he gives his testimony. When there is a conflict of oral evidence on any matter in issue and appellate court resolution turns upon the creditability of witness, the general rule is that it should permit the finding of fact rendered by the trial court to prevail unless it clearly appears that some features about the evidence of a particular witness has escaped the notice of the trial court or there is sufficient balance of improbabilities to displaced its opinion as to whether the creditability lies or the appraisals of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading or the evidence or on conjunctures and surmises.[1456] If it appears that the court has not framed the issues properly and then again, without taking each and every issue separately for discussion had taken all the issues together, on the pretext of "convenience" for discussion which is not proper, but then, in any case improper framing of the issues alone is not fatal unless prejudice is alleged and shown an appellate court is at liberty as per the provision of O XLI, rule 31, CPC to record the points for determination in the appeal, which, when done, will dispense with the defect of the improper framing of the issues by the trial court.[1457]

[s 107.6.4] Clause (d)

(See O XLI, rules 27, 28). As regards filing of application for additional evidence, it is better if the application is given a separate number and an order is passed thereon, separately. It is absolutely necessary that every application for permission to file additional evidence should contain a list of documents giving full particulars thereof, such as dates, parties thereto, and description. Apart from that, each document should also bear a certificate of endorsement made by the counsel or the party stating that the said document was the one referred to in the affidavit or application of the party. The application must also specify the number of pages of each document filed therewith. Whenever such application is filed in pending matter, the copies thereof and the copies of document sought to be filed, as additional document should be served on the other side after being duly verified as true copies by the applicant or his counsels. Appropriate rules have to be framed in this regard also.[1458] In view of the provisions of O XVIII, rule 18, the trial court is possessed of power to inspect any property or thing concerning which any question may arise at any stage of a suit. The appellate court is also, therefore, possessed of the power of inspection of any property or thing concerning which any question arises at any stage of the suit including appeal. Such a conclusion is inevitable if the provisions of O XVIII, rule 18 and section 107 of the CPC are read together.[1459] In an Andhra Pradesh case concerning land acquisition proceedings, the appellate court allowed certain documents to be brought on record by way of an additional evidence as the same were necessary for a just and effective decision about valuation.[1460]

1455. *Serajvddin v Abdul Khalique*, AIR 2004 Gau 126.
1456. *Madhusudan Das v Narayan Bai*, (1983) 1 SCC 35; *Ramdeo v Dulari Devi*, AIR 1996 All 253.
1457. *Serjuddin v Abdul Khalique*, AIR 2004 Gau 126.
1458. *Mohan Singh v Late Amar Singh*, (1998) 6 SCC 686.
1459. *Rajnaraian Rai v Sadhu Rai*, AIR 1995 All 351.
1460. *Land Acquisition officer v C Uma Maheshwara*, AIR 1993 AP 8.

Rule 27 of O XLI empowers the Court to permit additional evidence to be adduced at the appellate stage under the circumstances enumerated in the said Rule. Rule 27(1)(b) of O XLI provides a circumstance where the Court requires additional evidence to be produced in order to enable it to pronounce judgment in more satisfactory manner. However, where the application for permitting additional evidence was not even considered by the high court and the appeal was dismissed, it was held by the Supreme Court that the order of dismissal was improper.[1461]

DK Jain, J, speaking for the Bench in the above case, observed as follows:

> 17. It is manifest that in the present case, the High Court did not examine the record of the case with the thoroughness which was expected at the time of disposal of the pending applications. On a perusal of the impugned decisions, it is clear that the High Court was not even aware of the pendency of the application under O 41, r 27 CPC seeking leave to adduce additional evidence. A perusal of the documents, which came to light pursuant to the directions given by the High Court on 3rd April, 2002, *prima facie*, goes to show that these are likely to widely affect the decision of the court in one way or the other. If the stand of the appellant, which, according to them, is borne out from the documents now on record, is found to be correct, then obviously these will have material bearing on the core issue, namely whether the decree dated 13th March, 2001 is a nullity, having been allegedly obtained by concealing material facts and playing fraud on the Court.[1462]

[s 107.7] Sub-section (2) to Section 107

The appeal is considered to be an extension of the suit because under section 107 of the CPC, the appellate court has the same powers as are conferred by the Code on courts of original jurisdiction in respect of suits instituted therein. Such a power can be exercised by the appellate court "as nearly as may be" exercised by the trial court under the CPC. If the powers conferred upon the trial court are under a specified statute and not under the CPC, it has to be ascertained as to whether such a power was intended to be exercised by the appellate court as well. Such a position can be ascertained by having a reference to the specified law by keeping in mind the legislative intention of conferment of power on the appellate court either expressly or by necessary implication.[1463]

Sub-section 2 confers upon the appellate court, powers and duties co-extensive with that of the trial court, unless stated otherwise by a statute governing the cause.[1464] Accordingly, where the evidence on record is sufficient, the appellate court can resettle the issues and finally determine the suit, notwithstanding that the judgment of the trial court has proceeded upon some ground other than that on which the appellate court proceeds;[1465] but the decision must be based on the pleas taken by the parties and not on grounds not taken in the pleadings.[1466] The appellate court has power under this section to give leave to a plaintiff to withdraw from a suit under O XXIII, rule 1.[1467] The appellate court also has power under this section to order the rejection of a memorandum of appeal under O VII, rule 13, and such rejection shall

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1461. *North Eastern Railway Administration, Gorakhpur v Bhagwan Das*, AIR 2008 SC 2139 : (2008) 8 SCC 511.
1462. *North Eastern Railway Administration, Gorakhpur v Bhagwan Das*, AIR 2008 SC 2139, para 17 at p 2142 :.(2008) 8 SCC 511.
1463. *Vasant Ganesh Damle v Shrikant Trimbak Datar*, AIR 2002 SC 1237 : (2002) 4 SCC 183 : (2002) 2 SCR 198.
1464. *Jogesh Chandra v State of West Bengal*, AIR 1948 Cal 528.
1465. *Bhagwanti v Jiuti*, AIR 1977 All 341.
1466. *S Venkappa v Rangu*, AIR 1977 SC 890 : (1977) 3 SCC 532.
1467. See notes to O XXIII.

not of its own force preclude the appellant from filing a fresh memorandum of appeal.[1468] In a case before the Supreme Court, reading section 107(2) with section 149 of the CPC together and keeping fairness of procedure in view, it was held that, where the lower appellate court came to hold that the memorandum of appeal had not been sufficiently stamped, an opportunity should have been given by the court to the appellant to make good the balance court-fees within a time indicated and if, there was failure to comply with the directions of court, the memorandum of appeal could have been dismissed.[1469] The essence of a judgment is that it must be supported by reason. Importance of reasoning in judgment is all the more before the lower appellate court whose decision on finding of fact is binding on the high court in second appeal. If the judgment of the lower appellate court is unreasonable, it cannot be regarded as being in accordance with law. Therefore, where the lower appellate court simply agrees with the finding of fact recorded by the trial court, discusses the evidence on record and does not record its reasons in support of the finding, the finding will not be binding in second appeal.[1470] When a judgment is founded on misconception as to a concession made by an advocate, the proper procedure is to apply, by way of review, to the very court in whose judgment the error is alleged to have crept in, for a rectification of the mistake, if any, and it would not be proper for the appellate court to wipe out the effect of the so-called concession on considering the evidence.[1471] In a particular case, a court declined to decide the issue of jurisdiction as a preliminary issue. Evidence was recorded. Plaint was returned on a finding of want of jurisdiction without deciding the remaining issues. This was held to be invalid. The high court, in appeal, will not go into the merits of finding on issue of jurisdiction. Where an appeal is presented to a court which has no jurisdiction to entertain it, it can, under O VII, rule 10, read with this section pass an order that the memorandum be returned for presentation to the proper court.[1472] On the same reasoning, where an appeal against the decree of the subordinate judge is wrongly presented to the district court instead of the high court, and against the decree of the district court, a further appeal is taken to the high court, the high court should set aside the order of the district judge and direct him to return the memorandum of appeal for presentation to the proper court.[1473] Sections 104 and 107 do not prevent the high court from remanding the case to the trial court, for giving findings on all issues.[1474]

Under section 107 (2) of the Code it is open to appellate court to pass appropriate orders for injunction or stay during the pendency of the proceeding on an application filed for restoration of second appeal dismissed as being abated and application for substitution. It was held by the Allahabad High Court that the expression "all proceedings in any Court of civil jurisdiction" in section 141 of the Code is of wide import and injunction may be issued against persons who are sought to be substituted as heirs and legal representatives of the plaintiff.[1475]

Where a miscellaneous appeal was filed before the district court on rejection of the application for injunction and the district court came to the conclusion that it has no pecuniary jurisdiction to entertain the appeal. The only legal course open to the district court was to return the appeal for presentation before the appropriate Court. Thus, where the district court

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1468. *Jnanasundari v Madhab Chandra*, AIR 1932 Cal 482 : (1932) 59 Cal 388.
1469. *Mohammad Mahibulla v Seth Chaman Lal*, (1991) 4 SCC 529.
1470. *Bihari Lal v Murti Sri Radha Kishanji Thakurbari*, AIR 1981 Pat 234; *SVR Mudaliar v Rajabu F Bubari*, (1995) 4 SCC 15.
1471. *Gandhdhar Das v Gadadhar Das*, AIR 1986 Ori 173 (DB).
1472. *Ramachandra v Pannalal*, AIR 1954 Raj 191.
1473. *Peddi Siviah v C Ramanath*, AIR 1961 AP 327.
1474. *Chetan Textiles, Bombay v Jethabhai Hirji & Co*, AIR 1985 Guj 95.
1475. *Basant Lal v Lakshmi Chand*, AIR 2007 All 32 : (2007) 1 All LJ 158.

itself found that it had no jurisdiction but proceeded to decide the appeal on merit, the order was erroneous. Section 107 (2) read with O XXIII, rule 1 confers power on the appellate court to allow an appeal to be withdrawn.[1476]

Suit for declaration of title was dismissed where withdrawal can be permitted at the appellate stage. The CPC does not require the court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is, of course, possible that different considerations may arise where a set-off may have been claimed or a counter-claim may have been filed, as per procedural law applicable to the proceedings governing the suit.[1477]

An appeal against a decree in a suit can, under this section, be referred to arbitration,[1478] but not one against an order in execution.[1479] An appeal under the Representation of the Peoples Act, 1951, can, under this section, be withdrawn as provided in O XXIII, rule 1, and the high court cannot refuse to permit it.[1480]

Leave to sue defendants who are not residing within the territorial limits of the court under section 20(b) can be granted by the appellate court in appropriate cases.[1481]

Ordinarily, a court of appeal cannot take into account a new law brought into existence after the judgment appealed from has been given. This is so because the rights of a litigant in an appeal are determined under the law in force at the date of suit. But if the new law either expressly or by necessary implication takes in even pending matters, the court of appeal must have regard to the legislative intention so expressed and give effect to such a law.[1482] The appellate court can also take into account facts and events which have come into existence after the judgment and decree appealed against were passed.[1483]

[s 107.8] This Section and Section 12(3) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947

Where the appellant, by filing the application under section 12(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, had not made a prayer to the appellate court for passing any order which the trial court intended to pass under the CPC. His prayer was to invoke the benefit conferred upon a tenant under the Act. The beneficial provision under the Act unequivocally provides that it can be availed of in the suit and that too on the first day of hearing of the suit or on or before such other date as the court may fix, the first date of hearing cannot be stretched to be any date beyond the date before the issues are framed in the suit. The object is to protect the *bona fide* tenants from being evicted on the grounds of default by affording them further opportunity to make the payment of the arrears of rent at least at two times during the subsistence of tenancy, the provision is not intended to confer a right without circumspection to be availed of by the tenant at any time according to his convenience.

The words "such other date as the court may fix" would not include the date fixed by the appellate court in terms of section 107 of the CPC. However, in the instant case vide its order

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1476. *KP Chandrasekharan Pillai v Kesava Pillai*, (2009) 2 Civil Court C 605 : (2009) 2 Ker LT 193.
1477. *Dinabandhu Sahoo v Budhi Debi*, AIR 1991 Ori 215.
1478. *Moradhwaj v Bhudardas*, AIR 1955 All 353 : (1955) All LJ 96; *Subramania v Devdas*, AIR 1925 Mad 698 : (1955) 2 Mad LJ 625.
1479. *Moradhwaj v Bhudardas*, AIR 1955 All 353 : (1955) All LJ 96.
1480. *Bijayananda v Satrugna Sahu*, AIR 1963 SC 1566.
1481. *Dwarka Das v Hanuman Das*, AIR 1961 Raj 187 : (1960) ILR Raj 1497.
1482. *Dayawati v Inderjit*, AIR 1966 SC 1423 : [1966] 3 SCR 275.
1483. *Chajju Lal v Ram Pal*, AIR 1968 Tri 5. See also notes to O XLI, rule 20.

dated 18 January 2001, the appellate court had not extended the time and expressly permitted the appellant to deposit the arrears of rent allegedly payable by him without prejudice to the rights of the other party, i.e., the landlords. The high court was, therefore, justified in holding that the appellant cannot take advantage of section 12(3) of the Act at the appellate stage which he had failed to avail of before the trial court. The appellant was rightly held to be in arrears of rent for more than six months from the date of filing of the suit and had failed to apply before the trial court on the first day of suit for depositing the arrears of rent.[1484]

[s 107.9] Difference Between Appeal and Revision

The legislature made a provision for discretionary remedy of revision which is indicative of the fact that the legislature has created two jurisdictions different from each other in scope and content in the form of an appeal and revision. An appeal is a continuation of suit or proceedings wherein the entire proceedings are again left open for consideration by the appellate authority which has the power to review the entire evidence, subject to the prescribed statutory limitation. But in the case of revision, whatever powers the revisional authority may have, it has no power to recess and re-appreciate the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision.[1485]

[S 108] Procedure in appeals from appellate decrees and orders.—The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

(a) from appellate decrees, and

(b) from orders, made under this Code or under any special or local law in which a different procedure is not provided.

Compare O XLII, rule 1 and O XLIII, rule 2.[1486]

Appeals to the Supreme Court

[1487][**[S 109] When appeals lie to the Supreme Court.**—Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may from time to time be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies—

(i) that the case involves a substantial question of law of general importance; and

(ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.]

1484. *Vasant Ganesh Damle v Shrikant Trimbak Datar*, AIR 2002 SC 1237 : (2002) 4 SCC 183 : (2002) 2 SCR 198.
1485. *Lachhman Das v Santokh Singh*, (1995) 4 SCC 201; *Bhoolchand v Kay Pee Cee Investments*, (1991) 1 SCC 343.
1486. *Collector, Varanasi v Gauri Shankar Misra*, AIR 1968 SC 384.
1487. Substituted by CPC (Amendment) Act 49 of 1973, section 2, for former section 109 (w.e.f. 29-11-1973).

SYNOPSIS

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[s 109.1] Changes in the Section

The Code of Civil Procedure (Amendment) Act (49 of 1973), which received the assent of the President on 11 November 1973, substituted the present section for the old section. The Amendment Act, 1973 also deleted section 110. The section as it stood before the amendment was as follows:

> **Section 109.** Subject to the provisions in Chapter IV of Part *v* of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Court of India, and to the provisions herein contained, an appeal shall lie to the Supreme Court—
>
> (a) from any judgment, decree or final order passed on appeal by a High Court or by another Court of final appellate jurisdiction;
>
> (b) from any judgment, decree or final order passed by a High Court in the exercise of original civil jurisdiction; and
>
> (c) from any judgment, decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to the Supreme Court.

The section, as it stood before its amendment in 1973, corresponded with section 595 of the Code of Civil Procedure 1882 (except that in clauses (a) and (b) the words "decree or final order" were substituted for the words "final decree", and in cl(c) the words "or Order" were added after the word "decree"). By the Adaptation of Laws Order 1950, the following amendments were made in the section:

(i) the words "subject to the provisions in Chapter IV of Part V of the Constitution and such rules" were substituted for the words "subject to such rules";

(ii) the words "the Supreme Court" were substituted for the words "His Majesty in Council";

(iii) in clause (b), the words "judgment, decree or final Order" were substituted for the words "decree or final order";

(iv) by Amendment Act 66 of 1956, the words "judgment, decree or, final order" were substituted for the words "decree or order" in clause (c).

The Amendment Act 1973 restructured the section by taking the words "from any judgment, decree or final order" in clause (a) into the main operative part of the section. It deleted the words "passed on appeal" and the words "or by any other court of final appellate jurisdiction;"

in cl(a) and substituted for clauses (a), (b) and (c) new clauses (i) and (ii). The words "any other court of final appellate jurisdiction" found in the unamended section 109 were omitted in Article 133 of the Constitution, the obvious intention being to confine appeals to the Supreme Court against judgment, decree or final order passed by a high court. Though these words remained in the unamended section 109, there could be no appeal to the Supreme Court except against an order passed by the high court since the section was subject to Article 133. Those words having been, thus, rendered superfluous by their omission from Article 133, they are now deleted from the section also. The word "court" in section 109 made it abundantly clear that the section did not cover a tribunal or body which was not a court within the Code of Civil Procedure or the Civil Courts Act. Though decisions of tribunals appointed under special status were not open to appeal to the Supreme Court, the Supreme Court could grant leave to appeal under Article 136 of the Constitution in appropriate cases. Article 133, having restricted appeals to the Supreme Court from the orders of the high courts, there could not have been appeals to the Supreme Court against the orders passed by the judicial commissioners' courts. To get over this difficulty certain judicial commissioners courts for the purposes of Articles 132, 133 and 134 of the Constitution were declared by the Parliament to be high courts by enacting the Judicial Commissioners' Court (Declaration as High Courts) Act, 1950 and the Goa, Daman and Diu Judicial Commissioner's Court (Declaration as High Court) Act, 1964.

[s 109.2] Scope of the Section

Section 109 is subject to the provisions of Chapter IV of Part V of the Constitution. The articles bearing on the right conferred by section 109 are Articles 132, 133 and 134A. Clause 1 of Article 132 provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a high court, whether in a civil, criminal or other proceeding, if the high court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. However, it is Article 133 which deals with the appeals under section 109. Article 133, before its amendment by the Constitution (Thirtieth Amendment) Act, 1972 was as follows:

> **Article 133.** Appellate Jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters—
>
> (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies:
>
> (a) that the amount or value of the subject matter of the dispute in the court of the first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or
>
> (b) that the judgment, decree or final order involves, directly or indirectly, some claim or question respecting property of the like amount or value; or
>
> (c) that the case is a fit one for appeal to the Supreme Court; and where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law.
>
> (2) Notwithstanding anything in Article 132, any party appealing to the Supreme Court under cl (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

(3) Notwithstanding anything in this Article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Section 2 of the Constitution (Thirtieth Amendment) Act, 1972 which was brought into force with effect from 27 February 1973 substituted cl(1) of the article by the following clause:

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies:

(a) that the case involves a substantial question of law of general importance; and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

Section 3 of the Constitution Thirtieth Amendment Act, 1972, makes special provision inter alia as to pending proceedings and provides:

(1) Nothing in this Act shall affect—

(a) any appeal under sub-clause (a) or sub-clause (b) or sub-clause (c) of clause (1) of Article 133 of the Constitution which immediately before the commencement of this Act was pending before the Supreme Court; or

(b) any appeal preferred on or after the commencement of this Act against any judgment, decree or final order in a civil proceeding of a High Court by virtue of a certificate given by the High Court before the commencement of this Act under sub-clause (a) or sub-clause (b) or sub-clause (c) of Article 133;

and every such appeal may be heard and disposed of or as the case may be, entertained, heard and disposed of by the Supreme Court as if this Act had not been passed.

(2) Subject to the provisions of sub-section (1) no appeal shall lie to the Supreme Court under clause (1) of article 133 of the Constitution from any judgment, decree or final order arising out of a suit or other civil proceeding which was instituted or commenced in any court before the commencement of this Act unless such appeal satisfies the provisions of that clause as amended by this Act.

The amended clause (1) of Article 133 does away with the criterion of the value of the subject matter of Rs 20,000 in the court of the first instance and in an appeal from its judgment, decree or final order. It also does away with the certificate by the high court to that effect and instead lays down two new criteria, both of which must be satisfied before an appeal to the Supreme Court can lie. The first is that the case involves a substantial question of law of general importance and the second, is that such a question needs, in the opinion of the high court, to be decided by the Supreme Court. The two conditions are thus cumulative, so made clear by the use of the word "and" at the end of sub-clause (a). Therefore, the mere circumstance that the proposed appeal involves a substantial question of law of general importance is not by itself sufficient. Even, where such a question is raised, the high court must ensure that it is such as needs to be decided by the Supreme Court. The meaning of the expression "substantial question of law" was given by the Supreme Court in *Sir Chunilal v Mehta v Century Spg and Mfg Co Ltd,*[1488] in the following terms:

> The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal court or is not

1488. *Sir Chunilal v Mehta v Century Spg and Mfg Co Ltd,* AIR 1962 SC 1314 : (1962) 3 SCR 549.

> free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well-settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not the substantial question.

In the above case, the construction of a managing agency agreement, which was neither simple nor free from doubt, was held to be a substantial question of law.[1489] In another case, the question whether a dedication for the performance of *gurupuja* at a *samadhi*, and for conducting *annadanam*, was valid or not was held to be a substantial question of law.[1490] However, as aforestated, it is not enough that the case involves a substantial question of law. Such question must furthermore, be one of general importance. It has been decided by the High Court of Calcutta that the question whether revision lies from an award of an arbitrator appointed under section 19(1)(b) of the Defence of India Act, 1939, specially when there are a number of such applications pending, and where there exists a difference of opinion between two high courts, is a substantial question of law of general importance. The high court, however, expressed the view that Article 133(1) vested a wide discretion in the high court and held, in exercise of that discretion, that it was not a question which in its opinion needed to be decided by the Supreme Court.[1491] The mere fact that the refusal of the certificate is likely to cause inconvenience is no ground for its issuance.

The question next is to what appeals do the amended Article 133 and the amended section 109 apply? The ordinary rule is that a court of appeal cannot take into account a new law brought into existence after the judgment appealed from has been rendered. The reason underlying this rule is that the rights of litigants in an appeal are determined under the law in force, at the date of the institution of the suit. Courts have always looked with disfavour upon laws which take away vested rights or which affect pending cases. However, there is a distinction between procedural and substantive matters. The law affecting procedure is treated generally as retrospective. The right to an appeal to a superior tribunal is a very different thing from one regulating procedure and has since long been recognised as a substantive right.[1492] The right to appeal to the Supreme Court is also a constitutional right under Article 133 of the Constitution. Consequently, the appellate court must give effect to the same law which was in force at the date of the earlier proceeding.[1493] This is not an absolute rule of inviolability of substantive rights. As stated by the Supreme Court in *Dayawati v Inderjit*:[1494]

> If the new law speaks in language which expressly or by clear intendment takes in even pending matters, the Court of trial as well as the Court of appeal must have regard to an intention so expressed, and the Court of appeal must give effect to such a law even after the judgment of the Court of first instance. The distinction between laws affecting procedure and those affecting vested rights does not matter when the Court is invited by law to take away from a successful plaintiff what he has obtained under a judgment.[1495]

The Constitution (Thirtieth Amendment) Act, 1972 does contain, it is submitted, provisions as contemplated in the case of *Dayawati v Inderjit*. Section 3 of the Amendment Act, 1972 furnishes a special provision as to pending proceedings and expressly provides that nothing in the Act is to affect: (a) appeals pending before the Supreme Court immediately

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1489. *R Subba Rao v N Veeraju*, AIR 1951 Mad 969 : (1952) ILR Mad 264; *Kishori Lal v Murli Dhar*, (1961) ILR Raj 735; *Everest Orient Line v Jasjit Singh*, AIR 1962 Cal 308.
1490. *Saraswathi Ammal v Rajagopal Amma*, AIR 1950 Mad 81.
1491. *State of West Bengal v Somendra Kumar Mitra*, AIR 1975 Cal 335.
1492. *Colonial Sugar Refining Co v Irving*, AIR 1905 Cal 369.
1493. *Re a Debtor*, (No 490 of 1935) : [1936] 1 Ch 237.
1494. *Dayawati v Inderjit*, AIR 1966 SC 1423 : [1966] 3 SCR 275.
1495. *Jagannath Prasad v Hazari Lal*, AIR 1953 All 509; *Sadar Ali v Dalimuddin*, AIR 1928 Cal 640.

before the commencement of the Amendment Act; and (b) appeals, though preferred on or after the commencement of the Act, by virtue of certificates granted by the high courts under sub-clause (a) or (b) or (c) of the unamended Article 133(1) before the commencement of the Act. The fact that only two categories of appeals are saved by a specific provision does, it is apprehended, show that the rest of the appeals are governed by and are subject to the provisions of the amended Article 133 and amended section 109 of the CPC. This is also clear from sub-section 2 of section 3 of the Constitution Amendment Act, 1972 which provides that, subject to the provisions of sub-section 1, no appeal shall lie to the Supreme Court under clause (1) of Article 133 from any judgment, decree or final order arising out of a suit or other civil proceeding which was instituted or commenced in any court before the commencement of this Act, unless such an appeal satisfies the provisions of that clause as amended by this Act. This sub-section was intended to rule out the principle laid down in the case of *Colonial Sugar Refining Co,* that a right of appeal is a substantive right which cannot ordinarily be said to have been defeated by a new enactment, unless such enactment is expressly or by necessary intendment made retrospective.

[s 109.3] Right of Appeal to the Supreme Court

The right to appeal to the Supreme Court from a judgment, decree or final order in a civil proceeding is expressly given by Article 133 of the Constitution. It is, therefore, not necessary now to invoke the principles laid down in the series of cases beginning from *Secretary of State v Chelikani Rama Rao,*[1496] and ending with *Pramatha Nath Roy v Sanat Kumar Mukerji,*[1497] that once a civil proceeding reached the high court, the right of appeal conferred by sections 109 and 110 of the CPC would attach to these proceedings, notwithstanding that no right of appeal had been specially given by the relevant special statute. When a special statute dealing with a special class of cases uses, with reference to the decision given by a tribunal set up under that statute, the word "final", the use of this word must be taken to indicate an intention to override section 109 and no appeal will lie from that decision. There will be no right of appeal to the Supreme Court unless Parliament by law otherwise directs [Article 133(3) of the Constitution] from an order of a single judge of a high court either in a first appeal or a second appeal or in a revision.

However, mere filing of appeal in the Supreme Court does not operate as stay of proceedings in the Court below. The execution of a decree will not be stayed merely by reason of the filing of appeal against such decree. Mere pendency of Special Leave Petition before the Supreme Court cannot be a ground to direct the executing Court to stay its hands.[1498]

[s 109.4] Civil Proceedings

There is no right of appeal to the Supreme Court unless the judgment, decree or order is made in a civil proceeding. There has been some discussion in the courts as to the precise import of the words "civil proceeding". It has been said that the "simplest definition of civil proceeding is a proceeding in a court of civil jurisdiction, for example a civil court".[1499] It has also been

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1496. *Secretary of State v Chelikani Rama Rao,* 43 IA 192 : (1916) 39 Mad 617 : 20 Cal WN 1311.
1497. *Pramatha Nath Roy v Sanat Kumar Mukerji,* AIR 1949 FC 60 : [1948] FCR 228 : (1948) 53 Cal WN 12.
1498. *Shivarudrappa Fakirappa Uppin v Executive Engineer, Karnataka Housing Board, Hubli Dist,* AIR 2009 (NOC) 2915 (Kant) : (2009) 4 Kant LJ 454 (DB).
1499. *State of Uttar Pradesh v Mukthar Singh,* AIR 1957 All 505.

observed that the words "civil proceedings" are used in opposition to criminal proceedings.[1500] Discussing this question, the High Court of Madras held in *Krishnaswami v Council of Institute of Chartered Accountants,*[1501] that it would not be right to say that a civil proceeding will include whatever is not a criminal proceeding, or that whatever comes before a civil court is a civil proceeding or that whatever jurisdiction is conferred by a statute is a civil proceeding. It held that it would depend on the character of the dispute whether it is a civil proceeding. The decisions of various high courts are fairly unanimous that any proceeding which involves an adjudication of a right to property or any other civil right will be a civil proceeding,[1502] and that it is the nature of the right involved, and not the form of the proceeding, that is determinative.[1503] A proceeding for the grant of patent under the Patents and Designs Act, 1911 is a civil proceeding.[1504]

[s 109.5] Writ Proceedings

There is a difference of judicial opinion on the question whether proceedings for a writ under Article 226 of the Constitution are civil proceedings. It has been held in *Collector of Monghyr v Maharaj Pratap Singh,*[1505] that the extraordinary jurisdiction vested in the high court under this article is not for the purpose of determining the rights of parties, but only to see that the tribunals act within their jurisdiction and is, therefore, not a civil proceeding. However, the preponderance of authority favours the view that if the order in a writ proceeding has the effect of finally deciding the rights of parties, it will be a civil proceeding.[1506] However, it has been held by a Full Bench of the Patna High Court that proceedings under Article 227 of the Constitution are, in contrast to those under Article 226, civil proceedings, and that orders passed thereon are open to appeal under Article 133.[1507] The view of the Patna High Court expressed in the case of *Collector of Monghyr v Maharaj Pratap Singh* above is no longer correct, in view of the Supreme Court having subsequently held that writ proceedings under Article 226 are civil proceedings as they directly involve civil rights of the contending parties.[1508]

[s 109.6] Disciplinary Proceedings

An order of the high court refusing to enroll a person as a legal practitioner, under the Legal Practitioners Act, 1879, is not one from which the high court has jurisdiction to

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1500. *State of Uttar Pradesh v Mukthar Singh*, AIR 1957 All 505; *Saraswathi v Rajagopal*, AIR 1952 Mad 81 : (1952) ILR Mad 1 : (1951) 2 Mad LJ 63 : 68 LW 589.
1501. *Krishnaswami v Council of Institute of Chartered Accountants*, AIR 1954 Mad 340 : AIR 1953 Mad 862 : (1953) ILR Mad 79 : (1953) 2 Mad LJ 646; *Srirama Rao v Srinivasamurthi*, (1953) 1 Mad LJ 542.
1502. *Dhanalakshmi Vilas Cashew Co v President Cashew Industries Staff Assn*, AIR 1962 Ker 1 (FB) : (1961) ILR 2 Ker 43 : (1961) Ker LT 427 : (1961) Ker LJ 360; *Kapur Singh v UOI*, AIR 1957 P&H 173 : (1957) ILR Punj 873; *Brijlal v State of Uttar Pradesh*, AIR 1958 All 621 : (1958) 1 All 318; *Jagannath v State of Orissa*, AIR 1957 Ori 42 : (1957) ILR Cut 27.
1503. *Kehar Singh Nihal Singh v Custodian General*, AIR 1959 P&H 58.
1504. *Farben Fabriken Bayer v Joint Controller of Patents and Designs*, AIR 1963 Cal 433 : 67 Cal WN 743.
1505. *Collector of Monghyr v Maharaj Pratap Singh*, AIR 1957 Pat 202; *Shriram Hanuman Bux v State of Madhya Pradesh*, AIR 1955 Ngp 257.
1506. *Dhanalakshmi Cashew Co v President, Cashew Industries Co v President Cashew Industries Staff Assn*, AIR 1962 Ker 1 (FB) : (1961) ILR 2 Ker 43 : (1961) Ker LT 427 : (1961) Ker LJ 360; *Kapur Singh v UOI*, AIR 1957 P&H 173 : (1957) ILR Punj 873; *Kahar Singh Nihal Singh v Custodial General*, AIR 1959 P&H 58; *Dhanalakshmi v Income-tax Officer*, AIR 1958 Mad 151 : (1958) ILR Mad 117; *Income-tax Officer v Joti Prasad*, AIR 1960 All 84; *Jagannath v State of Orissa*, AIR 1957 Ori 42 : (1957) ILR Cut 27.
1507. *Budhinath Jha v Manilal Jadhav*, AIR 1960 Pat 361.
1508. *SAL Narayan Rao v I Bhagwan Das*, AIR 1966 SC 1445 : [1966] 3 SCR 198.

grant leave to appeal to the Supreme Court. Such an order is passed in the exercise of the administrative powers of the court. Similarly, an order by a high court striking an advocate off the rolls under its disciplinary jurisdiction conferred by clause 8 of the Letters Patent is one from which the high court has no power to grant leave to appeal. The principles underlying the decisions in *Re Sudhansu*[1509] and *Re An Advocate,*[1510] apply in such a case. (For the view of Calcutta, Bombay, Madras and Patna High Courts on the point, see note to clause 39 of the Letters Patent of the High Court of Calcutta, Bombay and Madras). According to the High Court of Allahabad, it has been the practice of that court to grant leave in a fit case, such as when a pleader's name[1511] or an advocate's name[1512] is struck off the rolls. The Supreme Court has power under Article 136 to interfere with an order passed by the high court in the exercise of disciplinary jurisdiction in proceedings against a legal practitioner, but only in exceptional cases.[1513]

[s 109.7] Proceedings by way of Arbitration

Where a dispute was referred to the decision of arbitrators under the Defence of India Rules and against the decision an appeal was taken to the court, as provided under the rules, it was held by the Supreme Court that this was not a judgment open to appeal under Article 133 as it was really an award with the imprimatur of the court impressed on it.[1514] Proceedings before a tribunal appointed under the Kanpur Urban Area Development Act, 1945 are really in the nature of arbitration and the decision of the arbitrator is not a judgment open to appeal,[1515] nor a decision by the high court in an appeal preferred under the Uttar Pradesh Towns Improvement Act, 1920.[1516] An appeal by special leave under Article 136 against an award made under the Industrial Disputes Act, 1947 is not an appeal as of a right.[1517]

[s 109.8] Election Cases

It was held in *VV Giri v DS Dora,*[1518] that a decision in an appeal, preferred under the Representation of the Peoples Act, 1951, raising the question of the validity of an election was not a civil proceeding and that accordingly, no leave to appeal could be granted under Article 133. However, the weight of authority is decidedly against this view.[1519]

[s 109.9] Contempt Proceedings

The Privy Council has held that a committal for a finding, by a high court, of contempt for breach of an injunction is not criminal in its nature, and that leave to appeal may be granted

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1509. *Re Sudhansu,* AIR 1922 Pat 603 : (1922) 1 Pat 590.
1510. *Re An Advocate,* AIR 1930 Rang 150 : (1930) 8 Rang 40.
1511. *P, a Pleader v Judges of the High Court of Allahabad,* AIR 1937 All 167 : (1936) All LJ 272.
1512. *S, an Advocate v Judges of the High Court of Allahabad,* AIR 1934 All 898 : (1934) 56 All 702.
1513. *Lalit Mohan v Advocate-General,* AIR 1957 SC 250 : [1957] SCR 167 : 1957 SCJ 230; *Manak Lal v Prem Chand,* AIR 1957 SC 425 : [1957] SCR 575 : 1957 SCJ 359 : 1957 SCA 719.
1514. *Hanskumar Kishanchand v UOI,* AIR 1958 SC 947 : [1959] SCR 1177 : 1959 SCJ 603 : 1959 SCA 226.
1515. *Govt of Uttar Pradesh v Rama Swarup,* AIR 1961 All 509.
1516. *UOI v Qabool,* AIR 1962 P&H 373.
1517. *Kamani Metal and Alloys Ltd v Workmen,* AIR 1967 SC 1175 : [1967] 2 SCR 463.
1518. *VV Giri v DS Dora,* AIR 1958 AP 642 : (1958) 2 Andh WR 324.
1519. *Kesava Gupta v Ghayur Ali Khan,* AIR 1959 All 607; *Lakshmi Shanker v Shripal Singh,* AIR 1960 All 548; *Budhnath Jha v Mamlal Jadhav,* AIR 1960 Pat 361; *Govinda Ramshanker Prasad Ghoshal,* 67 Cal WN 558.

under this CPC.[1520] No leave will be granted for the purpose of challenging the correctness of the findings given by the high court.[1521]

[s 109.10] Judgment on a Reference Under Section 66 of the Income Tax Act, 1922

The high court, hearing a reference under section 66 of the Income Tax Act, 1922, exercises an advisory jurisdiction and its opinion is not a judgment, decree or final order within Article 133 of the Constitution or this section.[1522] For the same reason, it has been held that a judgment given on a reference under section 108(1) of the Saurashtra Income Tax Ordinance 1949, is not open to appeal under this section;[1523] nor an order made on a reference under section 24 of the United Provinces Agriculturists Income Tax Act, 1948.[1524] A decision given by the high court on a point of law referred to it by the revenue authorities under section 21 of the Bihar Sales Tax Act, 1944 is not a judgment within the meaning of this section. It is only an opinion,[1525] and so is an order delivered under section 24(5) of the Cochin Sales Tax Act.[1526] It has also been held that a writ to quash assessment of income tax, under section 23 of the Income Tax Act, 1922, is not a civil proceeding and the order passed therein is not open to appeal under this section.[1527]

[s 109.11] Judgment

The word "judgment" occurs in this section and Article 133 of the Constitution. It was also used in section 205 of the Government of India Act, 1935. It has been held that in the context in which it occurs, the word signifies not the reasons in support of a decision, but a decision which finally adjudicates on the rights of the parties and that an interlocutory judgment, which merely decides an issue or issues without finally determining the rights and liabilities of the parties is not a judgment within this section, however, cardinal the issue might be.[1528]

[s 109.12] Decree

For definition of decree, see section 2(2) above.

1520. *Banerjee v Kuchwar L&S Co*, AIR 1938 PC 295 : (1939) 41 Bom LR 136 : 178 IC 490; *BB Light Railway v District Board, Patna*, AIR 1952 Pat 23 : 30 Pat 287.
1521. *SS Roy v State*, AIR 1953 Ori 266 : (1952) ILR Cut 467.
1522. *Tata Iron & Steel Co Ltd v Chief Revenue Authority, Bombay*, 50 IA 212 : ILR 47 Bom 724; *Jamnadas Prabhudas v CIT*, AIR 1955 Mad 624; *Jagannath Rao v CIT*, AIR 1956 Hyd 136 : (1956) ILR Hyd 558; *CIT v Ramdayal Ghansi Ram*, AIR 1962 AP 391 : (1962) 91 Andh WR 184.
1523. *CIT v Patel & Co*, AIR 1960 SC 278.
1524. *Holdsworth v State of Uttar Pradesh*, AIR 1956 All 392.
1525. *Tobaco Manufacturers (India) Ltd v State*, AIR 1951 Pat 29.
1526. *Sales Tax Commr v Peres & Co Ltd*, AIR 1958 Ker 53.
1527. *Allenbury & Co v Income-tax Officer*, AIR 1959 Pat 175; *Additional Income-tax Officer v Shanmuga Rajeswara*, AIR 1963 Mad 190.
1528. *Tata Iron & Steel Co Ltd v Chief Revenue Authority Bombay, supra*; *Hoari Ram Singh v Emperor*, AIR 1939 FC 43 : [1939] FCR 159; *Kuppuswami Rao v The King*, AIR 1949 FC 1 : [1947] FCR 180; *Mohamed Amin Bros Ltd v UOI*, AIR 1950 FC 77 : [1949] FCR 842; *Raghavacharyulu v Ramanujacharyulu*, AIR 1954 Mad 406 : (1954) 1 Mad LJ 198; *West Jamuria Coal Co v Bholanath*, AIR 1954 Cal 424 : 58 Cal WN 3; *Savithri Devi v Rajul Devi*, AIR 1916 All 245 : (1960) 2 All 917 : (1960) All LJ 897; *The Printers (Mysore) Pvt Ltd v Pothan Joseph*, AIR 1961 Mys 98.

[s 109.13] Preliminary Decree

An appeal would lie to the Supreme Court from a preliminary decree, for example, a decree declaring the liability of a party and directing accounts to be taken on the same principles as laid down in *Sanyasi v Krishnadhan.*[1529]

[s 109.14] Final Order

In *Ramchand v Goverdhandas,*[1530] the Privy Council said that an order is final if it finally disposes off the rights of the parties. In that case, a stay order under section 19 of the Arbitration Act, 1940 had been reversed and the suit went back for trial. The appellate court had thought that the order was final as it "went to the root of the suit, namely the jurisdiction of the court to entertain it" and it was for this reason that the order was supposed to be final; but it was not so where the parties were still under trial. In *Abdul Rahman v Cassim,*[1531] a suit for damages had been dismissed on a preliminary ground and the high court, on appeal, reversed the decree and remanded the suit for trial on the merits under O XLI, rule 23. The Privy Council held that this was not a final order. The test has been laid down by Sir George Lowndes in the following terms—

> The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under Section 109.[1532]

Their Lordships distinguished the previous Privy Council decisions of *Rahimbhoy v Turner,*[1533] and *Muzhar Hossein v Bodha,*[1534] as decided under the Code of Civil Procedure 1882. In *Rahimbhoy v Turner,*[1535] the order was one determining the defendant's liability to account and directing accounts to be taken. This was held to be the final order as it determined the cardinal point in the suit which was the defendant's liability to account. In *Muzhar Hossein v Bodha,*[1536] the suit was to recover property which was the subject of a gift by a will. The validity of the will was disputed and the high court, differing from the court of first instance, held that the will was valid and remanded the suit for subordinate inquiries. The Privy Council held that the order was a final order as it comprised a decision of the cardinal issue in the suit, namely, the validity of the will. The order in *Rahimbhoy*'s case was one which under the present Code would be a preliminary decree. With reference to *Muzhar Hossein's* case the Privy Council said that if the effect of the decree had been merely to remand the suit for trial on the merits, a different consideration would have applied. In an earlier case, where the lower court refused to set aside an *ex parte* decree and the high court remanded the suit for an inquiry on the merits, the Privy Council held that the order of the high court was not a final order but a purely interlocutory order directing procedure.[1537] The meaning of the words "final order" has been

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1529. *Sanyasi v Krishnadhan*, AIR 1922 PC 237 : 49 IA 108; *Firm Ganeshdas Kishnaji v Murlidhar*, AIR 1956 MB 151.
1530. *Ramchand v Goverdhandas,* 47 IA 124; followed in *Aisha Bee Bee v Noor Mohamed*, AIR 1932 Rang 192 : (1932) 10 Rang 504 and *Tan Ma Shwe v Tan Ma Nywe*, AIR 1932 Rang 189 : (1932) 10 Rang 499.
1531. *Abdul Rahman v Cassim*, AIR 1933 PC 58 : 60 IA 76, 81; *Mohamed Amin Brothers Ltd v The Dominion of India*, AIR 1950 FC 77 : [1949] FCR 842 : 85 Cal LJ 250; *Chandra Singh Dudhoria v Midnapore Zemindary Co Ltd*, AIR 1951 Cal 300 : (1950) 54 Cal WN 874 : 86 Cal LJ 324.
1532. *VM Abdul Rehman v DK Cassim*, AIR 1933 PC 58; referred to and relied upon by the Supreme Court in *Jethanand v State of Uttar Pradesh*, AIR 1961 SC 794; *Tarapore & Co, Madras v Tractors Export Moscow*, AIR 1970 SC 1168; *Prakashchand v Hindustan Steel*, AIR 1971 SC 2319.
1533. *Rahimbhoy v Turner,* 18 IA 6.
1534. *Muzhar Hossein v Bodha,* 22 IA 1.
1535. *Rahimbhoy v Turner,* 18 IA 6.
1536. *Muzhar Hossein v Bodha,* 22 IA 1; *Ananda Gopal v Nafar Chandra,* (1908) 35 Cal 618.
1537. *Radha Kishan v Collector of Jaunpur,* 28 IA 28.

considered in a number of decisions by the Federal court and the Supreme Court. The result of the authorities might, thus, be summed up—if the order amounts to a final decision on the rights of the parties in dispute in the proceeding, it is a final order; but if the proceeding still remains to be tried even after the order is made, and the rights in dispute have still to be determined, then the order is interlocutory.[1538] If the order finally determines all the rights of the parties, but proceedings have to be taken to give effect to it, it is in the nature of a preliminary decree and is a final order.[1539]

Order of Remand.—When the lower court dismisses a suit on the ground that it is barred by limitation, and the high court, reversing the decision, remands the suit for trial, the order is interlocutory.[1540] An order remanding a suit for decision on the merits is therefore, not a final order.[1541] The contrary view expressed in *Shantilal v Raj Narain*,[1542] is, it is submitted, not correct. There are a few decisions in which orders of remand, which did not decide finally the rights of parties, have been held to be final but they cannot be regarded as laying down the law correctly.[1543]

An order refusing to appoint a receiver in a suit is not a final order and no appeal lies to the Privy Council.[1544] In a case where the high court discharged an order made by the district court appointing a receiver and the high court granted leave to appeal, the Privy Council observed that as a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory order was one which was not a suitable subject for review by the judicial committee.[1545] An order passed in an appeal against an order appointing a receiver under O XL, rule 1, is not a final order open to appeal under this section[1546] nor is an order issuing an injunction restraining the defendant from proceeding with a suit in another court.[1547]

The following are further instances of orders which have been held not to be final orders:

(i) an order of the appellate court reversing the order of the court of first instance refusing to set aside an abatement and directing the lower court to rehear the application;[1548]

1538. *Premchand Satramdas v State of Bihar*, AIR 1951 SC 14 : [1950] SCR 799 : 1951 SCJ 5; *Syedna Taher Saifuddin v State of Bombay*, AIR 1958 SC 253 : [1958] SCR 1007.
1539. *Shri Mohini Gurudwara Prabandh Committee v Sheo Rattan Deo Singh*, AIR 1955 SC 576; *Sathappa Chetty v Subramania Chetty*, AIR 1922 Mad 510 : 40 Mad LJ 758; *Venkayya v Venkatarama Rao*, AIR 1956 AP 126; *Shrimati Bhagawati Kunwar v Hargopal*, (1960) All LJ 244.
1540. *Sindhuram Chowdhury v Krishna Dutta*, AIR 1951 Assam 73 : (1951) 55 Cal WN 219; *Mahant v Chudasama*, (1884) 8 Bom 548; *Habib-un-nissa v Munawar-un-nisa*, (1903) 25 All 629; *Baij Nath v Sohan Bibi*, (1909) 31 All 545; *Amsingh v Jethmal*, AIR 1957 Raj 173 : (1956) ILR Raj 327; *Kuldeep Singh v Mangal Kaur*, AIR 1958 P&H 313.
1541. *Abdul Rahman v Cassim*, AIR 1933 PC 58 : 60 IA 76; *Nuriniah v Ganges Sugar Works*, (1916) 38 All 150 (FB); *Sultan Singh v Murli Dhar*, AIR 1924 Lah 571 : (1924) 5 Lah 329; *Rajeshwarashram v Sharda Math*, AIR 1933 Bom 260 : (1933) 35 Bom LR 458; *U Nyo v Ma Pwa Thin*, AIR 1932 Rang 137 : (1932) 10 Rang 335; *Jethanand & Sons v State of Uttar Pradesh*, AIR 1961 SC 794 : [1961] 3 SCR 754 : [1962] 1 SCJ 713; *Raghavacharyulu v Ramanujacharyulu*, AIR 1954 Mad 406 : (1954) 1 Mad LJ 198; *Kanhayalal v Shiv Prasad*, AIR 1961 Cut 128; *Savitri Devi v Rajul Devi*, *supra*; *Royrao v Dutta Venkatapathi*, AIR 1961 AP 402 : (1960) Andh LT 856 : (1961) Andh WR 71.
1542. *Shantilal v Raj Narain*, AIR 1924 All 119 : ILR 45 All 74.
1543. *Kishan Chand v Lachhmi Chand*, AIR 1933 All 15; *Kishanchand v Lakshmichand*, 54 All 941 : 143 IC 450; *Sajjad v Ishaq*, 18 All LJ 83; *Khajendra v Sahayaram*, AIR 1921 Cal 177 : 25 Cal WN 896.
1544. *Chundi Dutt v Padumanund*, (1895) 22 Cal 928.
1545. *Benoy Krishna v Satish Chandra*, AIR 1928 PC 49 : 55 IA 131.
1546. *Narasimha v Venogupala*, AIR 1956 AP 159.
1547. *Manoharlal v Hiralal*, AIR 1957 MB 47.
1548. *Mumtaz-ud-Daula v James Skinner*, AIR 1925 All 263 : (1925) 47 All 335.

(ii) an order reversing an order of the lower court that the suit is barred by O II, rule 2,[1549] or that the suit as framed is maintainable,[1550] or that the plaintiff has no *locus standi* to maintain the suit,[1551] and remanding the suit for trial on the merits; an order in revision granting,[1552] or refusing[1553] leave to sue *in forma pauperis*; an order granting or refusing a review;[1554]

(iii) an order refusing an application to be brought on the record of a pending appeal as the legal representative of a deceased party;[1555]

(iv) an order reversing the order of the court of first instance decreeing a suit in terms of a compromise and directing that court to proceed with the trial of the suit;[1556]

(v) an order reversing an order of a revenue court returning a plaint for presentation to a civil court;[1557]

(vi) an order refusing to restore an appeal dismissed for default;[1558]

(vii) an order of the high court returning the memorandum of appeal or presentation to the proper court;[1559]

(viii) an order holding that an appeal is not time-barred;[1560]

(ix) an order overruling a claim of privilege;[1561]

(x) an order dismissing an application to amend a decree;[1562]

(xi) an order declining to interfere in a writ petition without a decision on the rights claimed.[1563]

The following are instances of orders which have been held to be final orders:

(i) an order made on an appeal setting aside or confirming a sale under O XXI, rules 90 and 92, was appealable to His Majesty in Council, although under section 104(2), no second appeal was available;[1564]

(ii) an order in an appeal from an order filing an award (see section 104(1)(f)) although no second appeal lies;[1565]

1549. *Ahmad Hussain v Gobind Krishna*, (1911) 33 All 391; *Venkataranga v Narasimha*, (1915) 38 Mad 509.
1550. *Mehr Chand v Labhu Ram*, AIR 1921 Lah 203 : (1921) 2 Lah 106.
1551. *Sultan Singh v Murli Dhar*, AIR 1924 Lah 571 (FB) : (1924) 5 Lah 329.
1552. *Ram Prasad v Fulpati*, AIR 1927 Pat 175 : (1927) 6 Pat 67.
1553. *Babu Sukan Singh v Gopal*, (1904) 8 Cal WN 926.
1554. *Dwarka Das Kedar Bux v Gajanan Jagannath*, AIR 1946 Cal 10 : (1945) 49 Cal WN 758; *Ambika v Devi Dayal*, AIR 1932 All 318 : (1932) 54 All 401.
1555. *Gangappa v Gangappa*, (1914) 38 Bom 421; *Ayyannath v Badriah*, AIR 1963 AP 15.
1556. *Shankar v Narsimha*, AIR 1922 Bom 283 : (1923) 47 Bom 106; *Sourendra Nath v Taruhala*, AIR 1925 Cal 857 : (1925) 29 Cal WN 832; *Bhagwati Dayal v Dhan Kunwar*, AIR 1926 All 311 : (1926) 48 All 339. See also *Brito v Brito*, AIR 1924 Mad 701 : (1924) 46 Mad LJ 357; *FA Savi v Sabitri*, AIR 1927 Pat 363 : (1927) 6 Pat 282; *Savitri Devi v Rajul Devi, supra.*
1557. *Iqbal Bahadur v Ram Sree*, AIR 1934 All 58 : (1934) 56 All 277.
1558. *Mohmood Hasan v Govt of Uttar Pradesh*, AIR 1956 All 457.
1559. *Mukundadas v Bidhan Chandra*, AIR 1960 Cal 77 : 64 Cal WN 52.
1560. *Kuldip v Maqub Kaur*, AIR 1958 P&H 313.
1561. *State of Panjab v Sodhi Sukhdev Singh*, AIR 1960 P&H 487.
1562. *Kishanlal v Sitaram*, AIR 1962 AP 411.
1563. *Dhanalakshmi v Income-tax Officer*, AIR 1958 Mad 151; *Bhagawandas & Co v Income-tax Officer*, AIR 1958 All 800.
1564. *Krishna Pershad v Motichand*, 40 IA 140.
1565. *Ramlal v Kishanchand*, AIR 1924 PC 95 : 51 IA 72.

(iii) an order of a high court dismissing an appeal for the appellant's failure to furnish security;[1566]

(iv) an order that an appeal had abated;[1567]

(v) an order in a revision reversing the dismissal of a suit and restoring it to the file of the lower court, when such an order had the effect of reinstating a preliminary decree;[1568]

(vi) an order refusing an application under section 45 of the Specific Relief Act 1 of 1877;[1569]

(vii) an order passed by a high court in insolvency proceedings.[1570]

The Explanation to Article 132 of the Constitution states that the expression "final order" used in that article includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case. It is submitted that this Explanation should now be the guide.[1571]

[s 109.15] High Court

Clause (a) of the unamended section 109 provided that an appeal shall lie to the Supreme Court from any judgment, decree or final order passed on an appeal by a high court or by any other court of final appellate jurisdiction. There were a number of occasions when the question arose whether a decree or a final order passed by a high court was a decree or an order passed on an appeal. Those decisions have now ceased to be of any use in view of these words having been omitted in Article 133 of the Constitution. There were also cases where it was held that by reason of the words passed "on an appeal" in section 109 as it then stood, no appeal lay before the Privy Council against an order in a revision as such an order was not one "passed on an appeal". However, since these words were omitted in Article 133 and section 109 was subject to that article, an order passed in revision would be appealable to the Supreme Court.[1572] The decision to the contrary in *Radhakisan Laxminarayan v VR Oke*,[1573] is, it is submitted, not correct as it does not take into account the change in law made by Article 133 and the amended section 109.

The unamended section 109 also contained in cl(a) thereof the words "by any other court of final appellate jurisdiction". Before the Constitution was promulgated, an appeal lay to the Privy Council from a final order passed by a district judge[1574] of a judicial commissioner's court[1575] made under section 104. These words, however, did not occur in Article 133 and as section 109 was subject to that Article, there could be no appeal to the Supreme Court except against an order passed by a high court. These words have now been omitted in the amended

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1566. *Mahadev v Secretary of State*, AIR 1932 All 312 : (1932) 54 All 390.
1567. *Chuni Lal v Amin Chand*, AIR 1933 Lah 690 : (1933) 14 Lah 609.
1568. *Lachmi v Balmukund*, (1921) 6 Pat LJ 461; on appeal *Lachmi Narayan Marwary v Balmukund Marwary*, AIR 1924 PC 198 : 51 IA 321.
1569. *Alcock Ashdown & Co v Chief Revenue Authority*, AIR 1921 Bom 378 : (1921) 23 Bom LR 1132.
1570. *Maung Ba Thaw v Ma Pin*, AIR 1934 PC 81 : 61 IA 158; *Galliara v Marugappa*, AIR 1934 Rang 292 : (1934) 12 Rang 355.
1571. See also note under the heading "clause (b)" in section 107 and "Sub-section (2): Appeal from order of remand" in section 105.
1572. *Lalmina v Kumar Kamal*, AIR 1952 Pat 450.
1573. *Radhakisan Laxminarayan v VR Oke*, AIR 1953 Ngp 145.
1574. *Saadalmand v Phul Kumar*, (1898) 20 All 412 : 25 IA 146.
1575. *Ramlal v Kishan Chand*, AIR 1924 PC 95 : (1924) 51 IA 72.

section 109, in order that its language is in consonance with Article 133. The result of this omission would be to preclude appeals to the Supreme Court from decrees and final orders by the judicial commissioner's courts. To avoid such a result the Parliament has declared, for the purposes of Articles 133 and 134, certain Judicial Commissioners' Courts to be high courts (see the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950 and the Goa, Daman and Diu Judicial Commissioner's Court (Declaration as High Court Act, 1964).

The word "court" in the section cannot include any tribunal or body which is not a court within the meaning of Code of Civil Procedure or the Civil Courts Act. Consequently, a decision of the rent controller under the West Bengal Premises Rent Control Order is not appealable under this section.[1576] In *Karuppan Chettiar v State of Madras*,[1577] the High Court of Madras has held that decisions of tribunals appointed under special statutes are not open to appeal to the Supreme Court under this section. The Supreme Court can grant leave to appeal under Article 136 of the Constitution in appropriate cases. However, such appeals are not as of right under this section.

[s 109.16] Limitation

Under Article 179 of the Limitation Act, 1908, the period of limitation prescribed for leave to appeal to the Supreme Court was 90 days from the date of the decree.[1578] The matter is now governed by Article 133 of the Limitation Act, 1963, which also prescribes the same period. Article 133, cl(b) provides that where leave is refused by the high court, an application for special leave in the Supreme Court must be filed within 60 days of the order of refusal.

Under the Limitation Act of 1877, it was held that in computing the aforesaid period, the time requisite for obtaining a copy of the decree appealed from could not be excluded, as section 12 of that Act did not apply to such applications.[1579] It was also held that the application could not be admitted after the expiration of the aforesaid period, even though there was sufficient cause for not presenting the application within the prescribed period as section 5 of the Act did not apply to such applications.[1580] Both these sections were amended in the Limitation Act, 1908, and they were made applicable to applications for leave to appeal. The decisions, therefore, under the Limitation Act, 1877, ceased to be law and it was expressly held that under section 12 of the Limitation Act, 1908, the time requisite to obtain copy of the decree appealed from was to be excluded.[1581] The matter is now governed by sections 5 and 12 of the Limitation Act, 1963, under which the position is the same as under the Limitation Act, 1908.

[s 109.17] Land Acquisition Act, 1894

An award by the court under Part III of the Land Acquisition Act, 1894, is deemed to be a decree.[1582] An appeal, therefore, lies from a decree of a high court on an appeal from such an award. In such a case, the Privy Council would not interfere in matters involving valuation of a property unless the judgment was not supported as it stood, either by reason of a wrong

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1576. *Jatia Estate Ltd v Vithal Das Bhimji*, 60 Cal WN 927.
1577. *Karuppan Chettiar v State of Madras*, AIR 1962 Mad 508 : 75 LW 536.
1578. *Azamabad Tea Co v Suraj Ratan*, AIR 1958 Cal 296 : 62 Cal WN 155.
1579. *Moroba v Ghanasham*, (1895) 19 Bom 301; *Anderson v Periasami*, (1892) 15 Mad 169; *Shib Singh v Gandharp Singh*, (1906) 28 All 391.
1580. *Shib Singh v Gandharp Singh*, (1906) 28 All 391.
1581. *Abdullah v Admn Gen of Bengal*, (1915) 42 Cal 325; *Ram Sarup v Jaswat Rai*, (1915) 38 All 82.
1582. Act 1 of 1894, section 26(2) as amended by Act 21 of 1921.

application of principle or because some important part of the evidence had been overlooked or misapplied.[1583]

[s 109.18] Interlocutory Orders

By Article 136 of the Constitution, the Supreme Court has the power to grant a special leave in its discretion. The practice of the Privy Council, as a rule, was not to grant special leave unless there was some substantial question of general interest involved.[1584] In a fit case, such a leave was granted even where the high court had refused a leave[1585] or even where it had been granted wrongly by the high court.[1586] Where special leave was granted the appeal was to be confined to the ground on which special leave was granted.[1587] Where special leave was granted as *ex parte* application, it did not preclude the Privy Council from going into the question, when true facts were brought to its notice of competency at special leave.[1588]

(See clause 40 of the Letters Patent).

[s 109.19] Clause (I), Section 109

The first condition for an appeal to the Supreme Court, now, is that the case must involve a substantial question of law, which question is also of general importance. For the meaning of the expression "substantial question of law of general importance" see the commentary under the heading "Scope of the Section" above.

[s 109.20] Clause (II), Section 109

Over and above the requirements of cl(i) and cl(ii) requires that the case in the opinion of the high court must be such that it needs to be decided by the Supreme Court. Article 133 and this section as amended, having dropped the criterion of the value of the subject matter, no matter how considerable such value may be, the only condition which now gives the right of an appeal to the Supreme Court is the existence of a substantial question of law of general importance, and the opinion of the high court that the question, so involved, needs to be decided by the Supreme Court. Accordingly, a question involved in the case may be a substantial question of law of general importance and yet, in the opinion of the high court, it may not be such as needs to be decided by the Supreme Court. If a previous decision of the Supreme Court has laid down principles applicable to such a question, the high court may refuse to certify that a subsequent case, which involves the same question and requires only the application of the principles earlier laid down, needs to be decided by the Supreme Court. However, if the decision of the high court affects not only a particular litigant but also involves

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1583. *Samiullah v Collector of Aligarh*, AIR 1946 PC 75 : 73 IA 44 : 48 Beng LR 439 : (1946) 50 Cal WN 401; *Narsing Das v Secretary of State*, AIR 1925 PC 91 : 52 IA 133; *Prag Narain v Collector of Agra*, AIR 1932 PC 102 : 59 IA 155; *Ahidhar v Secretary of State*, AIR 1930 PC 249 : 57 IA 223; *Rai Ram v Secretary of State*, AIR 1930 PC 283 : (1930) 34 Cal WN 1106.
1584. *Moti Chand v Ganga Prasad*, (1902) 24 All 174 : 29 IA 40; *Sadagopa v Krishnamoorthy Rao*, (1907) 30 Mad 185 : 34 IA 93.
1585. *Rahimbhoy v Turner*, (1891) 15 Bom 155 : 18 IA 6; *Ikramul Huq v Wilkie*, (1906) 33 Cal 893.
1586. *Sorabjee v Dwarkadas*, AIR 1932 PC 199 : 59 IA 366 : 36 Cal WN 947.
1587. *Raja Yarlagadda Siva Rama Prasad v Majeti Potharaju*, AIR 1949 PC 187 : 76 IA 48.
1588. *Mukhal Singh v Kishuni Singh*, AIR 1931 PC 22 : 57 IA 279; *Mangamma v Mahalakshmamma*, AIR 1930 PC 44 : 57 IA 56; *Zahid Husain v Mohammad Ismail*, AIR 1930 PC 196 : 57 IA 186; but see *Hemraj v Khemchand*, AIR 1943 PC 142 : 70 IA 171 : (1943) ILR All 727 : 48 Cal WN 7.

questions of great public importance, a certificate will presumably be issued.[1589] That would also be so where the question involved is a substantial point of law of general importance, and either it has not been so far decided or there is, upon it, a conflict of opinion among different high courts.

The tests applied by the Privy Council in cases such as *Benarasi Prasad v Kashi Krishna,*[1590] and *Radhakrishna v Swaminatha*[1591] under clause (e) of the unamended section 109, that is cases in which the points in issue are not measurable in terms of money but they are of great public importance including questions relating to religious rights and ceremonies, or caste rights or privileges, still hold validity. Where a petition was made by a company for certificate to appeal to the Privy Council, on the ground that the financial and commercial position of the company might be seriously affected by the question at issue, and those questions were of importance to companies generally, the high court issued the certificate. The order sought to be challenged in that case was one dismissing a petition for confirmation of a special resolution altering the memorandum of association.[1592] Similarly, the question as to the right of Mahomedans to take out religious processions is one of general importance to both the Hindu and Mahommedan communities, and was held to be a fit case for appeal to the Privy Council.[1593] It is submitted that such a question would be a fit one for a certificate under the present section. A question cannot be said to be of general importance unless it is such as is likely to arise frequently for decision and affect many parties in litigation. However, a question which has been settled by the highest authority is not one which can be certified as fit to be decided by the Supreme Court.[1594] The fact that there is divergence of opinion may not in itself be a ground for the grant of a certificate but that fact would have an important bearing on whether the question is one of public or private importance.[1595] It is submitted that these decisions still have validity under the amended section. Questions such as the validity of section 20 of the Uttar Pradesh Zamindari Abolition Act, 1951, and as to the power of the Board of Revenue under the Act to entertain a second application for review[1596] or as to the interpretation of section 123(7)(f) of the Representation of Peoples Act, 1951[1597] or of rule 56 of the Fundamental Service Rules[1598] have been held to be questions on which certificates of fitness under clause (c) of the unamended section 109 were granted. It is conceived that a certificate under clauses (i) and (ii) of the present section would be issued by the high court if such questions were to arise since they are, without doubt, substantial questions of law of general importance and need to be decided by the highest court of the realm. On similar consideration the decision in *Guru Govind Basu v Sankari Prasad Ghosal*[1599] still has validity, where a certificate of fitness was granted under clause (c) of the unamended section 109 for the question whether a partner in a firm of chartered accountants appointed as auditors of Life Insurance Corporation of India and other government concerns, held an office of profit under Article 102 of the Constitution.

As against the certificate of fitness for an appeal to the Supreme Court under clause (c) of the unamended section 109, the certificate issued now is a dual one. First, it must state

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1589. *CIT v Chitnavis*, AIR 1932 PC 178 : 59 IA 290.
1590. *Benarasi Prasad v Kashi Krishna*, (1901) 28 IA 11.
1591. *Radhakrishna v Swaminatha*, AIR 1921 PC 25 : (1921) 48 IA 31.
1592. *Bombay-Burmah Trading Corp v Dorabji*, (1903) 27 Bom 415.
1593. *Subhan v Babu Ram*, AIR 1930 All 121 : (1930) 52 All 329.
1594. *Muhamad Hussain v Ganga Naicken*, AIR 1963 Mad 222 : (1963) 1 Mad LJ 209.
1595. *Gulab Bai v Manphool Bai*, AIR 1953 Raj 42.
1596. *Inda Devi v Board of Revenue*, AIR 1957 All 116.
1597. *Raja Bahadur Chandra v Raghundath Misra*, AIR 1960 Ori 1.
1598. *Kailash Chand v UOI*, AIR 1959 All 685 : (1959) 1 All 67.
1599. *Guru Govind Basu v Sankari Prasad Ghosal*, AIR 1963 Cal 364 : 67 Cal WN 558.

that the case involves a substantial question of law of general importance and secondly, it must state that such a question, in the opinion of the high court, needs to be decided by the Supreme Court. The act of certifying, though left to the discretion of the high court, is a judicial act which cannot be performed without special exercise of that discretion evinced by the certificate.[1600] Under the unamended section, the certificate had to make plain upon its face that the discretion conferred on the high court was invoked and exercised.[1601] It was also the rule that it was the certificate, and not the order for the certificate, which had to be considered and acted upon; and unless the certificate upon which a leave to an appeal was based was in such a form as to justify that leave, it could not be held that the leave was properly granted.[1602] It is submitted that these rules are applicable under the present section.

[s 109.21] Revocation of Certificate

When a certificate is granted under this clause without sufficient grounds thereof, the Supreme Court may vacate it.[1603] It is, however, open to the appellant to support the grant of a certificate on a ground different from the one on which it is based.[1604]

[s 109.22] Proceedings Under Patents and Designs Act, 1911 now Repealed by the Patents Act, 1970 and the Designs Act, 2000

An application to the controller under the Act for the grant of patent is a civil proceeding, as it involves the right to use it exclusively for a period, and that is property. An appeal to the high court under section 23F of the Act, against an order granting a licence, would likewise be a civil proceeding. However, as the high court acts, in hearing the appeal, as a *persona designata,* and not as an ordinary court, no appeal lies against its decision to the Supreme Court, under this section or Article 133 of the Constitution.[1605]

[S 110] Value of subject-matter.—[*Omitted by Civil Procedure Code (Amendment) Act 49 of 1973, section 3 (w.e.f. 29-11-1973)*].

The basis of the value of the subject matter of the suit which gave the right to an appeal was also omitted from Article 133 which had been amended by the Constitution (Thirtieth Amendment) Act, 1972. Although section 3 of that Amendment Act excludes the applicability of the amended article, such an exclusion is in respect of two categories of appeals only, *viz*: (a) appeals pending before the Supreme Court at the date of the commencement of the amended article; and (b) appeals in respect of which certificates were already granted before such commencement. It would seem that in neither case the section before its deletion or the commentary thereon, would henceforth be of any practical use and hence, they are not reproduced here.

[S 111] Bar of certain appeals.—[*Omitted by the Adaptation of Laws Order, 1950*].

1600. *Banarasi Prasad v Kashi Krishna*, 28 IA 11.
1601. *Radha Krishna v Swaminatha*, AIR 1921 PC 25 : 48 IA 31; *Maharaj Bahadur Singh v Balchand*, (1920) 25 Cal WN 770.
1602. *Radha Krishna Das v Bal Krish Chand*, 28 IA 182.
1603. *Jethanand & Sons v State of Uttar Pradesh*, AIR 1961 SC 794.
1604. *Deputy Commr, Hardoi v Rama Krishna*, AIR 1953 SC 521 : [1954] SCR 506 : 1953 SCJ 664.
1605. *Farbenfebriken Bayer v Joint Controller of Patents and Designs*, AIR 1963 Cal 433 : 67 Cal WN 743.

[S 111A] Appeals to Federal Court.—[*Repealed by the Federal Court Act 21 of 1941, section 2 (w.e.f. 1-9-1942)*].

This section which was inserted by para 3 of Sch I of Adaptation of Indian Laws Order 1937, has been omitted by section 2 of the Federal Court Act, 1941 (21 of 1941).

[S 112] Savings.—(1) [1606][Nothing contained in this Code shall be deemed—

(*a*) to affect the powers of the Supreme Court under Article 136 or any other provision of the Constitution, or

(*b*) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to that court, or their conduct before the court].

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize courts.

SYNOPSIS

[s 112.1] Sub-section (1)(A)..... 1344
[s 112.2] Extension of Time to Furnish Security..... 1344

[s 112.1] Sub-section (1)(A)

This sub-section was substituted by the Adaptation of Laws Order 1950. The section declares that nothing in the CPC affects the jurisdiction conferred upon the Supreme Court by Article 136 of the Constitution. Before, independence His Majesty-in-Council had a similar jurisdiction by the virtue of the royal prerogative.[1607] In view of section 112 of the CPC, the Supreme Court's power under Article 136 is not effected by rule 3B of O XXIII of the Code.[1608] Though the powers of the Supreme Court under Article 136 are expressed in wide terms, the court has accepted the Privy Council's procedure of using those powers sparingly and in limited classes of cases. For example, where the case is of a grave nature involving a matter of important. question of law, or where the case is, otherwise, of public importance, or where interference by the court promotes the cause of justice.[1609] A special leave under Article 136 will not, thus, be given as a matter of course. Though the Supreme Court will not ordinarily interfere with a finding of fact, it should not refrain from doing so, where it has been arrived at upon an erroneous approach and otherwise suffers from a number of infirmities.[1610]

[s 112.2] Extension of Time to Furnish Security

Order XII, rule 3 of the Supreme Court Rules runs as follows—

> Where an appellant, having obtained a certificate from the High Court fails to furnish the security or make the deposit required, the court may, on its own motion or on application in that behalf made by the respondent, cancel the certificate and may give such directions

1606. Substituted by AO 1950, for sub-section (1).
1607. For an illustrative case on the exercise of such prerogative, see the discussion in *Andre Paul v The Attorney-General of Trinidad*, AIR 1936 PC 141 : (1936) 40 Cal WN 801 : 38 Bom LR 681 : 71 Mad LJ 665.
1608. *Union Carbide Corp v UOI*, (1991) 4 SCC 584.
1609. *Subedar v State of Uttar Pradesh*, AIR 1971 SC 125 : (1970) 2 SCC 445 : (1971) 1 SCR 826.
1610. *Kalinga Tubes Ltd v Workmen*, AIR 1969 SC 90 : [1969] 1 SCR 287 : (1969) 3 SCR 287.

> as to the costs of the appeal and the security entered into by the appellant as it shall think fit or make such further or other order as the justice of the case requires.

It has been held that the high court has power under this section read with O XII, rule 3, of the Supreme Court Rules to extend the time for furnishing security, even beyond the limit prescribed under O XLV, rule 7.[1611] However, where the petitioner does not deposit security in time nor apply for extension of time and in consequence leave is revoked, an application for review of the order under O XLVII, rule 1, or a second application for leave is barred under this section.[1612] (For history of admiralty jurisdiction and details of relevant enactments, see Law Commission Report on British Statutes).[1613]

It is pertinent to note that while sub-section (1) of section 112 provides for excluding the entire CPC in connection with the topics covered by sub-clauses (a) and (b) of sub-section (1) thereof, pertaining to powers of the Supreme Court in appeals, sub-section (2) of section 112 conspicuously does not contain the same phraseology, i.e., the words "nothing contained in this Code"; instead, it uses the phraseology "nothing herein contained", meaning thereby, nothing contained in the sub-topic "appeals to the Supreme Court" would apply to admiralty or vice-admiralty jurisdiction amongst others and nothing more. The said provision cannot get telescoped into any other part of the CPC nor can it travel beyond the limited scope and periphery of its operation as indicated in the said provision.[1614]

1611. *Gunwanti Devi v Bihar State*, AIR 1958 Pat 236.
1612. *The Deities of Sri Audinarayanaswami and Sri Anjaneyaswami Temples v Hanumacharlu*, AIR 1962 AP 245 : (1961) Andh LT 926 : (1962) 1 Andh WR 24.
1613. "British Statutes Applicable to India", *Law Commission of India*, Fifth Report.
1614. *MVAL Quamar v Tsavliris Salvage (International) Ltd*, [2000] 3 LRI 886.

PART VIII

REFERENCE, REVIEW AND REVISION

[S 113] Reference to High Court.—Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

[1][*Provided* that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court.

Explanation.—In this section, "Regulation" means any Regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State].

SYNOPSIS

[s 113.1] State Amendments 1347
[s 113.2] Any Court 1347
[s 113.3] Proviso 1348
[s 113.4] Power of the Court 1350
[s 113.5] State Amendment 1350

[s 113.1] State Amendments

Andhra Pradesh Amendment.—In the *Explanation*, after the words "Madras Code" the words "or any Regulation of the Madras Code in force, in the State of Andhra as it existed immediately before the 1 November 1956" were inserted by Andhra A L (Second Amendment) Order, 1954 and Andhra Pradesh A L (Amendment) Order, 1957 (w.e.f. 1-4-1956).

Tamil Nadu Amendment.—In the *Explanation*, after the words "Madras Code" the words "or any Regulation of the Madras Code in force in the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act 56 of 1959" were inserted by Madras (Added Territories) ALO, 1961 (w.e.f. 1-11-1960).[1]

[s 113.2] Any Court

It has been held that in the absence of a definition in the Code of Civil Procedure, 1908 (CPC), the word "court" must be construed as meaning courts governed by the CPC and that it would comprise courts of civil jurisdiction established under the local Civil Courts Act.[2]

1. Inserted by CPC Amendment Act 24 of 1951, section 2.
2. *Phul Kumari v State*, AIR 1957 All 495.

The collector, acting under the provisions of the Bombay Mamlatdars' Court Act, 1906, is not a court within this section[3] nor a tribunal constituted under the Central Provinces and Berar Relief of Indebtedness Act, 1939.[4] In a case before the High Court of Allahabad, it was held that the high court has no power under this section to entertain a reference from the Benaras State Court of an application submitted to His Highness, the Maharaja of Benaras in a civil case.[5] But a reference by the Improvement Trust Tribunal constituted under the Uttar Pradesh Town Improvement Act, 1919, is competent under this section as the provisions of the CPC have been extended to proceedings before it.[6] A reference by a subordinate court under section 113 must set out its opinion and grounds for doubting the validity of the law.[7]

The full bench of the Gauhati High Court dealt with a question that whether the reference of the review petition made to full bench passed by division bench was maintainable. It was held that though normally the review petition was to be heard by the same bench whose judgment was sought to be reviewed, or at least by a bench in which one of the members of the division bench was also a member, in case both the members were not present, the Chief Justice, could withdraw any pending proceeding from any bench and allot the same to another bench. In the instant case, the Chief Justice had passed the order on the administrative side constituting the full bench for hearing the matter relating to the foreigners. Hence, it was held that it could not be said that the reference to the full bench was not maintainable.[8]

[s 113.3] Proviso

The proviso appended to section 113 postulates that when there is a question before the civil court relating to the validity of any Act, ordinance or regulation or any provision of an Act which in its opinion is invalid or becomes inoperative, but has not been declared by the high court as such, then only the civil court may state the case and refer the matter for the opinion of the high court.[9]

The power under section 113 is subject to the prescribed conditions, that is, the conditions laid down in O XLVI.[10] The proviso and the explanation to the section were added as also section 432 of the Code of Criminal Procedure, 1973, by section 2 of the Code of Civil and Criminal Procedure (Amendment) Act, 1951. The object of these provisions is to enable questions as to the validity of an Act, ordinance or regulation or of any provision therein, to be decided speedily by the highest tribunal.[11] Before a reference could be made under this section, the conditions laid down in the proviso must be strictly complied with. The question must relate to the vires of an Act, ordinance or regulation or of any provision therein. This section has no application when the question raised is as to the validity of a notification,[12] or a rule or bye-law or order issued under an enactment,[13] or of a right or custom of pre-emption not turning on any provision of a statute.[14] When a division bench of the high court had already

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3. *Dalpath v Mohadu*, 14 Bom LR 259.
4. *District Judge v Harikishen Das*, AIR 1942 Ngp 8 : (1941) ILR Nag 588.
5. *Shebodh v Siva*, AIR 1925 All 293 : (1925) 47 All 322.
6. *Satendra Kumar Gupta v Benaras Investment Trust*, AIR 1959 All 513 : (1959) 1 All 278 : (1959) All LJ 133; *Adhar Kumar v Sri Easwar Radha Madu Mohan*, AIR 1932 Cal 660 : 36 Cal WN 370.
7. *HC Financial Corp v Nahar Electricals*, AIR 1982 (HC) 49.
8. *The State of Assam v Moslem Mondal*, 2013 (2) AKR 82 : 2013 (1) Gau LT 809.
9. *Mohd Azharuddin v AC Muthaiah*, AIR 2002 AP 409.
10. *Behram Shaw v Dastoorji*, AIR 1980 Guj 74.
11. *Public Prosecutor v Krishnaswamy*, AIR 1957 AP 567.
12. *Sher Singh v Ghansiram*, AIR 1954 Raj 233.
13. *State v B Basavalingappa*, AIR 1977 Mys 355 : (1971) 2 Mys LJ 237.
14. *Jeet Mal v Nand Lal*, AIR 1952 Raj 10.

decided the question as to validity of an Act, section 113 has no application.[15] A reference would not be competent under this section if a decision on the question raised is not necessary for the determination of the case.[16] A reference of hypothetical questions or of points likely to arise in future is incompetent.[17] A subordinate court can make a reference to the high court under section 113, only if the subordinate court entertains a doubt about the validity of any impugned Act, ordinance or regulation, the determination of which was necessary for the disposal of the case and the court must be of the opinion that the same is *ultra vires*. It can, then, state the case, setting out its opinion, with the reasons therefor, and state the same for the opinion of the high court. Where no such finding or reason for its opinion are given, the reference will not be competent.[18] To attract this section, it is necessary that the court should itself feel some doubts on the question. Where, therefore, the court had formed an opinion but made a reference because that opinion was in conflict with that of another court, it was held that that was not within this section.[19]

Where no issue is involved in the case relating to the validity of any ordinance, regulation or any Act or any provision of any Act which has become invalid but which has not been declared as such by the high court, necessitating the civil court to refer the matter to the high court for its opinion, having regard to the pleadings in the plaint and in the light of the relief claimed by the plaintiff, no such issue, *prima facie*, appears to be involved in the proceedings requiring the opinion of the high court, therefore, no reference under section 113 can be made.[20]

Reference was made to the high court under section 113, CPC by the lower court. The court found that the reference does not pertain to the matters testing the constitutional validity of any Act, ordinance or regulation, i.e., the condition of the proviso to section 113 is not fulfilled. Further, court observed that the reference made to it pertains to the interpretation of the terms of the decree, and the order passed by the hon'ble apex court in special leave petition (SLP) between the parties which are outside the scope of reference.[21] Court noted that as per O XLVI, rule 1, CPC, reference cannot be made of such matters which are appealable and in the instant case the application filed is appealable and thus, the court stated that the reference made to it is misconceived in law.[22]

Where the trial court is not satisfied that the question as to the validity of an Act, etc, is involved and categorically states that no case is made out for making such a reference, its discretion cannot be interfered with in revision.[23] It has also been held that a reference can be made only after the court records its *prima facie* finding that the impugned Act or proviso is bad.[24] In *Raja Ganga Pratap v Allahabad Bank*,[25] the appellant questioned the validity of section 2(f) of the Uttar Pradesh Zamindars Debt Reduction Act, 1953, under which certain

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15. *Central Bank of India v Vrajlal Kapurchand Gandhi*, AIR 2003 SC 3028 : 2003 (6) SCC 573 : 2003 (1) SCR 560
16. *Mumtajuddin v Fatima Begum*, AIR 1953 Hyd 52 (FB).
17. *Re District Munsif, Chittor*, AIR 1970 AP 365.
18. *Himachal Pradesh Financial Corp v Nahan Electrical, Village Ogli*, AIR 1992 HP 49.
19. *Tikaram v Maheswari Devi*, AIR 1959 All 659 : (1959) 2 All 87 : (1959) All LJ 592.
20. *Mohd. Azharuddin v AC Muthaiah*, AIR 2002 AP 409.
21. *Uday Prakash Mishra v Poonam Mishra*, Civil No 1 of 2017, decided on 3 March 2020 (Patna High Court).
22. *Uday Prakash Mishra v Poonam Mishra*, Civil No 1 of 2017, decided on 3 March 2020 (Patna High Court).
23. *Ashok Kumar v Union Territory of Chandigarh*, AIR 1980 P&H 205.
24. *Marayi Ammal v Nallayya Gounder*, AIR 1958 Mad 412 : (1958) 1 Mad LJ 431.
25. *Raja Ganga Pratap v Allahabad Bank*, AIR 1158 SC 293 : (1958) SCR 1150 : 1958 SCJ 431 : (1959) 1 SCA 105.

debts were excluded from the operation of the Act and applied for a reference under this section. He claimed the section to be discriminatory. That was refused on the ground that if section 2(f) was void, the whole section must be struck down on the ground that the offending portion was not severable from the rest and that in that view, the appellant would not be benefited. It was held by the Supreme Court reversing this order that the challenge of section 2(f) fell within section 113 and the appellant was in consequence entitled to a reference. It was, further, held that the question as to the severability of the offending portion would arise only after the validity of section 2(f) was determined and that would not affect the right of the appellant to a reference. It has been held that a party who claims under a statute has no right to impugn it and call for a reference under this section.[26] After a question is referred, if a new aspect of law touching the question arises, the high court is justified in answering the question with reference to such new aspect, provided it does not entail any fresh investigation into facts.[27] The reference is restricted to the specific point referred to for the opinion of the high court and therefore, the high court is not seized of the proceeding which remains pending before the court making the reference. An application in suit for reference of the appointment of a receiver, therefore, is not maintainable before the high court proving such reference.[28] Once the high court has answered the question referred to it by rejecting the reference, nothing further survives for the high court to decide.[29]

[s 113.4] Power of the Court

See notes under the same heading under section 47.

[s 113.5] State Amendment

Under the Explanation, the words "or any Regulation of the Madras Code in force is the State of Andhra as it existed immediately before 1st November 1956" were inserted after the words "any Regulation of the Bengal, Bombay or Madras Code" by the Andhra Pradesh Adaptation of Laws (Second Amendment) Order, 1954, and Andhra Pradesh Adaptation of Laws (Amendment) Order, 1957.

The Madras (Added Territories) Adaptation of Laws Order, 1961 inserted after the words "any Regulation of the Bengal, Bombay or Madras Code" the following words, namely "or any Regulation of the Madras Code in force in the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act 56 of 1959".

[S 114] Review.—Subject as aforesaid, any person considering himself aggrieved,—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

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26. *Venkatasubba Rao v Ramakrishna Rao*, AIR 1958 AP 322 : (1958) 1 Andh WR 335.
27. *SK Roy v Board of Revenue*, AIR 1967 Cal 338 : 18 STC 379.
28. *Delhi Financial Corp v Ram Parshad*, AIR 1977 Del 80.
29. *Municipal Corp of City v Shiv Shanker Gauri Shanker Mehta*, (1998) 9 SCC 197.

SYNOPSIS

[s 114.1] Scope 1351
[s 114.2] "Any Person" 1355
[s 114.3] Filing of Review Petition Without Order Under Review — Maintainability 1356
[s 114.4] Review on the Ground That Judge Was Earlier Counsel for Opposite Party 1356
[s 114.5] Review and Appeal 1357
[s 114.6] Simultaneous Relief of Appeal and Review — Permissibility 1357
[s 114.7] Review and Special Leave Petition 1357
[s 114.8] Review and Inherent Powers of Courts 1358
[s 114.9] Erroneous Decisions and Error Apparent on the Face of Record 1359
[s 114.10] Mistake on the Part of Court 1360
[s 114.11] Non-Consideration of the Law 1360
[s 114.12] Omission as to Authority 1361
[s 114.13] Review by Administrative Tribunal 1361
[s 114.14] Review by Railway Claims Tribunal 1361
[s 114.15] *Suo motu* Review 1362
[s 114.16] Review by State Government 1362
[s 114.17] Defaulting Party 1362
[s 114.18] Delivery of Judgment Without Writing for Written Submission 1362
[s 114.19] Power of the Court 1363
[s 114.20] Doctrine of Merger in Review Applications 1363

[s 114.1] Scope

Section 114 of the CPC empowers a court to review its order if the conditions precedents laid down therein are satisfied. The substantive provision of law does not prescribe any limitation on the power of the court except those which are expressly provided in section 114 of the CPC in terms whereof it is empowered to make such order as it thinks fit. [30]

Sinha, J, speaking for the Supreme Court Bench in the above case, observed as follows:

> 93. It is also not correct to contend that the Court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event. In a case of this nature when the Court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned Senior Counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on 29th September, 2004, the subsequent event may be taken into consideration by the Court for the purpose of rectifying its own mistake.[31]

Explaining the scope and ambit of the power of review, the Supreme Court, in the above judgment, quoted with approval a passage from its earlier judgment,[32] which was in relation to the rights of trustees of Malankara Jacobite Syrian Church in Kerala:

> Before going into the merits of the case it is as well to bear in mind the scope of the application for review which has given rise to the present appeal. It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms of O XLVII, rule 1 of our Code of Civil Procedure, 1908, the Court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule".

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30. *Board of Control for Cricket, India v Netaji Cricket Club*, AIR 2005 SC 592 : 2005 (4) SCC 741.
31. *Board of Control for Cricket, India v Netaji Cricket Club*, AIR 2005 SC 592, at p 606, para 93 : 2005 (4) SCC 741.
32. *Moran Mar Basselios Catholicos v Most Rev. Mar Paulose Athanasius*, AIR 1954 SC 526 : [1955] 1 SCR 520.

The full bench of the Patna High Court[33] has held that under section 114 of the Code, any person, considering himself aggrieved by a decree or order of a court from which appeal is allowed, but no appeal is preferred, or where there is no provision for appeal against the order or decree, may apply for review of the decree or order, as the case may be, in the court, which made the order or passed the decree. Broadly speaking, thus, under section 114 of the Code, review of a decree or order is possible if no appeal is provided against such a decree or order or where the provisions for appeal exist, but no appeal has been preferred. This is the substantive power of review. This substantive power of review under section 114 has not laid down any condition as a condition precedent for the exercise of the power of review nor has section 114 imposed any fetters on the court's power to review its decision.

Justice IA Ansari held that—

> (i) Ordinarily, a court or a tribunal cannot review its order or decision if the statute does not confer on the court or the tribunal, as the case may be, the power to review its own order. This apart, whatever limitations are imposed by a statute, while conferring the power of review on a court or a tribunal, the court or the tribunal, as the case may be, must adhere to the limitations, which the relevant statute may impose on the exercise of such power. Section 114 CPC, which embodies the substantive power of review of a civil court, does not impose any limitations on the court's power to review its order or decision; yet the power of review even by a civil court cannot be unguided and uncanalised, for, Order 47, Rule 1 circumscribes the court's power of review.
>
> (ii) Though, at one point of time, it was considered to be a rule of universal application that review by a court of its order is not possible except on three prescribed grounds, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed and (ii) mistake or error apparent on the face of the record or (iii) any such sufficient ground, which is analogous to the two grounds aforementioned, the subsequent development of law, on the subject of review, has shown that the grounds referred to, namely, that any sufficient ground must be analogous to the two sufficient grounds aforementioned is no longer a rule of universal application.
>
> (iii) One of the cases, which has helped in the expansion of the court's power to review its order is the case of Lily Thomas (*supra*) inasmuch as Lily Thomas (*supra*) ruled that ordinarily, the power of review, being a creature of statute, cannot be exercised as an inherent power, yet such technicalities of law may have to be bent, in an appropriate cases, for the purpose of correcting an order committed by the court if such an error arises out of a presumption of fact, which was nonexistent, and when the court finds that its refusal to review its own error would cause, or has caused, grave miscarriage of justice.
>
> (iv) It is essentially the principle behind the doctrine of "actus curiae neminem gravabit", which has made the court hold, in Municipal Board, Pratabgarh (supra), that when a court corrects and rectifies an error, it restores the rule of law and not defeat it. Even *Rajesh D. Darbar v Narasingrao Krishnaji Kulkarni*, reported in (2003) 7 SCC 219, recognises that in an exceptional case, a court may have to review its order by invoking the doctrine of "actus curiae neminem gravabit".

Explaining the scope of this section, the Delhi High Court ruled that disputed questions of fact, which are not amenable to writ jurisdiction, cannot be permitted to be taken on record by way of review. It was held that the petitioner's claim for benefit of one-time settlement in terms of the guidelines issued by the Reserve Bank of India is not borne out by the facts of the case.[34]

An important question regarding amenability of orders of civil courts to the writ jurisdiction under Article 226 of the Constitution came up, on reference, before the three-judge bench of

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33. *The High Court of Judicature at Patna v KK Chaubey*, 2015 (4) Pat LJR 328.
34. *Mono Caps (India) v State Bank of India*, AIR 2006 Del 44 : 2005 (125) DLT 217.

the apex court in *Radhey Shyam v Chhabi Nath*.[35] The reference was made by the two-judge bench, which, *vide* order dated 15 April 2009,[36] doubted the correctness of the law laid down in *Surya Dev Rai v Ram Chander Rai*,[37] where it was held that an order of the civil court is amenable to the writ jurisdiction of the high court under Article 226 of the Constitution of India. In *Surya Dev Rai*, the two-judge bench of the Supreme Court did not follow the *ratio* laid down by a nine-judge constitutional bench in *Mirajkar*[38] and one of the reasons it accorded for not following the said *ratio* was that *"the law relating to certiorari changed both in England and in India"*. The three-judge bench in *Radhey Shyam* overruled *Surya Dev Rai* and reaffirmed the correctness of the ratio laid down in *Mirajkar*. The bench categorically stated that the challenge to orders of judicial courts lie by way of appeal or revision under the relevant statutory provisions or under Article 227 of the Constitution and not by way of a writ either under Article 226 or Article 32. Comparing the position under the Constitution with the law relating to writs in England, it observed:

> It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all the other courts having limited jurisdiction subject to the supervision of the King's Court. Courts are set up under the Constitution or the laws. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of the civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts.

In *Himalayan Co-op Group Housing Society v Balwan Singh*,[39] another three-judge bench of the Supreme Court, while dealing with an issue relating to the jurisdiction of the high courts under Articles 226 and 227 of the Constitution, made reference to *Radhey Shyam* and observed that:

> The scope and extent of power of the writ court in a petition filed under Articles 226 and 227 of the Constitution came up for consideration before a three-Judge Bench of this Court in the recent case of *Radhey Shyam v Chhabi Nath*. This Court observed that the writ of certiorari under Article 226 though directed against the orders of an inferior court would be distinct and separate from the challenge to an order of an inferior court under Article 227 of the Constitution. The supervisory jurisdiction comes into play in the latter case and it is only when the scope and ambit of the remedy sought for does not fall in the purview of the scope of supervisory jurisdiction under Article 227, the jurisdiction of the Court under Article 226 could be invoked.

From the author's point of view, the above observation is not wholly correct. It does not seem that the three-judge bench in *Himalayan Co-op Group Housing Society* had correctly appreciated the principle laid down in *Radhey Shyam*.

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35. *Radhey Shyam v Chhabi Nath*, (2015) 5 SCC 423 : 2015 (3) SCR 197.
36. *Radhey Shyam v Chhabi Nath*, (2009) 5 SCC 616 : 2009 (6) SCR 236 : 2009 (5) Scale 630.
37. *Surya Dev Rai v Ram Chander Rai*, AIR 2003 SC 3044 : (2003) 6 SCC 675 : (2003) 2 SCR 290.
38. *Naresh Shridhar Mirajkar v State of Maharashtra*, AIR 1967 SC 1 : 1966 SCR (3) 744.
39. *Himalayan Co-op Group Housing Society v Balwan Singh*, AIR 2015 SC 2867 : AIR 2015 SCW 4254 : (2015) 7 SCC 373 : JT 2015 (5) 624.

The Supreme Court has repeatedly held in various judgments that the jurisdiction and scope of review is not that of an appeal and it can be entertained only if there is an error apparent on the face of the record. The following grounds of review are maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram v Neki*,[40] and approved by the Supreme Court in *Moran Mar Basselios Catholicos v Most Rev. Mar Poulose Athanasius*,[41] to mean "a reason sufficient on grounds at least analogous to those specified in the rule".

When review will not be maintainable:

(i) A repetition of the old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.[42]

While making a claim before the arbitrator where a party only claimed value of the machinery to be determined at the time of illegal seizure of the machinery, the party cannot be permitted to make claim for interest for the first time in review application.[43]

It has been held by the Orissa High Court that the mere possibility of two views on the subject cannot be a ground for review. The court cannot entertain a review petition to find out as to which view is correct.[44]

Where an irrevocable registered power of attorney was executed by a party in favour of a developer and after the death of the party his legal heirs also executed irrevocable power of

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40. *Chhajju Ram v Neki*, AIR 1922 PC 112.
41. *Moran Mar Basselios Catholicos v Most Rev. Mar Poulose Athanasius*, AIR 1954 SC 526 : 1955 SCR 520.
42. *Kamlesh Verma v Mayawati*, AIR 2013 SC 3301 : (2013) 8 SCC 320 : 2013 (11) SCR 25; see also *UOI v Sandur Manganese & Iron Ores Ltd*, (2013) 8 SCC 337.
43. *Nilakantan & Brothers Construction Pvt Ltd v Government of Tamil Nadu*, AIR 2006 Mad 172 : 2006 (2) Mad LJ 497 (DB).
44. *Ghanashyam Sahoo v Kendrapara Municipality*, AIR 2006 Ori 69 : 2005 Supp Ori LR 967.

attorney in favour of developer, the order cannot be said to have been obtained by playing fraud upon the court. Such order cannot be recalled in review.[45]

The scope of the power of the review as envisaged under O 47, rule 1, CPC is very limited and the review must be confined strictly only to the errors apparent on the face of the record. Re-appraisal of the evidence on the record for finding out the error would amount to exercise of appellate jurisdiction, which is not permissible by the statute. The review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of O XLVII, rule 1 CPC.[46] The review sought for is not permissible within the ambit and scope of section 114 or O XLVII, simply because something what is decided on merits sought to be decided again.[47] It is no doubt true that power of review should either be conferred expressly or it should be taken to be implied. Since the revenue court has got inherent power to do justice and there is nothing in the provision of the Act as to restrict or otherwise curtail that power, the revenue court has got power to review in exercise of its inherent jurisdiction or to recall the order which appears to be amounting to abuse of the process of the court or an order which is likely to cause injustice or which is likely to frustrate the very object and purpose of the Act.[48] The admissions and concessions, if mistaken, can be permitted to be withdrawn by consent.[49] Review on question of fact on the basis of new evidence is not permissible where it is proved that the new evidence was not available at the time of original hearing.[50] The amendment of a decree by correcting accidental errors, slips or omissions may not involve review or reopening of the decision in the case. It may not have any effect on the finality of the decision rendered by the court.[51] Where an application for amendment of plaint was made so as to take up the plea that earlier suit was not maintainable against the defendants as the petitioner, being "*bazigars*", belonged to the scheduled caste, for the reasons recorded above, the review petition was allowed and the petitioner was allowed to amend their plaint.[52]

The review jurisdiction is extremely limited and unless there is a mistake apparent on the face of the record, the order/judgment ought not to be reviewed. A review does not permit rehearing of the matter on merits.[53]

[s 114.2] "Any Person"

Section 114 and O XLVII, rule 1 does not contemplate a party to a suit or proceeding to seek for review, rather it permits any person aggrieved by the order to seek for review.[54]

It was held by the Calcutta High Court that review application against an order of revocation granting probate is maintainable against third party. Moreover, the applicants in the case were heirs and legal representatives of the deceased testator having caveatable interest in probate proceedings in case of intestate succession.[55]

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45. *Shauti Budhiya Vesta Patel v Nirmala Jayprakash Tiwari*, 2008 (3) AIR Bom R 257 : 2008 (1) All MR 544.
46. *Ishwar Dutt v Gyan Chand*, AIR 1998 Raj 302.
47. *Dolat Industries, Gonal v Krishna Oil Industries, Jamnagar*, AIR 2002 Guj 91.
48. *State of Karnataka v Karnataka Appellate Tribunal*, AIR 1996 Kant 143.
49. *Purewal and Associates Ltd v Punjab National Bank*, AIR 1992 HP 26.
50. *State of Rajasthan v Dhanni*, AIR 1993 Raj 67.
51. *PV Varadaraja Iyer v Ammukutty Amma*, AIR 1998 Ker 7 (DB).
52. *Labh Singh v Bant Singh*, AIR 1999 P&H 189 (DB).
53. *N Anantha Reddy v Anshu Kathuria*, (2013) 15 SCC 534 : 2013 (14) Scale 585.
54. *Numaligarh Refinery Ltd v Assam Board of Revenue*, AIR 2003 Gau 119.
55. *Uma Addhya v Biren Mondal*, AIR 2006 Cal 200 : 2006 (2) Cal HN 680 (DB).

[s 114.3] Filing of Review Petition Without Order Under Review — Maintainability

The party who seeks review of the order must place the same order on record and without placing it on record, the applicant cannot get any relief from the court because it is a well-settled principle of law that any party aggrieved by the order must first place it before the court for its consideration and without placing it on record, no person can get relief from the court. Hence, only on this ground the review application is required to be rejected. [56]

It is true that before filing review application, the applicant had approached the Hon'ble Supreme Court by way of SLP (civil). While disposing that petition, the Supreme Court observed that the proper procedure would be to move the learned judge in the high court to review the observations in regard to which the grievance is made. However, the Supreme Court has never observed that the applicant can seek review of the order without placing it on the record of this case. Hence, the review petition was not found maintainable. [57]

[s 114.4] Review on the Ground That Judge Was Earlier Counsel for Opposite Party

The learned single judge while practising at the bar had argued a revision on behalf of the respondent but the same was dismissed. Between the date of decision of that earlier revision and the date of hearing in the present revision-petition, a long period of more than eight years had elapsed. It is not the case of the appellant that the learned judge, whilst at the bar had at any time appeared for the respondent at the trial or was personally known to him. The learned judge cannot be expected to have remembered unless reminded that he had been a counsel for any of the parties at some state in some litigation between these very parties. If only the appellant would have brought this fact to the notice of the learned judge at or before the hearing, Supreme Court would have no reason to doubt that the learned judge would have certainly reclused himself from hearing the revision. But that was not done by the appellant and he must, therefore, bear burden of the fault entirely on himself.

The appellant must have known that the counsel who had appeared for his opponent in some litigation between these very parties and touching these very premises was elevated and was now a judge in the high court in which he was filing the revision. He should have told his counsel that in the event of the revision-petition coming up for hearing before such judge he should bring the fact to the notice of the learned judge. This must be taken as a duty to speak on the part of the litigant failing which he cannot be heard to raise grievance if the result of the litigation goes against him. The appellant would have never filed the review/recall petition if only he would have succeeded in the revision, and he became wiser only after the revision was dismissed. In the Supreme Court's opinion, the learned judge was right in hearing and deciding the revision on merits when it was argued before him without any demur and without seeking reclusion from the judge. Supreme Court could not find fault even with the view taken by the learned single judge in dismissing the review petition.

However still, on the principle that justice should not only be done but also seen to have been done, Supreme Court was inclined to set aside the two orders passed by the learned single judge and restore the revision petition for hearing afresh before the high court albeit by another judge. However, the appellant was burdened with cost of Rs 25,000 for his conduct

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56. *VN Shah v Hindustan Zinc Ltd*, AIR 2002 Guj 261.
57. *VN Shah v Hindustan Zinc Ltd*, AIR 2002 Guj 261.

which has resulted in the valuable time of the court being wasted and the respondent being dragged before this court in these proceedings, and on such costs being deposited, the revision petition shall stand restored and taken up for hearing expeditiously. From out of the amount so deposited, an amount of Rs 20,000 shall be made over to the State Legal Aid Service Authority and an amount of Rs 5,000 shall be paid to the respondent.[58]

[s 114.5] Review and Appeal

If, before the making of an application for review, an appeal from the judgment for review has already been filed and is pending, then the court has no jurisdiction to entertain the review application. Where the application for review is made first and thereafter, an appeal is preferred, the review application can be disposed of provided the appellate court has not disposed of the appeal before the review application is taken up for disposal.[59]

In the instant case, as the special appeal filed by the state before the division bench of this court was dismissed only on the ground of delay, the order of the learned single judge cannot be said to have merged in the order of the division bench. Therefore, the order of the learned single judge cannot be substituted as a binding precedent as a judgment of the division bench. Another effect is that review of the order of the learned single judge cannot be declined solely on the ground that a special appeal against the said judgment has been rejected. The order of the learned single judge shall continue to be final, effective and binding as between the parties. It is also a binding precedent as a judgment of the single judge. The same is the consequence of the rejection of the special leave to appeal by the Supreme Court. As no second appeal can be maintained against the same judgment of the learned single judge, the question of leave to special appeal does not arise. [60]

Where the review petition was filed after a delay of 30 odd days, the high court dismissed the petition on the ground of delay and non-prosecution and the restoration petition filed by the appellant was also dismissed, it was held by the Supreme Court that the high court instead of dismissing the review petition ought to have condoned the delay, the reason of which was sufficiently explained by appellant and ought to have allowed the revision application in favour of the appellant.[61]

[s 114.6] Simultaneous Relief of Appeal and Review — Permissibility

See notes under the same heading under section 96.

[s 114.7] Review and Special Leave Petition

The petition for review before the high court cannot be dismissed merely because a SPL is filed before the Supreme Court.[62]

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58. *Mohan Lal Aggarwal v Atinder Mohan Khosla*, AIR 2004 SC 4004 : (2004) 3 SCC 437 : 2004 (12) SCR 1174.
59. *Hari Singh v S Seth*, AIR 1996 Del 21 (DB).
60. *Nirbhay Singh v State of Rajasthan*, AIR 2002 Raj 28.
61. *Jai Krishan v State of Uttarakhand*, AIR 2014 SC 3578 : (2014) 12 SCC 164.
62. *Kapoor Chand v Ganesh Dutt*, AIR 1993 SC 1145 : 1993 (4) Supp SCC 432 : 1992 (3) Scale 356.

If review petition was filed well within time and since the review petition was not being decided by the high court, the appellant filed the SPL against the main judgment of the high court. The appeal arising out of SPL is maintainable.[63]

The dismissal of the SPL against the main judgment of the high court would not constitute *res judicata* when a SPL is filed against the order passed in the review petition, provided the review petition was filed prior to filing of SPL against the main judgment of the high court.[64] The position would be different where, after dismissal of the SPL against the main judgment, a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of SPL. In such a situation, filing of review would be an abuse of the process of the law.[65] If the high court allows the review petition filed after the SPL was dismissed, after condoning the delay, it would be treated as affront to the order of the Supreme Court.[66]

[s 114.8] Review and Inherent Powers of Courts

The provisions for amendment in sections 122 and 152(A) are different from the provisions of review contained in section 114 and O XLVII, rule 1, CPC. Both deal with different powers. Section 152(A) is intended to resolve a conflict of opinion in the high court as to the power of the court to take up an amendment application under section 152, where an appeal against decree/order has been disposed of *in limine* under O XLI, rule 11(1) and has no bearing whatsoever on the power of review. In fact, a review under O XLVII, rule 1 and an amendment under section 152 are totally different concepts. In the case of a review, the correctness of a judgment decree or order is in question, while in the case of an amendment of decree, the correctness of the judgment is assumed and the jurisdiction is for bringing the decree in conformity with the judgment. Again, where a review is allowed, the case has to be re-heard on merits but not where an amendment is allowed. In the case of review, a fresh decree is passed while in case of amendment the decree is to be amended.[67] The power of review cannot be equated to the power of jurisdiction to amend or correct the order and judgment conferred on the courts under sections 151 and 152 of the CPC. While exercising the power of review, the court has power to reconsider the entire case afresh and to make such orders as it thinks fit. In exercise of such powers, the court can set aside or modify the orders, judgments and decrees sought to be reviewed either wholly or in part on the basis of reasons altogether different from the reasons contained in the original order or judgment. The provisions in section 114 and O XLVII, rule 1 of the CPC prescribe the requirements to be complied with before exercising the power of review, its extent and the limitations subject to which it should be exercised.[68] If it clearly appears that there are some typographical errors which need be corrected but these are not legal errors which can modify the judgment or reverse the judgment as prayed for by the plaintiff/petitioner in review application; and, admittedly same typographical errors crept in through inadvertence in the judgment and accordingly those are corrected, it is needless to mention that the court has inherent power under sections 151 and 152 of the CPC to correct such mistakes which crept in through inadvertence and which are only clerical error in nature.

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63. *K Rajamouli v AVKN Swamy*, AIR 2001 SC 2316 : 2001 (5) SCC 37 : 2001 (3) SCR 473.
64. *Kunhayammed v State of Kerala*, AIR 2000 SC 2587 : AIR 2000 SCW 2608 : 2000 (6) SCC 359; *K Rajamouli v AVKN Swamy*, AIR 2001 SC 2316 : 2001 (5) SCC 37 : 2001 (3) SCR 473.
65. *K Rajamouli v AVKN Swamy*, AIR 2001 SC 2316 : 2001 (5) SCC 37 : 2001 (3) SCR 473.
66. *Abbai Maligai Partnership Firm v K Santhakumaran*, AIR 1999 SC 1486 : AIR 1998 SCW 4061; *K Rajamouli v AVKN Swamy*, AIR 2001 SC 2316 : 2001 (5) SCC 37 : 2001 (3) SCR 473.
67. *Hari Singh v S Seth*, AIR 1996 Del 21 (DB).
68. *PV Varadaraja Iyer v Ammukutty Amma*, AIR 1998 Ker 7 (DB).

The power of review under section 114 read with O XLVII, rule 1 of the CPC cannot be exercised as an inherent power or an appellate power.[69]

In the present case, the high court allowed a review petition which had some observation regarding possession of a disputed property and this issue was neither raised before the trial court nor before the first appellate court, and even no issue with respect to possession was framed by the trial court. The apex court observed that when the observations with respect to the possession of the plaintiff was made on the appreciation of evidence/material on record, then the high court should not have allowed the review application and amend its observations as it cannot be inferred that there was an error apparent on the face of the proceedings that were required to be reviewed in the exercise of powers under section 114 read with O XLVII, rule 1, CPC.[70]

[s 114.9] Erroneous Decisions and Error Apparent on the Face of Record

There is a clear distinction between an erroneous decision and an error apparent on the face of the record. The first can be corrected by the higher forum; the latter can only be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise".[71] An error apparent on the face of record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature. It must be left to be determined judicially on the facts of each case. When a court does not apply the provisions of an enactment which on the face of it would apply to a case, same would be a mistake or error apparent on the face of the record. But a mere error of law is not a ground for review. Only a manifest error would be a ground for review.[72] A review court cannot act as an appellate court and error on the face of the record means an error which strikes one by merely looking at record and would not require any long drawn process of reasoning.[73] Where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party, unless both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. In such a circumstance, the remedy available to the party aggrieved is review.[74]

In a case where the order of probate granted by the probate court was recalled by the appellate court in view of the compromise between the parties without arriving at its own conclusions, the Calcutta High Court held that the order suffers from error apparent on record and is liable to be reviewed.[75]

The Gauhati High Court held that in order to justify the review of an order a duty cannot be cost on the court to probe as to whether submissions advanced by the former counsel were in line with the pleadings in the suit in order to determine whether he was off the track without instruction. Since there was no apparent error committed by the court in recording submissions of lawyers, the review petition was dismissed.[76]

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69. *Ram Sahu (dead) through LRs v Vinod Kumar Rawat*, (2020) 8 Mad LJ 191.
70. *Ram Sahu (dead) through LRs v Vinod Kumar Rawat*, (2020) 8 Mad LJ 191.
71. *Parsion Devi v Sumitri Devi*, (1997) 8 SCC 715.
72. *Abhijit Tea Co Pvt Ltd v Terai Tea Co (P) Ltd*, AIR 1995 Cal 316; *Naresh Ch Deb Barma v Shri Gopal Chandra Banerjee*, AIR 1994 Gau 37.
73. *Govind Poojara v Mohan Lal*, AIR 1998 Raj 213.
74. *PJ Isac v Appsons Pharmaceuticals*, AIR 1999 Ker 6 (DB).
75. *Uma Addhya v Biren Mondal*, AIR 2006 Cal 200 : 2006 (2) Cal HN 680 (DB).
76. *Pratima Mukherjee v Amitava Mukherjee*, AIR 2006 Gau 173 : 2006 (2) Gau LT 526.

In *Khela Banerjee v City Montessori School*,[77] a review petition was filed seeking review of the judgment in *Khela Banerjee- I*,[78] on the ground that the observation made by the court that the Governor had passed an order for restoration of plot in favour of the review petitioner in violation of the Rules of Business are factually incorrect. It was the contention of the review petitioner that because of the imposition of the President's rule under Article 356 of the Constitution, the Governor became entitled to exercise all the powers of the state government under the Rules of Business. However, the Supreme Court refused to review the same holding that as the copy of the proclamation issued by the President under Article 356 was not brought to the notice of the court earlier.

[s 114.10] Mistake on the Part of Court

Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefore. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in O XLVII, rule 1 of the CPC is wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine *actus curiae neminem gravabit*.[79]

Application for review would be maintainable not only upon discovery of new and important piece of evidence or when there exists an error apparent on the face of the record, but also if the same is necessitated on account of some mistake, or for any other sufficient reason. The expression "sufficient reason" used in O XLVII, rule 1, CPC is wide enough to include misconception of fact or law by a court or even by an advocate. Thus, where the petition against the municipal corporation, cancelling enlistment of the contractor was dismissed on the ground that the impugned order does not debar the contractor from seeking fresh enlistment, it was held by the Delhi High Court that the dismissal was based on incorrect understanding as the Enlistment Rules debarred a contractor from seeking fresh enlistment if he is once removed from approved list.[80]

[s 114.11] Non-Consideration of the Law

The review proceedings cannot be equated with the original hearing of the case and the writ petition cannot be re-heard only on the ground that the law has not been properly considered and applied. If the arguments raised before the court were considered and decided in the judgment, the petitioner, if he has any grievance against the judgment, can prefer an appeal but if the provisions of law have not been considered in a particular manner in which the petitioner wants to agitate it, then that cannot be a ground for reviewing the judgment. If the view taken by the court in the judgment is a possible view, having regard to the facts discernable from the facts on record, then it cannot be said to be an error apparent on the face of the record and no review can be made.

The Madras High Court has held that an order refusing leave for a letters patent appeal, which forms part of the judgment, is not separate from or independent of the judgment and,

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77. *Khela Banerjee v City Montessori School*, AIR 2013 SC 3776 : (2013) 7 SCC 615 : 2013 (129) AIC 200 : 2013 (5) All WC 4595.
78. *Khela Banerjee v City Montessori School*, AIR 2012 SC 3776 : (2012) 7 SCC 261 : JT 2012 (6) 369.
79. *Board of Control for Cricket, India v Netaji Cricket Club*, AIR 2005 SC 592 : 2005 (4) SCC 741.
80. *Narendra H Chandwani v MCD*, 2009 (158) DLT 234.

therefore, cannot be subject to review without the main judgment itself being reviewed.[81] It is an established law that "any other sufficient cause" only means that a reason sufficient on grounds at least to those specified immediately previously. It should be borne in mind that review would not be permissible even if the court has proceeded on a wrong exposition of law or has wrongly decided on question of law. A review would not be permissible on the ground that the decision is erroneous on the merits.[82]

In an application for review of a judgment passed in second appeal, the court can only consider the errors apparent on the face of the record in its judgments on the substantial questions of law already heard and decided by the court and cannot consider fresh substantial question of law which was not heard and decided by the court at the time of disposal of the second appeal.[83]

[s 114.12] Omission as to Authority

Failure of consideration of the judgment of the Supreme Court materially affecting the results of the case amounts to an error apparent on the face of the record. The power of review can be exercised in a suitable case in order to impart justice to the parties but the judgment cannot be reviewed merely to allow the petitioner to agitate new grounds.[84] The omission to cite an authority of law is not a ground for reviewing the prior judgment saying that there is an error apparent on the face of the record, since the counsel has committed an error in not bringing to the notice of the court the relevant precedents.[85]

[s 114.13] Review by Administrative Tribunal

The power of review available to the administrative tribunal is the same as has been given to a court under section 114 read with O XLVII, CPC. The power is not absolute and is hedged in by the restrictions indicated in O XLVII. A review cannot be claimed or asked for merely, for a fresh hearing or arguments or correction of an erroneous view taken earlier.[86]

[s 114.14] Review by Railway Claims Tribunal

It would be necessary to refer rule 32 of the Railway Claims Tribunal (Procedure) Rules (1989). It states the following:

> 32. Review of decision (1) Any person considering himself aggrieved by any order of the Tribunal from which no appeal is allowed [or from which appeal is allowed, but has not been preferred] and who on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the order made against him, may apply for review of a final order not being an interlocutory order, to the Tribunal.

This rule says that any person considering himself aggrieved by any order of the tribunal from which no appeal is allowed and who on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the order

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81. *Eswari Pillai v Modhavan*, AIR 1969 Mad 227.
82. *Dolat Industries, Gonal v Krishna Oil Industries, Jamnagar*, AIR 2002 Guj 91.
83. *Niranjan Sarkar v Swapna Dam*, AIR 2001 Gau 92. See notes to O XLVII, rule 1, below. As to rules of procedure, see O XLVII below.
84. *Manish Newton v Lachoo College of Science and Technology*, AIR 1994 Raj 182.
85. *Dokka Samuel v Jacob Lazarus Chelly*, (1997) 4 SCC 478.
86. *Ajit Kumar Rath v State of Orissa*, (2000) 2 LRI 163.

made against him, may apply for review of a final order not being an interlocutory order, to the tribunal.

It is thus apparent that rule 32 restricts the scope of power of review vested under section 18(3)(f) of the Railways Claims Tribunal Act, 1987 to non-appealable orders and leaves out from its ambit, orders which are appealable under section 23 of the Act though such orders could be reviewed in view of section 114 and rule 1 of O XI, rule 7 of CPC. To the extent indicated above, rule 32 runs counter to section 18(3)(f) of the Act. As rule 32 is repugnant to the statutory provision of clause (f) of sub-section (3) of section 18, it is certainly bad and in no case can it be allowed to override the specific provision of the Act. In this view of the matter, the high court erred in not considering the appeal of the appellant on merits on the ground that the review petition was not maintainable under rule 32.[87]

[s 114.15] *Suo motu* Review

The court cannot review its decree or order passed by it *suo motu*.[88]

[s 114.16] Review by State Government

A State Government empowered to grant or decline an exemption from the provisions of the State Act on cinemas cannot review its earlier order declining to grant an exemption, unless the State Act gives it power of review. The provision in the General Clauses Act, 1897 to the effect that power can be exercised from time to time, does not confer a power of review.[89]

[s 114.17] Defaulting Party

Where the petitioner is unjustifiably absent on two consecutive days, the court cannot entertain a review application at the instance of such defaulting party.[90]

[s 114.18] Delivery of Judgment Without Writing for Written Submission

The plea that the court had delivered the judgment without waiting for the written submission is not acceptable when there is nothing on record to substantiate such a situation. But while considering such a question, the court cannot look into any materials which were not brought on record on the date when the order was passed. There is nothing in the order sheet to show that the court would be waiting to deliver the judgment after having reserved the same till the written notes are submitted and that there would be a further hearing on the question. Unless it is borne out by the record, the court is helpless in a proceeding for review. The review is concerned only on the basis of an error apparent from the record. It cannot enter into a process of taking evidence to establish something which is not on record in order to create records for the purpose. The court is not supposed to entertain such statements in review. If such questions are entertained, it would open a pandora's box and lead to great anomalies, which is undesirable.[91]

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87. *Kalpataru Agroforest Enterprises v UOI*, AIR 2002 SC 1402.
88. *Viswanathan v M Gounder*, AIR 1978 Mad 221.
89. *V Dhandayutha Pani v SP Krishnamurthi*, AIR 1988 Mad 78.
90. *K Anjanayulu v The Collector of Excise*, AIR 1989 AP 54.
91. *Bidya Devi v CIT Allahabad*, AIR 2004 Cal 63 (DB).

[s 114.19] Power of the Court

See also notes under the same heading under section 47.

In a case relating to appointment to government posts, where the high court exceeded in the exercise of powers of review, it was held by the Supreme Court that the order of review was liable to be set aside."[92] Laying down the framework within which the power of review is to be exercised by courts, SINHA, J, speaking for the bench in the above case observed as follows:

> 18. The Division Bench of the High Court committed a serious error in entering into the merit of the matter while exercising its review jurisdiction. The courts jurisdiction to review its own judgment, as is well known, is limited. The High Court, indisputably, has a power of review, but it must be exercised within the framework of Section 114 read with Order 47 of the Code of Civil Procedure. The High Court did not arrive at a finding that there existed an error on the face of the record. In fact, the High Court, despite noticing the argument advanced on behalf of Union of India that the 1st Respondent had no legal right to be appointed, proceeded to opine that the panel prepared for filling up of future vacancies should be given effect to. The review of the High Court was not only contrary to the circular letter issued by Union of India, but also contrary to the general principles of law.[93]

[s 114.20] Doctrine of Merger in Review Applications

According to the doctrine of merger, the decree passed by an inferior court merges with the decree passed by the superior court by way of appeal or revision whereby the decree of the inferior court is confirmed, varied or modified. The decree which is finally to be executed is of the final court due to the effect of merger of decrees. Similar is the position in case of review. However, where a review petition is dismissed, the doctrine of merger has no application.[94] Explaining the legal position, SB SINHA, J, speaking for the division bench in the above case, observed as follows:

> It is also incorrect to contend that in a case of this nature, namely where a review petition was dismissed, the doctrine of merger will have any application whatsoever.
>
> It is one thing to say that the respondent was entitled to file an application for review in terms of Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, but it is another thing to say that the decree passed in favour of the respondent merged with the order dismissing the review application. Matter might have been different, if the review application had been allowed either wholly or in part in terms whereof an application for execution of the decree could have been filed only in terms of the modified decree.[95]

[S 115] Revision.—[96][(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

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92. *UOI v B Valluvan*, AIR 2007 SC 210 : (2006) 8 SCC 686.
93. *UOI v B Valluvan*, AIR 2007 SC 210, at p 214, para 18 : (2006) 8 SCC 686.
94. *Manohar S/o Shankar Nale v Jaipalsing S/o Shivlalsing Rajput*, AIR 2008 SC 429 : (2008) 1 SCC 520.
95. *Manohar S/o Shankar Nale v Jaipalsing S/o Shivlalsing Rajput*, AIR 2008 SC 429, at p 431, para 11 : (2008) 1 SCC 520.
96. Section 115 re-numbered as sub-section (1) thereof by CPC (Amendment) Act, 1976 (104 of 1976) section 43 (w.e.f. 1-2-1977).

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

[97][*Provided* that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

[98][(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.]

[99][(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]

Explanation.—In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.]

SYNOPSIS

[s 115.1]	State Amendments	1365	[s 115.18]	Revision — Appellate Authority Subordinate to High Court—Original Authority Not Necessarily So	1385
[s 115.2]	Unamended Section 115	1369	[s 115.19]	*Forma Pauperis*	1386
[s 115.3]	Legislative Changes	1370	[s 115.20]	Two Changes	1387
[s 115.4]	Scope	1371	[s 115.21]	Mentioning of Wrong Section	1388
[s 115.5]	Essentials	1375	[s 115.22]	Prayer Clause	1388
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97. Substituted by the CPC (Amendment) Act, 1999 (46 of 1999), section 12 (w.e.f. 1-7-2002) *vide* Notification. S.O. 603(E), dated 6 June 2002 for the following.

Provided that the high court shall not, under this section, vary or reverse any order made, or any order deciding an issue; in the course of a suit or other proceeding, except where—

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

98. Inserted by the CPC (Amendment) Act, 1976 (104 of 1976), section 43 (w.e.f. 1-2-1977).

99. Inserted by the CPC (Amendment) Act, 1999 (46 of 1999), section 12 (w.e.f. 1-7-2002) *vide* Notification S.O. 603(E), dated 6 June 2002.

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[s 115.1] State Amendments

Madhya Pradesh.—The following amendments were made by Madhya Pradesh Act 4 of 1994, section 2 (w.e.f. 15-3-1994)–

In its application to State of Madhya Pradesh for section 115, substitute the following section/namely:—

"**115. Revision.**—The High Court may call for the record of any cases which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not under this section, vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceedings except where—

(a) the order, if it had been made in favour of the party applying for the revision, would have finally disposed of the suit or proceeding; or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation.—In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."—[Madhya Pradesh Act 4 of 1994, section 2 (w.e.f. 15-3-1994).]

Orissa.—*In its application to the State of Orissa,* *for section 115, substitute the following section, namely:—*

115. Revision.—The High Court, in cases arising out of original suits or other proceedings of the value exceeding one lakh rupees, and the District Court, in any other case including a case arising out of an original suit or other proceedings instituted before the commencement of the Code of Civil Procedure (Orissa Amendment) Act, 1991, may call for the record of any case which has been decided by any Court subordinate to the High Court or the District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court or the District Court, as the case may be, make such order in the case as it thinks fit:

Provided that in respect of cases arising out of original suits or other proceedings of any valuation decided by the District Court, the High Court alone shall be competent to make an order under this section:

Provided further that the High Court or the District Court shall not under this section, vary or reverse any order, including an order deciding an issue, made in the course of a suit or other proceeding, except where—

(i) the order, if so varied or reversed, would finally dispose of the suit or other proceedings; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

Explanation.—In this section, the expression "any case which has been decided" includes any order deciding an issue in the course of suit or other proceeding.

Saving.—The amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any jurisdiction already exercised, and any proceeding instituted or commenced in the High Court under section 115 of the Code of Civil Procedure, (5 of 1908), prior to the commencement of this Act shall, notwithstanding such amendment, continue to be heard and decided by such Court.—[Orissa Act 26 of 1991, section 2 (w.e.f. 7-11-1991).]

Uttar Pradesh.—(1) For section 115, substitute the following section, namely:—

115. Revision.—(1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has—

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of its jurisdiction illegally or with material irregularity;

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the District Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the District Court.

(3) The superior court shall not, under this section, vary or reverse any order made except where,—

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the superior court.

Explanation I.—In this section,—

(i) the expression 'superior court' means—

(a) the District Court, where the valuation of a case decided by a court subordinate to it does not exceed five lakh rupees;

(b) the High Court, where the order sought to be revised was passed in a case decided by the District Court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the District Court exceed five lakh rupees;

(ii) the expression 'order' includes an order deciding an issue in any original suit or other proceedings.

Explanation II.—The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceeding instituted before such commencement.—[Act 14 of 2003, section 2 (w.r.e.f. 1-7-2002).]

Transitory Provisions *vide* section 3 of Uttar Pradesh Act 14 of 2003.—(1) Notwithstanding anything contained in U.P. Act 14 of 2003 no judgement or order passed by the High Court in a revision filed on or after July 1, 2002 shall be liable to be questioned or reviewed on the ground that the revision ought to have been filed in the District Court.

(2) Any revision filed in the District Court in a case where the value of the original suit or proceeding does not exceed five lakh rupees and is decided by it on the assumption that the District Court would have jurisdiction notwithstanding the amendment of section 115 of the principal Act, by the Code of Civil Procedure (Amendment) Act, 1999 shall be deemed to have been correctly filed in that court and its decision thereon shall not be liable to be questioned on this ground, and such revision, if any pending on the date of commencement of this Act, shall be decided by that court.

(3) If on or after July 1, 2002 an application for revision under section 115 of the principal Act has been filed before the High Court in a case decided by a court subordinate to the District Court, where the value of the original suit or proceeding does not exceed five lakh rupees and such application is pending on the date of commencement of this Act, then such application, unless arguments thereon have already been concluded and only judgement remains to be pronounced by the High Court, shall stand transferred to the District Court concerned, and the same shall be disposed of in accordance with the said section 115 as substituted by this Act.

Statement of Object and Reasons of Uttar Pradesh Act 14 of 2003.—The Code of Civil Procedure (Uttar Pradesh Amendment) Act, 1978 (U.P. Act No. 31 of 1978) was enacted to amend *inter-alia* section 115 of the Code of Civil Procedure, 1908 in its application to Uttar Pradesh to provide for empowering the District Judges to revise the orders of courts subordinate to them, arising out of the original suits of the valuation up to Rupees Twenty thousand. The section 115 of the said Code was further amended in its application to Uttar Pradesh by the Uttar Pradesh Civil Laws (Amendment) Act, 1991 (U.P. Act No. 17 of 1991) to raise the said valuation up to Rupees One lac. Since the said amendments have been repealed by section 32 of the Code of Civil Procedure (Amendment) Act, 1999 (Act No. 46 of 1999), the District Judges in the state not have no power to revise the order of the court subordinate to them arising out of original suits with effect from the date of commencement of the said Act of 1999 i.e. 1-7-2002. Same view has been expressed by the Hon'ble High Court of Judicature Allahabad in the matter of *United Service Club and others v Anita Barlow and other* (Civil Revision Number 92 of 2002) decided on 16-9-2002. Consequently a litigant has to approach the Hon'ble High Court for filing a revision against the order of the subordinate courts arising out of suits of any valuation, whereas, he can file an appeal before the District Judge against the order of the subordinate courts passed in original suits of valuation up to Rupees Five lacs under the provisions of Bengal, Agra and Assam Civil Courts Act, 1887. With a view to removing the difficulties, it has been decided to amend section 115 of the said Code in its application to Uttar Pradesh to provide for empowering the District Judges to revise the orders of the courts subordinate to them arising out of original suits of the valuation up to Rupees five lacs.

The Code of Civil Procedure (Uttar Pradesh Amendment) Bill, 2003 is introduced accordingly.

"**West Bengal.**—After section 115, insert the following section, namely:—

115A. District Court's powers of revision.—(1) A District Court may exercise all or any of the powers which may be exercised by the High Court under section 115.

(2) Where any proceeding by way of revision is commenced before a District Court in pursuance of the provisions of sub-section (1), the provisions of section 115 shall, so far as may be, apply to such proceeding and references in the said section to the High Court shall be construed as references to the District Court.

(3) Where any proceeding for revision is commenced before the District Court, the decision of the District Court on such proceeding shall be final and no further proceeding by way of revision shall be entertained by the High Court or any other Court.

(4) If any application for revision has been made by any party either to the High Court under section 115 or to the District Court under this section, no further application by the same party shall be entertained by the High Court or any other Court.

(5) A Court of Additional Judge shall have and may exercise all the powers of a District Court under this section in respect of any proceeding which may be transferred to it by or under any general or special order of the District Court.—[West Bengal Act 15 of 1988, section 3 (w.e.f. 1-2-1989).]

Uttarakhand.—For section 115, substitute the following section, namely:—

115. Revision.—(l) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has–

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-section (1), when filed in the High Court; shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the District Court but lies only to the High

Court either because of valuation or because the order sought to be revised was passed by the District Court.

(3) The Superior Court shall not, under this section, vary or reverse any order made except where–

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the superior court.

Explanation I.—In this section–

(i) the expression 'superior court' means–

(a) The District Court, where the valuation of a case decided by a court subordinate to it does not exceed five lakh rupees;

(b) the High Court, where the order sought to be revised was passed in a case decided by the District Court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the District Court exceed five lakh rupees;

(ii) the expression "order" includes an order deciding an issue in any original suit or other proceedings.

Explanation II.—The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement.

Explanation III.—The provisions of this section shall not be applicable to the revisions already filed in the High Court before the commencement of this section.—[Uttaranchal Act 1 of 2006, section 2.]

[s 115.2] Unamended Section 115

[100](1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

the High Court may make such order in the case as it thinks fit.

[101]Provided that the High Court shall not, under this section, vary or reverse any order made, or may order deciding an issue, in the course of a suit or other proceeding, except where—

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made;

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

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100. Renumbered by Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976).
101. Added by Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976).

Explanation.—In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

[s 115.3] Legislative Changes

The section, before its alteration by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), corresponded to section 622 of the Code of Civil Procedure, 1882. The Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) retained the section intact, except that it is renumbered as sub-section 1 and adds a proviso thereto. The Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) also added a new sub-section 2 and an Explanation.

By the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) effective from 1 July 2002, the proviso to sub-section (1) contains clause (a) and has omitted clause (b) of the earlier proviso to sub-section (1). A new sub-section (3) has been inserted. This amendment has been brought about on the basis of Malimath Committee Report. By the said amendment, the scope of revision has been restricted by the legislature as revision would lie only against such interlocutory orders which would finally dispose of the suit or the proceeding and no other.

The amended provisions shall not apply to or effect any proceeding for revision which had been finally disposed of before the commencement of the amended provisions. The amended provisions shall, however, apply to revisions, which are pending adjudication at the time of commencement of the amended provisions.

Clause (b) of the proviso to sub-section (1) of section 115 provided that the high court shall not under this section, vary or reverse any order made, or may order deciding an issue, in the course of a suit of other proceeding except where the order, if allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

A sub-clause (3) to section 115 was inserted which provided that a revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the high court.

In the opinion of the authors, powers contemplated in clause (b) of the proviso to sub-section (1) should be available to the high court to correct instances of failure of justice or of orders causing irreparable injury. The deletion of said clause would only result in more remands by the appellate courts. As far as the insertion of sub-section (3) is concerned, this is a sound amendment, which will help in faster adjudication of disputes.

The Law Commission in its 163rd report while approving the insertion of sub-section (3) in section 115 opined that the proposal to delete clause (b) of the proviso to sub-section (1) is not advisable nor would it serve the purpose of speedy disposal of suits. The high courts in exercising the powers of revision should always bear in mind the significance, the object and the purpose underlying section 99 of the Code. Section 99 is premised on the supposition that each and every infraction of a procedural provision in the Code does not warrant interference by the appellate court and that interference with a judgment and decree is warranted only where such infraction has resulted in substantial prejudice to the party. This is the spirit behind section 99 which says, "No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any mis-joinder or non-joinder of parties or cause of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court". But the proposal to delete clause (b) of proviso to section 115(1) on the ground of frequent interference by the courts exercising powers of revision may not be warranted. The remedy lies elsewhere, namely, exercising restraint and self-discipline while exercising power of revision.

The Law Commission, therefore, recommended that the proposal to delete clause (b) of proviso to sub-section (1) of section 115 be given up. The addition of sub-section (3) is, however, perfectly in order.

[s 115.4] Scope

Section 115 is essentially a source of power for the high court to supervise the subordinate courts. It does not, in any way, confer a right on a litigant aggrieved by any order of the subordinate court to approach the high court for relief. The scope for making a revision under section 115 is not linked with a substantive right.[102]

Power conferred on the high court under section 115 of the CPC over all subordinate courts within its jurisdiction is a supervisory power and has been distinguished from its power of appeal to correct errors of fact and law. The power of revision under section 115 being in the nature of power of superintendence to keep subordinate courts within the bounds of their jurisdiction cannot be readily inferred to have been excluded by provisions of a special Act, unless such exclusion is clearly expressed in that Act.[103] However, the Supreme Court has held that the analysis made in *ITI Ltd*[104] to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act clearly envisages otherwise and the legislative intendment also so postulates and has referred the same to a larger bench for reconsideration.[105]

The jurisdiction exercised by the high courts under this section is called revisional jurisdiction. Even as the section stood before its amendment, the powers of the high courts under this section could only be invoked in cases in which no appeal lies to the high court and the case was decided by any court subordinate to such high court and such subordinate court appeared:

(i) to have exercised a jurisdiction not vested in it by law; or

(ii) to have failed to exercise a jurisdiction vested in it by law; or

(iii) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

It is true that the scope to entertain the petition under section 115, CPC is required to be exercised only when the petitioners case falls within the four corners of the provisions of section 115.[106]

It is a settled principle of law that that when a statutory remedy of second appeal is available under section 100, CPC, revision under section 115, CPC is not competent. It is on the settled principle that statutory remedy ousts revisional jurisdiction of this court which is discretionary, sometimes to be exercised *suo motu* or sometimes on an application. But there is no right of revision to a litigant unlike in a statutory remedy of appeal. So, second appeal lies against the order dismissing the appeal on preliminary grounds.[107]

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102. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : (2003) 6 SCC 659 : 2003 (4) Andh LD 1 (SC) : 2003 (4) All LT 27 (SC).
103. *ITI Ltd v Siemens Public Communications Network Ltd*, AIR 2002 SC 2308 : 2002 (5) SCC 510.
104. *ITI Ltd v Siemens Public Communications Network Ltd*, AIR 2002 SC 2308 : 2002 (5) SCC 510.
105. *Mahanagar Telephone Nigam Ltd v Applied Electronics Ltd*, (2017) 2 SCC 37.
106. *Sumer Chand Chhajed v Administrator (SDM), GS Samiti*, AIR 2002 Raj 76.
107. *Siddanagouda S/o Vithoba Patil v Tukaram S/o Vithoba Patil*, Regular Second Appeal No. 7468/2013, decided on 8 October 2020 (Karnataka High Court); see also *Suresh v State*.

The high court had no power to interfere in revision except in the three cases mentioned above.[108] Where the approach of judgment-debtor in the entire proceedings was negligent, careless, unfair and intended to stop the transfer of property to auction-purchaser and to avoid payment to decree-holder, the Supreme Court found that the high court ought not to have exercised its revisional jurisdiction.[109]

Further, in the exercise of its revisional power, it is not the province of the high court to enter into the merits of the evidence. It has only to see whether the requirements of the law have been duly and properly obeyed by the court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order.[110] Where there is no error of law apparent on the face of the record, the order shall not be interfered by the high court in civil revision.[111] The high court in its revisional jurisdiction, which is untenable, ought not to interfere with the order made by the trial court, unless there is an error in exercise of jurisdiction by the trial court.[112] If the high court finds that the external conditions of jurisdiction, of investigation and of command have been satisfied by the inferior court, it should not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior court in any matter committed by the legislature to the discretion of the inferior court.[113] While hearing a revision petition, the high court cannot, on the same principle, try a new issue, even if the parties were to consent to such a course, and thus convert itself into the original court,[114] nor can it admit additional evidence.[115] However, where the order of the court is based on misreading of pleadings consequent thereto, and the court has misdirected itself in passing an order, the court, under section 115, has the power to interfere.[116] Similarly, where the court below has arrived at a finding which suffers from jurisdictional errors, interference of the high court is not unwarranted in such a situation.[117]

A single judge of the Patna High Court has taken the view that a revision against decree for restoration of possession under section 6 of the Specific Relief Act, 1963, is not expressly barred, but generally court would not interfere in revision where other remedies are open to parties. In the case under the Specific Relief Act, 1963, the party has specific remedy by virtue of section 6(4) of the Act to institute a regular suit for declaration of title and possession. But in extreme case where grave injustice has been done or where the trial is no trial at all or where the decision is vitiated by an error apparent on the face of the record, the high court does interfere. However, this question was left open by the high court.[118]

In an execution case, where there was resistance or obstruction to possession of immovable property, the executing court rejected the application of objection as not maintainable on the

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108. *Hari Shankar v Rao Girdhari Lal Chowdhury*, AIR 1963 SC 698 : 1962 Suppl (1) SCR 933; *South India Corp v ST Corp*, AIR 1970 Ker 138 : (1969) 1 Ker 283; *Rajaram Nathuji Pathode v Maniram*, AIR 1975 Bom 1.
109. *Guttikonda Venkataramaiah v Godavarthy Venkateshwarlu*, (2015) 2 SCC 46.
110. *Dinshaw Iron Works v Miakhan Adamji*, AIR 43 Bom 42 : 44 Bom LR 924; *Muhammad v Ajudhia*, (1888) 10 All 467.
111. *KA Aboobacker v N Girija*, AIR 1995 Ker 221.
112. *Panchdeo Narain Srivastava v Jyoti Sahay*, (1984) Supp SCC 594.
113. *Shiva Nathji v Joma*, (1883) 7 Bom 341; *Rajinder Singh v Karnal Central Co-op Bank*, AIR 1965 Punj 331; *S Saroja v PG Emmanual*, AIR 1965 Mys 12; *Kishanlal v Madhabananda*, AIR 1965 Ori 180; *P Udayani Devi v VV Rajeshwara Prasad Rao*, (1995) 3 SCC 252; *Sideshwar Sahu v Arabhita Jena*, AIR 1996 Ori 29; *Amar Singh v Ghanshyam*, AIR 1998 Raj 333.
114. *Khushro S Gandhi v NA Guzder*, AIR 1970 SC 1468 : (1969) 2 SCR 959.
115. *Bhimsen v Savitri*, AIR 1966 All 247.
116. *Melagiriyappya v Tumalappa*, AIR 1996 Kant 150.
117. *State of Andhra Pradesh v Vatsavyi Kumara Venkata Krishna Verma*, (1999) 1 LRI 116.
118. *Krishna Prasad Sinha v Vikash Singh*, AIR 2007 Pat 112 : 2007 (1) Pat LJR 456.

ground that no document or paper was produced in support of the claim. There being no adjudication, such order would not be in consonance with O XXI, rule 103 of the Code and cannot be held to be a "decree". Since the order would not be appealable, revision against the same is maintainable.[119]

Section 141 of the Code pertains to "miscellaneous proceedings" while the words used in section 115 of the CPC are "suits and other proceedings". No doubt "miscellaneous proceedings" does not include execution proceedings as O XXI of the Code provides separate procedure for execution proceedings and does not require the assistance of section 141. But proceedings under section 47 of the Code are miscellaneous proceedings and as such other proceedings do cover proceedings under section 47 of CPC. Therefore, an order rejecting objections under section 47 is revisable.[120]

Adjudication of right of pre-emption under section 22(2) of the Hindu Succession Act, 1956, does not amount to decree as defined in section 2(2) of the Code and as such no appeal lies. However, remedy is available to a party under section 115 CPC or Article 227 of the Constitution.[121]

The high court should not, in revision, interfere with an order which is eminently just.[122] In case of the absence of any jurisdictional error committed by the tribunal, the high court would not interfere in its revisional jurisdiction.[123] Section 115 of the CPC, and provisions of similar pattern in several other enactments, are designed to confer a wide power on the ultimate authority to call for the records and supervise the correctness of the proceedings, subject to certain limitations.[124] The revisional jurisdiction of the high court would not be impliedly barred where provisions of a special enactment makes the decision of the appellate authority final and not open to question in any court, and also vests revisional jurisdiction in such authority.[125]

Whenever an appeal or revision petition is filed in the registry of the high court, the defects have to be pointed out by the registry, thereby giving an opportunity to the appellant/petitioner to rectify the defect. In the absence of any objection raised by the registry, it does not seem right where the court on preliminary objection disposes of the appeal.[126] However wide the scope of the revision may be, the revisional court is not competent to decide the validity of the provision of an Act.[127] The revision petition should not be dismissed summarily even if the court comes to the conclusion that there is no substance in the matter. The high court should indicate brief reasons in support of the view it takes.[128] A revision petition once admitted must be disposed of on merits. It cannot be dismissed on some technical grounds like non-payment of rent by the tenant.[129]

While exercising revisional jurisdiction, the court can take into consideration subsequent development, especially when such developments go to the root of the litigation and the cause

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119. *Most. Sanjna Devi v Amar Yadav*, AIR 2008 Pat 44 : 2007 (4) Pat LJR 727.
120. *Ram Agarwal v Smt. Brijendra Kaur*, AIR 2008 Uttr 25 : 2008 (4) All LJ 176.
121. *Arati Das v Bharati Sarkar*, AIR 2009 Cal 8 : 2009 (2) Cal LJ 782 (DB).
122. *Bhojraj Kunwarji Oil Mill v Yograj Singh*, AIR 1984 SC 1984 : (1985) 1 SCC 149.
123. *Oriental Co Ltd v Hansi*, AIR 1996 Raj 71.
124. *Raja Ramakaran v B Ramulu*, AIR 1982 AP 256.
125. *Aundal Ammal v Sadasivan Pillai*, (1987) 1 SCC 183.
126. *Udai Bhan Gupta v Hari Shankar Bansal*, (1984) Supp SCC 602.
127. *Venkateswara Textiles Traders and Printers v Canara Bank*, AIR 1998 AP 282.
128. *Harbans Sharma v Pritam Kaur*, (1982) 3 SCC 386(2).
129. *Hukumchand Amolikchand Logde v Madhava Balaji Potdar*, (1984) Supp SCC 600.

of action.[130] A basic plea, like, that there was no concluded contract between parties or that there was no written arbitration agreement, can be raised for the first time in revision but the revision cannot be dismissed on such technical grounds.[131] The Madhya Pradesh High Court, relying upon a Supreme Court judgment,[132] held that the correctness of the court proceedings cannot be challenged before the appellate or original courts unless such a challenge was made before these courts because the conduct of judge in recording the proceedings cannot be put in issue.[133] Where the permission is granted by the court to sue in a representative capacity, the court should be very slow to exercise its power under section 115 of the CPC, unless the decision of the court has resulted in manifest error, illegality or irregularity in exercise of the jurisdiction conferred on it, which has resulted in failure of justice.[134]

In a revision against an order partly allowing application under O XXIII, rule 1(3) while declining to grant leave to file fresh suit, the defendant cannot be allowed to raise a plea that plaintiff had filed the application for withdrawal by giving false information regarding the pendency of the suit. Such arguments can only be advanced before the trial court.[135]

Where a revision application was filed against land acquisition appeal by one of the co-owners but other co-owners who were parties in the appeal were not made parties, it was held by the Kerala High Court that the revision was bad for non-joinder of necessary parties.[136]

In another case where a party filed an application in the high court for a direction for early disposal of transfer application pending before district judge and the high court admitted the application with necessary direction to the district judge, it was held that this act of a party cannot be a ground for making disparaging, unmerited and uncharitable remarks against the advocate. The remarks in question were held to be liable to be expunged.[137]

In a particular case, the trial court held that a particular document was a deed of partition (after examining its contents) and the document was, therefore, inadmissible in evidence without stamp and registration. It was held that as the order was neither without jurisdiction nor vitiated by illegality or material irregularity, the high court will not interfere with it in revision.[138] Where the subordinate court on a preliminary issue held that document was a pronote and since it was insufficiently stamped, the same was inadmissible in evidence. The revision against the order was held to be maintainable.[139] In another case, the trial court granted an injunction to occupants of a building thwarting possession of it by the auction purchaser thereof. The injunction was issued on meagre material. The appellate court vacated it. It was held that the appellate court could not be said to have acted with material irregularity. The high court did not interfere with appellate order. Besides, the revisional application against the appellate order would amount to abuse of process of court.[140]

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130. *Narayandas Nathuman Hemrajani v Tarben Kalimuddin Mulla Fakhri Society*, AIR 1998 Guj 12.
131. *Gujarat State Fertilizers Co Ltd v HJ Baker & Bros.*, AIR 1999 Guj 209.
132. *State of Madhya Pradesh v Ramdas Shrinivas Naiyak*, AIR 1982 SC 1249.
133. *Beni Bai v Champa Bai*, AIR 1996 MP 243.
134. *Vinod v Pandurang*, AIR 1997 Kant 144.
135. *Rajasundari v Gowri*, AIR 2006 Mad 156 : 2006 (1) Mad LJ 164.
136. *KG Kuruvilla v Dy. Collector (L.A.), Kerala State Electricity Board*, 2007 (2) Ker LT 410 : 2007 (1) Ker LJ 865.
137. *Alex P Chacko v Verghese Mathew*, 2007 (1) Ker LT 534 : 2007 (52) All Ind Cas 613.
138. *Bhagwat Prasad Verma v Mukat Lal*, AIR 1987 HP 51.
139. *Mangilal v Lal Chand*, AIR 1995 Raj 189.
140. *Gopal Chandra Saha v Amal Kumar Ghosh*, AIR 1981 Cal 360.

The order of the appellate authority directing grant of succession certificate in favour of one party cannot be interfered with in civil revision.[141] Failure by the trial court to award penalty by considering provisions of section 74 of the Indian Contract Act, 1872 amounts to an error of law, revisable under section 115.[142]

The Jaipur Bench of the Rajasthan High Court has held that the provisions of section 115 of the Code can be applied *mutatis mutandis* to a revision under section 83(9) of the Wakf Act, 1995. Thus, where the Wakf tribunal passed order directing the commissioner to visit the disputed site and submit report before the court, it was held that the order did not decide the case finally and as such revision against the said order was not maintainable.[143]

Revision petition filed under section 115, CPC is not maintainable against the interlocutory orders after the statutory changes made through the amendment brought in the year of 1999.[144] Revision against an interlocutory order which does not finally decide the lis cannot be maintained. The remedy for the aggrieved party is to file an application under Article 227 of the Constitution.[145]

Where an application for dispensing with the requirement of serving notice to government under section 80 of the Code is rejected, the only option to the court is to return the plaint and present the same after compliance with the mandatory provision. It cannot be said to be a "case decided" so as to attract section 115 of the Code.[146]

In a suit for declaration and restoration of possession, there was a preliminary issue regarding the effect of non-service of notice under section 80 of the Code on the party who was in possession. The trial court held that the suit was maintainable as the respondent, who was a government servant, had not done any act in his official capacity. Revision against the order on preliminary issue was filed. In the meantime, the suit itself was dismissed on merit. Hence, when the revision was taken up for hearing, it had become infructuous. It was held by the Supreme Court that the order of the high court in revision holding that the suit was not maintainable for non-service of notice under section 80, CPC was liable to be set aside.[147]

The question as to whether leave to defend in a summary suit can be granted or not is within the discretionary powers of the high court and where such discretion has not been exercised erroneously or with any irregularity, no interference by Supreme Court is warranted.[148]

[s 115.5] Essentials

A civil revision, at the instance of a litigant is maintainable on satisfaction of the following circumstances cumulatively, *viz*:

(a) (i) impugned order amounts to a case decided.

(ii) Such order must have been passed by any court subordinate to such high court.

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141. *Joginath Gochhi v Sudhakar Pati*, AIR 1999 Ori 182.
142. *Ganga Maruthi v Nagraj*, AIR 1998 Kant 407.
143. *Ruda Ram v Ibrahim*, AIR 2007 (NOC) 1762 (Raj).
144. *Tek Singh v Shashi Verma*, AIR 2019 SC 1047 : 2019 (3) Mad LJ 540 : 2019 (3) Scale 86; see also *Deep Industries Ltd v ONGC*, (2020) 15 SCC 706 : 2019 (10) SCJ 429 : 2019 (17) Scale 85.
145. *Municipal Corp of Hyderabad v Philomena Education Foundation of India*, 2008 (1) Andh LT 670 (DB).
146. *Gaurang Das v Tahasildar, Baliapal*, AIR 2008 Ori 77 : 2008 (106) Cut LT 222.
147. *Ram Kumar v State of Rajasthan*, AIR 2009 SC 4 : (2008) 10 SCC 73.
148. *Southern Sales and Services v Sauermilch Design and Handles Gmbh*, AIR 2009 SC 320 : (2008) 14 SCC 457.

(iii) Such order must not be appealable one.

(b) there must be allegation of jurisdictional error, i.e., to say:

(i) exercise of jurisdiction not vested in the court below by law, or

(ii) a jurisdiction vested in it by law was failed to be exercised, and/or

(iii) has acted in the exercise of its jurisdiction illegally or with material irregularity.

(c) if the impugned order had been passed in favour of the revision-petitioner then that would have finally disposed of the suit or other proceedings.[149]

[s 115.6] Two Parts — Distinction

The section consists of two parts, the first prescribes the conditions in which jurisdiction of the high court arises, i.e., there is a case decided by a subordinate court in which no appeal lies to the high court, the second sets out the circumstances in which the jurisdiction may be exercised. But the power of the high court is exercisable in respect of "any case which has been decided".[150]

The question regarding maintainability of the revision by the high court is a question distinct and independent of the case in which the high court shall interfere with the orders passed by the court subordinate thereto. The former concerns the power to call for record of courts subordinate to it by a high court and relates to existence of conditions precedent on the basis of which such exercise of jurisdiction under section 115 depends and in the absence of existence of such conditions, there is no authority or jurisdiction to call for the record of subordinate courts for examination in the matter in exercise of jurisdiction under section 115, CPC. The latter relates to stage subsequent to exercise of powers by the court spelling out the circumstances in which the court, in exercise of its jurisdiction under section 115, can vary or modify the order in question. In which case, the high court may vary, modify or pass such other orders as it thinks fit depends on the authority exercisable by it under section 115, CPC. The maintainability of the revision depends upon two conditions, first, that it must relate to a case decided by the court subordinate to the high court and secondly, in connection with the case decided, no appeal lies thereto. Once these two conditions are fulfilled, it cannot be said that the application for revision is not maintainable. The question where in a given case, the court would exercise the jurisdiction to interfere with the orders made by the subordinate court in a case decided would depend upon the facts and circumstances of each case, depending upon the conditions imposed on exercise of such powers by the high court in a case where the revision is maintainable.[151]

[s 115.7] Section 9 and Section 115

See notes under the heading "Section 9 and Section 115" under section 9.

[s 115.8] Power of Court

See notes under the same heading in section 47.

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149. *Michael Mascarenhas, Major v John Mascarenhas, Major*, AIR 1996 Kant 348.
150. *Salio Ram v Kuldip Chand*, AIR 2003 HP 148 (DB).
151. *Chunnilal v Shanta Devi*, AIR 2001 Raj 76 (DB).

[s 115.9] Appeal and Revision — Respective Scope

See also notes under the same heading under section 100.

It has been held by the Supreme Court that the high court can exercise its inherent jurisdiction in appropriate cases. The revisional jurisdiction, in effect and substance, is an appellate jurisdiction.[152] Doctrinally revisional jurisdiction is a part of the appellate jurisdiction, but not *vice versa*. Both appellate jurisdiction and revisional jurisdiction have to flow from the statute books and no party to the proceedings has an inherent right of appeal or revision.[153]

Appeal or revision is a creature of the legislature and it is within their wisdom to provide or not to provide right of appeal against judicial decision or order. It is also within the domain of the legislature whether the high court should be vested with revisional power against any adjudicatory process. A bare reading of section 115 of the Code reveals that revisional power can be exercised only where the statute does not provide right of appeal. Therefore, when the Motor Vehicles Act, 1988 provides for appeal against the award of the motor accident claims tribunal, revision petition against the award is not maintainable.[154]

However, a special bench of the Madhya Pradesh High Court has held that the remedy of appeal under section 173(2) of the Motor Vehicles Act, 1988 is not available where the amount awarded by the claims tribunal is less than Rs 10,000. Therefore, the aggrieved party has the remedy of revision under section 115, CPC available to him. The constitutional remedy under Articles 226 and 227 stands barred in view of the alternative efficacious remedy under section 115 of the CPC.[155]

The full bench of the Patna High Court[156] dealt with the question that whether against the order of interim compensation made under section 140 of the Motor Vehicles Act, 1988, the appeal shall lie under section 173 of the Motor Vehicles Act or can such order be challenged in a revision application under section 115 of the CPC. Relying on *Yallwwa v National Insurance Co Ltd*[157] and *United India Insurance Co Ltd v Serjerao*,[158] it was held that an order of the tribunal awarding compensation under section 140 of the Act is appealable under section 173 as it amounts to an award under section 173.

Explaining the respective scopes of appeal and revision in the undernoted case,[159] Pasayat, J, speaking for the Supreme Court Bench observed as follows:

> 13. First aspect that has to be considered is the respective scope of appeal and revision. It is fairly a well settled position in law that the right of appeal is a substantive right. But there is no such substantive right in making an application under Section 115. Though great emphasis was laid on certain observations in *Shankar Ramchandra Abhyankar v Krishnaji Dattatraya Bapat*[160] to contend that appeal and revision stand on the same pedestal, it is difficult to accept the proposition. The observations in the said case are being read out of context. What was held in that case related to the exercise of power of a higher Court, and in that context the nature of consideration in appeal and revision was referred to. It was never held in that case that appeal is equated to a revision.

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152. *GL Vijain v K Shanker*, AIR 2007 SC 1103 : (2006) 13 SCC 136; [**see also** *Narinder Mohan Arya v United India Insurance Co Ltd*, AIR 2006 SC 1748 : (2006) 4 SCC 713].
153. *Hindustan Petroleum Corp Ltd v Dilbahar Singh*, (2014) 9 SCC 78 : 2014 (2) RCR 210.
154. *New India Assurance Co Ltd v Ganga Devi*, AIR 2007 Jhar 40 : 2006 ACJ 2857 (DB).
155. *National Insurance Co Ltd, Gwalior v Shrikant Vinod Tiwari*, AIR 2007 MP 98 (SB).
156. *Kanchan Mahato v Most. Champa Devi*, AIR 2014 Pat 215 : 2015 ACJ 719.
157. *Yallwwa v National Insurance Co Ltd*, AIR 2007 SC 2582 : (2007) 6 SCC 657.
158. *United India Insurance Co Ltd v Serjerao*, AIR 2008 SC 460 : (2008) 7 SCC 425.
159. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : (2003) 6 SCC 659.
160. *Shankar Ramchandra Abhyankar v Krishnaji Dattatraya Bapat*, AIR 1970 SC 1 : 1969 (2) SCC 74.

> 14. Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The scope for making a revision under section 115 is not linked with a substantive right.

A full bench of the Allahabad High Court[161] was seized of a question that whether in view of the judgments of the Supreme Court in *Hari Shanker v Rao Girdhari Lal Chowdhury*[162] and *Shiv Shakti Co-op Housing Society v Swaraj Developers*[163] declaring the power of revision as not a substantive right but merely an enabling provision, the provision for a revision under section 10B of the Uttar Pradesh Trade Tax Act, 1948 would on the repeal of that Act not be saved under section 81(2) of the Uttar Pradesh Value Added Tax Act, 2008. It was held that the power of revision is construed in the context of revenue or fiscal legislation not as one in the nature of a standalone provision, but as a provision which is intended to enable the revisional authority to ensure that the assessment has been carried out in accordance with law. An error on the part of the assessing authority is amenable to correction in revision. The power that is vested in the revisional authority is one which has a direct nexus with the order of assessment and is in the nature of a final determination over the order of the assessing officer. The object and purpose are to ensure that the assessment has been made in accordance with law. The power of the revisional authority to call for and examine the records for the purpose of satisfying himself as to the legality or propriety of the order of assessment and to pass such order with respect thereto as he thinks fit is, hence, unaffected by the repeal. This power is intrinsically connected with the right of the authority to ensure that the assessment has been carried out in accordance with law. This imposes a corresponding obligation and liability on the assessee where it is found that the assessment was otherwise than in accordance with law. One cannot be disassociated from the other.

It is the settled position of law that revision application against an interlocutory order, but remedy under Article 227 of the Constitution is available. But whether the court will exercise its power or not, that is within the discretion of the court. However, in a proper case where the order of the subordinate court is perverse or beyond jurisdiction, the court should exercise jurisdiction under Article 227 of the Constitution.[164]

[s 115.10] Revision and Jurisdiction of High Court Under Articles 226 and 227

There cannot be any restriction with regard to a proceeding under Article 226 or Article 227 and section 115 of CPC when it relates to a proceeding arising out of the order of the civil court. Whatever might be the nature of the proceedings, it remains a revisional jurisdiction.[165]

In *Shalini Shyam Shetty v Rajendra Shankar Patil*[166] it has been held that it may be true that a statutory amendment of a rather cognate provision, like section 115 of the CPC by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) does not and cannot cut down the ambit of high court's power under Article 227. At the same time, it must be remembered that

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161. *Ram Sewak Madan Mohan v Commissioner, Commercial Taxes*, 2016 (1) ADJ 130 : 2016 (3) All LJ 166.
162. *Hari Shankar v Rao Girdhari Lal Chowdhury*, AIR 1963 SC 698 : 1962 SCR (1) 933.
163. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : (2003) 6 SCC 659.
164. *Bharati Das v Ranjit Kumar Das*, AIR 2009 Gau 23 : 2009 (1) Gau LT 205.
165. *Om Rice Mill, Jaspur v Banaras State Bank Ltd*, AIR 2000 All 90.
166. *Shalini Shyam Shetty v Rajendra Shankar Patil*, (2010) 8 SCC 329 : 2010 (7) Scale 428; see also *Sameer Suresh Gupta v Rahul Kr Agarwal*, (2013) 9 SCC 374 : 2013 (3) Scale 275.

such statutory amendment does not correspondingly expand the high court's jurisdiction of superintendence under Article 227.

Effectively, revision over jurisdiction of the subordinate courts and its scope is almost similar to the power of court under Articles 226 and 227.[167]

The curtailment of revisional jurisdiction of the high court does not take away — and could not have taken away — the constitutional jurisdiction of the high court to issue a writ of certiorari to a civil court nor the power of superintendence conferred on the high court under Article 227 of the Constitution is taken away or whittled down. The power exists, untrammeled by the amendment in section 115 of the CPC, and is available to be exercised, subject to rules of self-discipline and practice which are well settled.

The conclusions in a nutshell, are hereunder:

(1) Amendment by Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) with effect from 1 July 2002 in section 115 of the CPC cannot and does not affect in any manner the jurisdiction of the high court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the high court, against which remedy of revision has been excluded by AIR 1933 All 523,[168] Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the high court.

(3) Certiorari, under Article 226 of the Constitution of India, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction — by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution of India is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law, and failure of justice or grave injustice has occasioned thereby, the high court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and

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167. *Purshotam v Henlej's Telegraph Works*, AIR 1933 All 523 : (1933) 55 All 719.
168. *Purshotam v Henlej's Telegraph Works*, AIR 1933 All 523 : (1933) 55 All 719.

the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the high court dictates it to act, lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error, though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of high court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The high court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The high court, in exercise of certiorari or supervisory jurisdiction, will not covert itself into a court of appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the high courts in India, unlike English courts, has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the high court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction, the high court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the high court may, in appropriate cases, itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.[169] Curtailment made by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), does not take away constitutional jurisdiction of high court under Articles 227 and 226.[170]

Where the power of revision has been invoked and dealt with, the high court ought not to interfere with the order in question in a subsequent writ petition.[171]

Normally, to rectify certain procedural error, the supervisory jurisdiction of the high court vested under Article 227 of the Constitution of India is not invoked because most of the irregularities can be taken care of well by the appellate court. But where the error is likely to cause serious prejudice, then supervisory jurisdiction is exercised. In view of the amendment in the CPC particularly section 115, a substantive petition under Article 227 of the Constitution

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169. *Surya Dev Rai v Ram Chander Rai*, AIR 2003 SC 3044 : 2003 (6) SCC 675 [overruled by a three-judge bench in *Radhey Shyam v Chhabi Nath*, (2015) 5 SCC 423 : 2015 (3) Scale 88].
170. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : 2005 (6) SCC 344.
171. *Shankar Ramchandra Abhyankar v Krishnaji*, AIR 1970 SC 1 : [1970] 1 SCR 322.

of India would lie and the error of law or a grave procedural error can be rectified in exercise of powers under Article 227 of the Constitution.[172]

At this stage, it would be pertinent to notice the decision of the Supreme Court in *Sadhana Lodh's case*.[173] That case was in relation to a motor accident claim. KHARE, CJI, speaking for the three-judge bench observed as follows:

> 6. The right to appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act. (See *National Insurance Co. Ltd., Chandigarh v Nicolletta Rohtagi and others.*)[174] This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115, C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115, C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution.
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> 7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an Appellate Court or the Tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or re-weigh the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision.

In a case, the Sikkim High Court has held that a deficient report of the local commissioner appointed under O XXVI cannot be set aside by the court. The court can call for a supplementary report without setting aside the first report. Thus, where the power of the high court under Article 227 of the Constitution was also invoked along with the power of revision under section 115 of the Code, it was held that the high court has powers to correct the arbitrary exercise of discretion by the lower court.[175]

Explaining the scope of section 115 of the Code and Article 227 of the Constitution of India, AP SUBBA, J, observed as follows:

> It is the well-settled position of law that the power of superintendence of the High Court under Art. 227 of the Constitution is much wider than the power of revision u/s. 115

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172. *Gujarat Electricity Board v Thakur Hasmukhbhai Khelshanker*, AIR 2006 Guj 16.
173. *Sadhana Lodh v National Insurance Co Ltd*, AIR 2003 SC 1561 : (2003) 3 SCC 524.
174. *National Insurance Co Ltd, Chandigarh v Nicolletta Rohtagi*, 2002 (7) SCC 456.
175. *Pentook Lepcha v Sonam Lepcha*, 2007 (2) Civil Court Cases 483 (Sikkim).

of the C.P.C. and the limitations which are applicable in case of power of revision u/s. 115 CPC do not apply to the supervisory jurisdiction of the High Court under Art. 227 of the Constitution. Of course it is also well-recognised principle that the supervisory power under Art. 227 of the Constitution is to be sparingly used and such power should not be used for correcting a mere error. In this regard, it might be noted that it has already been demonstrated above that the impugned order is not in conformity with the related provisions contained in the order and also the well-established principles of law on the point. In view of this, it is manifest that the limitation placed on the exercise of power vested in the High Court under Art. 227 of the Constitution would not extend to cases where the discretion exercised by the lower Court is found to be not only arbitrary but also against the well established principle of law as in the present case.[176]

[s 115.11] Second Appeal or Revision

See notes under the same heading under section 101.

It is the settled principle of law that as against the appeal preferred under section 384 of the Indian Succession Act, 1925, there is no provision for filing a second appeal and therefore, a civil revision lies. A decision by the revisional court is on the merit of the contention of the parties and by exercise of such jurisdiction. The revisional court, in appropriate cases, may set aside the order of the appellate court and dispose of the application for succession certificate by appropriate order. Therefore, the embargo put in section 115 of the CPC is not satisfied as against the maintainability of the civil revision.[177]

[s 115.12] Section 115 and Section 151

It cannot be accepted that the contentions that in exercise of the inherent power the high court, for ends of justice or to prevent abuse of the process of the court, can invoke the revisional jurisdiction overlooking the proviso to sub-section (1) of section 115 of the CPC. Such submission does not appeal since it is contrary to the clear and unambiguous language of the statute. There is no ambiguity in the language of the statute. The inherent powers of the civil court can ordinarily be exercised when there is no legislation on a particular field or subject-matter. Where there is an express provision barring a particular remedy, the court can never resort to the exercise of inherent power, particularly to nullify the effect of the express provision. It is the ordinary rule of interpretation that to exercise the power, the requisite condition must be fulfilled.[178]

Petitioners cannot "blow hot and cold", "fast and loose" or "approbate and reprobate". Where the petitioners have knowingly accepted the benefits of an order, they cannot be permitted to assail the same. This rule is applied to do equity.[179]

[s 115.13] Appeal or Revision — Proper Remedy

Unless the court comes to the conclusion that the appeal is the proper remedy and not revision, the withdrawal of the appeal and its consequential dismissal will not merge the decree in the order of the appellate court and hence, the revision will be competent and will survive. The revision application cannot be dismissed as not surviving unless the court comes to the conclusion that the proper remedy was not a revision but an appeal. If, on the other hand, the

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176. *Pentook Lepcha v Sonam Lepcha*, 2007 (2) Civil Court Cases 483, at p 490, para 20 (Sikkim).
177. *Lokanath Bhoi v Gaya Prasad Bhoi*, AIR 2004 Ori 176.
178. *Mrityunjay Sen v Sikha Sen*, AIR 2003 Cal 165.
179. *Mustaqeem v Faiyaz*, 2019 SCC OnLine Del 6751 : LNINDORD 2019 DEL 647.

court were to come to the conclusion that the proper remedy was revision and not appeal, any order passed in the appeal will be without jurisdiction and inconsequential and it cannot effect the pending revision application.[180]

[s 115.14] Two Views

What inference is to be drawn from the evidence on the record is for the trial court or the appellate court to decide. It is not for the high court under section 115 to decide.[181] If two reasonably possible views of the facts can be taken, the high court should not in revision, substitute its own finding of fact.[182] It will not decline to exercise its jurisdiction on the basis that one of the possible views has been taken by the lower appellate court, for example, as in the case of an interpretation by the terms of a Will. As a court of conscience, the high court has a duty to give effect to the wishes of the testator to the utmost extent possible.[183]

Section 103A of the Bihar Tenancy Act, 1985 lays that "revenue officer specially empowered by the state government in this behalf, may, on application made to him within three months of any order or decision on any objection made under sub-section (1) or on his own motion, after giving reasonable notice to the parties concerned to appear and be heard in the matter, revise, at any time before the final publication of the record-of-rights, any such order or decision whether made by himself or by any other revenue officer". The full bench of the Patna High Court held that although sub-section (3) of section 103A does not use the word "review" expressly yet when the said section says that the revenue officer may revise his own order, what is contemplated is review of the officer's own order. The aforesaid power of review conferred by section 103A of the Bihar Tenancy Act, 1985 is not the same as the power of review under section 114 or O XLVII of the CPC, nor is it circumscribed by the conditions mentioned by section 114 or O XLVII of the CPC.[184]

In an eviction suit, where the trial court determined provisional rent and directed the tenant to deposit arrears of rent in bank and the order was upheld by the first appellate court, it was held by the Supreme Court that interference with the concurrent finding of fact by the high court under revisional jurisdiction was not proper.[185] Explaining the legal position, LS Panta, J, speaking for the bench in the above case observed as follows:

> 15. It is well-settled position in law that under Section 115 of the Code of Civil Procedure the High Court cannot re-appreciate the evidence and cannot set aside the concurrent findings of the Courts below by taking a different view of the evidence. The High Court is empowered only to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the courts below. Simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction.[186]

The Supreme Court has reiterated that when the first appellate court, on appreciation of evidence, records a finding of fact on a particular issue, then such finding is usually binding on the high court while hearing revision against such order. It is only when any finding of fact

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180. *Chitaranjan Crochet Pvt Ltd v Lakshmoni Dass*, (1994) Supp 1 SCC 101.
181. *Industrial and Mining Equipment Co Pvt Ltd Delhi v NL Kanodia*, AIR 1986 Del 36.
182. *Helper Girdharbhai v Saiyed Mohamed Mir Sahib Kadri*, AIR 1987 SC 1782 : (1987) 2 SCC 538; *Bhojraj Kunwarji Oil Mill v Yograj Sinha Shankar Sinha*, (1985) 1 SCC 149; *L Prabhakara Prabhu v Canara Bank*, AIR 1996 Ker 297.
183. *Neettiyath Kalathil Parukutty Amma v Puthiyedath Parukutty Amma*, AIR 1999 Ker 236.
184. *Nand Kumar Thakur v The State of Bihar*, 2014 (4) Pat LJR 210.
185. *Yunis Ali v Khursheed Akram*, AIR 2008 SC 2607 : (2008) 7 SCC 293.
186. *Yunis Ali v Khursheed Akram*, AIR 2008 SC 2607, at p 2609, para 15 : (2008) 7 SCC 293.

is found to be wholly perverse or dehors to any provision of law or is recorded contrary to pleadings and evidence on record, interference in such finding may arise in appropriate cases but not otherwise.[187]

Applicability of section 115, CPC can't be exercised in a routine manner in absence of any perversity. The court dismissed the revision petition on the ground that impugned order is not perverse because all the contentions raised by the parties are being properly dealt by the learned judge along with the catena of proposition of the law laid by the various adjudicatory bodies on the issue involved in the present dispute.[188]

[s 115.15] Second Revision — Permissibility

The legislature in its wisdom has thought that on account of ample opportunity given to a party to put forth his case before three courts, *viz*, the trial court, the appellate court and the revisional court, there is no need to make the revisional order of the district court under Kerala Building (Lease and Rent Control) Act, 1965, subject to further scrutiny by means of a second revision either under the said Act or under the CPC.[189]

The ratio in the *Aundal Ammal*[190] case is that no second revision under section 115(1) will lie against revisional order of the subordinate court.[191]

[s 115.16] Simultaneous Appeal and Revision Against Composite Orders

In case of composite order, for the first part of the order, an appeal is maintainable and for the rest of the order, a revision may be preferred to a judge of the high court to decide the legality and proprietary of the order in question.[192]

[s 115.17] Revisional Court Exceeding Jurisdiction

The question for consideration before the revisional court was confined to the admissibility of the document on the grounds raised by the plaintiff. The revisional court, after holding that the reasons given by the trial court for not exhibiting the document could not be sustained, exceeded its jurisdiction in entering into the question of validity of the document on merits in the light of the provisions of the Indian Contract Act, 1872. The order of the high court virtually decided the suit. It is beyond the scope of the revision petition and suffers from patent illegality on the face of it, causing prejudice to the case of the defendant. So, the impugned order passed by the high court was set aside and the case was remanded to the high court for its decision afresh, in accordance with law.[193]

In an execution of money decree against the property of managing director of an industrial unit, objection was filed to the execution sale of the property of the managing director. The objection was raised on the ground of applicability of section 22(1) of the Sick Industrial

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187. *Kalidas Chunilal Patel (Dead) by LR v Savitaben*, 2016 AIR SC 3053 : (2016) 12 SCC 544 : JT 2016 (6) SC 356.
188. *Ramankant Nanalal Jasani v Sureshchadra Amrutlal Jasani*, 2019 SCC OnLine Guj 582; see also *Bansidhar Sharma (Since Deceased) Rep by his LR v State of Rajasthan*, AIR 2019 SC 5643 : (2019) 19 SCC 701 : JT 2019 (11) SC 19.
189. *Jetha Bai & Sons, Jew Town Cochin v Sunderdas Rathenai*, (1988) 1 SCC 722.
190. *Aundal Amml v Sadasivan Pillai*, (1987) 1 SCC 183 : [1987] 1 SCR 485.
191. *Mahadeo Savlaram Shelke v Pune Municipal Corp*, (1995) 3 SCC 33.
192. *UOI v Prahallad Moharana*, AIR 1996 Ori 19.
193. *Nawal Kishore Tulare v Dinesh Chand Gupta*, AIR 2001 SC 2542 : 2001 (6) SCC 110.

Companies (Special Provisions) Act, 1985 and section 18FH of the Industries (Development and Regulation) Act, 1951. On rejection of the objection, revision was filed against the order of rejection. The revisional court found that the objection was not tenable, but set aside the sale in the interest of the revival of the industrial unit. It was held by the Supreme Court that the revisional court exceeded its jurisdiction by setting aside orders of civil court which attained finality. It was observed that "there can be no objection to the revival of the respondent's unit but that is a matter between the respondent and the Kerala Financial Corporation or other Governmental Agencies and cannot in any manner affect the legal rights that have already accrued....."[194]

The Supreme Court had occasion to consider the bar created by the proviso to sub-section (1) of section 115. In an execution of a money decree, the executing court finally decided the manner in which the decree passed was to be satisfied. In that view of the matter, the Supreme Court held that the revision was maintainable. However, it was further held that the high court committed a jurisdictional error in view of the proviso (g) to section 60(1) of the Code by directing the satisfaction of the decretal amount from the fixed deposits of the appellant which were part of his pension and gratuity.[195]

Where the high court while admitting a revision passed mandatory injunction order directing the decree-holder to put the judgment-debtor in possession, it was held by the Supreme Court that since the decree-holder had taken possession of the property in execution of decree, the question of redelivering possession to judgment-debtor cannot arise.[196]

[s 115.18] Revision — Appellate Authority Subordinate to High Court—Original Authority Not Necessarily So

Merely because the appellate authority is a court subordinate to the high court, it would not follow that the original authority would be a court subordinate to the high court.[197]

A similar situation arose in *Thakur Das (Dead) by LRs v State of Madhya Pradesh*.[198] There, the facts were under the Essential Commodities Act, 1955. Against the order of the licensing authority constituted under section 6A of the Act, an appeal is provided under section 6C to the sessions court. When the said order was challenged in revision before the high court, a contention was raised that the order is not made by a court subordinate to the high court. This contention was rejected by the high court. That order was challenged before the Supreme Court. While upholding the said contention, the Supreme Court stated thus:

> While summing up its conclusions, the Court held that when a judicial authority like an officer who presides over a Court is appointed to perform the functions, to judge and decide in accordance with law and as nothing has been mentioned about the finality or otherwise of the decisions made by that authority, it is an indication that the authority is to act as a Court in which case it is not necessary to mention whether they are final or not as all the incidents of exercising jurisdiction as a Court would necessarily follow. We are in broad agreement with this conclusion.
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> We are accordingly of the opinion that even though the State Government is authorised to appoint an appellate authority under section 6C, the legislature clearly indicated that such appellate authority must of necessity be a judicial authority. Since under the Constitution

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194. *Syndicate Bank v New Look Rubbers (P) Ltd*, AIR 2008 SC 2670 : (2008) 5 SCC 274.
195. *Radhey Shyam Gupta v Punjab National Bank*, AIR 2009 SC 930 : (2009) 1 SCC 376.
196. *Inderjeet v Kulbhushan Jain*, AIR 2009 SC 3167 : (2009) 15 SCC 79.
197. *P Aisha Potty v RO, Kollam District Panchayath*, AIR 2002 Ker 89 (DB).
198. *Thakur Das (Dead) by LRs v State of Madhya Pradesh*, AIR 1978 SC 1 : 1978 (1) SCC 27 : 1978 SCR (1) 732.

> the Courts being the repository of the judicial power and the officer presiding over the Court derives his designation from the nomenclature of the Court, even if the appointment is made by the designation of the judicial officer the appellate authority indicated is the Court over which he presides discharging functions under the relevant Code and placed in the hierarchy of Courts for the purposes of appeal and revision.

Likewise, section 113(1) of the Kerala Panchayat Raj Act, 1994 provides an appeal to the district court, which is a court subordinate to high court. The order is hence revisable, and to hold that because a revision is provided against the appellate order, the trial order is also revisable may not be correct.[199]

[s 115.19] *Forma Pauperis*

As regards orders made on an application for leave to sue *in forma pauperis*, a distinction was at one time made by the Allahabad High Court between an order granting the application and an order rejecting the application. An order rejecting the application, it was held, amounts to a decision of the case and is, therefore, open to revision. On the other hand, it was held an order granting the application is not a decision of the case, but a mere interlocutory order, and it is not, therefore, open to revision.[200] This last mentioned view has been overruled by a full bench of that court which held that an order granting an application to sue *in forma pauperis* is so distinct from the main suit that it can be considered to have decided a case.[201] The Rangoon[202] and Bombay[203] High Courts and the chief court of Oudh[204] also hold that an order refusing leave to sue as a pauper is equivalent to a case decided and can, therefore, be revised. In two Allahabad cases,[205] however, WALSH, J, expressed the opinion that no revision lies even from an order rejecting the application, the ground of the decision being that it is not a "case decided" within the meaning of this section; no opinion was, however, expressed by PIGGOTT, J. But in a later case, the Allahabad High Court definitely reverted to the view that an order rejecting the application, though not the decision of the suit, was a decision of a case and, therefore, open to revision.[206] The Allahabad High Court has interfered in revision when a court, by not trying the question to pauperism, has failed to exercise the jurisdiction vested in it, and has dismissed the application after questioning the title of the applicant,[207] or the merits of the case.[208] A full bench of the Oudh court has, in this regard, held that an order on an application for permission to sue *in forma pauperis* is not revisable unless one or other of the requirements of this section is satisfied.[209] On the other hand, the Nagpur High Court has held that an order allowing a person to sue as a pauper is revisable if it otherwise fulfils the requirements of this section.[210]

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199. *P Aisha Potty v RO, Kollam District Panchayath*, AIR 2002 Ker 89 (DB).
200. *Chanda Begum v Maqsood Hussain Khan*, AIR 1942 All 319; *Muhammad Ayab v Muhammad Mahmud*, (1910) 32 All 623; *Harsaran v Muhammad*, (1881) 4 All 91.
201. *Ramzan Ali v Satul Bibi*, AIR 1948 All 244 (FB).
202. *Ma Mya Thin v Ma Chu*, AIR 1931 Rang 129 : (1931) 9 Rang 86.
203. *Bai Chandan v Chhotalal*, AIR 1932 Bom 584 : (1932) 56 Bom 585.
204. *Asa Ram v Genda*, AIR 1935 Oudh 20 : (1935) 10 Luck 265; *Sunder Babu v Mohan Dei*, AIR 1937 Oudh 481.
205. *Mahadeo v Secretary of State*, AIR 1922 All 1 : (1922) 44 All 248; *Shanker Ban v Ram Deo*, AIR 1926 All 446 : (1926) 48 All 493.
206. *Sumitra Devi v Hazari Lal*, AIR 1930 All 758 : (1930) 52 All 927; dissenting from 48 All 493.
207. *Shauran v Abdus*, AIR 1923 All 577 : (1923) 45 All 458.
208. *Sumitra Devi v Hazari Lal*, 52 All 927.
209. *Sundar Bharti v Nageshar Nath*, AIR 1940 Oudh 148 : (1940) 15 Luck 365.
210. *Krishna Kumar v Radhelal*, AIR 1938 Nag 210.

It has been held in a number of decisions, that when an application to sue as pauper is rejected on irrelevant considerations or on an erroneous view of the law, the order can be revised.[211] There is divergence of judicial opinion on the question of whether a revision can be maintained against an order refusing permission to sue as pauper or dispaupering the plaintiff, when subsequent thereto an order has been made dismissing the plaint for non-payment of the requisite court fee as directed. One view is that though the order refusing permission or dispaupering the plaintiff was by itself open to revision, when once it is followed by an order of dismissal, that order is open to appeal as a decree. On the analogy of an order rejecting a plaint under O VII, rule 11, no revision can, thereafter, be entertained against a previous interlocutory order.[212] The other view is that an order of dismissal for non-payment of court fee in a pauper application or suit by a pauper is, unlike an order under O VII, rule 11, not a decree, and the order refusing permission or dispaupering the plaintiff is open to revision.[213] When an order is set aside in revision and the case is remanded, a subsequent order dismissing the suit as a result of that order becomes vacated and the suit is revived.[214]

The High Court of Madras has held that where permission has been granted to sue *in forma pauperis*, the opposite party is entitled to challenge the order in revision, as the question of court fee is one between the plaintiff and the state.[215] That principle has been affirmed by the Supreme Court.[216] It is not necessary that an appellate court should hear the party before passing orders on an application to appeal *in forma pauperis,* and the order rejecting it is not open to revision on the ground that it has not discussed in detail the points involved.[217]

Where the trial court decided that the respondents are indigent persons, the order though interlocutory in nature, finally decides the issue. So, revision against such order is maintainable.[218] If application to sue as indigent person is allowed by trial court, without enquiry report from the government, revision against it in a 13-year-old litigation has the fate that the court would refuse to direct trial court to hold fresh enquiry.[219]

[s 115.20] Two Changes

On a reading of the juxtaposed provisions of section 115 of the CPC, it will be easily discernible that two changes have been brought in. First, the consideration is irrelevant that the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made; secondly, it has been clarified that the pendency of a revision shall not operate as a stay of a suit or other proceedings. The position that a revision should be entertained only in respect of those orders which would have finally disposed of the suit or other proceedings have not been altered. In these circumstances, assuming that a decree

211. *SE Orde v TC Deacon*, AIR 1952 All 582 : (1950) All LJ 93; *Murlidhar v Soshalamma*, AIR 1956 Hyd 31; *Raghurai Singh v Sitapati Kuer*, AIR 1955 Pat 257; *Ram Bhai Punjabhai v Gujarat State Road Transport Corp*, AIR 1975 Guj 94.
212. *Re Ramayamma*, AIR 1954 Mad 880 : (1954) 1 Mad LJ 544; *Venkatammal v Muthukrishna Naidu*, (1957) 2 Mad LJ 623 : 70 LW 945; *Re Vidutavali*, AIR 1959 Mad 14 : (1958) 1 Mad LJ 97; *Kamalamma v Marianna*, AIR 1960 Mys 140; *Dau Lal v Khang Singh*, AIR 1962 Raj 157; *Satyanarayana v Ramalingam*, AIR 1952 Mad 86 : (1951) 2 Mad LJ 74; *Venkatanarasimha v Gangammal*, AIR 1954 Mad 258.
213. *Re Subramanyam*, AIR 1955 AP 74 : (1955) Andh WR 109 (FB).
214. *Venkatanarayana v Seshagiri Rao*, AIR 1961 Mys 197 : (1961) Mys LJ 338.
215. *Kalimuthu v Govindaswami*, AIR 1961 Mad 71 : (1960) 2 Mad LJ 313.
216. *Ratnavarma Raja v Vimala*, AIR 1961 SC 1299 : (1962) 1 SCJ 60.
217. *Swaminath v Balasubramanya*, (1951) 1 Mad LJ 472 : 64 LW 333.
218. *D Hemachandra Sagar v D Prithviraj*, AIR 2004 Kant 33.
219. *D Hemachandra Sagar v D Prithviraj*, AIR 2004 Kant 33.

has not been passed, although leave to defend has not been allowed since the proceedings are still pending, the revision is not maintainable. Prior to the amendment, the interference of this court was possible under the deleted clause (b) of the proviso.[220]

[s 115.21] Mentioning of Wrong Section

Where the revisional court, under section 3 of Muslim women (Protection of Rights on Divorce) Act, 1986 failed to consider the original application of the petitioner as also the reply and the documents available on record, mere mention of a wrong section in the application or the order would not make the order or the application as illegal or nullity. This is so because the main contents of the application have to be taken note of, and further, in what context the application has been filed should be the main consideration before the court concerned. Therefore, the order of revisional court was set aside by high court in revision petition under section 115 CPC.[221]

[s 115.22] Prayer Clause

A perusal of the prayer clause in the revision petition shows that apart from the main prayer to the effect that respondents nos 1 and 2 may be injuncted and restrained from transferring, etc, any portion of the suit land for the so-called leasehold rights over the same, till the pendency of the main suit, there is also the ancillary prayer for any other order/direction which the court deems fit in the facts and circumstances of the case. That being the position, high court has the jurisdiction in exercise of the powers under section 115, CPC to frame the relief to be granted to the petitioners, in view of a case having been made out by them, which would include setting aside the impugned orders also. This view was fortified by the ratio of the decision of the Punjab and Haryana High Court in *Ude Singh v The State of Haryana*,[222] which in turn, relied on a decision of the Supreme Court in the case of *Charanjit Lal Chowdhury v UOI*.[223] No doubt, the abovesaid reported decisions were in respect of Articles 226 and 32 of the Constitution of India, but the principles contained therein would definitely apply to the exercise of revisional jurisdiction by this court under section 115, CPC.[224]

[s 115.23] Order and Proceedings

The expression "order" has been defined in section 2(14) of the CPC. It means the formal expression of any decision of a civil court which is not a decree. The order passed under O XIV, rule 2 is an interlocutory order by way of an aid to the proper adjudication of the claims and disputes arising in the suit itself, but does not determine the right of the parties conclusively.[225]

The reading of section 115, CPC, as it stands, makes it clear that no revision lies if the impugned order is of interim nature and does not finally decide the lis. In the case on hand, the application under O XIV, rule 2 has been allowed by the trial court, which has not brought the suit to an end. The question is whether the impugned order could be considered as a proceeding. No definition is available for the word "proceeding" in CPC. The word "proceeding" in general sense means the form and manner of conducting judicial business before a court. The meaning

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220. *VS Saini v DCM Ltd*, AIR 2004 Del 219.
221. *Shamim Bano v State of Rajasthan*, AIR 2004 Raj 205.
222. *Ude Singh v State of Haryana*, (1972) Punj LJ 20.
223. *Charanjit Lal Chowdhury v UOI*, AIR 1951 SC 41.
224. *Kalime Plastic Pvt Ltd v HP Financial Corp*, AIR 2001 HP 29.
225. *SG Badrinath v V Jagannathan*, AIR 2004 Mad 161.

of the word "proceeding" depends upon the scope of enactment wherein the expression is used with reference to the particular context where it occurs. It is not a technical expression with definite meaning. In a case, *KJ Lingam and AV Mahayalam v Joint Commercial Tax Officer, Mount Road Division,*[226] it has been held thus:

> Therefore, the meaning to be attributed to the word "proceeding" would depend upon the scope of the enactment wherein the expression is used and with reference to the particular context wherein it occurs.
>
> A proceeding may, in some enactment, mean an action or that which initiates an action and in another enactment it may also mean a step in an action. The word "any proceeding" in section 89 of the Judicature Act, 1873, was understood to be equivalent to any action. But in the rules of the Supreme Court, Order 64, rule 13, "proceeding" is used as meaning a step in an action.
>
> The words "Any other proceeding in the action" in the rules of the Supreme Court, Order 26, rule 1 mean any proceeding with a view to continuing the action, i.e., a step forward, not one backward.

The Honourable Supreme Court in another case, *Babu Lal v Hazari Lal Kishori Lal,*[227] held thus:

> The word "proceeding" is not defined in the Act. *Shorter Oxford Dictionary* defines it as "carrying on of an action at law, a legal action or process; any act done by authority of a court of law; any step taken in a cause by either party". The term "proceeding" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. The word "proceeding" in section 22 includes execution proceedings also. In *Rameshwar Nath v Uttar Pradesh Union Bank Ltd,*[228] such a view was taken. It is a term giving the widest freedom to a Court of Law so that it may do justice to the parties in the case. Execution is a stage in the legal proceedings. It is a step in the judicial process. It marks a stage in litigation. It is a step in the ladder. In the journey of litigation, there are various stages. One of them is execution.

In *Ram Chandra Agarwal v State of Uttar Pradesh,*[229] it was held thus:

> The provisions of the Code of Civil Procedure would apply generally to a proceeding before a Civil Court arising out of a reference to it by a Magistrate under Section 146(1) of the Code of Criminal Procedure. The expression "proceeding" used in section 24 Code of Civil Procedure is not a term of art which has acquired a definite meaning. Looking to the context in which the word has been used in section 24(1)(b) of the Code of Civil Procedure it would appear to be something going on in a Court in relation to the adjudication of a dispute other than a suit or an appeal. Bearing in mind that the term "proceeding" indicates something in which business is conducted according to a prescribed mode it would be only right to give it a comprehensive meaning so as to include within it all matters coming up for judicial adjudication and not to confine it to a civil proceeding alone. A proceeding before a Civil Court arising out of a reference to it under Section 146(1) Code of Criminal Procedure can be transferred by the District Court under section 24 Code of Civil Procedure because it is in any case a "proceeding".

It is seen from the above judgments that the term proceeding is not a term of art which has acquired a definite meaning. Looking to the context in section 24(1)(b) of CPC it would appear to be something going on in a court in relation to the adjudication of a dispute other than a suit or appeal. The order under O XIV, rule 2 cannot be construed as proceedings, which is

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226. *KJ Lingam and AV Mahayalam v Joint Commercial Tax Officer, Mount Road Division*, AIR 1968 Mad 76.
227. *Babu Lal v Hazari Lal Kishori Lal*, AIR 1982 SC 818.
228. *Rameshwar Nath v Uttar Pradesh Union Bank Ltd*, AIR 1956 All 586.
229. *Ram Chandra Agarwal v State of Uttar Pradesh*, AIR 1966 SC 1888. See also *Kulasekaraperumal v Pathakutty Thalevanar*, AIR 1961 Mad 247.

procussal, i.e., interlocutory or incidental order regulating proceedings but not finally deciding the suit. The word proceedings is applied for the purpose of section 115, the order under O XIV, rule 2 is not an order finally deciding the lis, hence the revision is not maintainable.[230]

To understand, reasonably and comprehensively, meaning of the term "proceeding" with reference to section 115 of the CPC, and intention of the legislators in that respect, useful reference is made to sections 24 and 141. Section 24 provides general power of transfer and withdrawal of suit, appeal or other proceeding and section 141 provides the procedure to be followed in all proceedings, i.e., proceedings which are other than suit or appeal. Rule 431 in the General Rules and Circular Orders of the High Court of Judicature, Orissa (Civil) (General Rules and Circular Orders) provides the list of applications under certain provisions in the CPC and provisions in other statute cognisable by civil court with the prescription to register them as miscellaneous judicial cases. In short, such proceedings are mentioned as miscellaneous judicial cases or miscellaneous cases. Section 24 of the CPC provides for transfer of a proceeding. Similarly, section 141 provides for the procedure regarding the suit to be followed, as far as it can be made applicable, in all proceedings. Procedurally and also traditionally, the aforesaid procedures are followed with respect to miscellaneous cases or miscellaneous judicial cases, and such cases only qualify to the term "other proceeding" mentioned in section 115 of the CPC. On the other hand, if wider meaning shall be given to that term by treating any and every interlocutory matter arising and decided/disposed of in a suit, then that does not fit into the provision of law in section 24 or section 141 of the CPC. Even section 146 of the CPC which speaks of proceedings by or against representatives does not mandate that any interlocutory application should be regarded as a proceeding within the above defined meaning of the term "proceeding". Therefore, unless application is registered as a miscellaneous case in accordance with the provision of the CPC read with the general rules and circular orders, that cannot be termed and determined as a proceeding for the purpose of section 115, CPC. That is so in view of the language in section 115 that "except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings".

The application filed by the petitioner under O IX, rule 13, CPC, is a proceeding but application filed by the petitioner under O XXVI, rule 2 being not prescribed in rule 431 of the General Rules and Circular Orders to be registered as a miscellaneous judicial case or miscellaneous case, and that being an interlocutory application relating to examination of a witness in commission, that cannot be given the meaning of the term "proceeding". Hence, the order passed relating to rejecting that application is not revisable under section 115 of the CPC.[231]

[s 115.24] Exercise of Revisional Jurisdiction Is Discretionary

The scope for the high court to interfere in exercising jurisdiction under section 115 of CPC is very limited. This section is enacted with a view to enable the high court to correct, when necessary, certain clauses of errors of jurisdiction committed by subordinate courts. If the subordinate court, in the decision of the case, in the exercise of its jurisdiction, has committed illegality or material irregularity, then only the high court can interfere with the orders passed by the subordinate court. When this condition is satisfied, that a subordinate court has committed illegality or material irregularity, then the high court can interfere with

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230. *SG Badrinath v V Jagannathan*, AIR 2004 Mad 161.
231. *Simplex Engineering and Foundary Works Ltd v B Pattnaik*, AIR 2003 Ori 149.

the decision. The high court cannot, in the exercise of revisional powers under this section, attack the findings of facts of subordinate court. No doubt the power in revision is limited one, in comparison to the appellate power. Whether the courts decide it rightly or wrongly, if they had jurisdiction to decide the case and even if they decided it wrongly, they did not exercise their jurisdiction illegally or with material irregularity. In such circumstances, the high court cannot interfere with the order passed by the subordinate court.[232]

The section gives a discretionary power of intervention to the high court.[233] The high court does not usually interfere if the aim of an irregularity of the lower court has been to promote justice.[234] Even though the order is without jurisdiction, the powers under section 115, CPC may not be exercised. The powers under section 115, CPC are intended to be exercised with a view to subserve and not to defeat the ends of justice. Where the order of the court below is in the interest of justice, the high court can refuse to interfere under section 115, CPC, even if the court below has no jurisdiction to pass such an order. The interference in revision is discretionary and should be exercised only in the interest of justice and not in a case where interference is against the interest of justice. The order even if not regular may not be interfered with in revision if it is made irregularly or even improperly unless grave injustice or hardship would result from a failure to do so. Where the interference is likely to work not in the interest of justice but rather against it, the high court will not interfere in its revisional jurisdiction.[235] The high court is not bound to interfere in each case in which it is found that the subordinate court has acted without jurisdiction.[236] Where it is clearly proved that defendant owes money to the plaintiff and a decree is passed against the defendant, the high court will not interfere in revision on a point of jurisdiction, as it cannot use its revisional powers to bring about injustice.[237] In a case where the district court acted outside the scope of its jurisdiction in allowing an appeal and reversing an erroneous order of a *munsif*, the high court declined to make an order which would have the effect of re-establishing the *munsif's* decision.[238] The high court cannot act under this section if the matter is sub judice in an appeal filed by another party.[239] Before interfering in revision, it takes into consideration the conduct of the petitioner.[240] It does not interfere in favour of a party who does not disclose the entire case.[241] However, it interferes where it finds that an order impugned before it is perverse, in the sense that it is in conscious violation of a rule of law or procedure.[242] The scope of revision under section 115, CPC is very limited.[243] The Constitution Bench of the Hon'ble Supreme Court

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232. *Shripat C Mahajan v Sanjay Radheshyam Jaiswal*, AIR 2002 Bom 211.
233. *Muhammad Naim-ul-lah v Ibsan-ul-lah*, (1892) 14 All 226; *Shiva Nathaji v Joma*, (1883) 7 Bom 341; *Sheikh Hari v Diljan Bibi*, AIR 1933 Cal 20 : (1933) 36 Cal 869; *Nirmal Industries v Naseemuddin*, AIR 1967 AP 370.
234. *GP Cooke v The Equitable Coal Co*, (1914) 8 Cal WN 621; *Basanti v Bai v Vishnu Kumar*, AIR 1956 MB 125; *Narasimha Rao v Someshwar Joshi*, AIR 1957 Mad 210 : (1956) 2 Mad LJ 399; *Sitaram v Kedarnath*, AIR 1957 All 825; *Narayanaswamy v Dhanraj Sowcar*, (1958) 1 Mad LJ 77 : 70 LW 871; *Sham Mohan Lal v Jai Gopal*, AIR 1968 Del 104; *Siddappa v Lakshmamma*, AIR 1965 Mys 313.
235. *Ranjan Shashe v Rambebn Vaishya*, AIR 2003 MP 186.
236. *Ranjan Shashe v Rambebn Vaishya*, AIR 2003 MP 186; *Ramswaroop Raghmuardayal v Mataprasad Prabhudayal*, AIR 1952 MB 8.
237. *Kappuswami v Alwar Chettiar*, AIR 1935 Mad 89; *Jagmohandas v Jamnadas*, AIR 1965 Guj 181; *Bhubaneswar v Sakuntala Devi*, AIR 1978 Ori 37.
238. *Kuti v Jitendra Nath*, AIR 1931 Cal 425 : (1931) 35 Cal WN 31; *Pandit Shyam Sundar v Gulcharan*, (1959) All LJ 856; *Devendranath v Abdul Hamid*, AIR 1951 Assam 36.
239. *Secretary of State v Sohan Singh*, AIR 1933 Lah 317 : (1933) 14 Lah 51.
240. *Dominion of India v Gobordhan Das*, AIR 1952 Cal 384.
241. *Jitendra Nath Basu v Tarakchandra Raychowdhury*, AIR 1947 Cal 28.
242. *Chanabasawwa v Bhimappa Ramappa*, AIR 1975 Kant 15.
243. *D Chaudhary v Rajasthan Cricket Assn Man Structures Ltd*, AIR 2003 Raj 18.

in a case[244] held that the high court cannot while exercising its jurisdiction under section 115, CPC correct errors of fact, however gross they may be, or even errors of law. It can only do so when the said errors have relation to the jurisdiction of the court to try the dispute. It is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity, that the revisional jurisdiction of the high court can be properly invoked. The extension of time specified under the decree for specific performance of contract for deposit of amount could be appropriately granted by the court which passed the decree, and not by the high court in revisional jurisdiction.[245]

[s 115.25] "In which no appeal lies"

The view taken by the Supreme Court in *SS Khanna's* case has been legislatively adopted by Parliament by enacting sub-section 2, which provides that the high court shall not, under this section, interfere with any decree or order against which an appeal lies either to the high court or to any court subordinate thereto. It is submitted that an order passed by a court subordinate to the high court in its appellate jurisdiction, if it is not appealable, would be amenable to the revisional jurisdiction of the high court. A revision against an order which is not appealable either before the subordinate court or the high court is maintainable.[246] Insertion of sub-section (2) of section 115, Code of Civil Procedure in 1976 extends absolute prohibition against exercise of any discretion in an order revisable under section 115(1), even in a case where any appeal against the impugned order lies to the court subordinate to the high court. Sub-section (2) of section 115 CPC postulates prohibition of exercise of jurisdiction by the high court to vary or reverse any decree or order against which an appeal lies either to the high court or to any court subordinate thereto. However, it does not make any deviation from the fact that unless the order under challenge is appealable directly to the high court or to any court subordinate to the high court, from the purview of jurisdiction of the high court under section 115 CPC, on the ground of maintainability of the revision petition, merely because the order is ultimately challengeable in an appeal from the final decree, that is the consistent view taken by the Supreme Court.

But there was at one time a difference of opinion on the question of whether a revision was barred when an appeal lay against the decision not directly to the high court but to a subordinate court and a second appeal lay to the high court against the decision of that court. The controversy turned on the meaning of the words "appeal lies thereto". One view was that it was only when an appeal lay directly to the high court against the decision under challenge that a revision was barred and this view rested on a literal interpretation of the words "thereto".[247] The other view was that the appeal to the high court might be either direct and immediate or indirect and mediate a court subordinate to the high court and that a revision would be barred

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244. *Pandurang Dhondi Chougule v Marniti Hari Jadhav*, AIR 1966 SC 153; see also *D Chaudhary v Rajasthan Cricket Assn Man Structures Ltd*, AIR 2003 Raj 18.
245. *Vatsala Shankar Bansole v Sambhaji Nanasaheb Khandare*, AIR 2003 Bom 57.
246. *Kalliani Kutty Amma v State*, AIR 1974 Ker 171.
247. *Sashikanta v Nasirbad Loan Office*, (1936) 63 Cal LJ 105 : (1936) AC 786; *Daw Mill Daw v A VPL N Chettiar*, AIR 1933 Rang 64 : (1933) 11 Rang 134; *Kedarnath Lal v Sheo Narain*, (1952) AP 280; *Maharani Nilmaprova v Kadambini Das*, AIR 1944 Cal 309 : 48 Cal WN 501; *Harabar v Muhamad*, AIR 1943 Oudh 241 : 18 Luck 668; *Vasu v Narayanan*, AIR 1962 Ker 261; *Mamba Nuboire v Yesamma*, 1961 Ker LT 927; *Gopala Krishna v Subhadra*, 1961 Ker LT 930; *Balubhai Dahyabhai Shroff v Gevanbhai Dayalbhai*, AIR 1963 Guj 117.

if the matter could be taken to the high court in second appeal.[248] Support for this view was sought in the broad statement of the law by the Privy Council in *Venkatagiri Iyengar v Hindu Religious Endowments Board*[249] that the provision for revision was intended to "prevent gross injustice in non-appealable cases." There was, however, no dispute that the high court was not competent to revise the decision of any appellate court if an appeal lay from that decision to the high court.[250] Dealing with the words "in which no appeal lies thereto" the Supreme Court has observed: "Nor is the expression in which no appeal lies thereto" susceptible of the interpretation that it excludes the exercise of the revisional jurisdiction when an appeal may be competent from the final order. The use of word "in" is not intended to distinguish orders passed in proceedings not subject to appeal from the final adjudication from those from which no appeal lies. If an appeal lies against the adjudication directly to the high court or to another court from the decision of which an appeal lies to the high court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the high court directly or indirectly, exercise of the revisional jurisdiction by the high court would not be deemed excluded.[251] This decision settled the controversy in favour of the second of the two views.

Since the section before its present amendment did not define the word "case", the question as to whether a given proceeding was a "case" for the purposes of this section arose in several matters. Thus, where an application for leave to sue in *forma pauperis* was granted, it was held that the order granting the permission was one which decided the "case", the case being the subject-matter of the application;[252] so too an order rejecting an application for review.[253] An order under section 19 of the Arbitration Act, 1899, staying a suit was also held to be "a case" decided under a special Act.[254] Likewise, passing of an *ex parte* decree was held to be deciding a "case".[255] The Supreme Court has construed the word "case" as follows: The expression "case" is not limited in its import to the entirety of the matter in dispute in an action. This Court observed in *Major SS Khanna v Brig. FJ Dillon* that the expression "case" is a word of comprehensive import: it includes a civil proceeding and is not restricted by anything contained in section 115 of the Code to the entirety of the proceeding in a civil court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases denying relief to the aggrieved litigant where it is most needed and may result in the perpetuation of gross injustice. But it was not decided in *Major SS Khanna's* case[256] that every order of the court in the course of a suit amounts to a case decided. A case may be said to be decided if the court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided.[257] Thus, allowing a question in the

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248. *Ram Run Vijay v Kishan Singh*, AIR 1944 Pat 54 : 27 Pat 61 (FB); *Man Mohan Lal v Raj Kumar*, AIR 1946 All 89 : 1946 All 413 (FB); *Pyar Chand v Dungar Singh*, AIR 1953 Raj 90 : 1952 Raj 608; *Custodian of Evacuee Property v Naziruddin*, AIR 1962 P&H 218 : 1962 (1) Punj 23; *Lakshmi Kumar v Smt. Bhimapani*, 29 Cut LT 594; *CR Das v EL Manufacturers*, AIR 1974 Cal 119 : 73 Cal WN 185.
249. *Venkatagiri Iyengar v Hindu Religious Endowments Board*, 76 IA 67 : 1950 Mad 1 (PC).
250. *Tirupathi v Vissam*, (1897) 20 Mad 155; *Ramgopal v Narendra*, AIR 1929 Cal 226 : (1929) 49 Cal LJ 81.
251. *Major SS Khanna v Brig. FJ Dillon*, AIR 1964 SC 497 : (1964) 4 SCR 409; *Smt. Vidya Vati v Devi Das*, 1977 SC 397.
252. *Ramzan Ali v Satul Bibi*, AIR 1948 All 234 : (1947) All 812 (FB).
253. *Muhammad Maqsood Ali Khan v Hoshiar Singh*, AIR 1945 All 377 : (1945) All 394.
254. *Punjab Marwari Chamber of Commerce v Ram Lal*, AIR 9131 Lah 644 : (1932) 13 Lah 59.
255. *Piroj Shah v Qarib Shah*, AIR 1926 Lah 379 : (1926) 7 Lah 161.
256. *Major SS Khanna v Brig. FJ Dillon*, AIR 1964 SC 497 : (1964) 4 SCR 409.
257. *Baldeodas Shivlal v Filmistan Distributors (India) Pvt Ltd*, AIR 1970 SC 406 : (1970) 1 SCR 435 : 11 Guj LR 158.

examination of a witness after overruling an objection, though an order is not a case decided.[258] An order under section 10 of the Code amounts to a case decided.[259] An order disposing of one challenge to a document without having the effect of disposing of the suit is not a case decided.[260] It would appear that to avoid any future controversy whether a given order is a "case" which has been decided, Parliament has provided the Explanation to this section and in doing so it appears that it has adopted the meaning given to the word "case" by the Supreme Court. Under the Explanation, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding. The expression "in the course of a suit or other proceeding" negates the idea of the word "case" as meaning the matter in action in its entirety.

It may be noticed that in this position a change has been brought about by inserting sub-section (2) to section 115, CPC, providing that if an appeal lies either to the high court or the court subordinate thereto against the impugned order, no revision would lie. However, where any appeal lay either to the court subordinate to the high court or to the high court in respect of the impugned order, there is no change in the position under the law merely because the order is challengeable in the final order or the decree, the jurisdiction to entertain revision is not excluded. The limitation imposed on appeal has been extended to all the appealable orders where the appeal lay to the high court or to any court subordinate thereto but has not been extended to exclude the jurisdiction of the high court where no appeal lie against the impugned order itself. Such a position remains unchanged.[261]

A revision is maintainable against an order rejecting an application seeking stay of a suit on ground that an arbitration agreement is in existence between the parties.[262] In cases where the tribunal constituted under the Motor Vehicles Act, 1988 has passed excessive award of compensation throwing all settled principles to the wind or the quantum of compensation awarded is arbitrary, the insurer is not without remedy. It can, then, instead of resorting to the remedy of appeal which is not available to him under the Act, invoke revisional jurisdiction of the high court under section 115 of the CPC or supervisory jurisdiction under Article 227 of the Constitution of India.[263]

[s 115.26] Conversion of Appeal into Revision and *Vice Versa* — Impermissibility

The Karnataka High Court, however, is of the opinion that a revision cannot be permitted to be converted into an appeal.[264]

To appreciate the question for permission to convert the appeal into civil revision, it is necessary to consider the relevant provisions for necessary contents in memo of second appeal and memo of revision. As per sub-rule (2) of rule 1, O XLI, memorandum of appeal shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from, without any argument or narrative; and such grounds shall be numbered consecutively. In second appeal, memorandum of appeal shall concisely set forth substantial question of law

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258. *Murigappa v Channappa*, AIR 1977 Kant 111; *Sagarmal v Gualo Chand*, AIR 1978 P&H 251.
259. *Ram Dass v Smt. Subhash Bakshi*, AIR 1977 HP 18.
260. *Nand Kishore v Kishan Chand*, AIR 1977 HP 68.
261. *Chunnilal v Shanta Devi*, AIR 2001 Raj 76 (DB).
262. *Fresenius AG v Dalmia Industries Ltd*, AIR 1997 All 411.
263. *United India Insurance Co Ltd v Ramdas Patil*, AIR 2000 MP 63 (DB).
264. *Anjalina D'souza v Laxmi Vikas Bank Ltd*, AIR 1995 Kant 30.

involved in appeal. In the aforesaid circumstances, the contents for memo of appeal in second appeal are based on different requirements, while the memo of revision has to contend the facts of the case and specific averments that the court either has exercised jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity. Without such averments in the memorandum of revision, it will be incomplete, and the revisional court may not entertain a revision. In the circumstances, memorandum of appeal and memorandum of revision are based on different requirements. In the circumstances, memorandum of appeal cannot be treated as a memo of revision. The position is similar under O XLI, rule 3 of the CPC. If the memorandum of appeal is not drawn up in the manner prescribed under rule 1 of O XLI, the memorandum of appeal shall be rejected or returned to the appellant for the purpose of being amended within a time to be fixed by the court or be amended then and there. In the circumstances, it will not be just and proper to convert the memorandum of appeal into revision. However, appellants who had filed appeal much before the amendment in section 102, CPC, can be permitted to withdraw this appeal with liberty to file a revision or other proceeding as they choose in accordance with law. If the appellants find that the order is revisable as per section 115, CPC, they may file such a revision before the court by taking all the grounds as required for revision, by drafting appropriate memorandum of revision within a period prescribed. In the abovesaid peculiar circumstances, their revision may not be dismissed on the ground of limitation and will be heard and decided in accordance with law. But the appeal cannot be permitted to convert into civil revision.[265]

[s 115.27] Conversion of Appeal into Revision and *vice versa* — Permissibility

The nature, quality and extent of appellate jurisdiction exercised in first appeal and of revisional jurisdiction are very different. The exercise of revisional jurisdiction under section 115 is confined to the question of jurisdiction only.[266] A right to appeal carries with it a right of re-hearing on law, as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way. On a reading of sub-section (1) and sub-section (2) of section 115, it is very clear that even if an appeal lies with the high court, no revision can be entertained. However, a revision may be converted to an appeal.[267] Where an appeal is preferred in a case in which no appeal lies, the high court may, in a proper case, treat the memorandum of an appeal as an application for a revision and deal with it on that footing.[268] This would be done in exercise of power under section 151. The court would be justified in passing such an order either in the interest of justice or for preventing abuse of the process of the court.[269] However, this cannot be done if the appeal is not maintainable only as to a part, as it will be

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265. *FCI v Munnilal Singh*, AIR 2003 MP 66.
266. *Manick Chandra Nandy v Debdas Nandy*, (1986) 1 SCC 512; *Lachhman Das v Santokh Singh*, (1995) 4 SCC 201.
267. *Charu Deka v Umeswari Nath*, AIR 1995 Gau 9.
268. *Merali v Sheriff*, (1912) 36 Bom 105; *Baikanta Nath v Sita Nath*, (1911) 38 Cal 421; *Rajah Venkata Ramayya v Veeraswami*, (1918) 41 Mad 554; *Mohini v Ramdas*, AIR 1924 Cal 487 : (1923) 28 Cal WN 271; *Banka Behari v Birendra Nath*, AIR 1927 Cal 850 : (1928) 55 Cal 219; *Abdul Hakim v Burramiddlin*, AIR 1926 Mad 559 : (1926) 49 Mad 580; *Sakeena Bibi v Stephens*, AIR 1926 Rang 205 : (1926) 4 Rang 221; *Chaparaddi v Kabul Malla*, AIR 1944 Pat 54 : (1943) 2 Cal 204 : (1943) 23 Pat 61 (FB); *Bhimrao Thanbaji v Girdharilal*, AIR 1954 Nag 125; *Patel v CM Milligam & Clarke Ltd*, AIR 1956 Bom 598; *Narayana v Parameswara*, AIR 1957 Ker 18; *Ramanujam v Subramaniam*, AIR 1967 Mad 298 : (1965) 2 Mad LJ 543; *Shyam Mohan Lal v Jai Gopal*, AIR 1968 Del 104.
269. *Bahori v Vidya Ram*, AIR 1978 All 299.

inappropriate to treat the same matter in part as appeal and in part as revision.[270] Similarly, if an application for revision is made in a case in which an appeal lies, the application may be converted into an appeal.[271] Where the cause of justice so demands, the court can treat an appeal as a revision (where no appeal lies), provided the conditions of section 115 are satisfied.[272] In a particular case, the revisional court decided the case on merit and did not pass any order on the application to convert the revision into an appeal, though it observed that an appeal, and not a revision was maintainable against the impugned order. The decision of the revisional court could not be held to be void ab initio and non est.[273]

Where a revision petition is filed against an appealable order, the court has discretion to grant permission to convert the revision into appeal in exercise of inherent powers under section 151 of the Code.[274]

[s 115.28] Conversion of Revision in to Writ

Although the revision petition can be treated as a writ petition under Articles 226 and 227 of the Constitution of India without an application on behalf of the petitioner, there must be a proper cause for the purpose. If no proper cause has been shown and it is not in the interest of justice, the revision petition cannot be treated as writ under Article 226 or Article 227 of the Constitution of India.

It has been held by the Supreme Court that since a civil revision is not maintainable against an interlocutory order, the high court, in appropriate cases, can permit the revision to be converted into an application under Article 227 of the Constitution.[275] PK BALASUBRAMANYAN, J, speaking for the bench in the above case, observed as follows:

> The respondents had filed the revision originally and during the pendency of that revision the High Court appears to have taken a view that an order in an appeal arising from a proceeding under Order 39, Rules 1 and 2 of the Code, could not be challenged under Section 115 of the Code since the order was in the nature of an interlocutory order. In such a situation, in our view, the High Court rightly decided to permit the revision petitioners before it, to convert the same as a proceeding under Article 227 of the Constitution of India. After all, the court could have done it on its own, even without a motion in that behalf by the petitioner.[276]

[s 115.29] "Case", "suit"

The word "case" is more comprehensive than the word "suit".[277] The meaning of expression "case" being of a comprehensive import, it includes civil proceedings other than suits and it is

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270. *Mohamad Esoof v VR Subramanyam*, AIR 1957 Mys 78.
271. *Krishna Ballav Ghosh v Sashimukhi Bose*, AIR 1949 Ori 11 : (1949) 1 Cut 781; *Run Bahadur v Bajrangi*, AIR 1925 Pat 16 : (1924) 3 Pat 344; *Sikandar v Baland*, AIR 1927 Lah 435 : (1927) 8 Lah 617; *Indubhusan v Angu Bala Dasi*, AIR 1955 Cal 63; *Gauri Shankar v Firm Dulichand*, AIR 1955 Cal 63; *Gauri Shankar v Firm Dulichand*, AIR 1959 MP 188; *Rupam Pictures v Brijmohan*, AIR 1977 Bom 425; *K Malla Reddy v Soma Srinivas*, AIR 1978 AP 289.
272. *Jiwan Dass Rawal v Narain Dass*, AIR 1981 Del 291.
273. *Rajeet Ram Singh v Fifth ADJ, Kanpur, Dehat*, AIR 1999 All 189.
274. *Umardeen v Additional District Judge, Muzaffarnagar*, 2008 (1) All LJ 379 : 2008 AIHC 1056.
275. *Col. Anil Kak v Municipal Corp, Indore*, AIR 2007 SC 1130 : (2005) 12 SCC 734.
276. *Col. Anil Kak v Municipal Corp, Indore*, AIR 2007 SC 1130, at p 1131, para 2 : (2005) 12 SCC 734; *Durga Devi v Vijay Kumar*, AIR 2010 Pat 126 : (2011) 59 BLJR 428 (DB).
277. *Vishwamitra v Girdharlal*, AIR 1958 All 683 : (1958) All LJ 131; *Surajlal Krishna Das v Parwana Ka Krishna Sugar Works*, AIR 1961 All 371 : (1961) All LJ 435; *Patna Municipality v Brij Ka; Krishna*, AIR 1958 Pat 22.

not restricted to the entirety of the proceedings in a civil suit. To interpret "case" as in entire proceedings, and not a part of proceedings, would be to restrict the exercise of supervisory jurisdiction of the high court, resulting in gross injustice to an aggrieved litigant. In the view that "case" includes a part of the case, there is no escape from the conclusion that a revisional jurisdiction may be exercised in respect of the question of whether an appeal lies from the ultimate order or decree passed in the suit.[278]

The question of whether proceedings by petition to a civil court under section 10 of the Religious Endowments Act, 1863, constituted a case for the purposes of this section arose before the Privy Council. Their Lordships in that connection observed:

No definition is to be found in the Code of the word "case". It cannot, in their Lordship's view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant, who is before the court. It must, they think, include an *ex parte* application such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties.[279]

The word "case" has also been held to include proceedings under the Guardians and Wards Act, 1890; Probate and Administration Act, 1881; Succession Certificate Act, 1889; Provincial Insolvency Act, 1920; Madras Agriculturists Relief Act, 1938, etc.[280] The word also includes election petitions when heard by a judge subordinate to the high court, when he can be held not to be persona grata, but a court; and, where the high court's power to revise has not been expressly taken away.[281]

The Bombay High Court has taken the view that the word "case" includes a part of a case and the high court has, therefore, power to interfere with interlocutory orders. There was divergence of opinion within the court on the question of whether the court should in exercise of its discretion interfere only in cases where there would otherwise be no remedy or whether it may interfere even if the injured party has another remedy, either by way of an appeal against the final decree under section 105 or by way of a suit. The Punjab and Haryana High Court held that the very purpose and object of section 115 would be defeated if the court was to take the view that the interlocutory orders passed by the civil courts are not revisable under section 115 of the CPC. The mere fact that such order can be challenged by way of an appeal against the decree under section 105 of the CPC, would not be sufficient to hold that the revisional jurisdiction of the court under section 115 cannot be exercised against such an order.[282]

The distinction between the decisions of the High Court of Allahabad, on one hand, and those of the other high courts on the other as to the meaning of the term "case", is brought out by the following case. *A* institutes a suit against *B* in court *X*. One of the issues in the suit is whether court *X* has jurisdiction to try the suit. The court holds that it has and the suit must proceed. *B*, thereupon, applies to the high court for revision of the order. Has the high court the power to interfere in revision with the order which is an interlocutory order?

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278. *Michael Marcarenhas, Major v John Marcarenhas, Major*, AIR 1996 Kant 348; *Major SS Khanna v Brig FJ Dillon*, AIR 1964 SC 497 : (1964) 4 SCR 409.
279. *Balakrishna Udayar v Vasudeva Aiyar*, AIR 1917 PC 71 : (1917) LR 44 IA 261; *Debidutt Debe v Central India Electrical Supply, Co*, AIR 1945 Nag 214; *Ambika Prasad v Jagadamba*, AIR 1945 Cal 289 : (1945) 20 Luck 488.
280. *Buddhu Lal v Mewa Ram*, AIR 1921 All 1 : (1921) 43 All 564; *Lalchand v Behari Lal*, AIR 1924 Lah 425 : (1924) 5 Lah 288; *Ballu v Hardawari*, AIR 1924 Lah 570 : (1924) 6 Lah LJ 219 (Guardians and Wards Act, 1890 — revision); *Vyasaraju v Brunda Vanasahu*, AIR 1943 Mad 617.
281. *Benode v Girnadra*, 38 Cal WN 500; *Abdul Razak v Kuldip*, AIR 1944 Pat 147; contra *Sudagar v Radharaman*, AIR 1949 Pat 333 : (1948) 28 Pat 63.
282. *Joginder Pal v Raj Rani*, AIR 1995 P&H 308.

According to the Allahabad decisions,[283] the high court has no such power as the order is not a decision of a "case", while, according to the other high courts[284] the high court has such a power, as the word "case" includes part of a case. They further held the high court can interfere if it comes to the conclusion that the order was wrong, although it can be challenged in an appeal against the final decree, for, if court *X* had no jurisdiction, it would result in unnecessary waste of time and money. The Allahabad view is no longer good law as the Supreme Court has decided that the word "case" is not restricted to a litigation in the nature of a suit but includes all proceedings in which the jurisdiction of a civil court is invoked for the determination of a claim or right legally enforceable and that revision is maintainable against interlocutory orders passed in a suit. A finding that a suit was not maintainable was held to be open to revision.[285]

The expression "case" is not defined in the CPC, nor in the General Clauses Act, 1897. It is undoubtedly not restricted to a litigation in the nature of a suit in a civil court — *Balakrishana Udayar v Vasudeva Aiyar*;[286] it includes the jurisdiction of the civil court in which the jurisdiction of the court is invoked for the determination of some claim or right legally enforceable. On the question of whether an order of a court which does not finally dispose of the suit or proceeding amounts to a "case which has been decided", there has arisen a serious conflict of opinion in the high courts in India and the question has not been directly considered by this court. One view which is accepted by a majority of the high courts is that the expression "case" includes an interlocutory proceeding relating to the rights and obligations of the parties, and the expression record of any case includes so much of the proceeding as relates to the order disposing of the interlocutory proceeding. The high court has therefore power to rectify an order of a subordinate court at any stage of a suit or proceeding even if there be another remedy open to the party aggrieved, i.e., by reserving his right to file an appeal against the ultimate decision, and making the illegality in the order a ground of that appeal. The other view is that the expression "case" does not include an issue or a part of a suit or proceeding and therefore the order on an issue or a part of a suit or proceeding is not a "case which has been decided", and the high court has no power in exercise of its revisional jurisdiction to correct an error in an interlocutory order.[287]

The word "case" in section 115 is of a very wide import and means any state of facts juridically considered, and therefore an interlocutory order deciding any substantial question in controversy between the parties so as to affect their rights, as distinguished from a purely formal or incidental order, amounts to a case decided within the meaning of section 115, even though such an order is passed in the course of the trial of a suit. Hence, an erroneous decision on a preliminary issue as to jurisdiction will be open to revision.

In *State v Krishhnu Mal*,[288] while dealing with the situation created on account of remand order having been passed by appellate court, it was held as under:

> The obvious answer to this contention is that this Court is seized of the matter in the exercise of its revisional jurisdiction. The District Judge has created an impossible situation by rejecting the cross-objections, while remanding the appeal under a Rule which has no application. The powers of this Court, to remedy such flagrant errors, in the exercise of

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283. *Buddhu Lal v Mewa Ram*, AIR 1921 All 1 : (1921) 43 All 564 (FB).
284. *Secretary of State v Narsibhai*, AIR 1924 Bom 65 : (1924) 48 Bom 43; *Rajani v Rajabala*, AIR 1925 Cal 320 : (1924) 52 Cal 128.
285. *Major SS Khanna v Brig. FJ Dillon*, AIR 1964 SC 497 : (1964) 4 SCR 409.
286. *Balkrishna Udayar v Vasudeva Aiyar*, AIR 1917 PC 71 : (1917) LR 44 IA 261.
287. *Sailo Ram v Kuldip Chand*, AIR 2003 HP 148 (DB).
288. *State v Krishhnu Mal*, AIR 1955 HP 33.

its revisional jurisdiction, are unfettered. It can proceed even "suo motu" in the interest of justice.

In *Mina Ram v Amlok Ram*,[289] it was observed as under:

> The word "case", used in Section 115, Code of Civil Procedure is a word of comprehensive import and includes civil proceedings other than suits and a part of a proceeding and an interlocutory order directly affecting the rights and obligations of parties is a "case decided". It has been so held by the Supreme Court in a case [290] with respect to the interpretation of Section 115, Code of Civil Procedure which does not apply to him. But these observations apply with full force to the interpretation of clause (a) of paragraph 35(1) aforesaid.
>
> The order, therefore, of Subordinate Judge directing the petitioner to pay an additional court-fee is a case decided within the meaning of paragraph (35)(1), aforesaid and is revisable. Though the order is interlocutory it affects the rights of the petitioner.

In *Sohan Singh and Co v Mohammad Aishak Tyagi*,[291] again, while interpreting the word "case" in section 115 of the CPC, it was held as under:

> Held, the expression "case" used in Section 115 is a word of "comprehensive import" and is not restricted to the entirety of proceeding in a Civil Court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding would be to impose a restriction upon the exercise of power of superintendence, which is inherent in the phraseology of Section 115.

The expression "case" is a word of comprehensive import, it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression "case" as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice.[292]

It may be observed that the majority view of the High Court of Allahabad in *Buddhulal v Mewa Ram*,[293] founded upon the supposition that even though the word "case" has a wide signification, the jurisdiction of the high court can only be invoked from an order in a suit, where the suit and not a part of it is decided, proceeded upon the fallacy that because the expression "case" includes a suit, in defining the limits of the jurisdiction conferred upon the high court the expression "suit" should be substituted in the section, when the order sought to be revised is an order passed in a suit. The expression "case" includes a suit, but in ascertaining the limits of the jurisdiction of the high court, there would be no warrant for equating it with a suit alone.[294]

[s 115.30] Effect of the Amendments Made by Section 43 of the Amendment Act, 1976

Section 43 adds to the original section renumbered as sub-section 1 a new proviso. It also adds a new sub-section 2 and an Explanation. Even as the section stood before its amendment, the revisional power of the high court was limited in the sense that it could

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289. *Mina Ram v Amlok Ram*, AIR 1966 HP 4.
290. *Major SS Khanna v Brig FJ Dillon*, AIR 1964 SC 497 : (1964) 4 SCR 409.
291. *Sohan Singh and Co v Mohammad Aishak Tyagi*,1972 Serv LJ (HP) 270.
292. *Sailo Ram v Kuldip Chand*, AIR 2003 HP 148 (DB).
293. *Buddhulal v Mewa Ram*, AIR 1921 All 1 : ILR 43 All 564 (FB).
294. *Sailo Ram v Kuldip Chand*, AIR 2003 HP 148 (DB).

interfere only if the subordinate court by its impugned order (a) had exercised jurisdiction not vested in it by law, or (b) it had failed to exercise a jurisdiction so vested; or (c) it had acted in the exercise of its jurisdiction illegally or with material irregularity. These conditions of limitation of power are kept intact. The proviso deals with interlocutory orders only. It further reduces the revisional power of the high court in regard to such orders in that even if a case were to fall under clause (a), (b) or (c), the high court *shall not*, in exercise of its revisional power, vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceeding unless the order in question is (a) one which, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or (b), which if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it has been made. The words "shall not" occurring in the proviso clearly indicate that the proviso is mandatory and prohibits the high court from interfering with the order unless the order is of the class which falls under its clause (a) or (b).[295] The effect of the proviso thus is that the order impugned in revision must not only suffer from some jurisdictional error but must further be of the category falling under either clause (a) or clause (b) of the proviso. Under clause (a) of the proviso, the high court cannot revise an order, even if it suffers from a jurisdictional error, if it is not such that had it been made in favour of the revision-petitioner it would have finally disposed of the suit or other proceeding. The result of such a restriction will presumably be that orders not falling under clause (a) can only be challenged in an appeal against the final decree under section 105 and until then, they would remain effective during the pendency of the suit or other proceeding. The question of whether an order is such as would result in failure of justice or irreparable injury to the party aggrieved by it would depend on the fact and circumstances of each case. An order dismissing an application under O XI, rule 1, has been held not to fall under clause (b) of the proviso on the facts of the case.[296] In a decision, the Delhi High Court has held that where leave to defend under O XXXVII, rule 2 has been refused and a decree has consequently been passed though the Order of refusal does not fall under clause (a) of the proviso since such an order, if passed in favour of the defendant, would not have finally disposed of the suit it would fall under clause (b) since barring a revision against such an order at the threshold would mean an automatic passing of a decree against the defendant. A revision against such an order is maintainable although an appeal would lie against the decree wherein the order could also be challenged.[297]

Sub-section 2 is a new provision. Its object is to limit revision applications. As the section stood unamended, the high court could entertain revision applications in cases in which "no appeal lies thereto." Though there was at one time a difference of judicial opinion as to the precise meaning of the word "thereto", that difference was finally resolved by the Supreme Court's decision in *Major SS Khanna v Brig. FJ Dillon (supra)* in which it was clarified that if an appeal lay against the adjudication directly to the high court or to another court from the decision of which an appeal lay to the high court, the high court had no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the high court directly or indirectly, exercise of the revisional jurisdiction by the high court would not be deemed excluded. The word "thereto" was construed to mean an appeal to the high court directly or immediately or indirectly or immediately. Sub-section 2 alters the position since it provides that the high court shall not vary or reverse any decree or order against which an

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295. *Hardwari Lal v Pohkar Mal*, AIR 1978 P&H 230.
296. *Tata Iron & Steel Co Ltd v Rajarishi Exports*, AIR 1978 Ori 179.
297. *SK Bhardwaj v Gupta*, AIR 1977 Del 226.

appeal lies either to the high court or to any court subordinate thereto. The new sub-section lays down new restrictions to the exercise of the revisional jurisdiction of the high court. Read with sub-section (1), it means that even if a revision petition is maintainable under sub-section (1) the high court shall not vary or reverse any decree or order if against such decree or order an appeal lies either to the high court or a court subordinate to the high court. The sub-section is mandatory in that it prohibits the exercise of the power to vary or reverse such a decree or order. In *Jokhi Ram Mohan Lal v Smt. Gita Devi*,[298] the revision-petitioner in the suit against him for eviction filed, while the suit was pending, an application alleging that the parties had arrived at a settlement and that the suit should therefore be disposed of in terms of the settlement under O XXIII, rule 3. The trial judge, after an inquiry, dismissed the application finding that there was no settlement arrived at by the parties. Under O XLIII, rule 1 as it stood before the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) an appeal lay before the district judge against such an order and the petitioner in fact filed an appeal in the district court which was pending when the Amendment Act was brought into force. The high court noticed its two earlier decisions, one in *Tipan Prasad Singh v Secretary of State*,[299] and the other in *Maqbool Alam Khan v Khodaija Begum*,[300] wherein two different views were taken on the construction of the word "thereto" in section 115 as it then stood (revised to sub-section 1). The earlier decision held that the word "thereto" meant an appeal either to the high court in which only a revision to it would be excluded and the latter case held that the word "thereto" meant an appeal either to the high court or the court subordinate to it and that in either case revision would not be maintainable. The high court after referring to these decisions observed that the new sub-section was enacted to remove this conflict of opinion and that its effect is that "if an appeal lies either to the High Court or to any court subordinate thereto the High Court shall not under this section exercise its revisional jurisdiction for reversing any order or decree". But in the final order it passed, the high court concluded that "the revision application is held to be not maintainable and it is accordingly dismissed". As stated earlier no change has been made in that part of the section which is renumbered as sub-section (1). That means that a revision is still maintainable under sub-section (1) in all cases where no appeal lies "thereto", i.e., the high court and if the decision suffers from any of the infirmities set out in clauses (a), (b) or (c) of that sub-section. Under sub-section (1), the exclusion of the revisional jurisdiction of the high court is limited to cases when an appeal lies to the high court and not to cases where an appeal lies to a court subordinate thereto. Sub-section (2) does not deal with maintainability of a revision but only prohibits the high court from varying or reversing a decree or an order against which an appeal lies to the high court or a court subordinate thereto. It is submitted that the proper construction to be placed on sub-section (2) as its language plainly means is that though a revision may be maintainable under sub-section (1) the high court shall not vary or reverse any decree or order if an appeal therefrom lies either before the high court or a court subordinate to it. Such a construction is preferable as it is in conformity with the words actually employed in sub-section (2). It is submitted that the proper order in *Jokhi Ram's* case should have been that though the revision was maintainable the high court declines to vary or reverse the impugned order.

The Explanation, as already stated earlier, is an inclusive and not an exhaustive provision in that any order made, or any order deciding an issue, in the course of a suit or other proceeding

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298. *Jokhi Ram Mohan Lal v Smt. Gita Devi*, AIR 1978 Pat 2.
299. *Tipan Prasad Singh v Secretary of State*, AIR 1935 Pat 86.
300. *Maqbool Alam Khan v Khodaija Begum*, AIR 1949 Pat 133 (FB).

would be a case which has been decided [see commentary under Interlocutory Orders above]. The Explanation legislatively confirms the Supreme Court's view expressed in *Major SS Khanna's case (supra)*. But the Explanation must be read along with the rest of the section. So read, although an order may be said to be a case decided, every such order would not be revisable unless there is a question of jurisdiction within the meaning of clauses (a), (b) or (c) of sub-section (1) and further it is an order as contemplated by clause (a) or (b) of the proviso.[301] The order also must be one which for the purposes of the suit decides some right or obligation of the parties.[302]

Sub-section 3 of section 97 of the Amendment Act provides: "Save as otherwise provided in sub-section (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement." But for the purposes of this section, clause (O) of sub-section 2 of section 97 provides that "the amendment of section 115 of the principal Act by section 43 of this Act shall not apply to or affect any proceeding for revision which has been admitted, after preliminary hearing, before the commencement of the said section 43; and every such proceeding for revision shall be disposed of as if the said section 43 had not come into force." The amended section thus applies to all revision applications except only those which have been already admitted after preliminary hearing before the commencement of section 43.

[s 115.31] Sub-section 1 (Proviso)

The words "failure of justice" in section 115, proviso, impose an additional condition. They cannot be taken as merely duplicating the requirement of illegality or material irregularity. In an Andhra Pradesh case, the trial court issued an injunction, restraining a company from evicting an employee's wife and children from quarters allotted by the company. The employee had voluntarily terminated the lease and stayed elsewhere, due to differences with his wife. Rent was directed to be deducted from the maintenance payable by the husband to the wife. It was held that the high court in revision would not interfere with this interlocutory order. There was no failure of justice. The quarter was owned by a legal person and not by a natural person. It was meant to be used by the employees. The husband was under an obligation to provide shelter to his wife and children.[303] The husband and the company, acting in different ways, had been recognising, all these years, the occupation of the quarter by the wife, in her matrimonial right. Neither the company nor the husband would suffer any monetary loss by reason of the interlocutory order passed by the district judge, because the judge had directed a deduction of rental amount from the sum of maintenance payable by the husband to the wife and the children. It almost amounted to making a book transfer. There was no failure of justice.[304]

A petitioner applying for revision must show how the impugned order (if allowed to stand) would occasion failure of justice or cause irreparable injury to petitioner.[305] Refusal of the trial

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301. *Food Corp of India v BN Dhar*, AIR 1978 Cal 264.
302. *Modi Spg. & Wvg. Mills v Ladha Ram & Co*, AIR 1978 All 260.
303. *In the matter of Bharat Heavy Plates and Vessels Ltd*, AIR 1985 AP 207.
304. *In the matter of Bharat Heavy Plates and Vessels Ltd*, AIR 1985 AP 207.
305. *Ashok Kumar v Sangitabai*, AIR 1988 MP 59.

court to re-examine a witness present in court cannot be interfered with in revision unless a clear case of failure of justice or irreparable injury is made out.[306] Defendant's objection was as to the valuation of suit by way of application under section 11 of Rajasthan Court Fees and Suit Valuation Act, 1961. Court overruled plaintiff's preliminary objection to such application and directed defendant's application to be heard. Order would not be interfered within revision. It did not dispose of the suit. Nor did it occasion injustice.[307] Where the trial court rejected a prayer for amendment of written statement, the order amounts to stopping the trial of a case which a party wants to put up. It falls under section 115(2) and is revisable.[308] The trial court in an Allahabad case, rejected the application for summoning original rules and bye-laws and kept the issue alive whether photostat copy of the rules could be admitted in evidence. It was held that if the photostat copy had been outright rejected, plaintiffs' interests would have been adversely affected.[309]

[s 115.32] Explanation — Any Case Which Has Been Decided

There can be no controversy about the meaning of the expression "any case which has been decided" in view of the Explanation inserted in the section which states that a case decided includes an order made or an order deciding an issue, in the course of a suit or other proceeding. However, as the Supreme Court observed in *Baldeodas Shivlal*'s case, every order in a suit cannot be regarded as one deciding a case. For instance, the high court cannot interfere with an order which decides that certain evidence is inadmissible.[310] Such an order does not decide an issue in the suit or the proceeding or part of such proceeding. Similarly, passing of an *ex parte* interim order, though made in the course of a suit, is not deciding a case.[311] An order which decides a case must be one which determines some legal right or obligation of one of the parties to the suit or the proceeding as the case may be.[312] For example, in a case, the plaintiff, after dismissal of his suit for injunction, filed an application for: (i) stay of the operation of the judgment and decree; and (ii) for allowing the present *status quo* for a reasonable time to enable the plaintiff to get copies, prefer an appeal and obtain further orders. The order passed simply stated that time had been granted till a certain date for counter and, in the interest of justice, up to that date status quo has to be maintained. It was held that: (i) taking into consideration the fact that, in case the plaintiff: (a) obtained a copy of the judgment and decree in the suit well before the date till which time for filing counter affidavit was granted; and (b) also happened to file an appeal and obtained appropriate orders from the appellate court, there may not be any need for further pendency of the application filed by the plaintiff; and (ii) in such circumstances, the petition itself may become infructuous before the date fixed for filing the counter, the order was a final one, hence, revision was maintainable.[313]

In a case, the issue before the court was whether a temple is a private trust or a public trust. That issue was finally decided on merits after hearing both parties and the matter was not opened for further hearing by trial court. It was held by the Allahabad High Court that it would come under the expression "any case which has been decided" and as such revision

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306. *Ramchand v Laxmi Kumar*, AIR 1980 Raj 128.
307. *Ghewar Chand v Gaj Singh*, AIR 1980 Raj 202.
308. *Satish Chandra v Krishna Prasad*, AIR 1989 All 34, at p 35 para 4.
309. *Madhuri Misra v Shanti Devi*, AIR 1990 All 42 (AN DIKSHITA, J).
310. *Isa Adam v Bai Mariam*, AIR 1927 Bom 664 : (1927) 29 Bom LR 304.
311. *MP Kapur v VBSOS & D Co*, AIR 1973 All 109.
312. *Ramgulam v Nawin*, AIR 1972 Pat 499.
313. *Layman's Evangelical Fellowship v J Kishorelal*, AIR 1989 Mad 105.

against such order would be maintainable.[314] But an order directing issue of notice on an application for temporary injunction, though it may come within the ambit of the expression "case decided", it would not amount to disposal of the application for injunction and as such revision against the order is not maintainable.[315]

An order rejecting an application for issuance of commission does not amount to "case decided" as neither any issue is decided nor any rights of parties are adjudicated upon. Hence, revision against such an order is not maintainable.[316]

Where an application for appointment of receiver was allowed subject to certain conditions and one of the conditions was that the parties were directed to give names of two persons for appointment as receiver, it could be said that the issue with regard to appointment of receiver was not finally decided. The order would be appealable under O XLIII, rule 1(s) of the Code but it is not revisable.[317]

Similarly, where a lower court decides a question of court fees payable on plaint, against the defendant, defendant's revision against the order is maintainable.[318] Order rejecting application for adjournment at the stage of recording of evidence amounts to "case decided". Ordinarily, a court exercising revisional jurisdiction does not interfere with an order refusing adjournment. However, it may do so if there is absence of any reason for rejection of the application. In a particular case, an adjournment was sought as material witnesses could not be summoned. The application was rejected while a similar application of opposite party had been allowed. It was held that the court, in a revision, can interfere in such peculiar circumstances.[319] However, in another case, where the party was prevented by an order of the civil court from taking the benefit of an independent remedy or a special or different procedure prescribed by the legislature, the order amounted to a "case decided" and was open to revision. The question involved was one of jurisdiction.[320]

Mere refusal to frame additional issues does not give a right to the parties to prefer a revision. As no right or obligation of a party is determined by refusal to frame additional issues, it cannot be held to be "deciding a case", so as to attract the expression "case which has been decided" in section 115.[321] A case is said to be decided within section 115 if the court adjudicates, for purposes of the suit, some vital right or obligation in controversy. The mere fact that any of the parties can ultimately challenge the findings before an appellate court, cannot be treated as an absolute bar to the maintainability of a revision petition.

A decision, in order to amount to a "case decided", need not dispose of the suit as a whole. It is sufficient if it decides a vital matter in controversy between the parties.[322] For example, certain lands were acquired by the government for a university. However, certain persons had purchased some lands from the original owner after the acquisition. They filed a suit for permanent injunction against the university by alleging title on the basis of adverse possession. Their applications for temporary injunctions were allowed. It was held that the order granting temporary injunction was liable to be set aside, as the same was passed without considering:

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314. *Devendra Kumar Mishra v Ramendra Kumar*, AIR 2006 All 82 : 2006 (1) All LJ 642 (Lucknow Bench).
315. *Mohd. Rais Khan v Naseeb Ullah Khan*, AIR 2006 All 166 : 2006 (2) All LJ 790.
316. *Ram Ishwar v Laxmi Narain*, 2007 (1) All LJ 477 : 2007 (66) All LR 195.
317. *Anil Sharma v Rajan Pathak*, AIR 2009 All 68 : 2009 (2) All LJ 381.
318. *Andhra Pradesh State Electricity Board v Venkateswara Rao*, AIR 1981 AP 197.
319. *Mungal Chand Chauhan v Rattan Lal Nehata*, AIR 1981 Gau 93.
320. *Gandabhai Jinabhai v Ramubhai Fakirbhai*, AIR 1982 Guj 142.
321. *Kishan Udyog v United Bank of India*, AIR 1990 All 8.
322. *Mohinder Nath v Sandhuran Rani*, AIR 1981 J&K 49.

(i) the proceedings taken by the government for the eviction of the purchaser and delivery of possession of the land to the university before the expiry of period of 30 years, which brought about a break in adverse possession; and (ii) the effect thereof.[323]

The "case decided" referred to in section 115 of the CPC does not mean the entire case or suit. If the entire case or suit is decided on merits in one way or the other, a statutory appeal is provided under section 96 of the CPC to challenge the said judgment and decree. Section 104 read with O XLIII provides for appeals against orders passed on interlocutory applications, enumerated in the said provision. The Explanation to section 115, CPC, which was introduced by way of Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976), makes it clear that the expression "any case which has been decided" includes any order made, or any order deciding any issue, in the course of a suit or other proceeding, setting at rest the controversy regarding the interpretation to the phrase "case decided". Therefore, section 115 of the CPC which confers a supervisory role on this court, has to be exercised at an interlocutory stage prior to judgment and decree and against orders which are not covered under O XLIII, CPC, and would have the effect of deciding the case between the parties. Therefore, it necessarily follows, it has to be against an interlocutory order passed in a suit. From the stage of institution of the suit till its final disposal by way of a judgment and decree there are various stages in a suit where the court is called upon to decide several important rights of the parties. The said rights may be substantial or procedural. If in deciding such rights interlocutory orders are passed, if those orders tend to decide the rights of the parties conclusively and finally, then the correctness or the legality of the order as set out in section 115 has to be gone into by this court in its jurisdiction under section 115 of the CPC. If in passing such orders if the trial court has not violated any of the conditions stipulated in section 115 then it can be legitimately said against such orders no revision lies. Therefore, the word case decided cannot be limited in its import to the entirety of the matter in an action. Any interpretation contrary to this on the said word imposes an unwarranted restriction on the exercise of the powers of superintendence by this court. Otherwise, section 115 of the CPC would be otiose and certainly that was not the intention of the legislature in providing remedies as contained in sections 115, 96 and 104 read with O XLIII of the CPC.[324]

A division bench of the Patna High Court has held that interlocutory orders made in course of hearing of suit or proceeding is not amenable to revisional jurisdiction if such an order does not put an end to the proceeding. There are several applications which require independent adjudication relating to maintainabiliry of suit and once the said adjudication is complete there can be no doubt that the proceeding comes to an end in as much as it would have an effect of finally disposing of proceedings.[325]

Every order in the suit cannot be regarded as a case decided. A case may be said to be decided if the court adjudicates, for the purpose of the suit, some right or obligation of the parties in controversy. A complete and exhaustive definition of case is not possible. It is something wider than suit, but at the same time it is not so wide to include every order passed during the trial of a suit or a proceeding. It is, however, no longer possible to claim that a case decided relates only to main suit and not any other proceedings between the initiation of the suit and its final adjudication. From the inception to the final disposal of the suit, certain proceedings may crop up and they have to be decided in such proceeding. If in such proceedings, some right or obligation of the parties in controversy gets decided, it would amount to the case being

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323. *Osmania University v Vrajeshwar Rao*, AIR 1990 NOC 32 (AP).
324. *K Anjaneya Setty v KH Rangiah Setty*, AIR 2002 Kant 387.
325. *Durga Devi v Vijay Kumar*, AIR 2010 Pat 126 : (2011) 59 BLJR 428 (DB).

decided. A large number of rights and obligations do crop up and they have foundations both, in substantive law as well as in procedural law. If they get decided by interlocutory orders, they are revisable.[326] The Calcutta view is, however, different. According to this view in order to be a "case decided" an order passed in course of suit or other proceedings need not be an order whereby some right or obligation of the parties in controversy has to be decided for the purpose of the suit of that proceedings.[327] The expression "case decided" includes interlocutory orders also if in exercising its revisional jurisdiction, a revisional court is satisfied that if the order impugned is allowed to stand it would occasion failure of justice or would cause irreparable injury to the party against whom it was made.[328] The object behind the enactment of section 115, CPC, is to provide means to secure correction or rectification of non-appealable order. The expression "case decided" means even if a part of the case and as such even on the fulfilment of the provisions laid down in proviso (b), the interlocutory order[329] can be interfered with. Thus, where an application for leave to sue *in forma pauperis* was granted, it was held that the order granting the permission was one which decided the "case", the case being the subject-matter of the application;[330] an order rejecting an application for review will also decide a case.[331] Likewise, passing of an *ex parte* decree was held to be deciding a "case".[332] Allowing of a question in the examination of a witness after overruling an objection, though an order, is not a case decided.[333] Thus, in a particular case, an application for summoning the witnesses for cross examination, when they have already filed additional affidavits, was found to be vague and it did not contain *bona fide* reasons. It was held that the interlocutory order refusing to summon the witnesses for cross examination after giving cogent and convincing reason would not require indulgence under section 115.[334] Similarly, the order of the trial court refusing to mark the affidavit in evidence amounts to "case decided",[335] the closure of the evidence of the party on the ground that witnesses were not present, though the absence of the witness was on account of inaction of the part of the *nazarat* of the court, causes failure of justice and can be interfered in revision.[336] The view of the court that it has right to direct a party to subject himself to medical examination involving blood group test is a case decided and can be interfered with in revision.[337] An order under section 10 of the CPC amounts to a case decided.[338] An order disposing of one challenge to a document without having the effect of disposing of the suit is not a case decided.[339] Similarly, an order rejecting an application for issuance of summons to produce documents is not a "case decided".[340] However, an order attaching bank guarantee under O XXXVIII, rule 5 is revisable under section 115.[341] A revision against an order passed by the lower court referring dispute for

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326. *Michael Mascarenhas v John Mascarenhas*, AIR 1996 Kant 348; *Major SS Khanna v Brig FJ Dillon*, AIR 1964 SC 497 : (1964) 4 SCR 409.
327. *Madhusudan Hazra v Amal Hazra*, AIR 1997 Cal 258.
328. *Sudha v Manmohan*, AIR 1996 Raj 59.
329. *Joginder Pal v Raj Rani*, AIR 1995 P&H 308.
330. *Ramzan Ali v Satul Bibi*, AIR 1948 All 234 : (1947) All 842 (FB).
331. *Muhammad Maqsood Ali Khan v Hoshiar Singh*, AIR 1945 All 377.
332. *Piroj Shah v Qarib Shah*, AIR 1926 Lah 379 : (1926) 7 Lah 161.
333. *Murigappa v Gannappa*, AIR 1977 P&H 251.
334. *Sudha v Manmohan*, AIR 1996 Raj 59.
335. *Michael Mascarenhas v John Mascarenhas*, AIR 1996 Kant 348.
336. *Madhusudan Hazra v Amal Hazra*, AIR 1997 Cal 258.
337. *Ningamma v Chikkaiah*, AIR 2000 Kant 50.
338. *Ram Das v Subhash Bakshi*, AIR 1977 HP 18; *Bihar Solvent Extraction Co v Bihar State Forest Development Corp*, AIR 1998 Pat 111.
339. *Nand Kishore v Kishan Chand*, AIR 1977 HP 68; *Unnikkal Parameswaran v K Rema*, AIR 1994 Ker 67.
340. *Indian Institute of Science Employees' Assn Bangalore v Indian Institute of Science*, AIR 1999 Kant 307.
341. *International, Air Transport Assn v Hansa Travels Pvt Ltd*, AIR 1998 Ker 80.

arbitration in suit filed under section 20 of Arbitration Act, 1940 (replaced by Arbitration and Conciliation Act, 1996) is maintainable.[342] Order of postponement of decision of issue to a later date, after recording evidence of parties does not amount to "case decided". So, revision against that order would not be maintainable.[343]

[s 115.33] Sub-section (1) Proviso — Position upto 30 June 2002

It is to be noted that prior to the amendments to the CPC by the old Amendment Act, 1976, the power of revision was wider. By the amendment, certain positive restrictions were put on the high court's power to deal with revisions under section 115. Prior to the said amendment, it was not strictly necessary that the impugned order would have the result of finally deciding the lis or the proceedings in the lower courts. In fact, the power could be exercised in any case where jurisdictional error was committed by the original court or where substantial injustice had resulted. By the old amendment Act, the condition of finally deciding of lis and the proceedings in the subordinate courts was introduced. The proviso which was introduced contains qualifications which are pre-requisites before exercise of power under section 115. They were clauses (a) and (b) of the proviso. Logically, the high court has *suo motu* power to revise an order where total failure of justice would have occasioned or where irreparable loss would have been caused to the parties against whom it was made. These powers were retained by clause (b). Though after 1976, the exercise of power was somewhat circumscribed, it was not totally curtailed. In other words, the high court could, even after the 1976 Amendment, interfere in cases where there was failure of justice or irreparable loss caused, the nature of the proceedings was substantially changed and the *suo motu* power of the high court was retained. It was in the nature of power of superintendence of the high court over the subordinate courts. Changes were related to indicating limitations in exercise of power.[344]

The proviso to sub-section 1 speaks of interlocutory orders which are subject to revision under section 115. In order that the high court has jurisdiction to revise an interlocutory order, it is necessary among other things that it must, firstly, be a "case" decided within the meaning of this section and, secondly, that no appeal must lie to the high court from that order. For the purposes of this section, interlocutory orders fall into two classes, namely:

(a) those from which an appeal lies under section 104(1). These are orders made by the court of first instance;

(b) those from which no appeal lies. These may be:

  (i) orders made by the court of first instance from which no appeal is allowed under section 104(1); or

  (ii) orders passed in first appeal from which no second appeal lies having regard to the provisions of section 104(2).

As regards interlocutory orders falling under class (a), the high court has no jurisdiction to revise them as they are appealable orders.[345]

As regards interlocutory order falling under class (b), there has been a conflict of opinion whether they were subject to revision. The conflict turned mainly on the word "case" and the word "may" in the section. The point under question was if the word "case" includes an issue or

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342. *The Central Warehousing Corp v Varghese K Pulayath*, AIR 1997 Ker 253.
343. *Branch Manager, Oriental Insurance Co Ltd v Ram Babu*, AIR 2006 (NOC) 1343 (All) : 2006 AIHC 2227.
344. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : 2003 (6) SCC 659.
345. *Narendra v Rakhaldas*, AIR 1925 Cal 510 : (1925) 41 Cal LJ 286.

part of a case. If it did not, the passing of an interlocutory order was not deciding a "case" and therefore, not capable of revision. Some high courts held that the word "case" included part of a case and some others that it did not.

The other part on which the conflict arose was that even if the word "case" included interlocutory orders and, then, the high court could revise such orders. It was not bound to do so as the section by using the word "may" gave discretionary power. The question which arose was, and on this point there was another divergence of opinion, in which cases was it proper for the court in the exercise of its discretion to revise interlocutory orders? To appreciate the different views on the subject, it is necessary to bear in mind that though an interlocutory order may not be appealable under section 104, it may be challenged in the appeal from the final order under section 105, provided the order is one "affecting the decision of the case". Again, there are some interlocutory orders from which an injured party has a right of suit to set aside the order as stated in the note below, "Alternative remedy by way of suit or otherwise". Some cases have held that if a party aggrieved by an interlocutory order has an alternative remedy of challenging that order in an appeal from the final decree under section 105, or if he has the alternative remedy by way of suit, the high court should not in the exercise of its discretion interfere in revision with such order, the power of revision being exercisable only where there is no other remedy. For instance, no appeal lies from an order of a district court made on appeal granting a temporary injunction (section 104(2)). Further, any error in such order cannot be objected to in an appeal from the final decree, as it cannot possibly affect the decision of the case within the meaning of section 105 nor does a suit lie to set aside such an order. The high court, may, therefore, interfere in revision with the order.[346] Similarly, where a court asks a plaintiff to pay additional court fee before his suit can be entertained, the high court may interfere in revision as the order in effect amounts to a denial of jurisdiction.[347] The question posed in a large majority of cases was, why should the discretion of the high court be fettered with such a hard and fast rule and why should the high court refuse to interfere in every case merely because the injured party has another remedy open to him even if its non-interference might lead to failure of justice or irreparable injury? This last consideration weighed with many judges and it has accordingly been held in some cases that the high court may in a proper case interfere in revision even if there is another remedy open to the aggrieved party. Effectively, revision over jurisdiction of the subordinate courts and its scope is almost similar to the power of court under Articles 226 and 227. A division bench of Allahabad High Court held that an order refusing to allow a partner of the defendant's firm to cross-examine was a "case" decided and, therefore, subject to revision.[348] However, where the application for cross examination is moved at a belated stage with a sole object to avoid early disposal of an injunction matter, the interference of the high court in revision is not called for.[349] An order declining the request of the petitioner to produce additional evidence when the main suit is yet to be decided is not revisable in view of proviso (a) of section 115.[350] The final decision of the court to permit or not to permit the secondary

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346. *Bai Atrani v Deepsing*, (1916) ILR 40 Bom 86; *Urban Improvement Trust v Sohni Devi*, AIR 1996 Raj 73; *Badiur Rahaman v Mokram Ali*, AIR 1932 Cal 687; *Chellappan v KP Varughese*, AIR 1964 Ker 23; *Surjit Singh v Ram Ratan Sharma*, AIR 1975 Gau 15.
347. *Ramrup Das v Mohunt*, (1910) 14 Cal WN 932; *Mani Lal v Durga Prasad*, AIR 1923 Pat 673 : (1924) 3 Pat 930 : 80 IC 667; *Kulandaivelu v Ramaswami*, AIR 1928 Mad 416 : (1928) 51 Mad 664.
348. *Purshotam v Henley's Telegraph Works*, AIR 1933 All 523 : (1933) 55 All 719.
349. *Rajib Barooah v Hemendra Prasad Barooah*, AIR 1994 Gau 52.
350. *Surjan Singh v Paras Ram*, AIR 1995 P&H 120.

evidence, if it is based on erroneous consideration of admissibility of primary evidence, will be an illegality and irregularity in the manner of exercise of its jurisdiction. In such cases, it will be open to the court to exercise power under section 115 of the CPC.[351]

The Allahabad High Court held the view at one time that an interlocutory order was not subject to revision.[352] A full bench of the same high court has since, then, held that though no revision lay from orders disallowing amendment of pleadings, since they are discretionary. However, an independent proceeding arising out of a case such as one to restore a case dismissed for default, or to set aside an *ex parte* decree, or where the amendment comes under some other order of the court, for example, the addition or substitution of parties, or the striking out of a pleading may be a "case decided" and subject to a revision.[353] The view of maintainability of a revision against the order passed under O VI, rule 17 is settled by the Honourable Supreme Court which held that the high court's interference with an exercise of discretion by the trial court in disposal of an application under O VI, rule 17 must be confined to exceptional cases.[354] The order by which the amendment was allowed could not be said to have finally disposed of the case and, therefore, it would not come under clause (a). From the facts it would appear that appellants only wanted to bring to the notice of the court the subsequent facts and after amendment of the plaint, respondent would get opportunity to file written statement and he would be able to raise all this defence. Ultimately if the suit is decided against the respondent he would have a chance to take up these points before the appellate court. It cannot be conceived of a situation that the proposed amendment if allowed would cause irreparable injury or failure of justice as the remedy of the respondent as stated above, is by way of an appeal; therefore, the view that the order allowing the amendment would not come under clause (b).[355] Unless, there is an error in exercise of jurisdiction by the trial court in disposal of an application for amendment, the high court cannot interfere with the order in exercise of its revisional jurisdiction.[356] An order under section 10 of the Code staying or declining to stay the trial of the suit[357] and an order striking out the defence for non-payment of costs[358] have been held to be "cases decided". An order on the question of valuation of suit properties and the court fees payable thereon is, however, excluded.[359] The Hyderabad High Court has held that only those orders made in a pending action are revisable which are not open to appeal either directly or indirectly and are made in a proceeding which can be regarded as independent of the suit.[360] The Chief Court of Oudh has held that revision of an interlocutory order is not competent.[361]

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351. *Kundan Mal v Nand Kishore*, AIR 1994 Raj 1.
352. *Harsaran v Muhammad*, (1882) 4 All 91; *Chattar Singh v Lakhraj*, (1883) 5 All 293; *Farid v Dulari*, (1884) 6 All 233; *Dhandei v Chotu Lal*, (1917) 39 All 354; *Budhoo Lal v Mewa Ram*, AIR 1921 All 1 : (1921) 43 All 564 : 63 IC 15 (FB); overruling *Bhargava & Co v Jagnnath*, (1919) 41 All 602; *Chhakhan Lal v Kanhaiya Lal*, AIR 1923 All 218 : (1923) 5 All 218; *Equitable Trust Co v Hafiz Mohomed*, AIR 1928 All 97 : (1928) 50 All 276; *Dilsukhrai v Dwarkadas*, AIR 1935 All 353 : (1933) 55 All 169.
353. *Suraj Pali v Ariji Pretinidi*, AIR 1936 All 686 : (1936) All LJ 923; *Madan Chandra Bhuyan v Assn of Scientific and Technical Officers, ONGC*, AIR 1994 Gau 36.
354. *Ratlam Electric Supply & Weaving Co v Madhya Pradesh Electricity Board, Jabalpur*, (1980) Supp SCC 598.
355. *Prem Bakshi v Dharam Dev*, AIR 2002 SC 559 : 2002 (2) SCC 2.
356. *Panchdeo Narain Srivastava v Jyoti Sahay*, (1984) SCC Supp 594; *Heera Lal v Kalyan Mal*, (1998) 1 SCC 278.
357. *Ramrichpal Singh v Dayanand Sarit*, AIR 1955 All 309 : (1955) 1 All 295 : (1955) All LJ 167.
358. *Parasram v Noor Jehan*, AIR 1958 All 330.
359. *Abdul Ghani v Vishunath*, AIR 1957 All 337 : (1956) 2 All 765 : (1957) All LJ 105; *Kanahialal v Ramkishan*, AIR 1957 All 339.
360. *Molagu Paniah v Molagu Ramanahan*, AIR 1954 Hyd 66.
361. *Paras Nath v Ram Bahadur*, AIR 1936 Oudh 22.

The High Courts of Bombay,[362] Calcutta,[363] Madras,[364] Patna,[365] Nagpur,[366] Orissa,[367] Rangoon,[368] Andhra Pradesh,[369] Assam,[370] Gujarat,[371] Kerala,[372] Madhya Pradesh,[373] the chief court[374] took a contrary view and held that the word "case" was wide enough to include an interlocutory order, and that the words "record of any case" include so much of the proceedings in any case as relate to an interlocutory order. It held that the high court, therefore, has the power to interfere in revision with the orders passed at any stage of a suit, though there may be another remedy open to the injured party, for example, by making the order a ground of appeal from the final decree under section 105, subject, however, to this limitation that the high court will not interfere unless its non-interference might lead to failure of justice or irreparable injury. That is also the view taken by the other courts in the undermentioned cases.[375] Following this principle, the High Court of Calcutta set aside an order of the subordinate court framing additional issues on the ground that their trial would entail an expenditure of time and money disproportionate to the matter in dispute and cause irreparable injury to the plaintiff.[376] A finding on a preliminary issue as to jurisdiction is revisable,[377] so also a finding as to the maintainability of an appeal.[378] In another case, where the question was whether an election petition was maintainable at all, and the lower court held that it was, the Madras High Court set aside the order in revision and dismissed the petition. The court observed that if the petition did not disclose any ground for an enquiry, the lower court would by holding the inquiry exercise a jurisdiction not vested in it by law.[379] An order holding that

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362. *SSC Exam Board v Pratibha G Deshmukh*, AIR 1965 Bom 28 : 66 Bom LR 569.
363. *Dhapi v Ram Pershad*, (1887) 14 Cal 768; *Gobinda v Kunja*, (1909) 14 WN 147; *Amjad Ali v Ali Hussain*, (1910) 15 Cal WN 353; *Yatindra Nath v Hari*, (1914) 20 Cal LJ 426; *Sivaprasad v Tricomdas*, (1915) 42 Cal 926; *Sarajudbala v Mohini*, AIR 1925 Cal 204 : (1924) 28 Cal WN 991; *Rajani v Rajabala*, AIR 1925 Cal 320 : (1924) 52 Cal 128; but see *Salam Chand v Bhagwan Das*, AIR 1926 Cal 1149 : (1926) 53 Cal 767.
364. *Kariya v Tirukkaivelu*, AIR 1925 Mad 707 : (1925) 48 Mad LJ 451; *Shiv Krishna Doss v Chandook Chand*, (1909) 32 Mad 334; *Sri Poosapathi v Sri Rajah*, (1915) 29 Mad LJ 53; *Re Nizam of Hyderabad*, (1886) 9 Mad 256.
365. *Nauratan v Wilford*, (1919) 4 Pat LJ 191; *Bankery v Ram Bahadur*, (1919) 4 Pat LJ 195; *Mani Lal v Durga Prasad*, AIR 1924 Pat 673 : (1924) 3 Pat 930.
366. *Liladhar v Firm Radha Kishan*, AIR 1946 Nag 5.
367. *Chandra Kishore Das v Babulal Agarwala*, AIR 1949 Ori 77 : (1949) 1 Cut 105.
368. *Jupiter General Insurance Co Ltd v Abdul Aziz*, AIR 1924 Rang 2 : (1923) 1 Rang 231; *LPR Chettyar Firm v RK Banerji*, AIR 1931 Rang 136 : (1931) 9 Rang 71; *Mohomed Chootoo v Abdul Hamid*, AIR 1933 Rang 49 : (1933) 11 Rang 36; *KPLSS Chettyar v Official Receiver*, AIR 1935 Rang 466 : (1935) 13 Rang 595.
369. *Srirama Sastry v Lakshmidevamma*, AIR 1957 AP 60; *Appanna v Subbarayulu*, AIR 1957 AP 530; *Lakshmayya v Suryanarayana*, AIR 1958 AP 254; *K Vasudeva Reddy v Venkata Reddy*, AIR 1963 AP 232.
370. *Ka Or Shabong v Ka Lasubon Shabong*, AIR 1950 Assam 214 : (1950) ILR Assam 140; *Haran Chandra v Krishna Kanta*, AIR 1955 Assam 61 : (1954) Assam 548; *Mahindra v Paresh*, AIR 1971 Assam & Nag 127.
371. *Shantilal Chunilal v Shantilal Fulchand*, AIR 1963 Guj 195; *Bai Chanchal v Bai Saraj*, AIR 1963 Guj 782 : AIR 1968 Guj 236.
372. *Chattanatha Karayalar v Central Bank of*, AIR 1955 TC 201; *Rajalekshmi v Kunji Pillai*, AIR 1959 Ker 227.
373. *Rikhiram Bhagwandas v Ramlal*, AIR 1961 MP 169; *Ramprasad Ramnarayan v Harischandra Dwarkadas*, AIR 1953 MB 50.
374. *Ambika Prasad v Jagadamba*, AIR 1945 Cal 289 : (1945) 320 Luck 488; contra *Prithvinath v Lala Bagirath Tandone*, AIR 1942 Cal 208.
375. *Devi Ram v Murli*, AIR 1953 HP 89; *Mohd Maqbul v Kadir Munjagrod*, AIR 1954 J&K 26; *Trilok Singh v Ganpatlal*, AIR 1956 Ajmer 20; *Mina Ram v Amolak Ram*, AIR 1966 HP 4.
376. *Sarajubala v Mohini*, AIR 1925 Cal 204 : (1924) 28 Cal WN 991; *Salam Chand v Bhagwan Das*, AIR 1926 Cal 1149 : (1926) 53 Cal 767.
377. *Manash Ranjan v Tropical Accumulators Ltd*, AIR 1957 Cal 1356; *Appanna v Subbarayulu*, AIR 1957 AP 350; *Prem Das v Govind Sahai*, (1952) Raj LW 114.
378. *Ashalata Mitra v AD Viz*, AIR 1956 Cal 311 : 60 Cal WN 574.
379. *Janarchanan v Verghese*, AIR 1925 Mad 707 : (1925) 48 Mad LJ 451.

a document was insufficiently stamped and impounding it under section 38 of the Stamp Act, 1899 amounts to a decision of a case.[380] An order refusing an application to bring on record the legal representatives of a deceased defendant under O XXII, rule 4 is open to revision.[381]

In *Shiva Nathuji v Joma*,[382] a full bench held that though the high court will not ordinarily interfere in revision where the aggrieved party has another remedy, it will interfere if that remedy is manifestly ineffectual and non-interference would result in a defeat of law and a grave injury to the aggrieved party. Later, a division bench in *Motilal v Nana*,[383] held that the high court should not, in its discretion, interfere with interlocutory orders except where the injured party has no other remedy. No reference was made in the judgment to *Shiva Nathuji*'s case. The decision in *Motilal v Nana* was disapproved in *Secretary of State v Narsibhai*,[384] where following *Shiva Nathuji*'s case, it was observed that the section did not make the absence of another remedy a necessary condition to inapplicability. Subsequently, another division bench distinguished *Secretary of State v Narsibhai*, stating that it involved a question of jurisdiction and observed that the overwhelming balance of authority supported the view that a finding of an interlocutory matter followed by an order is not a "case decided". It also stated that the high court cannot interfere in a case where the aggrieved party has another remedy by way of appeal.[385] This view was again dissented from another case, where the court remarked that this case went too far and followed *Narsibhai*'s case.[386] In *Ganesh Lakshman v Prem Chand* case[387] an order refusing to require the judgment-debtor to furnish security before granting stay was set aside alongwith an order framing an additional issue on the condition that the defendant deposit costs.[388]

The Patna High Court has held that an order of the small cause court returning the plaint for presentation to the proper court[389] and an order refusing to stay a suit under section 10 of the Code[390] are revisable. The same view has been held by Punjab,[391] Andhra Pradesh,[392] Nagpur,[393] and Orissa,[394] High Courts.

On the other hand, the Andhra High Court has set aside an order refusing to examine a witness.[395] In another case, the order appointing a hand writing expert as a commissioner for comparing disputed signature of executant of gift deed with that of his admitted signatures was held to be outside revision.[396] The high court, in a revision at the interim stage, is not justified in interfering with the appellate court's order granting additional evidence by way of

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380. *Rangaraju v Kamesan*, AIR 1953 Mad 698 : (1953) 1 Mad LJ 498 : 66 LW 461; *Devasikhamani v Andamuthu*, (1955) 1 Mad LJ 457 : 68 LW 146; *Santha Kumari v Suseela Devi*, AIR 1961 AP 424.
381. *Rajappa v Andalammal*, AIR 1957 Mad 236.
382. *Shiva Nathuji v Joma*, (1883) ILR 7 Bom 341 (FB); *Vithal v Balkrishna*, (1886) ILR 10 Bom 610 (FB); *Somchand v Chhaganlal*, (1911) ILR 35 Bom 243.
383. *Motilal v Nana*, (1894) ILR 18 Bom 35; *Irbasappa v Basangowda*, (1920) ILR 44 Bom 595; *Bai Rami v Jaga*, (1920) ILR 44 Bom 619.
384. *Secretary of State v Narsibhai*, AIR 1924 Bom 65 : (1924) ILR 48 Bom 43.
385. *Sennaji v Pannaji*, AIR 1932 Bom 81 : (1931) 33 Bom LR 1596.
386. *Jamnadas v Chandulal*, AIR 1937 Bom 167 : (1937) 29 Bom LR 138.
387. *Ganesh Lakshman v Prem Chand*, AIR 1956 Bom 249.
388. *Bhaskar v Narayandas*, AIR 1956 Bom 608.
389. *Patna Municipal Corp v Brij Raj Krishna*, AIR 1958 Pat 22.
390. *Dayanand Modi v UOI*, AIR 1952 Pat 373.
391. *Raj Spinning Mills v AG King Ltd*, AIR 1954 P&H 113.
392. *Appala Naidu v R Chinnam Naidu*, AIR 1963 AP 14 : (1962) 2 Andh WR 257.
393. *Chandrani Bahoo v Hukum Chand*, AIR 1953 Nag 37.
394. *Balakrishna v Mahtab*, AIR 1954 Ori 191.
395. *Lakshmayya v Suryanarayana*, AIR 1958 AP 254 : (1957) 2 Andh WR 242 : (1957) Andh LT 582.
396. *C Gargaiah v Deity Sri Shani Mahatma*, AIR 1995 Kant 287.

examination of hand writing expert, when the appeal is pending for the final hearing before the appellate court.[397]

The revisional court has the power to a grant relief in view of subsequent change of circumstances during the pendency of a revision petition.[398] The Punjab High Court has held that an order deciding the question of privilege under section 123 of the Indian Evidence Act, 1872 is revisable.[399] The Punjab High Court has, however, observed that an opinion given by the court under section 13(b) of the Arbitration Act, 1940 (replaced by Arbitration and Conciliation Act, 1996) is not a "case decided", it being purely advisory in character.[400] In another case, the Gujarat High Court set aside an order consolidating the trial of two suits.[401] The grant of leave to defend under O XXXVII of the CPC, on the acceptance of the offer of the plaintiff, if the defendant is ready to furnish bank guarantee is not considered a revisable order.[402] On the failure of the authorities to show that the injunction restraining the authorities from demolishing illegal constructions, would occasion failure of justice or it could cause irreparable injury to authority, the revision against the order is not maintainable.[403] Merely allowing a party to produce a document may not result in violation of justice sufficient enough to invite the mischief of section 115, as the real justice will be meted out when the document is received in evidence in accordance with the provision of the Indian Evidence Act, 1872.[404] Where the order of consolidation is passed under section 151 of the CPC, such an order is not appealable, hence, revision is maintainable against such order.[405]

In *Chappila v Chemmaran*,[406] the facts were that during the pendency in the district court of an appeal against a decree in a partition suit, the appellant who was one of the plaintiffs applied to withdraw the same. The respondents who were co-plaintiffs in the suit, then, applied to transpose themselves as appellants. That application was dismissed and it was followed by an order dismissing the appeal. A revision was then preferred to the high court against the order refusing transposition. Regarding, question of whether the revision was maintainable in view of the order dismissing the appeal, it was held by the High Court of Kerala, on the analogy of an appeal against a preliminary decree after the passing of a final decree, that it was competent. In *Pathak Sharma v Renuka Debi,*[407] it was held that an order passed before the commencement of proceedings could not be said to be an interlocutory order and that such an order could not be collaterally challenged in a revision petition against a subsequent order.

[s 115.34] Sub-section (1) Proviso — Present Position with Effect from 1 July 2002

Before examining the scope of revisions after the amendment and its effect on pending proceedings, it becomes necessary to consider the background behind this amendment. statement of objects and reasons and also the notes on clauses, under which this section has

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397. *Gurdev Singh v Mehnga Ram*, (1997) 6 SCC 507.
398. *Sanjoy Mitra v Bhupendra Nath Bhattacharjee*, AIR 1994 Gau 31.
399. *Sodhi Sukhdev v State of Punjab*, AIR 1960 P&H 407.
400. *UOI v Ram Sukh Das*, AIR 1959 P&H 61.
401. *Bhopo Fakirbhai v Bai Mani*, AIR 1961 Guj 92.
402. *Durjan Lal v State Bank of Bikaner and Jaipur*, AIR 1994 Raj 246.
403. *Urban Improvement Trust, Jodhpur v Sohni Devi*, AIR 1996 Raj 73.
404. *Kancherla Savadha Devi v Saripella Sivaramaraju*, AIR 1995 AP 291; *Gopal v Hira Chand*, AIR 1994 Raj 110.
405. *Zakinaben v Babubhai Alimohmad Kapadia*, AIR 1999 Guj 118.
406. *Chappila v Chemmaran*, AIR 1961 Ker 200; but see *Srilal v Irving*, AIR 1951 Cal 506; *Venkatanarasimha v Gangamma*, AIR 1954 Mad 258 : (1952) 2 Mad LJ 31.
407. *Pathak Sharma v Renuka Debi*, AIR 1959 Cal 613.

been amended by Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999). It is clear that this amendment has been brought on the basis of the report of Malimath Committee. The Committee had agreed in principle that scope of interference against interlocutory orders should be restricted and it was felt that this object can be achieved more effectively without demanding the high court of the power of revision and with a view to achieve the object, section 115 has been suitably amended with a view to expedite the disposal of civil suits and proceedings so that justice may not be delayed, which appears to be paramount object behind this amendment. Therefore, in the light of the aforesaid object, the language of the amended proviso is extremely clear, according to which, the high court shall not, under this section, vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.[408]

The effect of the same is that it has narrowed down and reduced the scope of civil revisions. Therefore, no orders can be passed even in pending civil revisions varying or reversing any order made, or any order deciding an issue in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Therefore, revision would only lie against such interlocutory orders which would finally dispose of the suit or other proceedings and no revision would lie against any other interlocutory orders which would not finally dispose of the suit or other proceedings, and no orders can be passed in pending cases in which other interlocutory orders are under challenge. Thus, rightly so, the scope of revision has been restricted by legislature by substituting proviso by amendment in the principal section 115 of the CPC by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), with effect from 1 July 2002.[409]

A plain reading of section 115 as it stands makes it clear that the stress is on the question of whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes", then the revision is maintainable. But on the contrary, if the answer is "no", then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under section 115. There is marked distinction in language of section 97(3) of the old Amendment Act, 1976 and section 32(2)(i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force, such an intent is significantly absent in section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation.[410]

The revision petition before the high court is wholly incompetent in view of the amended provision of section 115 of the CPC, if the revision petition was entertained at a stage of an interlocutory proceedings.[411] An order interim in nature or which does not finally decide the lis, cannot be challenged by way of a revision under section 115.[412]

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408. *Phool Singh v Mavla*, AIR 2002 MP 246.
409. *Phool Singh v Mavla*, AIR 2002 MP 246.
410. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : AIR 2003 SCW 2445 : 2003 (6) SCC 659. See also *Rajendra Singh v Brij Mohan Agarwal*, AIR 2003 All 180.
411. *Gayatri Devi v Shashi Pal Singh*, AIR 2005 SC 2342 : 2005 (5) SCC 527.
412. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : AIR 2003 SCW 2445 : (2003) 6 SCC 659.

Where Supreme Court carefully examined various provisions of CPC and found that no provision is available to the appellant to file an appeal against the order made by the trial court on an application filed under section 151, CPC, therefore, revision against dismissal of application made under section 151 is maintainable.[413]

According to this proviso, therefore, the order cannot be varied or reversed in the exercise of powers under section 115, CPC, for the reason that had the order been made in the favour of the revisionist it would not have finally disposed of the suits.[414]

Before the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), clauses (a) and (b) of proviso to sub-section (1) of section 115 of CPC were invoked for filing a revision before the high court. Thus, a party approaching the high court under section 115 by way of a revision has to necessarily satisfy the requirements specified thereunder. However, after the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) the position is changed. Clause (b) of sub-section (1) has been totally withdrawn. With the result, the only ground available for approaching the high court under section 115 is clause (a) of sub-section (1) *viz*, "if the order has been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings". The effect of the provisions under section 115 of CPC after amendment is that a revision petition is maintainable only if the impugned order has got the effect of disposing of the suit or proceedings finally. In all other cases where if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable.[415]

After 1 July 2002, the legislative intent to prohibit such interference in revision is made abundantly clear by the Amendment Act and the provisions of the section. It will be seen that by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), the proviso to section 115(1) was substituted. Clause (b) of the proviso was deleted. Section 115(2) was maintained and clause (3) was added to section 115. As long as the clause (b) of proviso existed on the statute book, it was possible for the high court to interfere in its revisional jurisdiction even if the order is of interim or interlocutory nature provided if such order is allowed to stand, it would result in failure of justice or irreparable loss. Conscious deletion of this provision by the legislature is, therefore, a positive indication of the intent of the legislature that even if the interlocutory order if allowed to stand caused failure of justice or irreparable loss, it should not be interfered with because it is of interim nature and parties can always be relegated to their rights by the appropriate final adjudication of the lis between the parties which will be decided only when the suit from which this arises is decided. That being the clear intent of the legislature, to severely restrict the scope of revisional powers of the high court, to interpret the proviso in a manner which will require reading into that proviso the contents of clause (b) which was definitely and positively eliminated by the legislature by restructuring the proviso, is impermissible in law. It will have, therefore, to be held that the revision application against orders under O XXXIX, rule 1, whether passed by the trial court or in appeal by the appellate authority under O XLIII, rule 1, are not liable to be revised under section 115, CPC, after 1 July 2002.[416]

The reading of the present provisions of section 115 of the CPC is that with effect from 1 July 2002, when the amended provisions have come into force, the revisional jurisdiction of the high court has been materially restricted. In order to invoke the revisional jurisdiction

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413. *Shipping Corp of India Ltd v Machado Brothers*, AIR 2004 SC 2093 : 2004 (11) SCC 168.
414. *Debi Das v State of Uttar Pradesh*, AIR 2003 All 14.
415. *Sultan-Ul-Uloom Educational Society v Mis Shahmat Ali Khan*, AIR 2003 AP 364.
416. *Nagorao v Narayan N Yerawar*, AIR 2003 Bom 178.

of the high court, the party concerned is not only to satisfy the high court that by the order impugned subordinate court exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it by law or acted in the exercise of its jurisdiction illegally or with material irregularity, but, also, to satisfy the high court that if the order had been made in his favour that would have finally disposed of the suit or other proceeding. It is not meant to be suggested for a moment that the interlocutory orders or orders passed in supplemental proceedings cannot be challenged under present section 115 of the CPC. The section does not make any differentiation between the classes of orders, which can be challenged. It only provides that for invoking the revisional jurisdiction of the high court, the petitioner must satisfy the requirements of the proviso to section 115. The legislature in its wisdom introduced amendments for imposing restrictions on the powers of revision by the high court. In view of deletion of clause (b) from the proviso, which was introduced by 1976 Amendment, the revisional power can be exercised by the high court only when the order impugned, if had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding. By the proposed amendment, the legislature suggested that no revision would lie against such orders, which do not finally decide the lis. The high court can, therefore, revise any order of any court subordinate to it when it appears to the high court that the said court has exceeded jurisdiction vested in it by law or refused to exercise a jurisdiction vested in it by law or acted illegally and with material irregularity in the exercise of the jurisdiction, but in invoking the revisional jurisdiction it is incumbent, as required by the proviso, that the impugned order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding. The legislature consciously deleted the power of the high court to interfere with any kind of order, which, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

In exercising the revisional power, the high court cannot ignore the proviso to the main section. The proviso will prevail as it speaks the last intention of the makers. Moreover, the Supreme Court in the case of *Prem Bakshi v Dharam Dev*,[417] while considering the power of the high court under section 115 of the CPC as it stood prior to amendment of 1999, observed as under:

> The proviso to sub-sections (1) and (2) with Explanation was added by the amending Act of 1976. By this amendment the power of the High Court was curtailed; the intention of the legislature being that the High Court should not interfere with each and every interlocutory order passed by the trial court so that the trial of a suit could proceed speedily and that only the interlocutory order coming under clause (a) or (b) of the proviso would be entertained by the High Court.

Therefore, it can never be suggested that the high court can interfere with each and every order passed by a court subordinate to it only if the requirements of sub-section (1) of section 115 are satisfied or for ends of justice or to prevent abuse of the process of the court can refuse to look into the proviso to said sub-section (1). The amendment was introduced by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) to restrict the power of revision only in respect of cases where the order would have finally disposed of the suit or the proceeding if it had been made in favour of the party applying for revision.[418]

Order rejecting application under O XXVI, rule 9, read with section 151 for appointment of approved values to fix valuation of plant and machinery is not revisable. In view of the

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417. *Prem Bakshi v Dharam Dev,* AIR 2002 SC 559 : (2002) 2 SCC 2.
418. *Mrityunjay Sen v Sikha Sen*, AIR 2003 Cal 165. See also *KR Subbaraju v Vasavi Trading Co.* AIR 2002 Kant 407.

provisions of section 115, CPC, and considering the fact that the impugned order rejecting the application has not disposed of the suit or the proceeding and hence the revision does not lie.[419]

In the past, i.e., before the Code Of Civil Procedure (Amendment) Act, 2002, (Act No. 22 of 2002), came into force, an order which suffered from jurisdictional error, could have been interfered with by the high court in exercise of its revisional jurisdiction under section 115 if the order under challenge was likely to cause failure of justice or irreparable loss or injury to the party approaching the revisional court, but with clause (b) of the proviso to section 115(1) having been deleted under the new Act, the implication is that even if an order suffers from jurisdictional error or causes failure of justice or irreparable injury to the party approaching the court, the order will not be interfered with in revision unless the order, which is sought to get revised, is such that had the order been made in favour of the party applying for revision, it would have terminated the suit or the proceeding.

It is of immense importance to note that a careful reading of the proviso to section 115(1) will show that this proviso applies in the case of orders, which are interlocutory in nature and not final orders concluding the proceeding or determining the suit. If during the course of progress of a suit or proceeding, an order is made, which suffers from jurisdictional error, the party aggrieved may apply under section 115(1) for revision, but such an order will not be interfered with in revision, even if the same is ex facie without jurisdiction, unless the order is such, which would have, if the order had been made in favour of the party applying for revision, finally disposed of the suit or the proceeding. If the order is such, which even if interfered with, will not terminate the progress of the suit or of the proceeding, the order will not be interfered with. It, therefore, logically follows that a final order, which disposes of the suit or the proceeding, cannot fall within the ambit of the proviso to section 115(1). To a final order, the limitations imposed by the proviso to section 115(1) on the revisional exercise of powers will not apply.

Thus, the proviso to section 115(1) will apply to interlocutory orders alone. In *Prem Bakshi's* case,[420] the Supreme Court has observed thus:

> Under Clause (a), the High Court would be justified in interfering with an order of a subordinate court if the said order finally disposes of the suit or the proceeding. By way of illustration, we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed with the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable.[421]
>
> If on the facts and circumstances of the case, it cannot be said that the application made by the present applicant in revision, had it been granted by the trial court, would have disposed of the suit. Under the circumstances, it must be found that High Court cannot "vary or reverse any order made, or any order deciding an issue".

It necessarily follows that the present revision is not maintainable and/or incompetent.[422]

Admitted facts reveal of a suit between an Indian citizen and United States company based in California. Request to record the evidence either by way of commissioner or audio-video link was sought for and the same had been rejected. There was a time schedule in the case on hand. If these witnesses were not examined in time, though an order would be passed by the learned judge, it would virtually amount to a disposal of the suit without evidence. It also

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419. *Ashok Paper Mills Ltd v Sanghi Textiles Ltd.* AIR 2004 Gau 162. See also *Mohan Lal Gupta v Chairman Nagar Palika, Kaithoon*, AIR 2003 Raj 187.
420. *Prem Bakshi v Dharam Dev*, AIR 2002 SC 559 : 2002 (2) SCC 2.
421. *Motiur Rahman v Achia Khatoon*, AIR 2003 Gau 103.
422. *Mahendrabhai Majatlal Patel v Mahipatji Shivaji Thakor*, AIR 2003 Guj 196.

would result in finally disposing of the proceedings itself. Interest of justice requires that a very narrow interpretation is not to be placed on the proviso and the order is to be understood in the light of its effect resulting in virtual final disposal of the suit itself. If a party is not permitted to lead evidence in terms of an order of court, nothing survives, except factually deciding the suit itself without the support of evidence. Therefore, this order would almost result in virtual final disposal of the suit itself and hence notwithstanding section 115(1) proviso, the matter requires the high court's interference. The Supreme Court also ruled that if an order under rule suffers from any specific injustice, courts have to step in to render justice to the parties.[423]

The Supreme Court has considered the scope of section 115 as under:

> The proviso to sub-section (1) of Section 115 puts a restriction on the powers of the High Court inasmuch as the High Court shall not, under this section vary or reverse any order made or any order deciding a issue, in course of a suit or other proceedings except where (i) the order made would have finally disposed of the suit or other proceedings or (ii) the said order would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Under clause (a), the High Court would be justified in interfering with an order of a subordinate court if the said order finally disposed of the suit or other proceedings. By way of illustration we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable. The order in question by which the amendment was allowed could not be said to have finally disposed of the case and, therefore, it would not come under clause (a). Now the question is whether the order in question has caused failure of justice or irreparable injury to respondent no 1. It is almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. Perhaps the converse is possible, i.e., refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. After all amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Hence, we cannot envisage a situation where amendment of pleadings, whatever be the nature of such amendment, would even remotely cause failure of justice or irreparable injury to any party. From the facts extracted above, it would show that appellants only wanted to bring to the notice of the court the subsequent facts and after amendment of the plaint, respondent no 1 would get opportunity to file written statement and he would be able to raise all his defence. Ultimately if the suit is decided against the respondent no 1, he would have a chance to take up these points before the appellate court. It cannot be conceived of a situation that the proposed amendment if allowed would cause irreparable injury or failure of justice as the remedy of the respondent no 1, as stated above, is by way of an appeal. We are, therefore, of the view that the order allowing the amendment would not come under clause (b).[424]

No revision would lie unless the order sought to be revised, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Borrowing terminology from the precedents laid down under section 397(2) of the Code of Criminal Procedure, 1973, not only interlocutory orders but also intermediate orders are not amenable to revisional correction under the amended section 115 of the CPC. All available indications compellingly point to that conclusion that only final orders sensu stricto will be revisable.

The contention that the words "other proceedings" appearing twice in the amended proviso to section 115(1) in the expression "suit or other proceedings" must be expanded to include interlocutory proceedings also, cannot be accepted and would hence be revisable.

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423. *TC Fox Film Corps v NRJ Film Production Associates, Pvt Ltd,* AIR 2003 Kant 148. See also *Prem Bakshi v Dharam Dev,* AIR 2002 SC 559 : 2002 (2) SCC 2.
424. *Prem Bakshi v Dharam Dev,* AIR 2002 SC 559 : 2002 (2) SCC 2; see also *TC Fox film Corps v NRJ Film Production Associates Pvt Ltd,* AIR 2003 Kant 148.

Such introduction of the words "interlocutory" in front of the word "proceeding" in the proviso would defeat the very purpose of the proviso. If such a construction were accepted, it would be impossible to locate any order to which the bar under the proviso would apply. That contention is nothing but civil.

The argument that the expression "any case which has been decided" appearing in section 115 (1), as clarified in the Explanation of section 115, and as explained in some binding and persuasive precedents, must persuade the high court to water down the apparent rigour of the amended proviso to section 115 (1), cannot obviously be accepted. The prohibition in the amended proviso does not permit this court to accept such a course. The width and the amplitude of the expression "any case which has been decided" must be appreciated and understood in the light of the very specific prohibition introduced by the amended proviso.

It follows from the above discussions that an order will not be revisable under the amended section 115 unless such order if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings in which such order is passed. The plain reading of the amended statutory provision cannot lead to any other conclusion. The circumstances under which the amendment is brought about cannot also persuade the high court to take any other view.[425]

[s 115.35] Sub-section (1) — Proviso — Pending Matters

Provisions of sub-section (2) of section 32 with its sub-clause (i), the repeal and savings clause, makes it clearer as it starts from a clause which prevails over other clauses, "Notwithstanding and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897" and under sub-clause (i) it has only saved the revision which had been finally disposed of. These provisions of repeal and savings of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) have already taken care of the provisions of General Clauses Act, 1897. In fact, there is no provision in this amendment in favour of pending proceedings. Therefore, it is clear that there is no substance in the submissions made in this regard, that section 6 would save the pending cases. Thus, from the plain and combined reading of this substituted "proviso" and the provisions of repeal and savings of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), it has only saved the finally disposed of revisions and not the pending revisions, therefore, it is clear that revisional power can only be exercised in accordance with the provisions of law in force at the time when the power is sought to be exercised and when the high court shall vary or reverse any order made. The legislature has clearly intended to limit the jurisdiction of the high court in exercising the powers under revision and those can only be exercised in cases where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings otherwise not. Therefore, the clear meaning is that no revision would be maintainable against any interlocutory order if it would not have the effect of finally disposing of the suit or other proceedings.

In view of the aforesaid discussion, it is clear is that in the presence of repeal and savings clause (i) of sub-section (2) of section 32 of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), and also according to the full bench decision,[426] the substituted "proviso" of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) is very clear

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425. *Madhavan v Narayana Das*, AIR 2003 Ker 103.
426. *Ramchandra Jagannath v Dattatraya Shankarrao*, AIR 1986 MP 191 (FB), 1986 MPLJ 406.

and the effect of the same is that it will not save those pending civil revisions which would be outside the scope of amended proviso.[427]

Clause (i) of sub-section (2) of section 32 of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) is very specific in its intendment, according to which, the amended provisions will not apply only to revision petitions which have already been disposed of. This by necessary implication, means that the amended provisions touching upon the jurisdiction of this court will have its full application to all such revision petitions which are pending before high court irrespective of its stage.[428]

It is very evident from the language of section 32(i) of the Amendment Act that the amendment shall apply to and affect all proceedings for revision which had not been finally disposed of before 1 July 2002. These revisions belong to that category of revision petitions which have not been finally disposed of prior to the date of the amendment (1 July 2002). The language of section 32(i) makes it crystal clear beyond controversy that the amended section 115 of the CPC will apply to pending proceedings for revision which have not been finally disposed of prior to 1 July 2002.[429]

[s 115.36] Sub-section (1) — Proviso — Orissa Amendment Act of 1999 and Article 254

It should be borne in mind that the Orissa Amendment came into operation with effect from 7 November 1991, *vide* Orissa Act, 1991, whereas the provision of section 115, CPC is as per the Act 46 of 1999 which came into force with effect from 1 July 2002. The relevant portion of section 32 of the Amendment Act 46 of 1999 which prescribes for repeal and savings, reads as hereunder:

> Repeal and savings:- (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court before the commencement of this Act shall, except insofar as such amendment or provisions is consistent with the provisions of the principal Act as amended by this Act, stand repealed.
>
> (2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897 (10 of 1897)-
>
> (a) to (h)
>
> (i) the provisions of Section 115 of the principal Act, as amended by Section 12 of this Act, shall not apply to or affect any proceeding for revision which had been finally disposed of.
>
> (i) to (v)

In view of the provision in Article 254 of the Constitution of India, if any provision of the state law, if repugnant to any provision of law made by the Parliament, then, to the extent of the inconsistency or repugnancy, the law made by the Parliament shall supersede and prevail, and to that extent the law made by the state legislature shall not be enforceable. Therefore, on a comparison of section 115, CPC, after the aforesaid amendment in the year 1999 and the Orissa Amendment Act of 1999, section 115 which has been made in the year 1991, though the Orissa Amendment is enforceable but only to the extent it is consistent with the law made by the Parliament. Therefore, clause (ii) to the second proviso below clause (c) of section 115 of the Orissa Amendment, i.e., "the order if allowed to stand would occasion a failure of justice or

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427. *Phoolsingh v Mavla*, AIR 2002 MP 246.
428. *KR Subbaraju v Vasavi Trading Co*, AIR 2002 Kant 407.
429. *Madhavan v Narayana Das*, AIR 2003 Ker 103.

cause irreparable injury to the party against whom it was made" is no more enforceable, being repugnant to section 115 as it stands. It is needless to say that the remaining part of section 115 of the Orissa Amendment shall still be operative being not repugnant to the existing provision of section 115, CPC.[430]

[s 115.37] Sub-section (1) — Proviso — "other proceedings"

Regarding the expression "other proceeding" referred to in the proviso to sub-section (1) of section 115 of the CPC, from a reading of the statute, it was never the intention of the makers of the law that by inclusion of the expression "other proceeding" they intended to vest the high court with the power of revision even in respect of order that may be passed in interlocutory or supplemental proceeding to a suit. The expression "in the course of a suit" is sufficient to vest the high court with the power of revision against the interlocutory orders passed by the court subordinate to it provided, however, the requirements of the proviso are satisfied. It appears that by insertion of the expression "other proceeding", the legislature intended to vest the high court with the power of revision in respect of order passed in the civil proceedings, which are registered other than suits. The expression "other" indicates different and distinct proceedings from those, which are registered as suits. A full bench, in the case of *Deb Narain Dutt v Narendra Krishan*,[431] held that "the word 'proceeding' is a very general one, it is not limited to proceedings connected with civil suits, but includes, I suppose, proceedings other than civil proceedings, and civil proceedings other than suits."

If the interpretation, that in view of the insertion of the expression "other proceeding" all types of orders passed in interlocutory or supplemental proceeding can be revised by the high court, the very purpose of the introduction of the amendment will be frustrated inasmuch as the whole purpose behind introduction of the amendment by Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) in respect of the exercise of the revisional power was to curtail the power of revision in order to avoid delay in disposal of the suit or the proceeding.[432]

[s 115.38] Sub-section (2)

Even after the amendments in 1976, in 1999 and prior to the amendment in 1976, the revision power was exercisable in a case where the order or the decree, as the case may be, was not appealable.

Sub-section (2), which was introduced by the old Amendment Act and retained even after present amendment, provides that the high court shall not interfere where the order or the decree is appealable in courts subordinate to the high court.[433]

The Supreme Court[434] has held that even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under section 115 of the Code in view of the specific bar under sub-section (2) thereof. It is only appealable under section 96 read with O XLI of the Code. The order passed by the trial court was found to be a composite order on rejection of the plaint as there was no cause of action and dismissal of the suit was not maintainable on the ground of *res judicata*. Both aspects were held to be covered

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430. *Simplex Engineering & Foundary Works Ltd v B Pattnaik*, AIR 2003 Ori 149.
431. *Deb Narain Dutt v Narendra Krishna*, (1889) ILR 16 Cal 267 (FB).
432. *Mrityunjay Sen v Sikha Sen*, AIR 2003 Cal 165.
433. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434.
434. *Rishabh Chand Jain v Ganesh Chand Jain*, AIR 2016 SC 2143 : (2016) 6 SCC 675 : 2016 (10) JT 459.

by the definition of decree under section 2(2) of the Code and, therefore, the remedy was held to be only appeal and not revision even if there is any irregularity in passing the order.

Section 115 must be read as a whole and the principle of harmonious construction must be applied to avoid inconsistency or repugnancy between sections 115(1) and 115(2). The bar under section 115(2) is on the exercise of revisional power, where the party is provided with the right of appeal to the high court or the subordinate court against the impugned order. It is not a bar to exercise revisional power under section 115(1) against an appellate order. Where an objection against a preliminary decree passed in the suit for dissolution of partnership and accounts is rejected by the trial court and the final decree is passed, the order rejecting the objection having been merged in final judgment and decree, no revision lies against that order in view of specific and mandatory provision of section 115(2). The only remedy available is to vindicate the grievance against the order rejecting the objection in the regular appeal against the final judgment and decree.[435] In a particular case, the first appellate court rejected a prayer for amendment of pleading, so as to add a new ground for asserting the legitimacy of the plaintiff in a partition suit. It was held that such an order cannot be challenged, by way of a revision, as it does not fall within the section 115, proviso. However, the question of acceptance or rejection of the amendment is a substantial question of law which can be raised in second appeal.[436] The order declining to set aside the local commissioner's report does not result in failure of justice nor does it cause irreparable injury to the petitioner, where it is meant only for preparation of inventory. Therefore, a revision against the same order is not maintainable.[437] A revision is not maintainable against the refusal to grant leave to defend a summary suit. After the judgment is passed, the defendant may assail the decision by way of an appeal. In the event that conditional leave has been allowed to the defendant, he must abide it and perform the obligations cast upon him or face the inevitability of a judgment being pronounced against him because of non-compliance of the conditions. It would be incongruous if he were to be better placed than the defendant who has been denied leave to defend altogether.[438]

When the admitted position is that section 132 of the Karnataka Panchayat Raj Act, 1993 provides for appeal to the district judge against the order passed under section 17 of Karnataka Panchayat Raj Act, 1993, rejecting application for rejecting election petition in the presence of a provision for appeal, the civil revision petition is clearly misconceived.[439] Upon determination of the question of title under sub-rule (2) of rule 58 of O XXI, the court below has disallowed the objection of the petitioner. The court having done that, the order amounts to a decree in sub-rule (4), and can be challenged only in appeal. Thus, the challenge made to the impugned order in this revision under section 115, treating it as an interlocutory order, is not maintainable.[440]

Section 2(2) of the CPC defines "decree". It is made clear therein that it shall be deemed to include the rejection of a plaint and the determination of any question within section 144. The order rejecting the plaint is therefore a decree in the eye of law and as such appealable in nature. For that reason, section 115 of the CPC relating to revisional jurisdiction cannot be applied to that case.[441]

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435. *Lala Lalsingh v Seth Shobhagchand*, AIR 1986 MP 140.
436. *Suraj Narain v Saraswati Devi*, 1987 (2) WLN 489.
437. *CK Venkataram Naidu v CR Vasanthi*, AIR 2000 Ker 27.
438. *VS Saini v DCM Ltd*, AIR 2004 Del 219.
439. *Malatesh v Maqbool Ahmad*, AIR 2002 Kant 207.
440. *Ravindera Sheregara v Syndicate Bank*, AIR 2002 Kant 324.
441. *N Narayani Ammal v P Sanjeev*, AIR 2001 Ker 305.

In a suit, a preliminary decree for partition and redemption was passed. Though application for final decree was filed, the same was dismissed without passing any judgment even in respect of the preliminary decree providing for partition. The order, not being a final order or decree, revision against the same is maintainable.[442]

Revision against an order refusing to grant temporary injunction is not maintainable. The aggrieved party can file appeal under O XLIII, rule 1(r) of the Code. The decision of the apex court in *Vidya Vati v Devi Das*[443] is not applicable with effect from 1 February 1977 when sub-section (2) was inserted in section 115 by Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976). Sub-section (2) of section 115 clearly provides that under revisional jurisdiction, the high court shall not vary or reverse any decree or order against which an appeal lay either to the high court or any court subordinate thereto.[444]

[s 115.39] Sub-section (3)

A new sub-section (3) has been added in section 115 by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), which states that revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the high court.[445]

If the impugned order is an order under rule 3 of O XXXIX and no appeal lies against that order under O XLIII, rule 1 of the CPC, and since no appeal lies against this order, the bar of section 115(2) is not applicable in the case.[446]

[s 115.40] Alternative Remedy by Way of Suit or Otherwise

The powers conferred upon the high court by this section are discretionary. Hence, though a party may not have a remedy by way of an appeal, the high court may, in the exercise of its discretion, refuse to interfere under this section if there is any other remedy open to the party. In exceptional circumstances, depending upon the facts and circumstances of each case, the high court is not prohibited from entertaining a revision petition under section 115 of the CPC.[447] The special and extraordinary remedy by invoking the revisional powers of high court should not be exercised unless as a last resource for an aggrieved litigant.[448]

The other remedy open to the applicant must be a certain and conclusive remedy allowed by law.

Upon the principle stated above, no application would have been entertained to revise an order made under O XXI, rules 60, 61, or 62 as no appeal lies from such order. However, the party against whom the order is made has a special remedy by way of suit under O XXI, rule 63.[449] That is so, also where a remedy by way of suit is available under section 73(2)

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442. *Sarojini Prabhu v Pappikutty Adiesiar*, AIR 2007 Ker 44.
443. *Vidya Vati v Devi Das*, AIR 1977 SC 397.
444. *Shiv Chandra Mishra v State of Bihar*, AIR 2007 Pat 183.
445. *Shiv Shakti Co-op Housing Society v Swaraj Developers*, AIR 2003 SC 2434 : 2003 (6) SCC 659.
446. *Urmila Devi v Nagar Nigam, Lucknow*, AIR 2003 All 158.
447. *Mahboob Pasha v A.R. Viswanatha Chetty*, AIR 1994 Kant 350.
448. *Sheo Prasad v Kastura Kuar*, (1888) 10 All 119, 122; *Sher Ali v Jagmohan*, AIR 1931 All 333 : (1931) 53 All 466; *Har Narain v Bird & Co*, AIR 1936 Oudh 132; *Bapiraju v J Vallayya*, (1955) AP 624; *Raghuraj Dayal v Hargovind*, AIR 1958 Raj 287.
449. *Sheo Prasad v Kastura Kuar*, (1888) ILR 10 All 119; *Ittiachan v Velappan*, (1885) 8 Mad 484.

against an order allowing rateable distribution of assets of a judgment-debtor.[450] Similarly, no application can be entertained to revise a decree passed in a suit for possession instituted under section 9 of the Specific Relief Act, 1877. However, though no appeal lies from a decree passed in such suit, the party against whom the decree is passed is not precluded from instituting a regular suit to establish his title to possession.[451] The High Court of Mysore has held that the high court will not interfere in a revision with an order passing an *ex parte* decree since the defendant can apply to have such a decree set aside or appeal against it.[452] If the remedy is a doubtful one, the high court may interfere by way of a revision under this section.[453] Even if the remedy is certain and conclusive, the high court may, in an exceptional case, interfere by way of revision under this section.[454] The High Court of Nagpur in this regard held, "No doubt the ordinary rule is that where an aggrieved party has other remedy available, this court is unwilling to interfere, but it is unquestionable, that even if there be such remedy, this court may interfere in exceptional cases".[455] Thus, even where another remedy is open, the high court should interfere, where non-interference will result in multiplicity of proceedings, delay and unnecessary expense to the parties.[456] In a case where the lower court refused the application of a decree holder for rateable distribution under section 73, on the ground that there was another property of the judgment-debtor available for the satisfaction of his claim, the High Court of Madras interfered in revision under this section, even though the applicant had clearly a remedy by suit. Justice Miller in that case, said:

> I do not depart from the view...that where a party has a remedy elsewhere than in the High Court, the High Court should not except in special cases interfere [under this section]. But here we have a case in which there is no doubt as to the rights of the parties, and no remedy if I do not interfere, except by a suit to which there can be no defence, and which therefore, would merely multiply proceedings. In such a case the lesser evil, at any rate is interference under [this section].[457]

When the court, on an erroneous view of the law, refused to proceed with the suit until the court fee was paid, the High Court of Madras interfered with the interlocutory order, as it would give more complete and efficacious relief and avoid unnecessary multiplicity of proceedings.[458] However, the court cannot interfere unless the particular point can be shortly and conveniently disposed off.[459] In a Patna case, MANUK, J., said:

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450. *Gurdilal Kaur v Satindar Singh*, AIR 1965 P&H 42 : 66 Punj LR 1032.
451. *Rajai Singh v Suraj Bali*, AIR 1942 Oudh 179; *Bhundal v Pandol*, (1888) ILR 12 Bom 221; *Vora Isaballi v Doudbhai*, (1890) 14 Bom 371; *Kashinath v Nana*, (1897) 21 Bom 731. See also *Ahmad Din v Atlas Trading Co*, (1915) PR 66, 287; *Mahboob Pasha v AR Viswanatha Chetty*, AIR 1994 Kant 350.
452. *TC Malleshappa v Firm of Shah Veer Chand Pratapmal*, AIR 1965 Mys 300.
453. *Ghulam v Dwarka Prasad*, (1896) 18 All 163, 168; *Azam Jung v Mohd Abdul Razak*, AIR 1957 Hyd 4.
454. *Debi Das v Ejaz Husain*, (1906) 28 All 72; *Emperor v Bihari Lal*, AIR 1928 All 588 : (1929) 51 All 338.
455. *Kashirao Panduji v Ramchandra Balaji*, AIR 1948 Nag 362; *Official Receiver v Amara Seshayya*, AIR 1941 Mad 262 : (1940) 2 Mad LJ 860; *Bayyalakshmi Ammal v Bappu Ayyar*, AIR 1946 Mad 90 : (1946) Mad 640; *Umatul Mehdi v Kulsoom*, (1908) 12 Cal WN 15, 24; *Raghunandan v Ram Charan*, (1919) 4 Pat LJ 94, 105; *Shiva v Joma*, (1883) ILR 7 Bom 341.
456. *Ram Sunder v Paras Ram*, AIR 1946 Oudh 88 : (1946) 23 Luck 167; *Ballelal v Manoharlal Guru*, AIR 1944 Nag 295.
457. *Sree Krishna Dass v Chandook Chand*, (1909) 32 Mad 334; *Administrator-General v Chettyar*, AIR 1928 Rang 83 : (1928) 5 Rang 742; *Ranganayaki v Shivarama*, AIR 1930 Mad 216 : (1931) 58 Mad LJ 104; *Ballelal v Manoharlal Guru*, AIR 1944 Nag 295; *Bayyalakshmi Ammal v Bappu Ayyar*, AIR 1946 Mad 90 : (1946) Mad 640; *Surajlal Balkrishna Das v Padrauna Raj Krishna Sugar Works Ltd*, AIR 1928 Mad 416 : (1928) 51 Mad 664.
458. *Kulandi v Indran*, AIR 1928 Mad 416 : (1928) 51 Mad 664.
459. *Vythilinga v Sankaralinga*, AIR 1935 Mad 282 : (1935) 58 Mad 771.

> When the High Court can by interfering under section 115 in appropriate cases terminate the litigation the mere fact that another remedy by suit only lies should not per se be a reason for non-interference.[460]

The following are instances of exceptional cases which have been held to justify revision, although a remedy by suit was available:

(i) an order refusing to inquire into an objection to an attachment when the applicant was under the impression that the attachment had ceased and that it was not necessary to file a suit under O XXI, rule 63;[461]

(ii) an order dispossessing a judgment-debtor under O XXI, rule 98, although the decree-holder purchaser had agreed to allow him to remain in possession;[462]

(iii) a decree under section 9 of the Specific Relief Act, 1877, when the court had no jurisdiction at all, the summary suit being barred by the provisions of the Agra Tenancy Act, 1901;[463]

(iv) when the court actually refused jurisdiction to entertain an application for a review based on an allegation of fraud.[464]

(v) if the facts and circumstances show that the trial court has disposed of the case on an obvious misapprehension as to the legal position.[465]

An order refusing an amendment or refusing to frame an issue can be interfered with in revision, even though the order under section 105 could have been made a ground of objection in the appeal.[466] These exceptional cases are so numerous that a full bench of the High Court of Allahabad has said that it cannot be laid down as a general proposition that the high court has no power of intervention when there is another remedy, by way of a suit. It has held that each case must be considered on its merits.[467]

[s 115.41] Whether High Court May of Its Own Motion Call for Record

The high court may, of its own motion, call for any record under this section, if it appears desirable to do so.[468] However, such an exercise should be in any case which has been decided by the court subordinate to it and the court should have decided it in contravention of the clauses (a)–(c) of sub-section 1 of section 115. Unless there is a decided matter, there is no

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460. *Raghunandan v Ram Charan*, (1919) 4 Pat LJ 94; *Hurmoozi v Aysha*, (1920) 5 Pat LJ 415.
461. *Basanti v Chhote Lal*, AIR 1931 All 608 : (1931) 53 All 918; *Saida Begum v Sabir*, AIR 1962 All 9; *Mulk Raj v Ramdas*, AIR 1957 J&K 17.
462. *Hiralal v Ramchandra*, AIR 1930 Bom 375 : (1930) 54 Bom 479; *Tulsi Charan Das v Sabal Chandra Das*, AIR 1952 Cal 9 : 88 Cal LJ 65; *Deo Daran v Satyendra*, AIR 1965 Cal 621 : 63 Cal WN 361.
463. *Khushnud v Janki*, AIR 1931 All 663 : (1931) 53 All 532.
464. *Khitish Chandra v Nagendra Nath*, AIR 1929 Cal 513 : (1929) 33 Cal WN 572.
465. *Sukhjeet Singh v Sirajumnisa*, AIR 2001 MP 59. See also *Sobhabati v Lakshmi Chand*, AIR 1984 Ori 171 : (1985) 1 Civ LJ 116; *Shree Onama Glass Works Ltd, Gondia v Shri Ram Harak Panday*, AIR 1966 MP 282; *Ajodhiya Prasad v Ghasiram*, AIR 1937 Nag 326; *Bhojraj v Sheshrao*, AIR 1949 Nag 126 : (1948) ILR Nag 422; *Ramamanemma v Basavayya*, AIR 1934 Mad 558.
466. *Narayan Sonaji Sagni v Seshrao Vithoba*, AIR 1948 Nag 258 (FB); *Liladhar v Firm Radhakishan*, AIR 1946 Nag 5; *Mangilal v Zam Singh*, AIR 1941 Nag 289; *Kishen Lal v Ram Chandra*, AIR 1933 All 347 : (1933) 55 All 256.
467. *Lila v Mahange*, AIR 1931 All 632 : (1932) 54 All 183 (FB); *Ashalata Mitra v AD Vig*, AIR 1956 Cal 311; *Shroff v Govindbhai*, AIR 1963 Guj 117; *Sabitaben v Dalal Raman Lal*, AIR 1963 Guj 147.
468. *Percy Wood v Samuel*, AIR 1943 Nag 333; *Bisheshar v Hari Singh*, (1883) 5 All 42; *Bibi Maryam v Sangamal*, AIR 1936 Pat 591 : (1936) 15 Pat 738; *Avirah Ouseph v Ammukutty Amma*, AIR 1965 Ker 179 : (1964) 2 Ker 64.

necessity for the high court to invoke its suo motu powers. Therefore, the revision petition not filed against any order or decision of the court will not be maintainable.[469] It is not necessary for the exercise of its powers, under this section that it should be put into motion by the party aggrieved by the proceedings complained of. It has been so held by the High Courts of Calcutta, Allahabad and Madras.[470] A party dying during the pendency of a revision application does not put an end to such revision, for the high court can always call, even suo motu for the record and satisfy itself about whether the impugned order requires its interference.[471] In a Bombay case, however, where a collector applied to the high court to revise a decision of a *Mamlatdar*, the high court declined to interfere, stating that in so doing it was following the established practice of the court. It further held that the defendant, if he felt aggrieved, could himself apply to that court.[472]

[s 115.42] Subordinate Court

A high court has no power of revision under this section unless the case is decided by a "court", and further, it is decided by a court "subordinate" to the high court. The word "court" means a court of civil judicature. Thus, a Debt Settlement Board is not a "civil court".[473] The district judge, having jurisdiction to hear the election petition under rule 80 of the Rajasthan Panchayati Raj (Election) Rules, 1994, is an authority according to section 117 of the Rajasthan Panchayati Raj Act, 1994. The decision of this authority cannot be called in question by way of appeal. The term "court" used in various headings of the Rules of 1994 is meant only to show that while hearing the election petition the judge functions as a "judicial tribunal" and that it is only in that sense that the word seems to have been used. The judge is not made identical with the civil court. It is, therefore, apparent that intention of the legislature in enacting the relevant provisions was to create an "election tribunal" and not a "civil court". Thus, the judge acting under rule 80 of the Rajasthan Panchayati Raj Election Rules, 1994 is a persona designata and his action in dealing with the election petition cannot be revised by the high court under section 115, CPC.[474] The word "civil court" also excludes:

(i) a tribunal appointed under Displaced Persons (Debts Adjustment) Act, 1951;[475]

(ii) an authority constituted under section 15 of the Payment of Wages Act, 1936;[476]

(iii) an arbitrator appointed under section 19(2) of the Defence of India Act, 1939;[477]

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469. *K Anjamma v Chanchal Danaiah*, AIR 1994 AP 44.
470. *Puran Mal v Janki Pershad*, (1901) 28 Cal 680; *Golam Mahammad v Saroda*, (1900) 4 Cal WN 695; *Debi Das v Ejaz Husain*, (1906) 287 All 72; *Anthony v Dapont*, (1982) 4 Mad 217; *Jaimala Kunwar v Collector of Saharanpur*, AIR 1934 All 4 : (1934) 55 All 825; *Ramayya v Venkaraju*, AIR 1954 Mad 864 (FB); *Nizamal Haque v Bibi Sajda Khatoon*, AIR 1954 Pat 61; *Ramachandra v Pannalal*, AIR 1954 Raj 191.
471. *Narpatsingh v Gokuldas*, AIR 1966 AP 384.
472. *Pandu v Bhavdu*, (1897) 21 Bom 806; *State of Bhopal v Chhoteram*, AIR 1953 Bhopal 28.
473. *People's Own Provident & General Insurance Co v Gurucharya*, AIR 1946 Bom 200 : 47 Bom LR 752.
474. *Santosh Kanwar v Surgyan Kanwar*, AIR 2002 Raj 152. See also *United India Insurance Co Ltd v Brij Mohan Das*, 1998 WLCUC (Raj) 1.
475. *Parkash Textiles & Mills Ltd v Mt Manilal*, AIR 1955 P&H 197; *Murli Ram v Hukar Singh*, AIR 1960 Raj 235; *Lal Chand v Bharat Nidhi Ltd*, AIR 1962 All 378 : 1962 All LJ 378; contra *Maghanmal Narumal v Moolchand Gianchand*, AIR 1961 MP 193.
476. *The Manager, Spring Mills Ltd v GD Ambekar*, AIR 1949 Bom 188 : 51 Bom LR 148; *Trilok Nath v Lord Krishna Sugar Mills*, AIR 1946 All 276 : (1946) All 248; *Tarabhai v Sorabji*, AIR 1944 Nag 288; *Savagram Ramprasad Mills v Vishnu Pandurang*, AIR 1950 Nag 14; *Mewar Textile Mills v Girdhari Singh*, AIR 1957 Raj 115; *Lobangalata Dei v Sheik Azizulla*, AIR 1958 Ori 123; *Kuriakose v Thomas*, (1959) Ker LJ 341 : (1959) Ker LT 460; *UOI v Vishwa Deo*, (1961) Raj LW 241; *Sitaram v Nagrashna*, AIR 1954 Bom 537 : 56 Bom LR 930.
477. *Abboy Reddiar v Collector of Chingleput*, AIR 1952 Mad 45.

(iv) an arbitrator appointed under section 11(6) of Arbitration and Conciliation Act, 1996;[478]

(v) a rent controller or an appellate authority under the East Punjab Urban Rent Restriction Act, 1949;[479]

(vi) a claims tribunal appointed under the Motor Vehicles Act, 1939 and the Rules made thereunder.[480]

(vii) The district judge having jurisdiction to hear the election petition under rule 80 of the Rajasthan Panchayati Raj (Election) Rules, 1994.[481]

However, an order passed by the district judge in an appeal under section 17 of the Payment of Wages Act, 1936 is open to a revision.[482] So also an order under section 20 of the Minimum Wages Act, 1948 has been held to be revisable under that section.[483] The motor accidents claims tribunal is a court subordinate to high court and also subordinate to it under section 115 of the CPC.[484]

When a judicial officer is given the right to determine certain matters of a judicial or a quasi-judicial nature, unconnected with the ordinary jurisdiction which he exercises under the law, a question will arise whether he acts as a court or as a persona designata. In the latter case, no revision will lie to the high court. Where the word used in the enactment giving the special jurisdiction is not "court" but "judge" the entire enactment is to be looked into to find out whether the matter is to be decided by him as a court or in his personal capacity.[485] The deputy commissioner, under Scheduled Districts Act, 1874, is clothed with the revisional power of high court and the same must be exercised in conformity with power under section 115.[486] In *Shyam Sundar Agarwal's* case, the Supreme Court clarified that the revisional powers provided under rule 36A of the Administration of Justice and Police (in Khasi and Jaintia Hills) Rules, 1937, has to be exercised in conformity with revisional powers as contained in section 115 of the CPC. Full bench of the Meghalaya High Court has held that the judgment of the hon'ble apex court in *Shyam Sundar Agarwal's* case alone would govern the field.[487] A civil revision petition, under section 115 of CPC, is maintainable before the high court against the order passed by the appellate authority under section 113 of the Kerala Panchayat Raj Act, 1994 or under section 189 of Kerala Municipality Act, 1994.[488] A court of exclusive jurisdiction is not subordinate to the high court.[489] A district

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478. *UOI v Girdhari Lal*, AIR 1998 Raj 240.
479. *Tarachand v State*, AIR 1962 P&H 555; *Syed Hanifa v Mohd Khalifulla*, AIR 1970 Mad 39 : (1969) Mad LJ 413.
480. *Branch Manager v Chanbi*, AIR 1968 Goa 78; *RSRT Corp Jaipur v Kalwati*, AIR 1977 Raj 236.
481. *Santosh Kanwar v Surgyan Kanwar*, AIR 2002 Raj 152.
482. *Devi Dutt v Central India Electric Supply Co*, AIR 1945 Nag 244; *Jogendra Nath Chatterjee v Chandershwar Singh*, AIR 1951 Cal 29 : 55 Cal WN 48; *Ramji Rupchand v District Superintendent*, AIR 1957 MB 155; *D'Souza v Monappa*, AIR 1963 Mys 128.
483. *Henson v Sultan*, AIR 1958 Assam 1.
484. *Ratri Parjuni v SK Pradhan*, AIR 2003 Ori 60; see also *State of Haryana v Darshana Devi*, AIR 1979 SC 855.
485. *Kiran Chandra Bose v Kalidas Chatterjee*, AIR 1943 Cal 247 : (1943) 47 Cal WN 460 : 77 Cal LJ 317; *Suhashini Das v Mahendra*, AIR 1947 Cal 455 : (1947) Cal WN 818.
486. *Shyam Sunder Aggarwal v UOI*, AIR 1996 SC 1321 : 1996 (2) SCC 132.
487. Full bench of the Meghalaya High Court in *Venetia Kharsyntiew v Tushar Nath Bhattacharjee*, review petition No 9 of 2014 in CRP No 28 of 2013, decided on 10 September 2015.
488. *KN Sushama v Mercy Antony*, AIR 2000 Ker 83.
489. *Shridhar Atmaram v Collector of Nagpur*, AIR 1951 Nag 90.

registrar is not a "court" within the meaning of this section,[490] nor is a collector dealing with an application under section 18 of the Land Acquisition Act, 1894.[491] The term also does not include the rent controller of Rangoon;[492] neither does it include a district judge acting under section 4 of the Bombay Act 12 of 1850.[493] When a district judge acts under the powers conferred on him by section 139 of the Madhya Pradesh Municipalities Act, 1961, he acts as a court and not as a persona designata and therefore, a revision in a suitable case lies against his order.[494] Similarly, the chief judge of the small cause court at Bombay acting under the powers granted to him by section 33 or section 218 of the Mumbai Municipal Corporation Act, 1888, is not a court subordinate to the High Court of Bombay;[495] nor is a district judge acting under section 23 of the Bombay District Municipal Act, 1873, a court subordinate to the High Court of Bombay.[496] The term "court" does not also include a judge acting under section 15 of the Bombay City Municipalities Act, 1925,[497] nor a chief judge of the small causes court at Rangoon acting under powers conferred by section 14 of the City of Rangoon Municipal Act, 1922.[498] The term also excludes a district judge giving an opinion under the Mandalay Municipal Election Rules.[499]

A district judge deciding a rent suit under United Provinces Tenancy Act, 1939, is a revenue court and so not subordinate to the high court.[500] The chief judge of small causes court, acting under the Madras City Municipal Corporation Act, 1999,[501] or a subordinate judge acting as an election commissioner under the Tamil Nadu District Municipalities Act, 1920,[502] or exercising powers under section 15 of the Rangoon Rent Act, 1920[503] is a persona designata and not a court subordinate to the high court, so also, an assistant judge deciding an election petition under the Bombay Municipal Boroughs Act (Act 18 of 1925) will fall under the same category.[504] A full bench of the High Court of Madras has held that the high court has no power to revise orders passed by a board of revenue under section 11,[505] or section 205[506] of the Madras Estates Land Act, 1908. An order of the Calcutta Improvement trust tribunal acting as a court under the Land Acquisition Act, 1894 is subject to revision.[507] district judge acting under section 57 of the Madras Local Boards Act 14 of 1920 has been held to be a court

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490. *Manavala v Kaumarappa*, (1907) 30 Mad 326; *Naganna v Pattabhiramayya*, AIR 1928 Mad 475 : (1928) 51 Mad 245.
491. *Khetridas Gungaram v First Land Acquistion of Collector, Calcutta*, AIR 1946 Cal 508 : (1946) 2 Cal 573 (FB) : 50 Cal WN 758; *Raman Lal D Desai v State of Gujarat*, AIR 1996 Guj 33.
492. *Mohideen v Bukshi Ram*, AIR 1926 Rang 33 : (1925) 3 Rang 410 (FB).
493. *Re Cooper* (1918) 42 Bom 119.
494. *Municipal Council Khandwa v Santosh Kumar*, AIR 1975 MP 36 (FB).
495. *Navalkar v Sarojini*, AIR 1923 Bom 421 : (1923) 25 Bom LR 463; *Ahmed Suleman v Municipal Commr of Bombay*, AIR 1930 Bom 231 : (1930) 54 Bom 224.
496. *Balaji Sakharam v Merwanji Nowroji*, (1895) ILR 21 Bom 279; *Gangadhar v Hubli Municipality*, AIR 1926 Bom 344 : (1926) 50 Bom 357.
497. *Jagmohan v Venkatesh*, AIR 1933 Bom 105 : (1933) 35 Bom LR 89.
498. *Municipal Corporation v Shakur*, AIR 1926 Rang 25 : (1926) 3 Rang 560.
499. *U Ba Pe v U Ba Shwe*, AIR 1933 Rang 41 : (1933) 11 Rang 1.
500. *Sankata Prasad v Ram Kushi Devi*, AIR 1947 Oudh 232 : (1946) 22 Luck 207.
501. *Lakshmanan v Kannappar*, AIR 1926 Mad 93 : (1927) 50 Mad 121.
502. *Bamnidi Nagula v Bhanoji Rao*, AIR 1950 Mad 123.
503. *Aziz v Kiloboy*, AIR 1927 Rang 1 : (1927) 4 Rang 304.
504. *Keshav v Municipal Borough, Jalgaon*, AIR 1946 Bom 64 : (1946) ILR Bom 143 : 47 Bom LR 851.
505. *Raja of Mandasa v Jagannayakalu*, AIR 1932 Mad 612 : (1932) 55 Mad 883 (FB).
506. *Raghunadha v Govinda*, AIR 1928 Mad 1032 : (1928) 55 Mad LJ 798; overruling *Narasimath Rao v Ryots of Peddamamidipalli*, AIR 1926 Mad 480 : (1926) 49 Mad 499, and in the effect of overruling *Ramaswami v Kali*, (1919) 42 Mad 310.
507. *Adhar v Radha*, AIR 1932 Cal 660 : (1932) 36 Cal WN 370.

within the meaning of this section.[508] The same applies to a district judge exercising powers under section 40A of the Bengal Agricultural Debtors Act, 1936[509] as also to a district judge exercising powers of a *kazi,*[510] or a commissioner exercising powers under section 3(1) of the Workmen's Compensation Act, 1923.[511] In this case under the Workmen's Compensation Act, 1923, it was said that the use of the term "judge" instead of "court" is not sufficient to imply that he acts as a persona designata; but in the case of *Sholapur Municipality v Tuljaram,*[512] Patkar, J, said that when a judge or presiding officer of a court, as distinguished from the court itself, is directed to perform any function of an authority created by statute, he should be considered a persona designata and not a court.

The High Court of Kumaun is not a court subordinate to the High Court of Allahabad.[513]

A collector exercising judicial functions under the Bombay Mamlatdars' Court Act, 1906 is a court within the meaning of this section,[514] and so is a civil court acting or purporting to act under the provisions of section 10 of the Religious Endowments Act, 1863.[515]

It has been held by the High Courts of Madras, Allahabad, Bombay, Rangoon and Nagpur and Gujarat that when an application is made to the collector for a reference to the civil court under section 18 of the Land Acquisition Act, 1894, and the application is rejected, the collector does not act as a court and his order is not subject to revision by the high court.[516] A contrary view was taken by the Oudh court,[517] and at one time by the Calcutta High Court[518] but a different view has since been expressed by it on the questions as to whether the land acquisition collector is a court subordinate to the high court[519] and the full bench of the same court has overruled the earlier decisions.[520] The Patna[521] and Calcutta[522] High Courts have held that a collector acting under the second proviso to section 49 of the 1894 Act is a "court", and an order made by him refusing to refer to the civil court a question under that proviso is subject to revision by the high court. The High Court of Calcutta has held that a collector acting under section 11 of the Land Acquisition Act, 1894 is not a "court" within the meaning

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508. *Ramaswami v Mathu*, AIR 1923 Mad 192 : (1923) 46 Mad 536; *Ahmad v Basava*, AIR 1923 Mad 254 : (1923) 46 Mad 123.
509. *Bazler Rahman Khandakar v Amiraddin*, AIR 1944 Cal 401 : (1944) 48 Cal WN 699.
510. *Mumtaz Quadas Mirza v Advocate-General*, AIR 1946 Oudh 244 : (1946) 21 Luck 516.
511. *Abdul Rashid v Hanuman Oil & Rice Mills*, AIR 1951 Assam 88; *Diviji v Goalin*, AIR 1941 Pat 65; *Giyan Chand v Abdul Hamid*, AIR 1938 Lah 855; *Mohanlal v Fine Knitting Mills*, AIR 1960 Bom 387 : 62 Bom LR 195.
512. *Sholapur Municipality v Tuljaram*, AIR 1931 Bom 582 : (1931) 55 Bom 544.
513. *Sadar Singh v Amar Singh*, AIR 1923 All 291 : (1923) 45 All 383.
514. *Purshottam v Mahadu*, (1913) 37 Bom 114; *Babaji v Bala*, AIR 1938 Bom 159 : 40 Bom LR 104.
515. *Balakrishna Udayar v Vasudeva Aiyar*, AIR 1917 PC 71 : 44 IA 261.
516. *Abdul Sattar v Special Deputy Collector*, AIR 1924 Mad 442 : (1924) 47 Mad 357 (FB); overruling *Parammeswara v Land Acquisition Collector, Palghat*, (1919) 42 Mad 231; *Kashi Prasad v Notified Area*, AIR 1932 All 598 : (1932) 54 All 282; *Balkrishna v The Collector of Bombay*, AIR 1923 Bom 290 : (1923) 47 Bom 699; *Bhajani Lal v Secretary of State*, AIR 1932 All 568 : (1932) 54 All 1085; *Mayet v Land Acquisition Collector*, AIR 1934 Rang 118 : (1934) 1 Rang 275; *Sapre v Collector, Saugor*, AIR 1937 Nag 12; *Raman Lal D Desai v State of Gujarat*, AIR 1996 Guj 33.
517. *Ahmed Ali v Secretary of State*, AIR 1932 Oudh 180 : (1932) 7 Luck 578; citing, however, the overruled case 42 Mad 231.
518. *Administrator-General of Bengal v Land Acquisition Collector*, (1907) 12 Cal WN 241; *Lord Elias v Stork*, AIR 1934 Cal 758 : (1934) 61 Cal 1041.
519. *Solomon v Stork*, (1934) ILR 61 Cal 1041 : 38 Cal WN 844.
520. *Khetridas Gangaram v First Land Acquisition Collector, Calcutta*, AIR 1946 Cal 508 : (1946) 2 Cal 573 : 50 Cal WN 758 (FB).
521. *Saraswati v The Land Acquisition Deputy Collector*, (1917) 2 Pat LJ 204.
522. *Krishna Das v The Land Acquisition Deputy Collector*, (1912) 16 Cal WN 327.

of this section.[523] The court to whom the collector makes a reference, i.e., the court as defined in section 3(d) of the Land Acquisition Act, 1894, is a court subordinate to the high court and subject to its revisional jurisdiction.[524]

The following orders have been held to be liable to be revised under this section:

(i) an order passed by a magistrate under section 111 of the Bombay Municipal Boroughs Act, 1925;[525]

(ii) an order of a district judge under section 7 of the Charitable and Religious Trusts Act, 1920;[526]

(iii) an order by the district judge is a revision under section 12B of the Madras Buildings (Lease and Rent Control) Act, 1949;[527]

(iv) an order under section 12 of the Madhya Pradesh Accommodation Control Order, 1955;[528] an order of the district judge awarding compensation under Bombay Land Requisition Act, 1948;[529]

(v) an order of the district judge under section 20 of the Kerala Buildings (Lease and Rent Control) Act;[530]

(vi) an order of the collector under section 13 of the Madras Hereditary Village-Offices Act, 1895 and by the appellate authority acting under rule 38,[531] and

(vii) an order of a district munsiff magistrate acting under Hyderabad Gram Panchayat Act.[532]

The following orders have been held not to be open to revision under this section:

(i) an order by the election commissioner under Travancore-Cochin Panchayats Act, 1950;[533]

(ii) an order of the computation officer under Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951;[534]

(iii) an order passed by the district judge in appeal under section 70(2)(b) of the Bihar Hindu Religious Trusts Act, 1950;[535]

(iv) an order by the revenue divisional officer acting under section 16 of the Andhra Pradesh (Andhra Area) Tenancy Act, 1956;[536]

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523. *British India Steam Navigation Co v Secretary of State*, (1911) 38 Cal 250.
524. *Makan Lal v Secretary of State*, AIR 1934 All 260 : (1934) 56 All 656 (FB).
525. *Challegon Borough Municipality v Multanchand Fulchand*, AIR 1956 Bom 675 : 58 Bom LR 375; *Lokamanya Milla Ltd v Municipal Borough*, AIR 1939 Bom 477 : 41 Bom LR 937.
526. *Avoch Thevar v Chummar*, AIR 1957 Ker 171 : (1957) Ker LJ 295 : (1957) Ker LT 461; *Goswami Manohar v Shyam Sunder*, (1957) All WR 157.
527. *Dinkar Rao v M Ratnaba Bai*, AIR 1958 Mys 77.
528. *Kailas Chandra v district judge, Bhopal*, AIR 1963 MP 218; *Naumal Bros. v Ali Hussain*, (1961) Jab LJ 253 : (1961) MPLJ 450.
529. *Patel Chunibhai Jivabhai v State of Gujarat*, (1963) 4 Guj LR 660; see contra 18 Bom LR 340.
530. *Ramankutty v Ittiachan*, (1960) Ker LJ 895.
531. *Subha Rao v Koteswara Rao*, AIR 1963 AP 37.
532. *Re Mangu Venkatiah*, (1962) 1 Andh WR 296 : (1962) 2 Andh LT 18.
533. *Varghese v Mammen*, AIR 1956 Tr & Coch 63 : (1955) Ker LT 714.
534. *Phul Kumari v The State*, AIR 1957 All 495.
535. *Onkar Datta v Bihar Hindu Religious Endownment Board*, AIR 1960 Pat 164.
536. *P Jagannath Rao v P Venkateswara Rao*, AIR 1960 AP 49 : (1959) Andh LT 755 : (1959) 2 Andh WR 264.

(v) an order made by the revenue divisional officer acting under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948;[537]

(vi) an order of a tribunal under Uttar Pradesh Muslim Waqfs Act, 1960, appointing a receiver;[538]

(vii) an order of the district munsif on an election petition under section 19(1) of the Madras Village Panchayats Act, 1950;[539]

(viii) an order of a district judge refusing to set aside a surcharge order made by a registrar under the Co-operative Societies Act, 1912.[540]

[s 115.43] Decision of a Single Judge of a High Court

A judge of a high court sitting alone is not a court subordinate to the high court, but performs a function directed to be performed by the high court. There is, therefore, no revision from his decision under this section.[541]

The expressions "court below" and "court subordinate" have different connotations. While a single judge of a high court is a "court below", in relation to a bench hearing an appeal under the Letters Patent, he is not a "court subordinate" to the high court within this section.[542] As to whether a non-appealable order of a single judge can form the subject matter of a review and reconsideration by division bench, has been discussed in detail in *Issardas v Hari*.[543]

[s 115.44] Decision of a Single Judge of the Chief Court of Oudh

The court of a single judge of the chief court of Oudh determining a suit of more than Rs 5 lacs in value as provided by section 7 of the Oudh Courts Act, 1925 (4 of 1925), is not a subordinate court to the chief court which is the high court referred to therein and, therefore, no revision lies against its order.[544] A single judge of a high court is not "subordinate" to the division bench merely because there is provision for letters patent appeal. Article 214 of the Constitution makes it clear that the high court is one court.[545]

[s 115.45] The Code of Criminal Procedure, 1898 Sections — 195(3), 476A [Now Section 340(2)], 476B [Now Section 341(1)] and "court subordinate"

For the purpose of section 195(3) (revised to section 195(3)), a civil court is subordinate to that court to which appeals ordinarily lie. Under the Punjab Courts Act, 1918, appeal lies

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537. *Paidaya v Murlidhar*, AIR 1961 AP 494.
538. *Sumi Central Board v Sirajhul Haq*, AIR 1963 All 557 : (1963) All LJ 607.
539. *Ponnuraman v Rajappa*, AIR 1960 Mad 353 : (1959) Mad 1061 : (1960) 1 Mad LJ 38 : 73 LW 633; *Lakshmana Chettiar v Kannappa Chettiar*, AIR 1927 Mad 93 : 50 Mad 121 : 15 Mad LJ 738 : 24 LW 773; *Abdul Wahid v Abdul Khader*, AIR 1947 Mad 400 : (1947) 1 Mad LJ 207; *Chinniah Tevar v Badsha*, AIR 1948 Mad 439 : (1948) 1 Mad LJ 314.
540. *Appu v Executive Officier*, (1962) Ker LT 393.
541. *Debendra Nath v Bibudhendra*, (1916) 43 Cal 90; *Jamna Dass v Sabapathy Chetty*, (1913) 36 Mad 138.
542. *Ladli Parshad v Karnal Distillery Co*, AIR 1963 SC 1279.
543. *Issardas v Hari*, AIR 1962 Mad 458 : (1962) Mad 744 : 75 LW 316.
544. *Rani Bisani v Minor Son of Madho Singh*, AIR 1927 Oudh 59 : (1927) 3 Luck 1; *Mahomed Sadiq v Kasim Ali*, AIR 1935 Oudh 72.
545. *Hindustan Steel Works Construction Ltd v Tarapore & Co, Madras*, AIR 1990 AP 82.

ordinarily from the subordinate court to the district court or high court. The court of the Additional District Judge is different from the district court.

A moved court *B*, which succeeded court *C*, which had heard the original suit for filing a complaint under sections 193 and 471 of the Indian Penal Code, 1860. That was transferred to court *D*, which directed a complaint to be filed. An appeal against this order was referred to the district court and that was transferred to the court of the Additional District Judge, who reversed the order and dismissed the petition. This order was, in turn, set aside by the high court in a revision. It was held by the Supreme Court that court *D* was not competent to sanction the prosecution as it was neither the original court nor its successor; that the order of the Additional District Judge was without jurisdiction as the court of the subordinate judge was not subordinate to him. The order of the high court was right in so far as it set aside the order of the Additional District Judge but was wrong in upholding the order of the subordinate judge as he had no jurisdiction to make the complaint.[546]

[s 115.46] Jurisdiction

The word "jurisdiction" originally seems to mean the entitlement "to enter upon the enquiry in question".[547] But as MATHEW, J, described the word,[548] it is "a verbal cast of many colours". It is not confined to the jurisdiction to entertain a suit or an appeal. A court may have jurisdiction to entertain a suit or an appeal, and yet it may have no jurisdiction to pass a particular order in the suit or the appeal. If it does so, the case falls under clause (a) of sub-section 1 and the high court will be entitled to interfere in a revision. This follows from the decisions of the Privy Council in *Lachmi Narain v Balmukund*,[549] and *Brij Mohan v Rai Uma Nath*.[550] A contrary view expressed by a full bench of the Patna High Court in *Dominion of India v Hazari*[551] is, it is submitted, not correct in as much as the trial court there had no jurisdiction to proceed with the suit and pass the decree against the railways without there being a notice under section 77 of the Railways Act, 1890, which is mandatory under that section.

Since the question of jurisdiction touches the root of the matter, it can be raised in a revision for the first time even if it has not been taken in the lower court.[552] Where the court below decides that the suit has abated only against one of the defendants and that it would proceed against the remaining defendants, the order results in terminating a part of the controversy involving the question of jurisdiction. Hence, a revision against such an order is maintainable.[553] The high court cannot, in its revisional jurisdiction, travel beyond the scope of section 115 and go into matters which are not relevant for the purpose of testing the jurisdictional error committed by the court below.[554] In a particular case, the lower court decided the question of court fee payable on the plaint against the defendant's contention. The matter involved the question of pecuniary jurisdiction. It was held the defendant's revision against the lower

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546. *Kuldip Singh v State of Punjab*, AIR 1956 SC 391 : [1956] SCR 125.
547. *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147.
548. *ML Sethi v RP Kapur*, AIR 1972 SC 2379 : (1972) 2 SCC 427 : (1973) 1 SCR 697.
549. *Lachmi Narain v Balmukund*, AIR 1924 PC 198 : 51 IA 321.
550. *Brij Mohan v Rai Uma Nath*, (1893) 20 Cal 8 : 19 IA 154.
551. *Dominion of India v Hazar*, (1949) 28 Pat 552.
552. *AA Dadabhai v Hira Lal Chiman Lal*, AIR 1965 Guj 131 : (1956) 6 Guj LR 99; *Poonamchand v Ram Prasad*, AIR 1969 MP 44.
553. *Gulam Rasool v Mariyam*, AIR 1980 Raj 197.
554. *UOI v Lakshmi Narayan Sinha*, AIR 1981 Pat 99.

court's order was maintainable.[555] In another case, it was held that the decision on the question of whether the building in dispute had been a construction of more than 10 years on the date of the suit, was the determination of the jurisdictional question under Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, upon which the jurisdiction of the court depends. Therefore, it was open to the high court in exercise of its revisional jurisdiction to review the findings.[556]

In the High Court of Patna, the settled practice is that where two distinct matters are dealt with by one order of the court below, then the party aggrieved thereby must file a separate revision application, challenging in each case the two distinct matters in regard to which the revision is sought.[557] The order of attachment by the executing court, if passed without jurisdiction, can be set aside by the high court in a revision.[558] In a Madhya Pradesh case, eviction of a tenant had been ordered. The tenant had failed in the apex court. Legal representatives of the tenant filed a suit on the ground that the eviction was obtained by fraud. An application for temporary injunction, for restraining the decree holder from execution of the decree, was rejected. It was held that no error of jurisdiction had been committed by the court and the order of rejection was not amenable to interference in a revision.[559] An order of interim custody under sections 12 and 25 of the Guardians and Wards Act, 1890, passed by the trial court, cannot be interfered with in a revision where there is no error of jurisdiction.[560]

An order granting conditional leave to defend in a summary suit is a jurisdictional question and revision against such order is maintainable. However, where conditions are not fulfilled in terms of the order granting leave to defend and the suit is decreed, the grant of conditional leave can be challenged in appeal against the decree.[561] SINHA, J, speaking for the bench in the above case, explained the legal position as follows:

> 17. We fail to persuade ourselves to agree with the contention of Mr. Chitale that although a revision from an order granting conditional leave was maintainable, the same could not have been a subject-matter of challenge in an appeal from a decree as envisaged under Section 105 of the Code of Civil Procedure.
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> 18. A statutory right conferred on a litigant cannot ordinarily be taken away. A civil revision application might have been maintainable as against the order dated 27.11.2002 granting conditional leave. The said remedy was also available where leave to defend a suit is refused. Leave to defend a suit, as noticed hereinbefore, should ordinarily be granted. It was, therefore, permissible for the defendant to raise the said contention in the appeal although it had asked for time to comply with the conditions.[562]

In a case, order of the court recalling an earlier order, directed specimen signatures of the defendants to be taken in court. The signatures had already been taken in the court. The revision was held to be not maintainable against the order. The court could not be said to have committed any jurisdictional error in passing the order and could not be said to be "a case decided" within the meaning of section 115. Even on the merits, the order seemed to be

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555. *Andhra Pradesh State Electricity Board v K Venkareswara Rao*, AIR 1981 AP 197.
556. *Punjab National Bank v Ganga Narain Kapur*, AIR 1994 All 221.
557. *Puranmal Bajoria v Nagarmal*, AIR 1980 Pat 143.
558. *Bhajan Singh v Bant Singh*, AIR 1980 P&H 149.
559. *Gordhan v Om Prakash*, AIR 1991 NOC 99 (MP).
560. *Khurshid Gauhar v Sidhiqunnisa*, AIR 1986 All 314.
561. *Wada Arun Asbestos (P) Ltd v Gujarat Water Supply and Sewerage Board*, AIR 2009 SC 1027 : (2009) 2 SCC 432.
562. *Wada Arun Asbestos (P) Ltd v Gujarat Water Supply and Sewerage Board*, AIR 2009 SC 1027, at p 1031 : (2009) 2 SCC 432.

correct.[563] If a subordinate court has jurisdiction to decide a question before it, it may decide it rightly or wrongly. Whether the question be one of law or of a fact, such a wrong decision would not bring the case within the purview of any of the three clauses of section 115(1). It is only where the error of law or of a fact has relation to the jurisdiction of the subordinate court to try the dispute that the section would be attracted.[564] In a particular case, an appeal was filed under section 102 of the Kerala Land Reforms Act, 1963. A plea as to maintainability of the appeal was not raised before the appellate authority. It was, however, raised for the first time in revision. It was held that being a pure question of law touching the jurisdiction of the appellate court, it could be raised in a revision.[565]

An appellate court has no jurisdiction to pass an order of mandatory injunction in respect of constructions made after the disposal of the original suit. In a case, the impugned order had not only been passed without jurisdiction, but also there had been glaring miscarriage of justice. It was held that the case was fit for interference in revision.[566] Where a trial court accepts a written statement at the end of the trial, there is no jurisdictional error nor is there any final disposal. Such a course causes no irreparable injury to the plaintiff and is not subject to a revision.[567] In another case, a document which merely recorded a mortgage was assessed to stamp duty under the Stamp Act, 1899, in the erroneous belief was that the document created a mortgage. It was held that erroneous belief as to the applicability of the Stamp Act, 1899 to the document resulted in assumption of jurisdiction not vested and the order could be set aside in a revision.[568] Section 115 is not attracted against a conclusion of law or of a fact, in which the question of jurisdiction is not involved. However, where the execution court has dismissed the execution application on the ground of limitation (apart from other grounds), the question of limitation is a question of jurisdiction. Therefore, it is a fit case for interference in a revision.[569] Where the question of court fee raised by defendant is not a question of court fee simpliciter, in case of a combined question of court fee and jurisdiction, the defendant can request the high court to interfere in a revision with the impugned order of the lower court.[570]

In its application to the State of Uttar Pradesh, the amendment brought about in section 115 of the Code incorporates the valuation of the suit for determining the jurisdiction of the forum where revision can be filed. In a case from Uttarakhand, wherein the valuation of the suit was Rs 50 lakhs, it was held that the district judge did not have any jurisdiction to receive or entertain the revision petition or to deal with the same. It was held that the concept of valuation, as finds mention in section 115 CPC, is relatable to the valuation of the suit as it has been pegged in the plaint originally filed. This valuation has nothing to do with the valuation sought to be varied or changed through an amendment.[571]

[s 115.47] Exercise by Court of Jurisdiction Not Vested in It by Law

If a court assumes a jurisdiction which, by reason of the pecuniary or territorial limits of the jurisdiction of such a court or by reason of the subject matter of the suit or other proceedings

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563. *Shitla Prasad v Allahabad Finance Corp*, AIR 1981 All 361.
564. *Ramdeen v Ramswarup*, AIR 1982 MP 158.
565. *P Kunhimanaik Kam v IM Kunhiraman Thirumumbu*, AIR 1990 NOC 29 (Ker).
566. *Nirmal Kumar Bag v Santi Kumar Chakraborty*, AIR 1981 Cal 320.
567. *Handeo Singh v Ghura Singh*, AIR 1982 Pat 136.
568. *Sanjay Investments v Nepal Chandra Dutta*, AIR 1981 Cal 327.
569. *Bans Raj Singh v Krishna Chandra*, AIR 1981 All 280.
570. *Andhra Pradesh State Electricity Board v Venkateswara Rao*, AIR 1981 AP 197.
571. *Rajendra Nath Shah v District Judge*, AIR 2009 Uttr 28 : 2009 (2) All LJ 218.

instituted in it, is not vested in it by law, the high court to which such court is subordinate has power under clause (a) to interfere in revision under this section. It will not, however, do so unless the facts from which absence of jurisdiction may be inferred are patent upon the face of the record.[572] If the agreement entered into by the petitioner and the respondent does not contain the estimated value of the land described therein, the provision of rule 2 of O XXXVI would not have been fulfilled and as such the court would not have assumed jurisdiction in view of rule 3 of O XXXVI. Consequently, the judgment and decree passed by the learned trial court is without jurisdiction and liable to be interfered in exercise of revisional power under section 115 of the CPC since the learned trial court assumed jurisdiction quite illegally in deciding the reference.[573] Where a civil judge exercised jurisdiction not vested in him by a statute and molated the procedure laid down by the statute and thus, committing an illegality in exercise of its jurisdiction, the high court must rectify the error by the exercise of its revision jurisdiction.[574] Similarly, the high court has power to interfere in a revision under clause (a), if the lower court decrees a suit for possession under section 9 of the Specific Relief Act, 1877, when the plaintiff has not been dispossessed otherwise than in due course of law.[575] Such a power lies if the lower appellate court entertains an appeal from an order from which no appeal lies,[576] or if a testamentary court appoints a receiver.[577] The high court can also exercise such a power if the lower court inquires into a question into which it has no jurisdiction to inquire;[578] if the lower court demands search fee on an application for copies of records in addition to the stamps for copies[579] or dismisses a suit for non-production of document;[580] or if the lower court allows an application to withdraw a suit contrary to the provisions of O XXIII, rule 1.[581] In a suit where an insolvency court ordered a distribution of assets after the insolvency had been annulled, the court was held to have acted without jurisdiction.[582] The rules of the High Court of Calcutta had empowered a single judge to hear revisional applications in cases of the value of Rs 1,000, and so when a single judge granted a rule for the revision of an order in a suit of more than that value, the rule was discharged for want of jurisdiction.[583] Where a small cause suit was tried by the *munsif* on the original side and his decision was reversed on an appeal, the high court set aside the decree of the appellate court on the ground that the appeal was incompetent.[584] Where the lower court set aside an execution sale on the ground that the decree was passed on a debt and that in consequence the land was not liable for sale under section 43(4)(e) of the Abolition of Proprietary Rights Act, 1951, the high court set aside the order in revision on the ground that the decree was for damages of breach of contract and the lower court had no jurisdiction to set aside the sale.[585] In another case, an amendment was sought in suit for specific performance before civil judge for enhancing the valuation of

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572. *Mihar Ali v Muhammad Hussain*, (1892) 14 All 413.
573. *Ramdhan Sinha v Notified Area Authority*, AIR 2001 Gau 149.
574. *Chandrika Singh v Raja Vishwanath Pratap Singh*, (1992) 3 SCC 90.
575. *Rajwanti Kuer v Mahabir Rai*, AIR 1931 All 205 : (1931) 52 All 414.
576. *Bai Mani v Ranchodlal*, AIR 1923 Bom 214 : (1923) 25 Bom LR 147 (order under O XXI, rule 101); *Thanmal v Income-tax Officer*, AIR 1958 All 636; *Avirah Ouseph v Ammukutty Amma*, AIR 1965 Ker 179 : (1964) 2 Ker 64.
577. *Kanhaiya v Kanhaiya*, AIR 1924 All 276 : (1924) 46 All 372.
578. *Maung Tun U v Maung Po*, AIR 1923 Rang 199 : (1923) 1 Rang 265.
579. *Raja Saheb v Sub-Collector*, AIR 1928 Mad 370 : (1928) 51 Mad 599.
580. *Tafazzul v Shah Mohammad*, AIR 1949 All 261.
581. *V Narayanappa v Narayanappa*, AIR 1971 Mys 334.
582. *Panna Lal v Official Receiver*, AIR 1931 All 71 : (1931) 52 All 313.
583. *Nishi v Barda*, AIR 1930 Cal 744 : (1930) 34 Cal WN 730.
584. *Abde Ali Ali Mohammad v Fida Hussain Abdul Karim*, AIR 1957 MB 122.
585. *Mohamed Hasan Khan v Ahmed Hafiz Ali*, AIR 1957 Nag 97.

the suit which was allowed, irrespective of the fact that the suit in question stood transferred in view of amendment in Karnataka Civil Courts Laws (Amendment) Act, 1989. It was held that though the civil judge did not have the jurisdiction, since no prejudice was caused to the parties nor it resulted in the failure of justice, the order could not be interfered with by the high court in civil revision.[586]

[s 115.48] Failure to Exercise Jurisdiction

Where a court having jurisdiction to act in a matter declines jurisdiction, clause (b)[587] applies. When a court refuses to exercise jurisdiction vested in it by law under a misapprehension of the law or an erroneous construction of the statute, or a misconstruction of a document, eg, reference to an arbitration, the high court will interfere in revision under clause (b). The same situation arose where a suit is dismissed without a trial on a misapprehension of the scope of section 9 of the Specific Relief Act, 1963;[588] then the executing court flatly refused to exercise jurisdiction vested in it. Hence, the order can be brought within the purview of section 115, CPC.[589] The principle is that once a court rightly assumes a jurisdiction, it does not exercise its jurisdiction illegally or with material irregularity simply because it decides a question of law or of a fact erroneously. However, if a question of jurisdiction is involved in its conclusion of a fact or law, then the high court can interfere, in the event of such conclusion being erroneous, because it would amount to illegal assumption or exercise of jurisdiction.[590] Thus, a plea of limitation or of *res judicata* is one of law which concerns the jurisdiction of the court which tries the proceedings. A finding of these pleas in favour of the party raising it would oust the jurisdiction. An erroneous decision on these pleas, therefore, is concerned with the question of jurisdiction.[591] Merely because the court has rejected and refused to grant permission it cannot be said to be a case of failure to exercise jurisdiction. When jurisdiction can be said to have been refused to be exercised by the court, and the expression "the failure to exercise jurisdiction" means that court has refused to consider the application on merits on some technical ground, but in a case where the court has considered the application on its merits, looking to the facts and circumstances mentioned, the court cannot be said to have failed to exercise jurisdiction, merely because it has not granted the permission. The court has come to a conclusion, either to grant the application or to refuse the application on its merits and if it is done one way or other it cannot be said to be a case of failure or refusal to exercise the jurisdiction vested in it. So, even if there was some error or some error was committed by the court below, every error cannot be said to amount to jurisdiction error, to make out a case within the purview of section 115, for invoking the jurisdiction of high court.[592]

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586. *Laxmi Bai v Kamalaksha G Nayak*, AIR 1994 Kant 174. For other cases under this head, see note below: "Wrong Decision of Lower Appellate Court as to Jurisdiction of Trial Court".
587. *Joy Chand Lal v Kamalakshya*, AIR 1949 PC 239 : 76 IA 131 : 53 Cal WN 562; *Basantilata v Amar Nath*, AIR 1950 Cal 411 : (1950) 54 Cal WN 451; *Abola Kuer v Balk Kuar*, AIR 1948 Pat 382 : (1947) 26 Pat 526; *Central Government of India v Chhottalal*, AIR 1949 Bom 359 : 51 Bom LR 615; *M & SM Railway v Chenghi Syed Ali*, AIR 1950 Mad 402; *Pentakota v Yellapu*, AIR 1950 Mad 158; *Kanai Lal v Purna Chandra*, (1930) 34 Cal WN 733.
588. *Onams Glass Works, Gondia v Ram Hakak*, AIR 1966 MP 282; *Maya Ram v Sant Ram*, AIR 1965 All 409.
589. *Aitha Gopalakrishna v Miryala Venkata Radha Krishna*, AIR 2004 AP 542.
590. *Kamani Devi v Sir Rameshwar Singh*, AIR 1946 Pat 316; *Mahadeo Gopal v Hari Wajman*, AIR 1945 Bom 336 : 47 Bom LR 350; *Jey Chand v Kamalaksha Chowdhury*, AIR 1946 PC 239 : 76 IA 131 : (1949) 53 Cal WN 562; *Premchand v Bajrangibai*, AIR 1969 Raj 270 : (1969) 19 Raj 448; *Tripti Basu v KK Ghose*, AIR 1966 Pat 324.
591. *Pandurang Dhondi Chougule v Maruti Hari Jadhav*, AIR 1966 SC 153 : [1966] 1 SCR 108 : 68 Bom LR 41.
592. *Sreenivasa v K Srinivasulu*, AIR 2001 Kant 497.

The Patna High Court has held that where the subordinate court fails to exercise a jurisdiction vested in it or where it has acted in exercise of its jurisdiction illegally or with material irregularity, the high court can interfere in its revisional jurisdiction.[593]

On the other hand, an erroneous construction of section 12 of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 does not involve any question of jurisdiction.[594] A jurisdictional question of law or of a fact means the collateral question which the court has sometimes to decide to ascertain whether it has jurisdiction and has nothing to do with the merits of the case.[595] The simplest case where the point of jurisdiction is involved is where a preliminary issue is raised, whether the court has jurisdiction or not.[596] An erroneous decision on the question of estoppel would lead to failure to exercise jurisdiction.[597] Thus, where a court has jurisdiction to accept a plaint,[598] or an application,[599] or to execute a decree,[600] or to review its judgment,[601] but it refuses to accept the plaint or application or to execute the decree to review its judgment, on the ground that it has no jurisdiction, the high court will interfere under this section. In a case where the lower court had ignored the provisions of section 59 of the Negotiable Instruments Act, 1881 and had shut out the defence, the high court interfered in revision;[602] similarly, the high court can interfere where a condition upon leave to defend is imposed in spite of the existence of a triable issue raised *bona fide* and in good faith.[603] When a subordinate judge refused to allow an assignee to execute a decree, the High Court of Allahabad held that there was a failure to exercise jurisdiction because the judge did not exercise his own judgment but followed a ruling which was not applicable.[604] An order refusing to make an inquiry under O XXI, rule 2, is open to a revision.[605] Again, when the lower court made an order on the petition "that the petition will be recorded", this was said to be no order at all, and the court was directed in a revision to hear and dispose it off on merits.[606] Similarly, where a court refused to confirm a sale under section 312 of the CPC 1882 (O XXI, rule 92), believing that it had no power to do so if the purchaser objected to the sale on the ground of misrepresentation, it was held by the Privy Council that the case was one in which the court had failed to exercise a jurisdiction vested in it by law and that the decision was, therefore, subject to a revision under the present section.[607] In another case, when a court refused to entertain an application to set aside an *ex parte* decree under O XXXIV, rule 6, on the erroneous ground that it was an execution proceeding, the order was subject to a revision.[608] The rejection of an application for fixing a standard rent, on the ground that the

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593. *Prem Shanker Choudhary v President, Bihar State Board of Religious Trusts*, AIR 2006 Pat 12 : 2005 (4) Pat LJR 487.
594. *Ratilal B Nazar v Ranchhodbhai*, AIR 1966 SC 439.
595. *NM Nayak v Chotalal Hariram*, AIR 1968 Bom 51 : (1967) Bom 1110; *Dullan Prasad v Rajeshwari Bibi*, AIR 1977 All 151.
596. *AV Ibrahim v Carippa*, AIR 1971 Mys 298.
597. *Bhaboot Mal v Sens Mal*, AIR 1973 Raj 56.
598. *Zamiran v Fateh Ali*, (1905) 32 Cal 146; *Badami Kuar v Dinu Rai*, (1868) 8 All 111; *Mukan Di Lal v Nur Elahi Abdul*, AIR 1934 Lah 44.
599. *Gunnerbinnersa v Gopendra*, AIR 1936 Cal 572 : (1936) 63 Cal 49.
600. *Shamrav v Niloji*, (1886) 10 Bom 200; *Asiruddin v Ram Sakhi*, AIR 1925 Cal 679 : (1925) 41 Cal LJ 166.
601. *Akbar Khan v Muhammad*, (1909) 4 Ind Cas 23.
602. *Ram Narain v Ramjiwan*, AIR 1937 Nag 267.
603. *The New Ashapuri Co-op Hsg Soc Ltd v Arvind Kumar M Patil*, AIR 1975 Guj 76.
604. *Ram Sahai v Madan Lal*, AIR 1926 All 346 : (1926) 48 All 432.
605. *Baijnath v Bishwa Nath*, AIR 1940 Oudh 381 : (1940) 15 Luck 712.
606. *Muniswami Mudali v Meenakshi*, AIR 1928 Mad 215 : (1928) 51 Mad 244.
607. *Brij Mohun v Rai Uma Nath*, (1893) 20 Cal 8 : 19 IA 154.
608. *Babu Lal v Raghunandan*, AIR 1930 All 841 : (1930) 52 All 839.

provisions of the Calcutta Rent Act, 1920, were not applicable to the case, is a refusal by the rent controller to exercise a jurisdiction conferred upon him by the Act, and is accordingly a proper case for interference under this section.[609] An order returning a memorandum of appeal for presentation to another court is also open to a revision.[610] Interference under this section is also appropriate where a court has no discretionary power to refuse a relief, but refuses the relief, believing that it has a discretionary power to do so. Thus, where a court refused the application of a decree-holder for a rateable distribution under section 73, though according to its own finding he was clearly entitled to such distribution, on the ground that there was other property of the judgment-debtor available for the satisfaction of his claim, the High Court of Madras interfered under this section.[611] However, where a court has discretion in a matter, a wrong exercise of such a discretion is not a proper ground for interference under this section.[612] On the contrary, an order erroneously construing a provision as obligatory, instead of discretionary, would be subject to revision by the high court.[613]

It has been held by the Supreme Court that where a jurisdiction is conferred on an authority to decide a matter, it cannot, unless the statute empowers it to do so, direct the party to establish his claim in a civil court and that such an order is open to revision as it amounts to a failure to exercise jurisdiction.[614] The following decisions have been held to be revisable under this clause: an order dismissing a petition to set aside an execution sale under O XXI, rule 90, on the ground that as the objection was not put forward before sale, when there was no such bar imposed and the objection was on the sale made 30 days before due publication of sale proclamation;[615] an order of the district judge hearing an appeal under section 17 of the Payment of Wages Act, 1936 holding that the provisions of the Act were not applicable to the claim;[616] an order returning the award of the arbitrator for presentation to the court having jurisdiction;[617] and an order of the district judge, dismissing an application for transfer of execution proceedings on the ground that section 24 had no application;[618] an order showing failure on the art of a revenue divisional officer to exercise discretion after considering the circumstances of the landlord and tenant vested in him under section 3(3) of the Tamil Nadu Cultivating Tenant Protection Act, 1955;[619] an order refusing to appoint a commissioner for local investigation as to particulars of improvements and their value on a misapprehension that such an appointment would mean abdication or delegation of power,[620] an order refusing to entertain the plaintiff's claim on the basis of a Supreme Court decision which had no application,[621] an order rejecting an application that the defendant is a minor and should be properly represented without any inquiry merely because the plaintiff described him to be a major.[622]

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609. *Basanti v Rajani*, AIR 1922 Cal 514 : (1922) 49 Cal 928.
610. *Ghulam v Ghulam*, AIR 1925 Lah 479 : (1925) 7 Lah LJ 285.
611. *Shri Krishna Doss v Chandook Chand*, (1909) 32 Mad 334; *Ramnath Panda v Damodar Shahu*, AIR 1950 Ori 230.
612. *Jhunkulal v Bisheshar Das*, (1918) 40 All 612; *Ahmed Hussain v Hardial*, AIR 1926 All 142 (2) : (1926) 28 All 199.
613. *State of Madhya Pradesh v Azad Bharat Finance Co*, AIR 1967 SC 276 : [1966] Supp SCR 473.
614. *Kasturi & Sons v Salivateswaran*, AIR 1958 SC 507 : [1959] 1 SCR 1 : (1958) SCJ 244.
615. *Kisan Dinaji v Deorao Nathuji*, AIR 1954 Nag 240.
616. *Cachar Cha Sramik Union v Manager, Martycherra Tea Estate*, AIR 1959 Gau 13.
617. *PC Biswas v UOI*, AIR 1956 Assam 85.
618. *Dasarath Prasad Singh v Baijnath Prasad*, AIR 1960 Pat 285.
619. *DS Chellammal Anni v Masanan Sambam*, AIR 1955 SC 498.
620. *Rangayya v Govinda*, AIR 1970 Mys 314.
621. *Sahdul Mian v UOI*, AIR 1968 Pat 188.
622. *Pradipkumar v Lakshmi Narayan*, AIR 1977 Cal 171.

A revision would lie if the subordinate court has, inter alia, failed to exercise a jurisdiction in it. In a particular case, the court had granted a time-bound stay order and thereafter no order had been passed extending the period, though an application in that behalf had been filed for a long time. This amounted to non-exercise of a jurisdiction. However, an application under section 115 could not be allowed as no order was sought to be set aside. However, to keep an application pending for an indefinite period, and not passing an order itself amounted to non-existence of jurisdiction. Lower court could be directed to take up the application for consideration on the merits.[623] An application for condonation of delay in filing an appeal was dismissed by the court below on the ground that the copy of judgement and decree taken much later after date fixed for taking delivery, besides appellant though admitted in the hospital did not avail the telecommunication facility to instruct counsel to file appeal. The delay was not condoned and it cannot be said that the appellate court committed any error which could be said to be an exercise of jurisdiction illegally or with material irregularity.[624] Where the application for issuance of precept to the collector for effecting partition of shares in agricultural lands assessed to the payment of land revenue as per share indicated in the decree was dismissed merely because the application had been made almost after 45 years of the passing of the decree, the court would be considered to have committed serious error of law and jurisdiction and the order dismissing the application was liable to be set aside.[625]

[s 115.49] Where a Court in the Exercise of Its Jurisdiction Has Acted Illegally or with Material Irregularity

Clause (c) of the section contemplates cases other than those referred to in clauses (a) and (b). This clause clearly excludes clause (b), for a court cannot refuse to exercise its jurisdiction and also act in the exercise of it with material irregularity.[626] The clause refers to cases where the court, having jurisdiction and exercising it, has acted illegally or with material irregularity in the exercise of such jurisdiction.[627] Order by court granting ad interim *ex parte* injunction after expressing its satisfaction regarding existence of *prima facie* case and urgent nature of matter although not containing reasons in detail is neither without jurisdiction nor in exercise of jurisdiction with material irregularity, so is not liable to be interfered with.[628] The words, "acted in the exercise of its jurisdiction illegally or with material irregularity", have given rise to a conflict of decisions. It is, therefore, better first to state the settled law, and then to deal with the various interpretations put on the words "illegally" and "with material irregularity" by the various high courts.

[s 115.50] What Is Not "illegality" or "material irregularity"

It is settled law that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law — the leading

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623. *Dhaneswar v Chandra Chowdhary*, AIR 1985 Gau 46.
624. *Gopi Lal v Sunder Lal*, AIR 1996 Raj 219.
625. *Ramrati Bai v Suraj Pal*, AIR 1995 Bom 445.
626. *Basaratulla v Reasuddin*, AIR 1926 Cal 773 : (1926) 53 Cal 679.
627. *Kristamma v Chapa*, (1894) 17 Mad 410.
628. *Binod Kumar Gupta v Rajendra Prasad Shukla*, AIR 2003 Cal 68.

case on this subject is *Amir Hassan Khan v Sheo Baksh Singh*,[629] decided by their Lordships of the Privy Council in 1884. In that case, it was laid down that where a court has jurisdiction to decide the question before it and in fact decides the question, it cannot be regarded as acting, in the exercise of its jurisdiction, illegally or with material irregularity, merely because its decision is erroneous. The mere fact that the decision of the court is wrong, affords no ground for the interference of the high court under this section. In the course of the judgment, their Lordships stated:

> The question then is, did the judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, [namely, whether the suit was barred by *res judicata*] and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

Following this decision, it has been held that the high court will not interfere under this section, merely because the lower court allowed an application which was barred, by limitation,[630] or wrongly decided that a suit was barred by limitation;[631] but, a contrary view has been taken in the following cases, where the high court interfered under clause (b) on the ground that by wrongly deciding the question of limitation, the court had declined to exercise jurisdiction vested in it.[632] But it is submitted that this decision is not correct. Whether the petition was barred by *res judicata*,[633] or because the lower court proceeded upon an erroneous construction of the sections of an Act;[634] or misunderstood the effect of a document in evidence;[635] or excluded evidence which it ought to have admitted,[636] except where such a course was in direct contravention of a statutory provision,[637] or held, though incorrectly, that no relation of landlord and tenant existed between the parties to a suit or proceedings;[638] or that it was not necessary to give notice to a railway company under section 77 of the Railways Act, 1989;[639] or that the procedure under section 61 of the Presidency Small Causes Court Act, 1882 was not followed;[640] or that an application to set aside a sale was not time-barred;[641] or that it wrongly applied sections 130 and 131 of the Transfer of Property Act, 1882, it would not entitle the high court to interfere under this section.[642] Similarly, no revision lies from an

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629. *Amir Hassan Khan v Sheo Baksh Singh*, (1885) 11 Cal 6 : 11 IA 237; *Muhammad Yusuf Khan v Abdul Rahman Khan*, (1889) 16 Cal 749 : 16 IA 104; *Parasurama v Seshier*, (1904) 27 Mad 504; *Misrilal Parasmal v Sadasiviah*, AIR 1965 SC 553; *Hindustan Aeronautics v Ajit Prasad*, AIR 1973 SC 76 : (1972) 3 SCC 195.
630. *Babu Ram v Munna Lal*, AIR 1927 All 358 : (1917) 49 All 454.
631. *Mithalal Ranchhoddas v Maneklal Mohanlal*, AIR 1941 Bom 271 : 43 Bom LR 480; *Sundar Singh v Doru Shankur*, (1898) 20 All 78; *Ramgopal v Joharmall*, (1912) 39 Cal 473; *Jhotu Lal v Ganouri*, (1918) 3 Pat LJ 376.
632. *Radhaballabh v Ramranvijay*, AIR 1947 Pat 391; *Anant Pradhan v Nimal*, (1927) Pat 366.
633. *Amrita v Balkrishna*, (1887) 11 Bom 488; *Senaji v Pannaji*, AIR 1932 Bom 81 : (1931) 33 Bom LR 1566.
634. *Rabbabai v Noorjehan*, (1886) 13 Cal 90; *Krishna v Kedarnath*, (1888) 15 Cal 446; *Kali Charan v Sarat Chunder*, (1903) 30 Cal 397; *Ganga Charan v Shoshi Bhushan*, (1905) 32 Cal 572; *Ram Singh v Saliq Ram*, (1906) 28 All 84; *Malkarjun v Narhari*, (1901) 25 Bom 337, 347 : 27 IA 216.
635. *Maharaja of Cochin v Perali Kunnat Madhava Menon*, AIR 1942 Mad 413; *Dasrath Rai v Sheodin*, (1894) 16 All 39.
636. *Madhavrao v Gulabbhai*, (1899) 23 Bom 177; *Enat Mondul v Baloram*, (1899) 3 Cal WN 581; but see *Bhusan v Profulla*, AIR 1921 Cal 251 : (1921) 48 Cal 119 (shutting out evidence).
637. *East Indian Rly Co v Kanai Lal*, AIR 1924 Cal 493 : (1923) 28 Cal WN 292, at p 294.
638. *Shew Prasad v Ramchunder*, (1914) 41 Cal 323.
639. *East Indian Rly Co v Kanai Lal*, AIR 1924 Cal 493 : (1923) 28 Cal WN 292.
640. *Tops v Karnani Bank*, AIR 1932 Cal 411 : (1932) 59 Cal 311.
641. *Musammat Bibi v Paras Nath*, AIR 1924 Pat 37 : (1923) 2 Pat 800.
642. *Sant Singh v Mubarak*, AIR 1928 Lah 140 : (1928) 9 Lah 308.

order passed in appeal, remanding a case under O XLI, rule 23,[643] though such an order may be erroneous in law. In these cases, the court considered the question and came to an erroneous conclusion. However, if the court does not adjudicate upon the question and entertains an application which is, on the face of it, barred by limitation, it acts with material irregularity and its order is revisable.[644]

When, however, as in the cases previously cited, the court has considered a question which it has jurisdiction to decide, and comes to an erroneous conclusion, that is not open to revision, as, a mere error of law is not an illegality within the meaning of this section. In such cases, the high court might well have said, in the words of their Lordships of the Privy Council in another case;[645] "It (the lower court) made a sad mistake it is true; but a court has jurisdiction to decide wrong as well as right". The point was further emphasised by their Lordships of the Privy Council in *Balakrishna Udayar v Vasudeva Aiyar*,[646] wherein, referring to this section, their Lordships said:

> It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

In *Venkatagiri v Hindu Religious Endowments Board*,[647] the Privy Council once again stated:

> Section 115 applies only to cases in which no appeal lies, and, where the legislature has provided no right of appeal, the manifest intention is that the order of the trial court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate court in within its jurisdiction; (b) that the case is one in which the court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on those three matters it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate court on questions of fact or law.

The scope of revisional jurisdiction under this clause came up for consideration before the Supreme Court in *Keshar Deo v Radha Kissen*,[648] wherein it was observed that the words "illegally or with material irregularity" had reference to a "material defect of procedure" and not to "error of either law or of fact after the formalities which the law prescribes have been complied with". However, where the question is one, on the decision of which the court's jurisdiction depends, the court cannot, by an erroneous finding, confer upon itself jurisdiction

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643. *Chhubu Mian v Harcharan Das*, (1912) PR No 119, at p 406.
644. *Tara v Basiruddin*, (1915) 19 Cal WN 970; cf *Raghubir Singh v Mulchand*, AIR 1937 All 598.
645. *Malkarjun v Narhari*, (1901) 25 Bom 337 : 27 IA 216; *Rajwant Prasad v Ram Ratan*, 42 All 171; *Cawashah Bomanji v Prafulla Nath*, AIR 1941 Nag 364.
646. *Balakrishna Udayar v Vasudeva Aiyar*, AIR 1917 PC 71 : (1917) LR 44 IA 261; *Ravad Raibari v PGM Rajmani*, AIR 1977 Ori 58; *GK Krishnan v Meenakshi Kutty Amma*, AIR 1977 Ker 199; *Ashiq Ali v Imtiaz Began*, (1917) 39 All 723 (suit valuation); *Jhunku Lal v Bisheshar Das*, (1918) 10 All 612 (O XXIII, rule 1); *Ray Nicholas Lines v All India Spinners Association*, AIR 1947 Pat 185 (SB) (where, however, it was held that an order made arbitrarily or whimsically can be revised in revision).
647. *Venkatagiri v Hindu Religious Endowments Board*, AIR 1949 PC 156 : 76 IA 67 : 51 Bom LR 952; *RD Gupta v UOI*, AIR 1970 Assam & Nag 35 : (1969) ILR Assam 151; *Badridas Kothari v Meghraj Kothari*, AIR 1967 Cal 25; *Rati Singh v Ram Prasad*, AIR 1971 Pat 156; *Pandurang Dhondi v Maruti Hari Jadhav*, AIR 1966 SC 153 : [1966] 1 SCR 102, unless the error of law has relation to the jurisdiction of the court to try the dispute itself.
648. *Keshar Deo v Radha Kissen*, AIR 1953 SC 23 : [1953] SCR 136 : 1952 SCJ 633; *Radhavallav Math v Jaga Pradhan*, AIR 1965 Ori 221; *DLF Housing & Construction Co v Sarup Singh*, AIR 1971 SC 2324 : [1970] 2 SCR 368.

which it otherwise does not possess. Such an order is liable to be interfered with in revision.[649] In *Satyanarayan v Mallikarjun*,[650] while discussing the powers of the high court under Article 227 of the Constitution and section 115 of the CPC, the Supreme Court observed that an error, not apparent on the face of the record, could not be corrected under those provisions.

The rule laid down in *Balakrishna*'s case has been interpreted, or rather, applied differently by different high courts. This may be explained by an illustration: *A* applies under O XXI, rule 89 to set aside a sale in execution of a decree. The lower court places a wrong interpretation on rule 89, and holds that *A* is not a person entitled to apply under that rule, and the application is dismissed. *A* then applies to the high court for a revision of the order of the lower court. Can the high court interfere in revision? It has been held by the Patna High Court[651] that it can, the reason given being that the case is one of a refusal to exercise jurisdiction vested by law in the lower court and, therefore, within this section. In the course of his judgment, MULLICK, J, said:

> The court's decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction. An erroneous decision on a question of law or fact after jurisdiction has been once legally assumed would not be a ground for interference under section 115 of the Code of Civil Procedure, but if the decision is *the very basis and foundation of jurisdiction* in its limited sense as distinguished from powers, it at once comes within the purview of the section. The judgment of their Lordships of the Privy Council in *Balakrishna Udayar v Vasudeva Aiyar* is, in my opinion, an authority for this view.

The same view has been taken by a full bench of the Madras High Court.[652] This view has been dissented from by a full bench of the Allahabad High Court and by the Calcutta High Court.[653] In the Allahabad case, BANERJI, J, after referring to *Balakrishna*'s case, said:

> In the present case the court was competent to determine whether *A* was entitled to make an application under O XXI, Rule 89, and it had jurisdiction to decide that question, and it decided it adversely to *A*. The court may have been wrong in its decision, but it cannot be said that in the exercise of its jurisdiction it acted illegally or with material irregularity in the sense in which those words have been interpreted by their Lordships of the Privy Council in the case to which I have referred and in earlier cases decided by their Lordships.

The substantial point of difference between these two divergent views is that, whereas, the Patna and Madras High Courts treat the refusal by a lower court, to entertain the application as a refusal to exercise jurisdiction vested in it by law, the High Court of Allahabad regards the refusal as no more than a decision, though erroneous on a point of law, in the exercise of the lower court's jurisdiction. There is no difference of opinion between these courts on the point that, where the lower court assumes jurisdiction or refuses jurisdiction on an erroneous construction of a statute, the high court can interfere in revision. The difference arises on the question — whether it is a case of refusal to exercise jurisdiction, or a case merely of a wrong decision on a point of law, in the exercise of the court's jurisdiction. According to the Patna and Madras High Courts, it is the former; whereas according to the Allahabad High Court, it is the latter.

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649. *UOI v RM Agarwal*, AIR 1971 Bom 52 : (1971) Mah LJ 167..
650. *Satyanarayan v Mallikarjun*, AIR 1960 SC 137 : [1960] 1 SCR 890 : 1960 SCJ 1065.
651. *Musammat Dhanwanti v Sheo Shankar*, (1919) 4 Pat LJ 340; *Haribar Prasad v Gopal Saran*, AIR 1935 Pat 385 : (1935) 14 Pat 488.
652. *Sundaram v Mausa*, AIR 1921 Mad 157 : (1921) 44 Mad 554 (FB); *Seetaramayya v Subramaniyam*, AIR 1935 Mad 547 : (1935) 58 Mad 938; *Mehboob Alam v Nasira Begum, AIR* 1977 Raj 189.
653. *Yad Ram v Sunder Singh*, AIR 1923 All 392 : (1923) 45 All 425 (FB); *Kally Nath Dutt v Sheo Bux*, AIR 1950 Cal 87 : (1950) Cal WN 355.

Following its full bench ruling, the Madras High Court has held that though an erroneous decision on a point of limitation is not a ground for interference under this section, the high court can, and will, interfere if the small causes court refuses to entertain an application for retrial of a suit tried by a single judge of that court, where such refusal proceeds on a wrong view of a question of limitation.[654] It was similarly held by this court that, where a district judge, on an erroneous construction of a statutory rule, assumes jurisdiction to declare whether a person elected as a president of a local board is duly elected or not, and assuming such jurisdiction declares his election to be void, the high court has the power to interfere under this section.[655] The same high court interfered in revision, where a subordinate judge misconstrued the legal position in the case, and refused to release the property under attachment as he should have done;[656] as also, where the result of an erroneous decision was likely to perpetuate the error and to give rise to multiplicity of suits, not for one year but for all time to come;[657] as also when the lower court, proceeding on an erroneous view of the law, refused a commission for the examination of a defendant;[658] also where the decision of the lower court was based on a total absence of legal evidence.[659]

The High Court of Calcutta has held that, where a judge has misdirected himself as to the meaning and effect of a section or of a rule under the CPC, the high court can interfere in revision. Thus, where a plaintiff was allowed to withdraw his suit under O XXIII, rule 1, with liberty to bring a fresh suit on the same cause of action on the ground of a formal defect in the framing of the suit after the suit had been heard and decided against him on merits, the high court interfered in revision.[660] In another case, the high court interfered in revision, on the ground that the *munsiff* had not directed his attention properly to the provisions of O XXI, rule 60.[661] A presidency small causes court has only revisional jurisdiction under section 38 of the Presidency Small Causes Courts Act, 1882, and when the court, purporting to act under that section, interfered on a question of fact, the Calcutta High Court held that it had no jurisdiction to make the order.[662] The Calcutta High Court also interfered when a lower court settled the share which a co-sharer landlord was entitled to pre-empt arbitrarily and without regard to any principles.[663] The Oudh High Court interfered in revision where the lower court allowed the plaintiff to withdraw the suit, with liberty to institute a fresh suit, the object of the withdrawal being to produce evidence in the new suit which he had omitted to produce at the right time.[664] The High Court of Rangoon has held that if the lower court fails to take into account some proposition of law or some material fact in evidence, it acts illegally, and its decision may be revised by the high court, but if the lower court has applied its mind to the case and duly considered the facts and the law applicable, then, although its decision may be erroneous, the high court cannot interfere in revision.[665]

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654. *British India Steam Navigation Co v Sharafally*, AIR 1923 Mad 435 : (1923) 46 Mad 938.
655. *Ramaswami v Muthu*, AIR 1923 Mad 192 : (1923) 46 Mad 536; *Ahamad v Basava*, AIR 1923 Mad 254 : (1923) 46 Mad 123.
656. *Gangayya v Venkataramayya*, (1923) 43 Mad LJ 80.
657. *Suryanarayan v Sree Raja Venkata*, (1929) 56 Mad LJ 273.
658. *Rajagopala v Kasiviswanathan*, AIR 1934 Mad 399 : (1934) 57 Mad 705.
659. *Mudaliar v Subramaniam*, AIR 1969 Mad 317 : (1968) 2 Mad LJ 490.
660. *Ram Saran v Radha*, AIR 1929 Cal 88 : (1928) 55 Cal 1067.
661. *Rajkishore v Bhabatosh*, AIR 1929 Cal 225 : (1929) 49 Cal LJ 51.
662. *Baldeodas Lohia v Balmukund*, AIR 1930 Cal 806 : (1930) 57 Cal 612.
663. *Khosal v Upendra*, AIR 1932 Cal 220 : (1932) 35 Cal WN 1058.
664. *Tikai v Firm Sheo Dayal*, AIR 1928 Oudh 482 : (1928) 3 Luck 403.
665. *Fut Chony v Maung Po Cho*, AIR 1929 Rang 145 : (1929) 7 Rang 339.

The decision in *Amir Hasan Khan's* case pre-supposes jurisdiction in the court, whose decision is sought to be revised on the ground that it is erroneous. Hence, the principle of that decision does not apply where a court erroneously assumes jurisdiction which is not vested in it by law.[666] Thus, if a court, proceeding upon an erroneous construction of a section of an Act, assumes jurisdiction which is not vested in it by law, the high court will interfere in revision and set aside the decree of the lower court as one passed without jurisdiction.[667] Similarly, if a court wrongly decides that a suit is of a civil nature and entertains the suit on that basis, the decision is open to revision under clause (a) of this section, for, no civil court is competent to entertain a suit which is not of a civil nature (see section 9 above).[668] Likewise, if a court, proceeding upon an erroneous construction of a statute or upon a misapprehension of the law, declines to exercise jurisdiction vested in it by law, the high court has the power to interfere under clause (b) of this section.[669] If the lower court, by reason of its misconstruing the order on a claim petition under O XXI, rule 58, declines to go into the merits of the case, the high court can interfere under clause (b) of this section.[670] These are cases under clauses (a) and (b) of the present section. These are not cases under clause (c), which is the clause under consideration. The reason why these cases are mentioned here is that it was contended in these cases that, as the assumption of jurisdiction or the refusal to exercise it had proceeded upon an error of law, the high court had no power to interfere under this section. The decision in *Amir Hasan Khan's* case was invoked in support of this contention. But the high courts held that if the case came under either clause (a) or clause (b) of this section, it was immaterial whether the assumption of jurisdiction or the refusal to exercise it proceeded upon an error of law. The high courts also pointed out that the basis of the decision in *Amir Hasan Khan's* case was that the lower court had jurisdiction to determine the question before it, and that it had determined it. All that this case decided was that an erroneous decision of a case in the exercise of the court's jurisdiction was not a ground for interference under this section.

Since the above decisions were given, there have been pronouncements by the Privy Council and by the Supreme Court, which have cleared much of the doubt. In *Joychand Lal Babu v Kamalaksha Choudhury*,[671] an application by a debtor for relief under the Bengal Money-Lenders Act, 1940, was dismissed by the subordinate judge on the ground that the debt was a commercial debt and did not fall within the ambit of the Act. The high court, however, set aside this order in revision, holding that it was not a commercial debt, and that the applicant was entitled to relief. Affirming this judgment on appeal, the Privy Council held that though a mere error was not a ground for interference in revision, "if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored". In *Jagdish Prasad v Ganga Prasad*,[672] the point in dispute was whether the landlord was entitled to enhancement of the rent agreed upon. Under the United

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666. *Manisha v Siyali*, (1888) 11 Mad 220.
667. *Province of Madras v Vikrama Deo Verma*, AIR 1943 Mad 284; *Vishvambhar v Vasudev*, (1892) 16 Bom 708; *Bhimji v BB & Cl Ry*, AIR 1926 Bom 266 : (1926) 50 Bom 215. See also *Brij Mohun v Rai Uma Nath*, (1893) 20 Cal 8 : 19 IA 154.
668. *Ross v Pitambar*, (1903) 25 All 509, see the judgment of Blair, J, at p 525 of the report.
669. *Barko v Habiba Khanan*, AIR 1947 Oudh 101 : (1946) 22 Luck 88; *Ka Or Shabong v Ka Lasuban Shabang*, AIR 1950 Assam 214; *Jugobundhu v Jadu*, (1888) 15 Cal 47; *Maharajah of Burdwan v Apurba*, (1911) 15 Cal WN 782; *Rajani v Rajabala*, AIR 1925 Cal 320 : (1924) 52 Cal 128; *Konchadu v Sundara*, AIR 1936 Mad 91 : (1936) 59 Mad 303.
670. *Seetaranmayya v Subrahmanyan*, AIR 1935 Mad 547 : (1935) 58 Mad 936.
671. *Joychand Lal Babu v Kamalaksha Choudhury*, AIR 1949 PC 239 : 76 IA 131.
672. *Jagdish Prasad v Ganga Prasad*, AIR 1959 SC 792 : (195)] 1 SCR 733 : 1959 SCJ 495.

Provinces (Temporary) (Control of Rent and Eviction) Act, 1947, he would not be so entitled unless new construction had been done by the landlord after 30 June 1946. The high court held, in reversal of the finding of the civil judge, that there was no such construction, and dismissed the application. Repelling the contention that the high court was not competent to interfere in revision, with a finding of fact, the Supreme Court held that the question of new construction by the landlord was a jurisdictional fact and stated:

> ...therefore, if an erroneous decision of a subordinate court resulted in its exercising jurisdiction not vested in it by law, or failing to exercise the jurisdiction so vested, or acting, with material irregularity or illegality in the exercise of its jurisdiction, the case for the exercise of powers of revision by the High Court is made out.

A similar question arose in *Roshanlal v Iswardass*.[673] Under the provisions of the Delhi and Ajmer-Mewar Rent Control Act, 1947, the rent controller has jurisdiction to fix a standard rent for new constructions made after 24 March 1947. The dispute between the parties related to the question of whether the shops which were the subject-matter of the application, were constructed before or after that date. The rent controller had held that the shops were constructed after 24 March 1947, and fixed the standard rent. This order was confirmed by the district judge, but was set aside by the high court in its revisional jurisdiction under section 115. This judgment was set aside, on appeal, by the Supreme Court, which held that, being a jurisdictional fact, the correctness of the finding was open to revision, but that "the High Court was in error in interfering with the finding of fact by the Rent Controller and the District Judge, in support of which finding there was clear and abundant evidence".

The results of the authorities may thus be summed up:

(i) A court which has indisputable jurisdiction to hear a cause has jurisdiction to come to a decision, wrong as well as right, and the decision is not open to revision.

(ii) Where the question is one, on the decision of which the jurisdiction of the court depends, the court cannot, by an erroneous finding, confer on itself a jurisdiction which it does not possess, and its order is liable to be revised by the high court.

On this principle, revision has been entertained against a decision on a question as to the character of the lands situated in an estate, where the jurisdiction of the court to entertain a suit for rent or ejectment with reference thereto, depended on whether they were *ryoti* or home farm lands;[674] against an order rejecting an application to sue *in forma pauperis* on the ground that the plaint did not disclose a cause of action;[675] against an order setting aside the election of a candidate to a municipal committee on the ground that he was disqualified;[676] against an order as to valuation of a suit, where it might affect the jurisdiction of the court.[677]

A court has no power to dismiss a suit after a decree has been passed. If it does so, the question arises whether the case is one of exercise of jurisdiction not vested in the court, or one of illegality or material irregularity. In *Lachmi Narain v Balmakund*,[678] the judicial committee held that the case was one of exercise of jurisdiction not vested in the court. In that case, the high court, on appeal, passed a decree by consent for a partition upon certain terms and remitted the suit to the subordinate judge for disposal under the decree. The plaintiff failed to

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673. *Roshanlal v Iswardass*, AIR 1962 SC 464 : (1962) 2 SCR 947.
674. *Periannan v AS Amman Koil*, AIR 1952 Mad 323 : (1952) 1 Mad LJ 71 (FB); *Pentakota Naryudu v Venkataramanamurthi*, AIR 1950 Mad 158 : (1949) 2 Mad LJ 623.
675. *Rajwanthi Kuer v Ram Bhawan Rai*, AIR 1954 Pat 63.
676. *Sadasheo v Hemaji*, AIR 1958 Bom 507.
677. *Ganeshlal v Narainlal*, AIR 1958 Pat 486.
678. *Lachmi Narain v Balmakund*, AIR 1924 PC 198 : (1924) 51 IA 321.

appear on the day appointed by the subordinate judge, and the judge dismissed the suit under O XVII, rule 2, and O IX, rule 8. The plaintiff applied to the high court in revision. The high court decided that the case came both under clause (a) and clause (c) of this section and set aside the order of the subordinate judge, and ordered the case to be restored to his file. The defendants appealed from this order to the Privy Council on the ground that the high court had no power to interfere in revision. Their Lordships affirmed the decision of the high court and said: "Their Lordships do not think it necessary to determine that the case came under para (c) of section 115. But they think that the order which the subordinate judge made was one which he had no jurisdiction to make". The order of the subordinate judge was not merely wrong in law, rather, it was an order which he had no jurisdiction to make. Similarly, when the court held that for the final determination of all the questions involved, an applicant is a necessary and proper party, and to avoid multiplicity of proceedings, impleadment is necessary and that it should exercise its discretionary jurisdiction to make impleadment, the order and the decision is one which is within its jurisdiction, and is not open to interference in revision.[679]

Besides the cases mentioned above, there are cases in which the action of the lower court has been held not to amount to illegality or material irregularity, e.g., failure to give notice where no notice is required to be given under the CPC, though it might have been given as a matter of equity;[680] deciding a case without taking into consideration a point of law where such point was never raised before the court;[681] omitting to state in the order granting a review, that the new matter discovered by the applicant was important;[682] and, refusal to condone delay after hearing the parties;[683] rejection of the defendant's application for producing documents before his evidence is recorded;[684] no specific reference to petition for condonation of delay in order of restoration of suit passed by the trial court.[685] Order directing plaintiff to strike down certain paragraphs in pleadings on ground that they are unnecessary, scandalous, frivolous and vexatious does not amount to no material irregularity or jurisdictional error in passing said order warranting interference under section 115.[686]

[s 115.51] What Is "illegality" or "material irregularity"

Amir Hassan Khan's case decided what "is not" illegality or material irregularity. What is it, then, which does constitute illegality or material irregularity within the meaning of this section? The courts have taken *Amir Hassan Khan's* case as the key to the solution of this question. However, as many judges have put different interpretations upon this case, there are many conflicting views as to the meaning of these words. Following are some of the leading examples:

(i) The words, "acted in the exercise of its jurisdiction illegally or with material irregularity", refer only to an error of jurisdiction, and apply only to cases of the kind contemplated by clauses (a) and (b) of this section.[687]

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679. *Aswathamma v HM Vijayraghava*, AIR 1999 Kant 21; *Rajiya Begum v Sahib Zadi Anwar Begum*, AIR 1958 SC 886.
680. *Vishnu v Rampratab*, AIR 1921 Bom 219 : (1921) 45 Bom 360.
681. *Haridas v Ratansey*, AIR 1922 Bom 149 : (1922) 46 Bom 56.
682. *Srinivasa v Official Assignee*, AIR 1927 Mad 641 : (1927) 50 Mad 891.
683. *K Achou Singh v Parnimashi Devi*, AIR 1971 Mani 16.
684. *Madanlal v Shyamlal*, AIR 2002 SC 100 : (2002) 1 SCC 535.
685. *Davinder Pal Sehgal v Pratap Steel Rolling Mills Pvt Ltd*, AIR 2002 SC 451 : (2002) 3 SCC 156 : 2002 (1) LJR 778 : 2002(1) Punj LJ 61.
686. *Mohammed Azhuruddin v AC Muthaiah*, AIR 2002 AP 409.
687. *Magni Ram v Jiwa Lal*, (1885) 7 All 336; *Badami Kuar v Dinu Rai*, (1886) 8 All 111; *Indubala Dassi v Lakshmi Narayan*, (1934) 38 Cal WN 1146; *Mahavir Singh v Naresh Chandra*, AIR 2001 SC 134.

(ii) The words refer only to errors of procedure as distinguished from errors of law.[688] This view proceeds mainly on the word "acted". In a case in the Calcutta High Court, Jenkins, CJ, said:

> It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one of *the faults of procedure* indicated in that section. If there was an error committed (by the judge of the Small Causes Court), it was an error of *law* and not *of procedure*, and in my opinion Justice Fletcher had no power to interfere.[689]

This view is supported by the decisions of the Privy Council which have stated that it is a material irregularity to decide a case in the absence of the necessary party,[690] or to summarily dismiss an application of a person to be brought on record as a party.[691]

(iii) The words apply to cases where there is a wilful disregard, or conscious violation by a judge, of a rule of law or procedure.[692] As against this view, it has been said that it engrafts upon the Privy Council ruling, a qualification to the effect that, the high court can interfere under the present section, if the erroneous decision is the result of a conscious violation by the lower court, of a rule of law or procedure, and that the distinction is in no way warranted by the language of this section.[693] To this, it is submitted that, if the section does not apply to cases where a judge consciously violates a rule of law or procedure, a lower court might, with impunity, or wilfully, disregard the decisions of the high court, or even of the Privy Council.[694]

(iv) The words apply to cases where the decision complained of is vitiated by a gross and palpable error.[695] According to this view, a mistake, though of law, would, if it is gross and palpable, give jurisdiction to the court, under this section. However, this view runs contrary to the decision in *Balakrishna Udayar v Vasudeva Aiyar*, which was later[696] rejected by the Privy Council in *Venkatagiri Iyengar v Hindu Religious Endowments Board Madras*.[697] See also the decisions wherein, it was held that a mere error was not a ground for revision.[698]

(v) The words "acted illegally" do not imply the committing of an error of procedure as the expression "acted with material irregularity" does. These words have reference to gross and palpable errors committed by subordinate courts, which result in grave injustice.[699]

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688. *Kristamma Naidu v Chapa Naidu*, (1894) ILR 17 Mad 410.
689. *Shew Prasad v Ramchunder*, (1914) 41 Cal 323.
690. *Umed Mal v Chand Mal*, AIR 1926 PC 142 : 53 IA 271.
691. *Atma Ram v Bani Prasad*, AIR 1935 PC 185 : (1935) 62 IA 257.
692. *Shiva Nathaji v Joma Kashinath*, (1883) 7 Bom 341; *Kristamma v Chapa*, (1894) 17 Mad 410; *Motibhai v Ranchodbhai*, AIR 1935 Bom 222 : (1935) 59 Bom 430.
693. *Kristamma v Chapa*, (1894) 17 Mad 410.
694. *Ross v Pitambar*, (1903) 25 All 509.
695. *Mohunt v Khettar Moni Dassi*, (1896) 1 Cal WN 617; *Enat Mondul v Balaram*, (1899) 3 Cal WN 581; *Venkubai v Lakshman*, (1888) 12 Bom 617; *Gulabchand v Kabiruddin*, AIR 1931 Cal 2 : (1931) 58 Cal 111; *Peram Kistama Naidu v Sankarayya Nayudu*, AIR 1945 Mad 278.
696. *Balakrishna Udayar v Vasudeva Aiyar*, AIR 1917 PC 71 : 44 IA 261.
697. *Venkatagiri Iyengar v Hindu Religious Endowments Board Madras*, AIR 1949 PC 156 : 76 IA 67 : 53 Cal WN 458.
698. *Jal Hirji Tavaporewala v KA Hamid*, AIR 1956 Bom 323; *Krishna Deb Jha v Jokhilal*, AIR 1956 Pat 290; *Veerappa v Bangarappa*, AIR 1960 Mys 297; *Kamala v Rajagopalchari*, AIR 1963 Mad 305 : 75 LW 172.
699. *Jagunnessa v Satish Chandra*, AIR 1924 Cal 633 : (1924) 51 Cal 690; *Indubala v Lakshmi Narayan*, 38 Cal WN 1146.

However, it will not serve any useful purpose to discuss these conflicting views. It will suffice to say, as observed by the judicial committee in *Balakrishna Udayar v Vasudeva Aiyar*,[700] that "the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."[701]

Having noted the different interpretations put upon the words in question, we now proceed to note some of the decisions reported on this subject.

It is an "illegality" to frame an issue on a point of fact expressly admitted by the defendant and to dismiss the suit on the ground that the fact is not proved.[702] Similarly, it is an "illegality" if a court passes a decree on an unstamped *hundi*, when the Indian Stamp Act, 1899 expressly provides that an unstamped *hundi* shall not be acted upon.[703] It is an "illegality" if the appellate court calls in question the admissibility of a document not duly stamped, after the same has been admitted in evidence in the court of the first instance — such a course is manifestly against the provisions of the Indian Stamp Act, 1899, in which it is enacted that, when an instrument has been admitted in evidence, such an admission shall not be called into question at any stage of the same suit.[704] It is also an "illegality" to pass a decree where there is no evidence at all to support it,[705] or where the evidence is obviously of no value,[706] or to decide a case on personal inspection of the subject matter of the suit, ignoring the evidence on record.[707] It is an "illegality" to attach in the execution of a decree, the tools of an artisan, contrary to section 60 of the CPC,[708] or to attach money in a provident fund, regulated by the Provident Funds Act, 1925,[709] or to confirm the sale in execution, in disregard of a stay order passed by the same court in another proceeding.[710] However, where the interim order of attachment, passed by a lower court lacks legality and competency, the high court can interfere with the order in revision.[711] It is an illegality when the court dismisses an application to set aside a sale under O XXI, rule 89, merely because the names of all the purchasers have not been written in the application.[712] Where the auction sale is vitiated due to a violation of the mandatory provisions of O XXI, rule 85 and rule 138 of the Karnataka Civil Rules of Practice, 1967, it amounts to an exercise of jurisdiction "illegally" and with "material irregularity".[713] It is also an "illegality" to include, in a decree, costs which are not legally taxable.[714] It is also an illegality if the court refuses to follow a ruling by which it is bound,[715] or where the lower court orders to proceed with the suit in the absence of a necessary party.[716] It is also an "illegality" if a provision

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700. *Balakrishna Udayar v Vasudeva Aiyar*, AIR 1917 PC 71 : (1917) 44 IA 261, at p267.
701. See notes above on "Jurisdiction".
702. *Gorakh v Vithal*, (1887) 11 Bom 435.
703. *Chanbasappa v Lakshman*, (1894) 18 Bom 369.
704. *Shiddapa v Irava*, (1894) 18 Bom 737.
705. *Shields v Wilkinson*, (1887) 9 All 398; *Haidarali v Saiyed Ghulam*, AIR 1934 Bom 343 : (1934) 58 Bom 623.
706. *Bhairab v Kalidhan*, AIR 1929 Cal 736 : (1928) 33 Cal WN 569.
707. *Sakeena Bibi v Stephens*, AIR 1926 Rang 205 : (1926) 4 Rang 221.
708. *Badami v Dinu*, (1886) 8 All 111, at p 115; *Dhan Singh v Basant Singh*, (1886) 8 All 519, at p 529; *Sew Bux v Shibchunder*, (1886) 13 Cal 225.
709. *Hindley v Joynarain*, (1919) 46 Cal 962.
710. *Ram Pratap v Mohanlal*, AIR 1967 All 161.
711. *Nullimarla Jute Mills Co Ltd v Sree Mahaveer Rice and Oil Mills*, AIR 1989 AP 214.
712. *Div Chand v Sheo Prasad*, AIR 1929 All 593 : (1929) 51 All 910.
713. *Annappa Reddy v S Suresh*, AIR 1995 Kant 119.
714. *Bhagwant Singh v Bhao Singh*, AIR 1932 All 337 : (1932) 54 All 490.
715. *CTACT Firm v Maung Aye*, AIR 1937 Rang 197.
716. *Hardeva v Ismail*, AIR 1970 Raj 167 : (1970) 20 Raj 99.

relating to limitation is overlooked,[717] or there is violation of a statutory provision.[718] The grant of an interim injunction, without giving a notice to the caveator is an order which is without jurisdiction.[719] Further, an order refusing to correct the number of exhibits also suffers from illegality.[720] If a finding of fact is recorded, after having ignored the material on record on illegal grounds, then the court can be said to have acted "illegally" and with "material irregularity".[721] Where the "material irregularity" has been committed by the appellate court in its decision, in rejecting a ballot paper under the Kerala Panchayat Raj (Conduct of Election) Rules, 1995, the high court cannot shut its eyes and hold that interference is not called for, in view of the limited jurisdiction under section 115 of the CPC.[722]

It is a "material irregularity" if a decree is passed in a suit in the absence of a party necessary to the suit.[723] It is also a "material irregularity" if a court, taking a mistaken view of the question in issue, proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on a determination of that issue.[724] It is also a "material irregularity" where the lower court would not have decided the question of fraud in the manner that it did, except for a mistaken assumption of the facts.[725] It is also a "material irregularity" to treat the delivery of the summons by post to a person who was not shown to be the defendant, as good service, and to pass a decree *ex parte* against the defendant on that footing;[726] or to attach, in the execution of a personal decree against the defendant, property which he holds as trustee for another;[727] or to transfer a suit on application under section 24 without a notice to the opposite party;[728] or to make an order against a person without hearing him,[729] or without giving the parties an opportunity of examining or cross-examining an expert, on whose report the court has relied.[730] It is also a "material irregularity" for a court to decline to look into the evidence when required to do so, and to proceed to dispose of the suit upon the pleadings or upon the allegations made in a petition,[731] or to refuse to draw up its own decree, whether it be preliminary or final;[732] or to refuse to grant a certificate for the refund of court fees paid on a memorandum of appeal, when a case is remanded under O XLI, rule 23.[733] It is also a "material irregularity" to apply to a case, a section of an Act, which is not applicable to it,[734] or to disregard the provisions of the Indian Evidence Act, 1872, and to place the burden of proof on the wrong party;[735] or to decide a case on a point of fact which was not raised in the

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717. *Khun Khun Chaube v Mahabir Chaube*, AIR 1948 All 261 : (1948) All 155 (FB).
718. *Naubat Rai v Jugal Kishore*, AIR 1949 All 606.
719. *Contemporary Target Pvt Ltd v MB Enterprises*, AIR 1994 Gau 7.
720. *Lakshmi Kanta Mandal v Minor Achintya Mandal*, AIR 1994 Cal 227.
721. *AP Nagaraj v VR Krishna*, AIR 1996 Kant 202.
722. *Kuzhipathalil Mathai Yohannan v Mathew Joseph*, AIR 1998 Ker 106.
723. *Umed Mal v Chand Mal*, AIR 1926 PC 142 : 53 IA 271 : 52 Mad LJ 368 : 31 Cal WN 413.
724. *Venkubai v Lakshman*, (1888) 12 Bom 617; *Sivaprasad v Tricumdas*, (1915) 42 Cal 926.
725. *P Atchamma v T Bayana*, AIR 1969 AP 196.
726. *Jagannath v Sassoon*, (1894) 18 Bom 606; *Abraham v Donald*, (1906) 29 Mad 324.
727. *Re Shard* (1901) 28 Cal 574.
728. *Ram Das v Habib*, AIR 1933 All 178 : (1932) 53 All 916; *Fatima v Imdad Ali*, (1920) 18 All LJ 351.
729. *Sato Koer v Gopal Sau*, (1907) 34 Cal 929; *Braja Bhusan v Sris Chandra*, (1919) 4 Pat LJ 20; *Bachubai v Ibrahim*, AIR 1922 Bom 207 : (1923) 47 Bom 11; but see *Mulchand v Tarni Prasad*, (1918) 4 Pat LJ 642; *Beant Singh v Nur Mohd*, AIR 1967 J&K 11.
730. *Nawab Bahadur v Kumar Dinendra*, AIR 1932 Cal 844 : (1932) 59 Cal 1272.
731. *Braja Bhusan v Sris Chandra*, (1918) 4 Pat LJ 20.
732. *Sidhnath v Ganesh*, (1913) 37 Bom 60.
733. *Bhausing v Chaganiram*, (1918) 42 Bom 363.
734. *Sew Bux v Shib Chunder*, (1886) 13 Cal 225; *Jugobundhu v Jadu*, (1887) 15 Cal 47; *Sivaprasad v Tricumdas*, (1915) 42 Cal 926; *Amina Bibi v KM Moideen*, AIR 1925 Rang 300 : (1925) 3 Rang 211.
735. *Kally Nath Dutt v Sheo Bux*, AIR 1950 Cal 87 : (1950) 54 Cal WN 355; *Bir v Raghubar*, AIR 1947 Pat 469 : (1947) 26 Pat 393; *Rasu v Kattara*, AIR 1924 Rang 349 : (1924) 2 Rang 202.

pleadings;[736] or an omission to look into the records of the case.[737] However, if the burden of proof is placed upon the wrong party, the high court will not interfere if the irregularity does not lead to grave results.[738] It is a "material irregularity" to invoke the inherent jurisdiction of the court when there is a specific provision in the CPC.[739] Where an application is made to set aside a sale under O XXI, rule 90, and it is followed by another application, which does no more than give additional particulars of irregularity in conducting the sale, it is a "material irregularity" to refuse to consider the second application.[740] Where the lower court had decided a case, without at all applying its mind to the mandatory provisions of a statute, the full bench of the Allahabad High Court held that the lower court had acted with "material irregularity" in the exercise of its jurisdiction.[741] Where a person is entitled, as of right to a relief, and it is wrongly refused to him, revision lies in the high court.[742] Also, where a judge ignores the plain provisions of section 4 of the Limitation Act, 1963, he exercises his jurisdiction with "material irregularity".[743]

Following are some more decisions in which revision petitions have been entertained on the ground of "illegality" or "material irregularity":

Where the decree was passed in terms of an award without giving notice to the parties;[744] where an order of transfer was made under section 24 without giving notice as prescribed therein;[745] where an application by a person claiming to be interested in joint family properties, to be impleaded as a party to a suit for partition, was dismissed in disregard of O I, rule 10(2);[746] where an order was made setting aside an *ex parte* decree, without deciding whether there was sufficient cause for non-appearance and for imposing onerous terms;[747] where certain intermeddlers were brought on record as legal representatives to a deceased party, when they had no possession of the properties which were the subject matter of the suit;[748] where an order was made permitting the plaintiff to withdraw the suit, with liberty to file a fresh one on grounds not warranted by O XXIII, rule 1,[749] revision petitions in the high courts were entertained. The trial court, in a case, accepted the report of the commissioner, in violation of O XXVI, rule 18. A revision against such an order would be maintainable in the high court. If such an order was allowed to stand, there would be a violation of the principles of natural justice.[750] In *Maganlal Chhotalal Desai v Chandrakant Motilal*,[751] the Supreme Court held that where the landlord's suit was for possession, arrears of rent and mesne profits, and the defendant tenant in his written statement had asked for fixation of standard rent and dismissal of the suit, the lower court had acted illegally and with material irregularity when it had

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736. *Darbari Singh v Sheo Shankarlal*, AIR 1948 Oudh 98; *Maung Pa v Abdul Gani*, AIR 1926 Rang 214 : (1926) 4 Rang 202.
737. *Mihirlal v Panchkari*, AIR 1950 Cal 520 : (1950) 54 Cal WN 637.
738. *LPR Chettyar Firm v RK Banerji*, AIR 1931 Rang 136 : (1913) 9 Rang 71.
739. *Mallappa v Algiri*, AIR 1931 Mad 791 : (1931) 60 Mad LJ 475.
740. *Ram Saran v Girdhari Lal*, AIR 1926 All 305 : (1926) 48 All 286.
741. *Raghubir Singh v Mulchand*, AIR 1937 All 598 (FB); *Mariam v Amina*, AIR 1937 All 65 (FB); *Kuzhi Pathalal Mathai v Mathew Joseph*, AIR 1998 Ker 106.
742. *Hafiz Abdul Noor v Sahu Brij Mohan*, AIR 1938 All 153.
743. *Veerappa v Iratappa*, AIR 1938 All 153 : (1938) 40 Bom LR 152.
744. *P Malliah v G Sankaraiah*, AIR 1955 Hyd 255.
745. *Baijnath Prasad v Dasarath Prasad*, AIR 1958 Pat 9.
746. *Gomathi Devi v Ram Prasad*, AIR 1958 MP 6.
747. *Chhaganraj v Suganmal*, AIR 1958 Raj 237.
748. *Sohanlal v Bindeshwari Devi*, AIR 1959 All 419.
749. *Bhagmal v Khemchand*, AIR 1961 P&H 421.
750. *Chaitan Das v Purnabasi Pattnayak*, AIR 1988 Ori 52.
751. *Maganlal Chhotalal Desai v Chandrakant Motilal*, (1968) 71 Bom LR 89.

directed the landlord plaintiff "to render an account of the overpayments made to him". Also, an order refusing to examine a person as a witness;[752] an order refusing to stay an ad interim injunction issued by the trial court, without considering the well-established conditions for it, is revisable.[753] A failure to take into consideration the relevant features of the case amounts to "material irregularity".[754] It has been held, in some cases, that an erroneous decision of the court on the question of onus of proof is a ground for interference in revision.[755] However, other high courts have taken a different view.[756]

[s 115.52] Wrong Decision of Lower Appellate Court as to Jurisdiction of the Trial Court

The question to be considered under this head is whether the high court has jurisdiction to interfere, under this section, when the lower appellate court erroneously decides, in the exercise of its permitted jurisdiction as an appellate court, that the court of the first instance had or did not have jurisdiction to entertain a suit. Cases of this nature arise, when a court of the first instance returns a plaint, on the ground that it has no jurisdiction to entertain the suit, and the lower appellate court affirms or sets aside the order of the court of the first instance. Does the high court, in such a case, have the jurisdiction to revise the order passed by the lower appellate court?

On this issue, the decisions of the Allahabad High Court itself have not been altogether consistent. In some cases,[757] it was held that an error of the appellate court was within the exercise of its jurisdiction to hear the appeal and that, therefore, its order is not open to revision. However, even in these cases, the high court reversed the order passed by the court of the first instance, although it might have been contended that such an order was merged in the order of the lower appellate court.[758] In other cases, the Allahabad High Court has held that the order passed by the lower appellate court, erroneously deciding that the court of the first instance should take cognizance of a case it has no jurisdiction to try,[759] or should not take cognizance of a case it is competent to try,[760] is open to revision, for it would be anomalous if an order made by a district court, in its original jurisdiction, were open to revision but not so when it is made in its appellate jurisdiction. The Calcutta High Court held that the order of the lower appellate court is open to revision,[761] though an earlier case had taken the opposite view.[762] In the Bombay High Court, where the lower appellate court confirmed the order of the court of the first instance, the orders of both the courts were reversed.[763] The Madras

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752. *Syed Yasin v Syed Mohd Hussain*, AIR 1967 Mys 37.
753. *Chandrama v Yasodanandan*, AIR 1972 Pat 128.
754. *PK Bajpayee v NK Nanerjee*, AIR 1978 Cal 505.
755. *Birbabu v Raghubarbabu*, AIR 1947 Pat 469 : 26 Pat 393; *Rameshchandra v HD Jain College*, AIR 1957 Pat 145; *Sobha Singh v Beharilal*, 58 Punj LR 432; *UOI v Shanti Devi*, 59 Punj LR 44.
756. *Nagori Ibrahim v Shahji Babumal*, AIR 1954 Raj 83; *L'Union Fire, Accident & General Insurance Co Ltd v OP Kapur*, AIR 1963 P&H 397.
757. *Badami Kuar v Dinu Rai*, (1886) 8 All 111 (FB); *Jwala Prasad v East India Railway*, (1918) 16 All LJ 535; *Chandu Lal v Koka Mal*, AIR 1921 All 226 : (1921) 43 All 334; *Bisheshar Prasad v Raghubir*, AIR 1926 All 58 : (1926) 48 All 168.
758. See the judgment of DANIELS, J, in 48 All 168.
759. *Abdul Hakum v Mukarram*, AIR 1930 All 158 : (1929) 27 All LJ 1157; *Nizakat Ali v Shaukat Husain*, AIR 1943 All 300.
760. *Ram Iqbal v Telesari*, AIR 1930 All 713 (FB) : (1931) 53 All 75.
761. *Zamiran v Fatech Ali*, (1905) 32 Cal 146.
762. *Mathura Nath v Umesh Chandra*, (1896) 1 Cal WN 626.
763. *Vishvanath v Rambhat*, (1891) 15 Bom 148; *Nandlal v Kisanlal*, AIR 1928 Bom 548 : (1928) 30 Bom LR 1391.

High Court held that the order of the lower appellate court was open to revision.[764] This is also the view taken by the High Courts of Patna,[765] Nagpur[766] and Himachal Pradesh.[767] The controversy has been set at rest by the Hon'ble Supreme Court, where it has been held that the high court certainly can decide whether jurisdictional facts have been correctly decided by the subordinate courts or not.[768]

In the Punjab High Court, in a case, the lower appellate court held that the land over which the judgment-debtor had encroached, was not covered by a decree for mandatory injunction. But the evidence showed that no other conclusion was possible, except the one that the judgment-debtor had encroached upon the land, within the boundaries given in the decree sheet. The high court could, in the circumstances, interfere in revision.[769] If the appellate court has remitted the matter and there being no apparent error on the face of the record so as to interfere by this court in exercise of the revisional powers, the high court should not interfere with the impugned order.[770] It is true that the scope to entertain the petition under section 115, CPC is required to be exercised only when the petitioners' case falls within the four corners of the provisions of section 115. In a case, a reasoned order was passed by the trial court granting the injunction. Detailed reasons were given for holding *prima facie* case in favour of the plaintiffs and the trial court also held that the election which was being conducted was not as per the law. The trial court relied upon the judgments of the high court. The trial court also considered the provisions of section 10(1) of the Act of 1989 and also the Rules framed thereunder and, thereafter, granted the injunction order. The appellate court, in its order, held that whether the state government has power or not, whether the education department has power or not, can be challenged in the high court and the civil court only has the jurisdiction to see whether the election was being conducted as per the government order or not. It was, in itself, sufficient ground for interference by high court, when the first appellate court, under a wrong impression of its lack of jurisdiction held that the power of the state government and even the education department cannot be looked into by the civil court as it can be looked into only by the high court.[771] The presumption available under section 114 of the Indian Evidence Act, 1872 relates to the existence of a fact which is likely to have happened, for eg, once a letter is posted, the fact likely to happen is, that the letter must have reached the addressee. Thus, where, in an eviction suit, the plaintiff had proved the factum of posting of the quit notice by producing the certificate of posting before the court, the presumption available to the plaintiff was that the letter must have reached the addressee in the normal course. Dismissing the suit, by limiting the presumption only to the posting of the quit notice, amounts to exercising the jurisdiction illegally. Such an order is, therefore, revisable by the high court.[772] The power of appointment of a commission for the purposes of local investigation cannot be exercised to assist a party to collect evidence, where the party can itself get the evidence. An appointment made without considering whether the plaintiff was unable to ascertain the boundary by an

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764. *Atchayya v Sri Seetharamachandra*, (1916) 39 Mad 195; *Meenatchi v Ananthanarayana*, (1903) 26 Mad 224; *Kattiya v Ramaswamiya*, AIR 1929 Mad 396 : (1929) 56 Mad LJ 394.
765. *Ram Prasad Rai v Maheshkant*, AIR 1922 Pat 525.
766. *Kanij Johra v Raja Hussain*, AIR 1937 Nag 39; *Keshrao Bapuji v Ganeshrao Shamrao*, AIR 1941 Nag 278.
767. *Bansilal v Kansi Ram*, AIR 1975 HP 15.
768. *The Executive Officer, Arthanareswarar Temple v P Sathyamoorthy*, [1999] 1 LRI 444; *Chaube Jagdish Prasad v Ganga Prasad*, AIR 1959 SC 492 : (1959) 1 SCR 733.
769. *Jagdish Rai v Dalip Singh*, AIR 1982 P&H 147.
770. *Pabitra Mohan Pradhan v Damayanti Pradhan*, AIR 2003 Ori 1.
771. *Sumer Chand Chhajed v Administrator* (*SDM*), *GS Samiti*, AIR 2002 Raj 76.
772. *Amritlal Waljibhai Rathod v Vishwarao Deorao Patil*, AIR 1989 Bom 410.

expert engaged by him, amounts to the exercise of jurisdiction with "material irregularity", and the order is not sustainable.[773]

[s 115.53] Execution Proceedings

If the executing court has gone beyond terms of the decree and has set up a new case, then the high court can exercise its provisional jurisdiction in either setting aside the said decree or correcting its jurisdictional error.[774] The decree holder in an auction sale in execution of a money decree purchased an immovable property. The judgment-debtor challenged the sale on the ground of inadequacy of valuation and absence of sufficient opportunity to deposit the decretal amount, which was dismissed by the executing court as well as the first appellate court. The high court, in revision, observed that there was no material irregularity in the sale and the price was also not too low, but it set aside the sale on the sole consideration that the property was purchased by the decree holder and not by any stranger. The Supreme Court reversed the order of the high court as there was no material irregularity or illegality in the order.[775] The order for handing over the possession falling under O XXI, rule 36 of CPC is revisable under section 115.[776] The parties have been litigating for over 36 years and it is desirable that the matter comes to an end as soon as possible. It is clear that the revisional court has a jurisdiction and indeed a duty to ensure that expeditious justice is done between the parties and the order to be passed is in consonance therewith.

In the facts and circumstances of the present case, the court, therefore, should not hesitate to set aside the alleged auction sale which has been vitiated by fraud in order to do justice to the judgment-debtor avoiding protracted litigation.

Thus, the high court, even after detection of the serious irregularities and illegalities in holding the auction sale by the executing court and particularly after establishment of fraud on court in course of holding the said auction sale of the property of the judgment-debtor in execution of the decree, cannot allow the party to go before the trial court for final decision on the application filed under O XXI, rule 90.

After detection of the aforesaid illegalities in conducting the auction sale, the court cannot permit the said sale to stand even for a moment, as in that event, the same would cause grave injustice to the judgment-debtor. When fraud on court has been established, the high court cannot shut its eyes and remain a silent spectator. The court must come forward to undo the wrong by setting aside the illegal and irregular court sale in order to do substantial justice. The high court, being the superior court, has the duty and obligation to rise to the occasion in order to do substantial justice to the parties.[777] The defendant husband party was a service holder in a reputed company at Calcutta, and had disclosed his earnings by production of salary slips, income tax deduction certificate and other material documents upon affidavits. The wife petitioner did not dispute the said documents. The wife-petitioner claimed an alimony *pendente lite* for herself and for the maintenance and educational expenses of their minor child, including medical expenses and litigation costs under different heads as per the schedule given in her petition. In support of such claim, necessary documents can be furnished upon affidavit. The claim of the wife-petitioner that the husband opposite party received different amounts by

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773. *Basanta Kumar Swain v Baidya Kumar Parida*, AIR 1989 Ori 118.
774. *Man Industrial Corp Ltd v Rajasthan Financial Corp*, AIR 1997 Raj 108.
775. *P Ambujakshi v EE Sainudeen*, (1997) 11 SCC 455.
776. *Naresh Sharma v Ramesh Chand*, AIR 2000 HP 6.
777. *Arati Daw v Pradip Roy Chowdhary*, AIR 2003 Cal 218.

way of bonus and other allowances from the employer could also be disclosed by production of documents upon requisition from the employer company of the husband supported by an affidavit. There being no other relevant circumstances for being considered for the purpose of disposal of the application of the wife under section 24 of the said Act, it cannot be said at this stage that the learned court acted illegally and with material irregularity in exercise of jurisdiction in deciding to dispose of the same on the basis of the affidavits of the parties. The revisional application, therefore, failed.[778]

An order passed by an executing court is revisable on limited grounds where it relates to appreciation of evidence on the basis of material brought on record. Thus, where the high court does not find that the executing court committed any illegality or material irregularity in passing the order, the Supreme Court held that the high court exceeded its jurisdiction by concluding without cogent or sufficient reasons that the finding of the executing court was factually incorrect.[779]

Where the executing court directed delivery of possession in favour of three decree holders, the order was challenged by way of revision only against two of such decree holders. The revision was allowed and the order of possession was set aside. The Supreme Court held that since the order of delivery of possession in favour of decree holders was common and inseparable and since it had become final against one decree holder, the high court was not right in reversing the order of executing court as against two respondents.[780] A revision is not maintainable against the order passed under O XXI, rule 92(1) as it is appealable under section 104 read with O XLIII, rule 1, CPC.[781] A revision is also not maintainable against an order adjudicating resistance to the possession of immoveable property.[782] A revision petition challenging the initiation of execution proceedings, subsequent to passing of an award under Consumer Protection Act, 1986 is maintainable,[783] when the executing court flatly refused to exercise the jurisdiction vested in it. Hence, the order can be brought within the purview of section 115, CPC.[784]

The only ground contended before the Rajasthan High Court was that the auction-purchaser did not deposit the balance three-fourth amount within a period of 15 days as required by O XXI, rule 85, therefore the sale was void. As against this, on behalf of the judgment-debtor it was contended that he had moved requisite application before the executing court for depositing the amount, but since the learned presiding officer was not available, the amount could not be deposited and that the entire amount had already been deposited as soon as the tender was passed. The high court held that the contention raised is a question of fact as to whether the amount has been deposited or not, and if deposited whether in time or not, and if not deposited in time whether the purchaser had sufficient cause for the delay, and whether such a delay could be condoned or not. All these questions cannot be allowed to be raised for the first time in this revision petition.[785] It has been held that a plea raised for the first time in revision before the high court that daughter also being a co-owner of the premises was a necessary party and eviction petition filed by other co-owners without impleading her was not

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778. *Sebanti Goswami v Sagnik Goswami*, AIR 2002 Cal 48.
779. *Khazan Singh v Gurbhajan Singh*, AIR 2007 SC 2941 : (2007) 5 SCC 228.
780. *Rajeshwari Amma v Joseph*, (1995) 2 SCC 159.
781. *Talari Thippeswamy v K. Doddappa*, AIR 1996 Kant 128.
782. *Sk Saiful Nandlal v Sk Akkas Ali*, AIR 1998 Cal 137.
783. *National Insurance Co v Raj Dulari*, AIR 1998 J&K 69.
784. *Aitha Gopalkrishna v Miryale Venkata Radha Krishna*, AIR 2004 AP 542.
785. *Panan v Bank of Baroda*, AIR 2002 Raj 419.

maintainable.[786] The bench relied on the constitution bench judgment in *Hindustan Petroleum Corp Ltd v Dilbahar Singh*.[787]

The provision of O XXI, rule 64, CPC is a mandatory provision. So, non-compliance with the provision of O XXI, rule 64 would definitely vitiate the auction in case the provision is applicable. Moreover, the objection raised by the applicant can be entertained on the basis of the material on record and no evidence is required to be recorded for deciding the objection. Thus, the objection on the basis of O XXI, rule 64, can very well be agitated before the high court in spite of the fact that the same was not pressed earlier before the executing court.[788]

[s 115.54] Limitation — Condonation of Delay

Although the revisional jurisdiction of the high court is a part of the general appellate jurisdiction of the high court, a revisional application does not become an appeal for the purpose of application of Article 120 of the Limitation Act, 1963. Thus, in the matter of substitution under O XXII of the CPC during revision, the period of limitation would be three years as provided under Article 137 of the Limitation Act, 1963 and not by Article 120.[789] The trial court has considerable measure of discretion in the question as to whether to condone the delay or not. In these circumstances, the high court should not ordinarily disturb, in revision, the discretion exercised by the trial court.[790] The judgment of the high court allowing a revision petition condoning a delay of about 17 years in filing an appeal, which was not condoned by the appellate authority was held to be unsatisfactory when there was no occasion for interfering in civil revision with appellate authority refusing to condone the delay.[791] The plaintiff bank obtained a preliminary decree and an application for final decree was made along with application for condonation of delay, seeking condonation of delay of 714 days. The lower court dismissed the application on the ground of want of sufficient cause explaining the delay. The delay was condoned in revision as the respondent bank was a government undertaking and since huge sum of public money is involved, some indulgence may be shown in considering claim of parties. The Supreme Court set aside the order of the high court and held that there is no justification to condone the delay as the bank's lawyer was regularly appearing in the courts during those days.[792]

[s 115.55] *Ex parte* Decree

When alternative and effective remedies are available to the defendant, against the *ex parte* decree, consequent on setting the defendant *ex parte*, it would not be appropriate for the defendant to resort to revisional proceedings under section 115 of the CPC, challenging the order refusing to set aside the order of setting the defendant *ex parte*. Where the defendant in a suit was set *ex parte*, however, no revision was filed against that order, and subsequently, *ex parte* decree was passed, which was allowed to become final, as no appeal under section 96 or an application under O IX, rule 13 was preferred. The revision, subsequently, which was filed against the order setting the defendant *ex parte* was not maintainable.[793]

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786. *Kasthuri Radhakrishnan v M Chinniyan*, AIR 2016 SC 609 : (2016) 3 SCC 296 : JT 2016 (1) SC 487.
787. *Hindustan Petroleum Corp Ltd v Dilbahar Singh*, (2014) 9 SCC 78 : 2014 (2) RCR (Rent) 210.
788. *Suraj Singh v UOI*, AIR 2006 MP 214.
789. *Shanker Bhattacharyya v Jyotimoyee Devi*, AIR 1998 Cal 55.
790. *Patel Kantibhai Ambalal v Shambhubhai Chhotabhai Patel*, (1990) 3 SCC 154.
791. *Pathuma v Kallara K. Mohammed*, (1997) 10 SCC 735.
792. *Sri Veera Hanuman Rice and Flour Mill v State Bank of India, Ramachandrapuram, Applicant* [2000] 4 LRI 574
793. *Kojjarapu Venkata Rao v Rajapudi Nageswara Rao*, AIR 2000 AP 105.

The Calcutta High Court interfered in revision when the lower court, professing to act under section 151 set aside an *ex parte* decree when no case under O IX, rule 13, had been made out.[794] The Allahabad High Court also interfered in such a case, on the ground that the lower court had no jurisdiction outside the provisions of O IX, rule 13, to direct a case to be heard again.[795] In a case, the Lahore High Court interfered in revision, when the lower court set aside an *ex parte* decree even though the application to set it aside was barred by limitation.[796] Where the application for setting aside an *ex parte* decree was disallowed on the ground that the said decree was not *ex parte* and that it was a full-fledged decree amounting to a judgement, such finding could not be interfered in revision.[797]

[s 115.56] Order Refusing Review

Where the lower court refuses to entertain an application for review, based on an allegation of fraud, the high court has the power to interfere under this section.[798] This section, however, does not apply to an order refusing to grant a review,[799] and a revision against an order dismissing an application for review of a decree has been held to be barred, where an appeal lies against the decree.[800] However, it has been held in a number of cases, that a revision lies against an order refusing review,[801] provided that the grounds set out in section 115 exist.[802] When the lower court has rightly refused to restore an execution application under O IX, the high court has no power under this section to direct it to treat the application as one in review.[803] Dismissal of review application against order closing evidence of defendant in a suit for possession where the defendant has availed of several opportunities to lead evidence and the suit has been pending for over one decade, and it was not a case of defendant in review application that new and important matters or evidence had been discovered or that mistake or error apparent on face of record was evident, was upheld by revisional court as to jurisdictional error in said order.[804]

[s 115.57] Order Granting Review

An order granting a review may be set aside in revision.[805] When an appeal is preferred against an order granting review, the judgment in appeal is not open to revision unless the grounds stated in section 115 are established.[806] However, where the appellate court travels

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794. *KB Dutt v Shamsuddin*, AIR 1930 Cal 488 : (1930) 34 Cal WN 419.
795. *Pragilal Karasingh v Khilawan Singh*, AIR 1946 Nag 393; *Ram Sarup v Gaya Prasad*, AIR 1925 All 610 : (1926) 48 All 175; *Radha Mohan v Abbas Ali*, (1931) 53 All 612.
796. *Piroj Shah v Quarib Shah*, AIR 1926 Lah 379 : (1926) 7 Lah 161.
797. *Shah Shailenshkumar Vinodkumar v Ashokkumar Vajeraj*, AIR 1996 Guj 102.
798. *Khitish Chandra v Nagendra Nath*, AIR 1929 Cal 513 : (1929) 33 Cal WN 542.
799. *Peddiboyima v Kilambi Sreenivasa*, AIR 1943 Mad 377 1; *Lakshman v Maruti*, AIR 1924 Bom 344 : (1924) 26 Bom LR 284.
800. *Aksing v Durjan Singh*, AIR 1953 Raj 153.
801. *Thakur Singh v Bhaironlal*, AIR 1956 Raj 113; *Arya Insurance Co v Lala Channoolal*, AIR 1957 All 400; *Subba Rao v Satyanarayana*, AIR 1961 All 502.
802. *Arya Insurance Co v Lala Channoolal*, AIR 1957 All 400.
803. *Safitannessa v Megh Lal*, AIR 1926 Cal 735 : (1926) 43 Cal LJ 285.
804. *Punjab National Bank v VP Mehra*, AIR 2004 Del 135.
805. *Majid-un-Nissa v Anwarulla*, AIR 1942 Pat 210 : (1941) 18 Luck 48; *Nathu Lal v Raghubir Singh*, AIR 1926 All 50 : (1926) 48 All 160; *Surendra Chandra v Formuz Ali*, AIR 1952 Assam 25; *Chatardas v Keshav Das*, AIR 1954 MB 3.
806. *Mohd Mehdi v Hussain Ali*, AIR 1954 All 209 : (1953) All LJ 613.

outside the scope of O XLVIII, rule 7, and disposes of the appeal on grounds other than those mentioned therein, its order is liable to be revised.[807]

The Gujarat High Court set aside an order of the lower court, permitting additional evidence on the ground that it was made prematurely, that is, even before the record was examined, and a lacuna was found, and further, that if the order was allowed to remain, it would result in having to discard such evidence at all subsequent stages of the proceedings.[808]

[s 115.58] Lunacy

As regards the power of the high court to interfere in lunacy proceedings, see the undermentioned case.[809]

[s 115.59] Temporary Injunction

In a case in the Madras High Court, the plaintiffs claimed a transfer of certain shares of registered companies, standing in the names of the defendants. An agreement on which the plaintiff relied was yet to be formalised. It was held that the trial court should realise that injunctions (whether prohibitory or mandatory), should not be granted as a matter of course, and that the trial court must exercise extreme caution and care, before an order of injunction is passed. Even at the stage of making an ad interim order of injunction, the court has to apply its mind seriously to the question of whether the plaintiff had made out a *prima facie* case for the grant of an injunction. The mere circumstance that an ad interim order can be vacated after the defendant appears and contests the correctness of the order of injunction, is no justification for issuing an injunction as a matter of course.[810]

If an application for temporary injunction under O XXXIX, rules 1 and 2, CPC is rejected, even then the plaintiff can move fresh application under section 151, CPC with a distinction that in case temporary injunction is granted under O XXXIX, rules 1 and 2, then miscellaneous appeal is maintainable under O XLIII, rule 1, but if an injunction is granted under section 151, of the CPC, then no miscellaneous appeal would be maintainable, only revision would be entertainable under section 115.[811]

It is clear that an order on the injunction application does not dispose of the suit. It also does not dispose of that application either. In case the injunction application were to be rejected or allowed, it would dispose of the application but such an order would be appealable and hence not open to revision. However, if an *ex parte* injunction is not granted and only notice is issued on the injunction application it would not dispose of the application as final orders on the injunction application are yet to be passed after inviting objections of the opposite party and the injunction application remains pending. This is further clear from the provisions of O XXXIX, rule 3A, CPC introduced by Act No 104 of 1976. This provision has been deleted in Uttar Pradesh but it is helpful for interpreting the proviso to section 115, CPC as regards the meaning of disposal of the proceedings. Under this provision, the court is required to endeavour for final disposal of the injunction application within 30 days from the date when *ex parte* injunction was granted. The provision necessarily implies that an order issuing notice on an injunction application does not dispose of the injunction application finally. The

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807. *Naimuddin Sheik v Janatulla Mondal*, AIR 1960 Assam 204.
808. *Dharmashi v Patel Kadva*, AIR 1966 Guj 302 : (1966) 7 Guj LR 405.
809. *Saroj v Mahendra*, (1927) 54 Cal 836; *Gul Mohamad v Viniya Bai*, AIR 1963 MP 9.
810. *S Sundaram Pillai v P Govindaswami*, AIR 1985 Mad 199.
811. *Satya Prakash v First Addl. Distt. Judge, Etah*, AIR 2002 All 198.

decision of Allahabad High Court in *H Bevis and Co*[812] was rendered under a different set of provisions before the proviso to section 115, CPC had been introduced and is distinguishable. The decisions in *Brig FJ Dillon*,[813] and *Ajabul Hassan*[814] are also distinguishable as the maintainability of this revision is not being challenged on the ground that the order is not a case decided. A proviso carves out an exception to the main provision. The proviso as it stands restricts the power of interference in revision to a situation where the case decided disposes of the suit or proceedings. While refusing to grant an *ex parte* temporary injunction by merely issuing notice upon such application may amount to a "case decided" but the proviso restricts the power of the high court and precludes it from interfering in revision in such a case, as the order of *ex parte* temporary injunction would not have disposed of the injunction application or terminated the proceedings for temporary injunction. A revision against such an order is, therefore, not maintainable.[815]

Before the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999), clauses (a) and (b) of proviso to sub-section (1) of unamended section 115 of CPC were invoked for filing a revision before the high court. Thus, a party approaching the high court under section 115, CPC by way of a revision has to necessarily satisfy the requirements specified thereunder. However, after the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) which has come into effect from 1 July 2002, the position is changed. Clause (b) of sub-section (1) has been totally withdrawn. With the result, the only ground available for approaching the high court under section 115 is clause (a) of sub-section (1) of section 115, CPC, *viz*, "if [the order has] been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings". The effect of the provisions under section 115 of CPC after amendment is that a revision petition is maintainable only if the impugned order has got the effect of disposing of the suit or proceedings finally. In all other cases, where if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable.

Along with the suit, an application was also filed before the trial court when the lower appellate court by the impugned order granted temporary injunction restraining the petitioner-defendant, staff and employees, henchmen from interfering with the peaceful enjoyment and possession of the plaint schedule land. It is not in the nature of finally disposing of the suit or other proceedings. In view of the amended provisions of section 115 of the CPC, the revision was found not maintainable.[816]

The court's merely postponing consideration of issue so that it may hear both parties and decide the matter, does not amount to "case decided", and thus the revision is not competent.[817]

An appeal against an order granting or refusing injunction is maintainable under O XLIII, rule 1 and that appeal is a continuation of the proceedings. An order granting injunction if maintained in appeal merges into the appellate order and if reversed ceases to exist and an order dismissing an application for grant of temporary injunction comes into existence, even if that order continues to be temporary. In either case, it is an order in continuation of the proceedings which are pending and, therefore, it cannot be said that it is an order in a proceeding which is neither a suit nor a proceeding as contemplated by O XXXIX and,

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812. *H Bevis & Co v Ram Behari*, AIR 1951 All 8.
813. *Major SS Khanna v Brig. FJ Dillon*, AIR 1964 SC 497.
814. *Ajaibul Hassan v Chirangee Lal*, AIR 1951 All 564.
815. *Rajendra Singh v Brij Mohan Agarwal*, AIR 2003 All 180.
816. *Sultan-ul-uloom Educational Society v Mir Shahmat Ali Khan*, AIR 2003 AP 364.
817. *Golikota Reddy v Goli Raja Gopale Reddy*, AIR 2001 AP 110.

therefore, is a final order is not acceptable. Even if it is presumed that the order passed by the appellate court under O XLIII decides the appeal finally and the proceedings by way of miscellaneous appeal come to an end, the *lis* pending in the civil suit does not stand decided by reason of that order. What is contemplated by section 115 as amended in 2002 is that the order should be such if made in favour of the revision applicant would have finally disposed of the suit or other proceedings. The civil suit in which temporary injunction is granted or not granted is not decided finally either by grant or refusal thereof and continues to pend. Taking into consideration this aspect of the matter, therefore, it cannot be said that merely because the revision application is directed against an order passed by appellate court finally deciding the miscellaneous appeal under O XXXIX, rule 1 read with O XLIII, rule 1, CPC, the revision is maintainable. What is necessary after July 2002 for maintaining a revision is that the order impugned in revision must have the effect of finally disposing of the suit or proceedings in favour of the person who applies for revision. By the very nature of things and the nature of O XXXIX itself, such a contingency cannot occur and consequently, a revision application whether against an appellate order or original order granting or refusing injunction is not maintainable after 1 July 2002.[818]

Although the impugned order does not contain a reasoning in so many words supported by adequate facts and materials, trial court has at least expressed its satisfaction that there exists a *prima facie* case and the matter seems to be an emergent one and according to the appellate judge there has been compliance of the basic requirements of these provisions of O XXXIX, rule 3 in substance. The Additional District Judge, while disposing of the appeal, has further observed that the questions regarding legal status of the parties, their title to the suit property or the question of its inalienability or the legal consequences are questions to be decided at the time of final hearing on the basis of the materials produced by both the parties and at the time of considering the simple question as to whether an ad interim injunction should be issued or not the factor of urgency should be kept in mind and he was satisfied that although the reasons were not given by the trial court in details, in essence and substance they were briefly assigned for his coming to such a finding. Be that as it may, having regard to the fact that here by virtue of the passing of the impugned order by the trial court, no jurisdictional error was committed or, in other words, the order was neither without jurisdiction nor in exercise of the jurisdiction with material irregularity, the revisional application becomes untenable in law under the provisions of section 115 of the CPC.[819]

The legal principle which flows from the ratio in various authoritative pronouncements is that if the trial court or the lower appellate court is found to have passed an order of temporary injunction in exercise of its power either under O XXXIX, rule 1, CPC or under O XXXIX, rule 2, in clear breach of the said propositions, the same cannot be stated to have been passed in exercise of the jurisdiction vested in it under the said provisions of CPC and, therefore, that order would be liable to interference and will have to be set right by this court in exercise of its revisional jurisdiction under section 115.[820]

An order granting interim injunction or temporary injunction pending final orders on the injunction petition filed under O XXXIX, rule 1, read with section 151 of the CPC is only an

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818. *Nagorao v Narayan N Yerawar*, AIR 2003 Bom 178; *Kasturibai v Corp of City of Hubli*, AIR 2003 Kant 170.
819. *Binod Kumar Gupta v Rajendra Prosad Shukla*, AIR 2003 Cal 68.
820. *B Srinivasacharya Gudi v G Veeranarayane Dev*, AIR 2002 Kant 1.

appealable order under O. XLIII, rule 1(r), but not revisable under section 115 of the CPC, or under Article 227 of the Constitution of India.[821]

Where in the case of grant of injunction in title suit by trial court, evidence on record was thoroughly and systematically considered by the trial court to record its satisfaction regarding existence of *prima facie* case, factum of possession in favour of plaintiff and invasion of suit property by defendants satisfying requirement of balance of convenience and irreparable loss in favour of plaintiff, the appellate court, however, wrongly vacated injunction recording finding that factum of possession is available in favour of defendant giving undue importance to documents of no significance, the finding of appellate court being perverse were set aside in revision.[822]

In a case, a reasoned order was passed by the trial court granting the injunction. The detailed reasons were given by the trial court for holding *prima facie* case in favour of the plaintiffs and the trial court also held that the election which is being conducted is not as per the law. The trial court relied upon the judgment of high court delivered in *Ravindra Sahu*,[823] and also other judgments. The trial court also considered the provisions of section 10(1) of the Act of 1989 and also rules framed thereunder and, therefore, granted the injunction order. The appellate court in para no 10 of the order held that whether the state government has power or not, whether the education department has power or not, can be challenged in the high court and the civil court has jurisdiction only to see that whether the election is being conducted as per the government order or not, is itself sufficient ground for interference by high court as the first appellate court under wrong impression of its lack of jurisdiction held that the power of the state government and even the education department cannot be looked into by the civil court and it can be looked into only by the high court. This is a clear case of failure of exercise of jurisdiction under wrong impression of law. In addition to above, the first appellate court misunderstood the order of the trial court wherein the trial court held that the action of the administrator is in violation to rule 23 and the action is contrary to the law, hence it is *ultra vires* and the first appellate court held that it can be so declared only by the high court. Therefore, it appears that the first appellate court committed illegality in exercise of its jurisdiction. In addition to above, the first appellate court failed to consider the reasonings given by the trial court before reversing finding of the *prima facie* case. Therefore, this was not a case wherein the present revision petition should have been dismissed only on the ground that it is not a case in which this court cannot interfere with while exercising powers under section 115, CPC.[824]

Order directing issue of notices on temporary injunction application does not amount to case decided, so revision against such order is not maintainable.[825]

[s 115.60] Order Rejecting Plaint Under Order VII, Rule 11, CPC

Order VII, rule 11 of CPC deals with rejection of plaint. Once the plaint is rejected, then obviously nothing is pending before the court. That order is formal expression of an adjudication, which so far as regards the court expressing it, conclusively determines the rights of the parties. In fact, section 2 of the CPC which defines the term "decree" specifically states

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821. *C Nagarathnamma v District Panchayat Officer, Chittoor*, AIR 1995 AP 342.
822. *Kamini Bale Patra v Gonrahari Patra*, AIR 2003 Ori 161.
823. *Ravinder Kumar Shau v State of Rajasthan*, AIR 1994 Raj 36 : (1993) 2 WLC (Raj) 721.
824. *Sumer Chand Chhajed v Administrator (SDM), GS Samiti*, AIR 2002 Raj 76.
825. *Imamuddin v Mohammed Yusuf*, AIR 2006 (NOC) 1325 (All) : 2006 AIHC 448.

that the decree shall be deemed to include rejection of the plaint. Section 96 of the CPC deals with appeal from original decrees.[826]

In the full bench decision of Madras High Court in *Satyanarayanacharyulu v Ramalingam*,[827] the petitioners filed a suit in the subordinate court for declaration and for other reliefs and paid a fixed court fee of Rs 100 under section 19A of Sch II, Court Fees Act, 1870, valuing the suit for the purposes of jurisdiction at Rs 3,600. The question arose whether the court fee paid had been correct and after considering the objection the subordinate judge came to the conclusion that the suit had been grossly undervalued and directed the petitioner/plaintiff to pay an additional court fee of Rs 400. The order directing payment of additional court fees was made on 14 March 1947 and a period of 10 days' time was given for payment of the deficit court fee. The suit was adjourned to 24 March 1947 and by that time, as the deficit court fee was not paid as per the order dated 14 March 1947, the plaint was rejected. A revision was filed against the order dated 24 March 1947. The full bench approving the view taken in an earlier ruling,[828] ruled that if the order directing payment of additional court fee was not complied with and it was followed by an order dismissing the suit, a revision would not be maintainable and the remedy is only by way of an appeal against the decree. Or in other words, the court ruled that once a plaint is rejected, the remedy for the plaintiff is only to file an appeal and not a revision petition.[829] A learned single judge of Madras High Court had occasion to consider a similar question and after considering the ruling of the full bench referred to as well as other rulings.[830]

Both from the section and those decisions it is clear that only appeal will lie against rejection of plaint and it is not limited to such cases wherein the plaint was rejected for the reasons stated under O VII, rule 11 of CPC.

In a ruling of Madras High Court[831] a learned single judge referred extensively the various rulings including *R Shanmughavelu Pillai v R Karuppannan Ambalam*[832] and concurred with it.

Thus, the legal position is that as against the order rejecting the plaint, only an appeal lies and not a revision.[833]

According to the view of the Patna High Court, there was a conflict of opinion between two division benches of the court. When a similar question came up before a single judge, the matter was referred to a division bench. This division bench of Supreme Court held that an order rejecting a plaint under O VII, rule 11 of the Code is a decree and is appealable and no revision would lie.[834]

Quoting the definition of "decree" given in section 2(2) of the Code, it has been observed as follows:

> 11. It is an inclusive definition and the rejection of the plaint by legal fiction has been deemed a decree. Once it is held that the rejection of the plaint is a decree, the natural corollary of the same shall be that an appeal would lie. In view of the language of Section 2(2)

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826. *KS Geetha v Stanleybuck*, AIR 2003 Mad 146.
827. *Satyanarayanacharyulu v Ramalingam*, AIR 1952 Mad 86 (FB).
828. *Ratnavelu Pillai v Varadaraja Pillai*, AIR 1942 Mad 585 : (1942) 1 Mad LJ 569.
829. *KS Geetha v Stanleybuck*, AIR 2003 Mad 146.
830. *Harihar Bakhsh Singh v Jagannath Singh*, AIR 1924 Oudh 413; *Radhakishen v Wali Mohammed*, AIR 1956 Hyd 133; *Badri Nath v State of Pepsu*, AIR 1957 Pepsu 14.
831. *Nesammal v Edward*, 1998 (3) CTC 165 : 1999 AIHC 470.
832. *R Shanmughavelu Pillai v R Karuppannan Ambalam*, AIR 1976 Mad 289.
833. *KS Geetha v Stanleybuck*, AIR 2003 Mad 146.
834. *Meera Sinha v Girja Sinha*, AIR 2009 Pat 19 : 2009 (2) Civ LJ 494 (DB) [see also *Somra Devi v Hansraj Devi*, AIR 2009 Pat 71].

> of the Code, order rejecting the plaint has to be treated as decree. Thus on principles we are of the opinion that rejection of a plaint, being a decree, there is no escape from the conclusion that an appeal would lie.[835]

[s 115.61] No Revision from Discretionary Orders

The high court will not interfere in revision, with an order which is at the discretion of the lower court to make,[836] unless the order is not supported by any consideration of justice, or by any provision of law;[837] or unless irreparable injury will ensue to one of the litigants, or if there will be a failure of justice if the matter is not put right;[838] or if the trial has not begun, and no prejudice is caused to the other side which cannot be compensated in terms of cost.[839]

The lower appellate court allowed a plaintiff to withdraw his suit, and appeal without leave, to bring a fresh suit on the same cause of action, with the result that the defendant was deprived of the benefit of a judgment in his favour. The case went to the Calcutta High Court in revision, but the high court, while disapproving of the order, declined to interfere with the discretion of the court.[840] However, in a similar case, the Allahabad High Court did interfere in revision.[841] In *Printers (Mysore) Pvt Ltd v P Joseph*,[842] the law relating to the powers of an appellate court to interfere with an order made by the lower court in the exercise of its discretion, was stated by the Supreme Court:

> The Appellate Court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion had been exercised by the trial court reasonably and in a judicial manner the fact that the Appellate Court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the Appellate Court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the Appellate Court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the Appellate Court — and in many cases it may be its duty — to interfere with the trial court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial court is in law wrongful and improper and that would certainly justify and call for interference from the appellate court. These principles are well established.

These observations were made with reference to the powers of a court, hearing an appeal against an order under section 34 of the Arbitration Act, 1940 (replaced by Arbitration and Conciliation Act, 1996). The same principles apply when the high court acts under its revisional jurisdiction.[843] Where the propriety of an order, made in the exercise of its discretion, is challenged in revision, the limitations imposed by section 115 should be taken into account.

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835. *Meera Sinha v Girja Sinha*, AIR 2009 Pat 19, at para 11 : 2009 (2) Civ LJ 494 (DB).
836. *Phanindra v Pramatha Nath*, AIR 1928 Cal 421 : (1928) 55 Cal 748; *Jhunku Lal v Bisheshar Das*, (1918) 40 All 612; *Hasan Ali v Lachhman*, AIR 1927 All 750 : (1928) 50 All 413; *Harendra v Emperor*, AIR 1931 Cal 604 : (1932) 59 Cal 68; *Mt Suraj Pali v Ariyi Pratinidhi*, AIR 1936 All 686 : (1936) All LR 929 (FB); *I & T Publication v Partap Chand*, AIR 1967 Del 37 : 69 Punj LR 146; *Amir Singh v Om Prakash*, AIR 1978 All 15.
837. *Budhulal v Jagan Nath*, AIR 1949 All 70; *Syed Sadiq v Asaf Kadar*, AIR 1931 Cal 604 : (1931) 34 Cal WN 278.
838. *Indu Bala v Lakshmi Narain*, AIR 1935 Cal 102 : (1934) 38 Cal WN 1146.
839. *Loke Nath v Abani Nath*, AIR 1934 Cal 686 : (1933) 37 Cal WN 1093.
840. *Sahebjan Bibi v Gopal*, AIR 1930 Cal 424 : (1930) 34 Cal WN 265.
841. *Raghubir Das v Sital Prasad*, AIR 1935 All 740 : (1935) 58 All 245.
842. *Printers (Mysore) Pvt Ltd v P Joseph*, AIR 1960 SC 1156 : [1960] 3 SCR 713.
843. *Asian Asphalt v Shalimar Tar Products Ltd*, AIR 1978 Cal 305.

In *Razia Begum v Anwar Begum*,[844] while discussing the power of the high court to interfere in revision with an order made under O I, rule 10, the Supreme Court observed: "The question of addition of parties under O. 1, r. 10, of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but is of a judicial discretion, which has to be exercised in view of all the facts and circumstances in a particular case; but in some cases, it may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in section 115 of the Code", and that where the order was within the powers of the court, a discretion exercised judicially by it, could not be questioned under section 115. Where the trial court, in the exercise of its discretion, has granted unconditional leave to defend, the high court ought not, under this section, to interfere, unless the defence is patently dishonest, or so unreasonable, that it cannot reasonably be expected to succeed.[845] Where the high court has refused to exercise its discretionary jurisdiction, after an inordinate delay of more than five years from the date of the order of the district judge, under section 18 of the Land Acquisition Act, 1894, and more than 10 years from the order of land acquisition collector, the order of the high court is not vitiated by any error of jurisdiction or "material irregularity", in the exercise of its jurisdiction.[846] For other instances in which the high court declined to interfere with a discretionary order, see the cases noted below.[847]

Where there is a concurrent finding, based on careful and minute considerations of evidence adduced by the tenant, that tenant's claim of permanent tenancy is not *bona fide* and therefore, he is liable to be evicted from the suit premises on this ground alone, according to the provisions of section 15(2)(vi) of the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954. The high court, exercising revisional jurisdiction under section 26 of the said Act, could not interfere with the concurrent files, and set aside the order of eviction. The jurisdiction of the high court, in revision under section 76, against the order passed on appeal by the district judge, is a limited one, and it is in *pari materia* with the provisions of section 115 of the CPC. The concurrent findings in the above-mentioned case, could not be held to be either without jurisdiction or those that would amount to a failure to exercise jurisdiction vested with them. Also, the same could not be held to be made by the original or the appellate authority illegally or with "material irregularity".[848]

Ordinarily, the high court is not called upon to upset a finding of the lower appellate court with regard to matters of fact. However, when the finding is based on a clear mis-reading of the evidence and misappreciation of the circumstances on record, the high court must interfere and correct the error right.[849] An *ex parte* decree in this case was set aside. A delay of 17 months had taken place in filing the application to set it aside. The lower court gave cogent and convincing reasons for condoning the delay. It was held that a revision against this

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844. *Razia Begum v Anwar Begum*, AIR 1958 SC 886 : [1959] SCR 111 : 1958 SCJ 1214 : 1959 SCA 46; *Aswathamma v HM Vijayaraghava*, AIR 1999 Ker 21.
845. *Mechelec Engineers and Manufactures v Basic Equipment Corp*, AIR 1977 SC 577 : (1977) 4 SCC 687.
846. *Mirza Majid Hussain v State of Madhya Pradesh*, (1995) 2 SCC 422.
847. *Bhuvaneshwari Khur v Raghubansh*, AIR 1954 Pat 34 (refusing to return plaint under O VII, rule 10); *Kather Dutt v District Magistrate*, AIR 1956 All 232 (declining to issue a commission); *Hanumandas v Prithvinath*, AIR 1956 All 677 (excusing delay under section 5 of the Limitation Act, 1963); *Ramaswami v Sivalingam Chettiar*, AIR 1957 Mad 597 (joinder of parties); *Chandu Modi v State of Bihar*, AIR 1961 Pat 298 (refusing amendment, as not *bona fide*).
848. *Chandmal v Firm Ram Chandra and Vishwani*, AIR 1991 SC 1594 : (1991) 3 SCC 130 : (1991) 2 SCR 732 : JT 1991 (2) SC 553.
849. *Bengal National Textile Mills Ltd v MJ Textile Agencies*, AIR 1981 P&H 226.

was not maintainable.[850] In a case in the Allahabad High Court, a suit for accounts was filed within time. All the partners were impleaded as parties to the suit, with allegations against all of them. An application for amendment of the plaint was made. In the relief clause, instead of defendants 2–6, defendants 1–6 were sought to be added. The cause of action was not changed. A rejection of the amendment application was held to be erroneous and, as such, quashed in revision.[851]

There was an agreement between the decree-holder and the debtor, with respect to the account of simple decree and mortgage decree, to the effect that a consolidated sum be paid. The property was sold and the same fetched a price that was adequate at the time of auction. It was held that the high court would not, in revision, interfere with the auction.[852] In a suit on a pronote, both the courts had arrived at the conclusion that a blank paper had been converted into a pronote. Such a finding could not be interfered with in revision.[853]

In a case in the Allahabad High Court, the trial court allowed a part of the amendment of the written statement, as applied for and no reasons were given. Interference in revision was held to be justified. It was further held that the "admission" stated in O VIII, rule 5, does not necessarily bind the party, and that an amendment can be allowed. Also, an admission could be permitted to be withdrawn in a given case, if the amendment is not one which deprives the plaintiff of a valuable right that has accrued to him. In the instant case, the amendment sought in the written statement would have resulted in making the claim of the plaintiff barred by limitation and, consequently, the same was not allowed.[854]

Except in certain rare cases, the high court would not be competent to disturb the findings of the courts below, however grossly erroneous they might appear to be. However, points of law, which are related to questions of jurisdiction or, which ultimately go to the root of the jurisdiction of the court, are certainly points which can be examined by the high court while exercising its revisional jurisdiction.[855] A simple matter of appointment of *Mutawalli*, that too, in accordance with the scheme, which was in vogue for almost a century, was protracted on one pretext or the other for two decades. The matter was already complicated by the active participation of the tenant in the matter of appointment of *Mutawalli*. As no material was placed before high court having any bearing on order passed by trial court, application for review was rejected as granting of leave would only add to existing complications.[856]

[s 115.62] Revisable and Non-revisable Orders

In all the subordinate proceedings arising in a suit by way of interlocutory application where the rights of the parties are to be adjudicated and if such adjudication results in final conclusion of such rights and if the said questions involved in the adjudication of rights in such proceedings do not arise for consideration at the time of final disposal of the suit, necessarily such of the subordinate proceedings should be construed to come within the purview of the phrase "other proceedings" and in respect of such orders, a revision would lie. The orders passed under O XXXIX, rules 1 and 2, under O XL, under O XXVI, rule 9, under O VI, rule 17, under O XIII (belated production of document), under O XVI (belated summoning of witnesses)

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850. *R Subbarayan v Ravaimani Ammal*, AIR 1988 Mad 228.
851. *Iqbal Singh v Jagdish Chandra*, AIR 1988 All 242.
852. *Yashodanand Gard v Hindustan Commercial Bank*, AIR 1986 All 215.
853. *Banchanidhi Panda v Baishnale Charan Aout*, AIR 1982 Ori.
854. *Mahendra Radio & Television v State Bank of India*, AIR 1988 All 257.
855. *Gujarat Electricity Board v Mahesh Kumar & Co, Ahmedabad*, AIR 1982 Guj 289.
856. *Radhakrishna Rice Mill v Jumma Maseed*, AIR 2003 AP 70 (DB).

and under O XVIII (to reopen the case and to recall the witnesses), have the character of an independent subordinate proceedings arising in a suit not relatable to the question that arise for final adjudication in the suit. Any orders thereon in revision would finally conclude the rights of the parties in such proceedings. Therefore, a revision would lie. However, allowing the applications under O XXVI, rule 9, under O VI, rule 17, under O XIII (belated production of document), under O XVI (belated summoning of witnesses) and under O XVIII (to reopen the case and to recall the witnesses), may not materially prejudice the rights of the parties, since there would be a scope for the parties to contest at the stage of evidence and also at the stage of arguments to challenge the relevance, veracity and legality of such evidence.[857]

It is clear from a reading of O XLIII, rule 1(q) that only an order under rules 2, 3 or rule 6 of O XXXVIII are appealable. Rule 6 relates to attachment before judgment and only rules 2 and 3 relate arrest as prayed for by the plaintiffs in the suit. It is evident from rule 1(q) of O XLIII that an order passed under O XXXVIII, rule 1 is not appealable in nature though an order under rule 2 which is to be passed after the defendant is brought before court and where he fails to furnish security is appealable. It cannot, therefore, be said that an order as passed in is made before the stage of arrest is not revisable in nature.[858]

[s 115.63] Order Admitting or Refusing Document — Problem and Solution

The argument that if orders of admitting and refusing documents are allowed to be challenged in revision and in such petitions if order of stay is granted in respect of further proceedings of the suit, it would drag on the proceedings endlessly and therefore the revision is held to be not maintainable on the premise that such order does not amount to "case decided", is concerned, the very object is defeated if after the final disposal of the suit, the appellate court were to find fault with such orders and consequently orders for remand of the matter to the trial court, the duration taken for disposal of such matters would be enormous. Moreover, when the matters are remanded, the original parties may not be alive and the very object would be frustrated. The said complaint can be remedied by not admitting the revision petitions and by ordering notice to the counsel who are appearing in the court below and dispose of such revision petitions expeditiously at the admission stage itself. These problems are agitating the legal fraternity for quite some time and merely because we are unable to find a practical solution it cannot be said that the revision petition should not be entertained at all. In fact, the Supreme Court taking note of these problems has suggested a solution by prescribing the following procedure in a decision in a case[859] as held as under:

> It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing Order on such objection. But the fall out of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional Court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the Appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede

857. *Meenakshamma v Munivenkatappa*, AIR 2003 Kant 450.
858. *S Selvarathivam v Rajasekharan Nair*, AIR 2001 Ker 1.
859. *Bipin Shantilal Panchal v State of Gujarat*, AIR 2001 SC 1158 : (2001) 3 SCC 1 : (2001) 1 SCJ 460 : [I] 2001 (3) SC 120 : (2001) 3 SRJ 437.

steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.

When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. However, we make it clear that if the objection relates to deficiency of stamp duty of a document, the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

We, therefore, make the above as a procedure to be followed by the trial courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence.[860]

[s 115.64] Concurrent Findings

The high court, in revision, cannot set aside the concurrent findings by taking a different view.[861] The mere fact that a different view is possible on re-appreciation of evidence, cannot be a ground for the exercise of revisional jurisdiction. The high court cannot substitute its own findings on a question of fact for the findings recorded by the lower court on re-appraisal of evidence,[862] however grave the said error may be, unless they relate to jurisdiction of the court.[863] Interference with the findings of facts are justified only if they are perverse or if there was non-appreciation or non-consideration of the material evidence on record.[864] The court would be justified in setting aside the concurrent findings of the facts if the same were vitiated due to non-compliance of the mandatory provisions of law.[865] However wide the powers of statutory revision under Uttar Pradesh Consolidation of Holdings Act, 1953 may be, in contrast to section 115 of the CPC, still, while exercising that power, the authority concerned cannot act as court of appeal so as to re-appreciate the evidence on record for the purposes of recording findings on questions of facts.[866]

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860. *K Anjaneya Setty v KH Rangiah Setty*, AIR 2002 Kant 387.
861. *Masjid Kacha Tank, Nahan v Tuffail Mohammed*, (1991) Supp 2 SCC 270; *Kumarathal v Balasubramania Gounder*, AIR 1996 Mad 277; *Narinder Nath v Col Jaswant Singh*, AIR 1994 P&H 111; *Ka Mathilda Kharmalki v Ka Sabina Nengrum*, AIR 1997 Gau 74; *Bindu Khan v Samee Khan*, AIR 1998 Raj 115; *Prem Chand v Manak Chand*, AIR 1997 Raj 198; *Dulia Devi v Dulia Devi*, AIR 2001 All 195.
862. *Patel Valmik Himatlal v Patel Mohan Lal Muljibhai*, (1998) 7 SCC 383; *Ka Anthappai v C Ahammed*, (1992) 3 SCC 277.
863. *Debasish Majumdar v Saha Brothers*, AIR 1998 Gau 4; *Sarasvadiya Savitaben Narsinhbhai v Harilal Kaniji Patel*, AIR 1999 Guj 308.
864. *Masjid Kacha Tank, Nahan v Tuffail Mohammed*, (1991) Supp 2 SCC 270.
865. *Amro Devi v Ajay Kumar*, AIR 1994 HP 81.
866. *Ram Avtar v Ram Dhani*, (1997) 2 SCC 263.

In exercise of the revisionary jurisdiction, under section 115, CPC, which is limited, the high court cannot interfere with the concurrent findings of fact by the courts below, when the view taken by them was plausible and not perverse.[867]

In *Hiya Associates v Nakshatra Properties (P) Ltd*[868], while examining whether the revisional court was justified in remanding the case to the executing court for fresh consideration in the facts and circumstances of the case, the apex court succinctly stated when the superior court is justified in remanding the case back for reconsideration. It observed:

> In our opinion, the remand of a case to the subordinate court is considered necessary when the superior court while exercising its appellate or revisionary jurisdiction finds that the subordinate court has failed to decide some material issues arising in the case or there is some procedural lacuna noticed in the trial, which has adversely affected the rights of the parties while prosecuting the suit/proceedings or when some additional evidence is considered necessary to decide the rights of the parties which was not before the trial court, etc.

In a case under the East Punjab Urban Rent Restriction Act, 1949, the Supreme Court held that interference of the high court on the question of *bona fide* requirement against the findings of the appellate authority was improper.[869] Explaining the point, Tarun Chatterjee J, speaking for the bench in the above case, observed as follows:

> It is true that the High Court in its revisional jurisdiction could have interfered with such findings of fact arrived at by the Appellate Authority, if the High Court had found that the findings of the Appellate Authority on the question of *bona fide* requirement were either perverse or arbitrary. On a close examination of the impugned order of the High Court, we do not find any ground to hold that the findings of fact, regarding the *bona fide* requirement of the appellants, were perverse or arbitrary or the pleadings made by the appellants in their eviction petition could be said to be not in conformity with the requirement of Section 13(3)(a)(ii) of the Rent Act.[870]

[s 115.65] Court Fee

The order rejecting plaint for non-payment of court fees is "decree" in terms of section 2(2) and as such appealable, so revision is not maintainable.[871]

An order demanding an improper court fee, if unfavourable to the plaintiff, is equivalent to telling the plaintiff that the court will not proceed with the trial although the plaintiff has, in fact, paid the proper court fee. It is, therefore, a refusal to exercise jurisdiction, and the high court will interfere in revision.[872] However, if such an order is favourable to the plaintiff, though it may cause detriment to the revenue authorities, and also does not prejudice the

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867. *Surinder v Nand Lal*, AIR 2018 SC 2872 : (2018) 2 SCC 717 : 2018 (1) Scale 642.
868. *Hiya Associates v Nakshatra Properties (P) Ltd*, (2018) 18 SCC 358 : 2018 (13) Scale 583 : JT 2018 (9) SC 398.
869. *Ajit Singh v Jit Ram*, AIR 2009 SC 199 : (2008) 9 SCC 699.
870. *Ajit Singh v Jit Ram*, AIR 2009 SC 199, at p 203, para 14 : (2008) 9 SCC 699.
871. *N Narayani Ammal v P Sanjeev*, AIR 2001 Ker 305.
872. *Chintalapati Murthiraju v Chintalapati Subbaraju*, AIR 1944 Mad 315 : (1944) Mad 626 (FB); *Ratnavelu v Varadaraja*, AIR 1942 Mad 585; *Basuki Prasad Singh v Satya Kinkar Sahana*, AIR 1950 Pat 470; *Baldeo Gulabrao v Abdul Hafiz*, AIR 1950 Nag 249; *Ramsarup v Mohant*, (1910) 14 Cal WN 932; *Mani Lal v Durga Prasad*, AIR 1924 Pat 673 : (1924) 3 Pat 930; *Kolandavelu v Ramaswami*, AIR 1928 Mad 416 : (1928) 51 Mad 664; *Lakshmi Narain v Dip Narain*, AIR 1933 All 350 : (1933) 55 All 274; *Ramkhelawan v Bir Surendra*, AIR 1938 Pat 22 (FB) : (1938) 16 Pat 766; *Sailendra Nath v Surendra Nath*, AIR 1935 Cal 279 : (1935) 62 Cal 417; *Thiruvengadasami v State of Madras*, AIR 1959 Mad 155 : (1959) 1 Mad LJ 151 : 72 LW 131; *Aziz v Sultan*, AIR 1960 J&K 34; *Firm of Fakirchand Makandas v Shri Jagadguru Shankaracharya*, AIR 1970 Guj 145 : 11 Guj LR 686; *CR Kothari v KD Kothari*, AIR 1971 Guj 55 : 12 Guj LR 174.

defendant, there is no ground for revision.[873] Though the defendants would ask for enquiry with reference to the value of the court fee payable on the plaint, the defendants cannot have any grievance against the order overruling the objection to get him entitled to invoke the revisional jurisdiction of the high court on the question of whether the plaintiffs have paid adequate court fee on the plaint or not,[874] unless the question of jurisdiction is connected with the question of court fees.[875] Thus, it was observed in *Sathappa Chettiar v Ramanathan Chettiar*[876] that:

> Normally the dispute between the litigant and the Registry in respect of court fees arises at the initial stage of the presentation of the plaint or the appeal and the defendant or the respondent is usually not interested in such a dispute unless the question of payment of court fees involves also the question of jurisdiction of the court either to try the suit or to entertain the appeal.

The Calcutta High Court has held that an order of the effect that the plaintiff's valuation is correct is not open to revision.[877] However, if the plaintiff's valuation is too low, it can be revised. Otherwise, the Patna High Court has laid down that the plaintiff would be able to drag the defendant into any court he pleases.[878] This passage was quoted, with approval, by the Bombay High Court in *Bhikamdas v Motilal*,[879] wherein, it was held that an erroneous decision of the effect that a suit fell under a particular category for the purposes of court fees was open to revision. And, it was further pointed out that the jurisdiction of the court might be affected by the decision. The Kerala High Court also held that the defendant could prefer a revision against an order deciding that the suit fell under a particular category and that the court fee paid was correct.[880] The Mysore High Court held that where the plaintiff, claiming exemption under a notification issued under the Hyderabad Court-Fees Act, presented a plaint without any court fee, it was open to the defendant to challenge its validity in a revision, as the rule that the defendant cannot move the court under section 115, when the court fee paid has been held to be sufficient, has no application when no court fee has been paid.[881]

In *Ratnavarma Raja v Vimla*,[882] the Supreme Court has observed that whether proper court fee has been paid or not, is an issue between the plaintiff and the state and that the defendant has no right to question it in a revision. In view of this pronouncement, some of the decisions noted above might require reconsideration.[883] The Allahabad High Court has held that a decision in the trial of a suit as to the amount of court fee is not an independent

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873. *Pusaram v Himatrao*, AIR 1943 Nag 315; *Muhammad v Rahina Bee*, AIR 1929 Mad 191 : (1929) 56 Mad LJ 302; *Kattiya v Ramaswamia*, AIR 1929 Mad 396 : (1929) 56 Mad LJ 394; *Varada Pillai v Thillai*, AIR 1931 Mad 8 : (1931) 59 Mad LJ 593; *Raja Deo Singh v Shambo Krishna Narain*, 1960 All LJ 124; *Vasu v Chakki Mani*, AIR 1962 Ker 84 : 1961 Ker LR 325; *G Krishnamurthy v Sarangopani*, AIR 1996 Mad 440.
874. *Sundarrajan v Vellai Vinayagar Koil*, AIR 2001 Mad 110.
875. *Hajrabi v Md Ibrahim*, AIR 1948 Nag 219; *Prem Dulari v Raj Kumari*, AIR 1965 J&K 121.
876. *Sathappa Chettiar v Ramanathan Chettiar*, AIR 1958 SC 245 : [1958] SCR 1041 : 1958 SCJ 407.
877. *Falkner v Mirza*, AIR 1925 Cal 814 : (1925) 29 Cal WN 627; *Secretary of State v Raghunathan*, AIR 1933 Mad 506 : (1933) 56 Mad 744.
878. *Ramcharitar v Basgit*, AIR 1932 Pat 9 : (1931) 11 Pat 161.
879. *Bhikamdas v Motilal*, AIR 1958 Bom 307.
880. *Zainabey Razak v Noor Mohamed*, AIR 1961 Ker 146 : (1960) Ker LT 1322 : 1961 Ker LJ 70 (FB); *Lekshmanan Nadar v Krishnan Nadar*, AIR 1961 Ker 142.
881. *Chandappa v Sadruddin*, AIR 1958 Mys 132.
882. *Ratnavarma Raja v Vimla*, AIR 1961 SC 1299 : [1961] 3 SCR 1015 : (1962) 1 SCJ 60.
883. *Vasu v Chakki Mani*, AIR 1962 Ker 84.

proceeding and, therefore, not open to revision.[884] The Oudh High Court has held that an order demanding deficit court fee from a plaintiff is not open to revision.[885]

An order deciding whether a document sought to be admitted in evidence was duly stamped or not, can be revised, as, it would affect its admissibility.[886] Where a document produced at a trial is impounded as being insufficiently stamped, the order is open to revision.[887] Consequent to an amendment of the plaint seeking recovery of possession of property, in addition to the original suit for declaration and permanent injunction, directions issued to the plaintiff to pay *ad-valorem* court fee on the valuation so made, was held as not liable to be interfered in revision.[888] Where a plaint is rejected because of deficient court fee, on account of failure of the plaintiff's counsel to pay the court fee, despite the fact that the same was purchased and handed over to the counsel, the plaint can be restored under section 151 and that order will not be open for interference in revision.[889] In a case where the trial court has adjudicated upon the issue relating to valuation of the subject matter of the suit and sufficiency of court fee paid or payable, then he will be deemed to have acted within the jurisdiction to do so even if the decision is found to be erroneous or wrong on merits. That by itself cannot clothe defendant with the right of maintaining a revision before high court under section 115, CPC. No doubt, as provided under sub-section (4)(a) of section 11 of the Karnataka Court-fees and Suits Valuation Act, 1958, he will have a right to raise such an issue before the court of appeal if an occasion arises, and in such a situation the procedure laid down under the said sub-section will have to be followed for adjudicating and for recovery of the deficit court fee and refund of the excess court fee but the revision against the said order is not maintainable.[890]

[s 115.66] Deccan Agriculturists Relief Act, 1879

A special judge has, by virtue of section 53 of the Deccan Agriculturists Relief Act, 1879, a revisional power, in all cases where a failure of justice appears to have taken place. The high court is, therefore, reluctant to interfere where such revisional powers suffice, but will do so in a case of general importance.[891] The revisional jurisdiction vested in the high court under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, or in the district court under section 29(3) of the same Act is wider than the jurisdiction vested under section 115 of the CPC.[892]

[s 115.67] Provincial Insolvency Act, 1920

Under the first proviso to section 75(1) of the Provincial Insolvency Act, 1920, there is a very wide power of revising appellate orders of a district court in the exercise of insolvency jurisdiction.[893] The Allahabad High Court treated an application under section 115 of the

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884. *Gupta & Co v Kirparam*, (1935) 57 All 17 : (1934) All 620 (FB); dissenting from *Lakshmi Narain v Dip Narain*, AIR 1933 All 350 : (1933) 55 All 274.
885. *Lachmi Narayan v Secretary of State*, AIR 1934 Oudh 396.
886. *S Rangaraju v DS Kamesan*, AIR 1953 Mad 698 : (1953) 1 Mad LJ 498 : 66 LW 461; *Brijraj v Sabu Raghunandan*, AIR (1955) Raj 85 : 1955 Raj 367; *Raghunath Prasad v Mangilal*, AIR 1960 Raj 20.
887. *Devasikhamani v Andamuthu*, (1955) 1 Mad LJ 457 : 68 LW 146; *Santhakumari v K Susheela Devi*, AIR 1969 AP 355.
888. *Lina Sengupta v Sovarani Guha*, AIR 1995 Cal 152.
889. *Narain Agricultural Corp v Allahabad Bank*, AIR 1995 All 225.
890. *Manickal Verma v Jamanadevi*, AIR 2002 Kant 332.
891. *Sahoo v Narayan Shastri*, AIR 1931 Ker 138 : (1931) 55 Bom 411.
892. *Rajgor Shantilal Shivji v Trustees of Jivibai alias Mongibai Will Trust*, AIR 1989 Guj 57.
893. *Ratbu Mal v Kunj Behari*, AIR 1937 All 4; *Pandit Chhotu Ram v Khairati Ram*, AIR 1960 Punj 604.

CPC for revision of an order made by a district judge, in appeal, refusing to extend the time for an insolvent's application for discharge, as one under section 75 of the Provincial Insolvency Act.[894]

[s 115.68] Indian Companies Act, 1956

A district court, exercising jurisdiction under the Indian Companies Act, 1956, is subject to the revisional jurisdiction of the high court. If, acting under an erroneous view of the law, it does not consider what it ought to consider, and decides something it ought not to decide, that would amount to a "material irregularity" in the exercise of its jurisdiction.[895]

[s 115.69] Provincial Small Cause Courts Act, 1887

Under section 25 of the Provincial Small Cause Courts Act, 1887, the high court has wider powers of interference than those conferred by section 115 of the CPC.[896] Though this is so, the principle underlying this section would equally apply to revisions under section 25 of the Provincial Small Cause Courts Act, 1887.[897] The high court will interfere under section 25 of the Act where substantial injustice has resulted by reason of an erroneous view of law, but not otherwise.[898] The Provincial Small Cause Courts Act, 1887 has its own self-contained scheme of revision under section 25. It excludes revision under section 115 of the CPC.[899] The law is also clear on that point that a judgment in a small cause suit need not contain more points for determination, and that the decision thereon, in view of O XX, rule 4(1) of the CPC, which the high court cannot alter, and if some reasons are given unless they are absurd, the high court in revision under section 115 cannot supplement its reason contrary to the finding.[900]

[s 115.70] Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and Maharashtra Rent Control Act, 1999

The full bench of the Bombay high court while dealing with the question that whether a revision application under section 34(4) of the Maharashtra Rent Control Act, 1999 would be maintainable in respect of a procedural order passed under the CPC in a suit arising out of the Maharashtra Rent Control Act, 1999, has held that an order rejecting application for setting aside *ex parte* decree is appealable under section 29(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 is correct view. The order of the trial court is not a mere procedural order not affecting substantive rights of the parties under the Rent Act. The order did affect the substantive rights of the parties. The order did cause substantial prejudice to the plaintiff, who had filed the suit for asserting his rights and liabilities against the tenant under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Scope and ambit of the revisional power under section 34(4) of 1947 Act and under section 29(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, though not as narrow as

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894. *Madho Prasad v Madho Prasad*, AIR 1933 All 230 : (1933) 52 All 241.
895. *British India Corp v Shanti Narayan*, AIR 1935 All 310 : (1935) 57 All 810.
896. *Vithalbhai v Nadiad ES Co*, AIR 1941 Bom 67 : (1940) 42 Bom LR 1098; *Habib Dar v Zoona Bibi*, AIR 1965 J&K 48.
897. *Kandaswami v Theagaraja*, AIR 1968 Mad 203 : (1968) 2 Mad 604 : (1967) 2 Mad LJ 475.
898. *Jaganath Prasad v Mt Parana*, AIR 1942 Oudh 202; *Sampat Sukul v Sub Karan Tewari*, AIR 1942 Oudh 161 : (1941) 17 Luck 226; *Rajeswara v Dasrath*, AIR 1943 Nag 117 (FB); *Jafar Uddin v Devi Prasad*, AIR 1939 All 590.
899. *Aundal Ammal v Sadasivan Pillai*, (1987) 1 SCC 183.
900. *Musunuri Anjaneyulu v Koona Lakshmi*, AIR 1998 AP 214.

the scope of the revisional power under section 115 of the CPC is at the same time not so wide as to enable the revisional court to interfere with an order of the trial court under the Rent Act, merely on the ground that it is not according to procedural law. After the revisional court is satisfied about maintainability of the revision application, the revisional court will consider whether the order is according to law.[901]

[s 115.71] Sanction to Prosecute

If a civil or a revenue court, acting under section 476 of the Code of Criminal Procedure 1973, grants or refuses an application to prosecute a party to the suit or witnesses before it, its order is a decision of a case within the meaning of the present section. The high court, therefore, has no jurisdiction to interfere under section 439 of the Code of Criminal Procedure, 1973 or to call for the proceedings of the lower court under this section. However, it has the power to call for the proceedings and to pass such orders as it may deem expedient. In other words, an application in such cases lies on the civil revisional side of the high court, and not on the criminal revisional side. However, the bench, exercising criminal jurisdiction, it has been held, may deal with the matter, if authorised to do so by the Chief Justice under section 14 of the High Courts Act, 1861.[902] The same rule applies where action has been taken by a subordinate civil court under section 195 of the Code of Criminal Procedure 1973.[903] (See also the undermentioned cases.)[904] On the other hand, it has been held, that an order made by a civil court under section 476B of the Code of Criminal Procedure, 1973 is an order made by a court exercising criminal powers, and is not an order made by a civil court. Therefore, an application in revision to the high court from such an order should be heard and decided under section 439 of the Code of Criminal Procedure, 1973 and not in accordance with the provisions of this section.[905] Likewise, where a complaint under section 479A of the Code of Criminal Procedure, 1973 is lodged before a magistrate by a civil court the remedy for the person concerned is by way of a petition under section 651A of the Code of Criminal Procedure, 1973 and not under this section.[906]

[s 115.72] Hindu Marriage Act, 1955, Section 24

As per section 24 of the Hindu Marriage Act, 1955, either spouse is entitled for maintenance amount pending litigation and the expenses of the processes if the spouse has no independent income. The order made under sections 24 or 25 or 26 of the Hindu Marriage Act, 1955 is not appealable under section 28(2) of the said Act.[907] The judgment of appellate court dismissing

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901. *Bhartiben Shah v Smt. Gracy Thomas*, 2013 (3) ABR 962 : 2012 (2) All MR 9 : 2013 (2) Mah LJ 25.
902. *Re Petition of Bhup Kunwar*, (1904) 26 All 249 (FB); *Emperor v Har Prasad*, (1913) 40 Cal 77 (FB); *Emperor v Kashi*, (1916) 38 All 695. But see *Uttupura v Emperor*, (1910) 33 Mad 48 (FB); *Abdul Haq v Sheo Ram*, AIR 1927 All 334 : (1927) 49 All 536; *Bismillah v Shakir Ali*, AIR 1928 Oudh 494 : (1929) 4 Luck 155; *Harendra v Emperor*, AIR 1931 Cal 441 : (1932) 59 Cal 68; *Purna Chandra Dutta v Sheikh Dhalu*, AIR 1930 Cal 721 : (1931) 34 Cal WN 914.
903. *Salig Ram v Ramji*, (1906) 28 All 554; *Re Chennanagoud*, (1902) 26 Mad 139.
904. *Re Ram Prasad Mala*, (1910) 37 Cal 13; *Re Beni Prasad v Prasad Mala*, (1910) 37 Cal 13; *Beni Prasad v Sarju Lal*, (1911) 33 All 512; *Budhu Lal v Chattu*, (1916) 43 Cal 597, SC in appeal (1917) 44 Cal 804 (order made by a judge of the presidency small cause court); *Paramaswamy v Alamelu*, (1919) 42 Mad 76 (Madras Estates Land Act, 1908); *Emperor v Chote Lal*, (1917) 398 All 367 (non-specification of statements on which charge is brought).
905. *Emperor v Bhatu Sadu Mali*, AIR 1938 Bom 225 (FB); approving *Dhanpat Rai v Balak Ram*, AIR 1931 Lah 761 : (1931) 13 Lah 342 (FB).
906. *Didar Singh v Sarbit Singh*, AIR 1972 P&H 319.
907. *Sunil Hansraj Gupta v Payal Sunil Gupta*, AIR 1991 Bom 423.

appeal against order granting interim maintenance does not call for any interference. In the circumstances, the request of the revision petitioner to remit the matter back to the principal district court for the purpose of returning the civil miscellaneous appeal to seek proper remedy cannot be considered by the high court.[908]

There was a conflict of judicial opinion on the question as to whether a revision lies against an order for interim maintenance made under section 24 of the Hindu Marriage Act, 1955, which turns on the interpretation of section 28 of the Act. According to one view, section 28 leaves the matter to be regulated by the law for the time being in force, that is, the CPC, and, as the order is not appealable under the Code, a revision lies.[909] As against this, it has been held that section 28 confers, independently of any law, a right of appeal against all orders passed under the Act, and so, an order under section 24 is appealable, and then, revision lies.[910] Therefore, revisional application will only lie against such final or interlocutory order if it had been made in favour of the party applying for revision, would have finally disposed of the suit or the proceeding.

The revisional application directed against order passed by the learned Additional District Judge, in a matrimonial suit rejecting an application filed by the husband for amendment of his written objection to the application filed by the wife under section 24 of Hindu Marriage Act, 1955 can never be said that the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit so the revisional application under section 115 of the CPC is not maintainable.[911]

An application was made by both the parties to a divorce petition, for interim maintenance. The trial court found that neither of the parties had an independent income to support the other. Such a finding could not be interfered with, in revision.[912]

A decree granting divorce under section 13(1)(ib) whether *ex parte* or bipartite, is a decree which is appealable under section 28 of the Hindu Marriage Act, 1955. Consequently, the order of the trial court refusing to set aside such an *ex parte* decree, and rejecting the application under O IX, rule 13 of the CPC, could have been validly made the subject matter of an appeal under O XLIII, rule 1(d). Therefore, the revision application before the high court should be treated, in substance, as one by way of a miscellaneous appeal.[913] The question of maintenance *pendente lite* and litigation expenses arises with the filing of an application for matrimonial reliefs under the Act. It ends as the proceedings terminate. It has no separate existence and cannot stand by itself. No application for maintenance *pendente lite* or litigation expenses can exist independently unless *lis* is there. Admittedly, no appeal lies against the order. Thus, the revision also does not lie in view of the amended provision to section 115, CPC[914]

In a case, an application for divorce by consent was pending. The petitioner applied for an amendment in order to add a prayer for restitution of conjugal rights, which was rejected. While the revision against the rejection was pending, the parties filed a joint application for mutual divorce. Section 13B of the Hindu Marriage Act, 1955, provides that the court must

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908. *Uma Maheswari v V Mathivanan*, AIR 2004 Mad 484.
909. *Saraswathi v Krishnamurthi*, AIR 1960 AP 30; *Prithviraj Singh v Bai Shirprabha Kumari*, AIR 1960 Bom 316 : 62 Bom LR 47 : (1960) Nag LJ 92.
910. *Sobhana Sen v Amar Kanta Sen*, AIR 1959 Cal 455; *Harilal v Lilavati*, AIR 1963 Cal 428.
911. *Mrityunjay Sen v Sikha Sen*, AIR 2003 Cal 165.
912. *Urmila Devi v Hari Prakash*, AIR 1988 P&H 84.
913. *Yallawwa v Shantavva*, (1997) 11 SCC 159.
914. *Ramavtar Verma v Chintamani*, AIR 2004 MP 137.

wait for six months. However, it was held that the high court, in revision, could pass an order for divorce by consent, even at a period earlier than the specified time of six months.[915]

[s 115.73] Rent Control Legislations

The fact, for what purpose the premises was let out and whether the tenant has changed the user of the premises is jurisdictional fact and it was open to the revisional court to go into the said questions. The high court fell in error in holding that the trial court's finding that the premises was let out for operating stitching machine, rolling machines being finding of court could not have been set aside by the revisional court. The revisional court recorded a finding that even prior to the amendment of the Act, the tenant used the premises for the purpose other than that for which the premises was let out, without the consent of the landlord.[916]

The trial court accepted the deposit of arrears of rent by the tenants and refused to strike off defence for more than one valid reason. The most important reason assigned by the trial judge is that there is a serious question of jurisdiction of the civil court involved in the cases. The court also came to the conclusion that as the arrears of rent were deposited in the bank, there was no mala fides on the part of the tenants. The rent was not withheld for any ulterior purpose. The arrears of rent were, thereafter, deposited in court with an application or representation which was made in accordance with sub-rule (2) of rule 5 of O XV of the CPC.

The high court could not justifiably interfere with the same in exercise of its revisional jurisdiction under section 115 of the CPC.[917]

The eviction suit was filed by the landlord *inter alia* on ground that the demised premises in question has become unfit for human habitation. Civil revision arising out of the suit remained pending in the high court for more than 18 years. The landlord made an application for the appointment of a local commissioner. Landlord in his application stated that the roof of the shop has since also fallen down and its condition further deteriorated, during the pendency of the revision. The application was allowed by the revisional court. The Supreme Court held. when the question of whether accommodation in question is fit for human habitation was in issue and with the long passage of 18 years, if fresh assessment was sought through a local commissioner, it cannot be said, that in allowing such commission the high court exceeded in its revisional jurisdiction.[918]

If the impugned order is found to have been passed by the court below in exercise of its discretionary jurisdiction vested in it by sub-clause (b) of section 20(1)(i) of the Karnataka Rent Control Act, 1961 and it has not acted illegally or with any material irregularity in exercise of that jurisdiction, the revision directed against it is not maintainable in law.[919]

The high court's power of revision under section 50 of the Karnataka Rent Control Act, 1961 is not as narrow as is section 115 of the CPC, but is wider.[920]

In view of the language used in section 23E of the Madhya Pradesh Accommodation Control Act, 1961 and in the light of the scope of high court considering a revision under section 23E

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915. *Mihir Narayan Mohanty v Sadyalaxmi Patnaik*, AIR 1991 NOC 92 (Orissa).
916. *Bharat Lal Baranwal v Virendra Kumar Agarwal*, AIR 2003 SC 1056 : AIR 2003 SCW 576.
917. *Mangat Singh Trilochan Singh v Satpal*, AIR 2003 SC 4300 : (2003) 8 SCC 357.
918. *Lekh Raj v Mumi Lal*, AIR 2001 SC 996 : (2001) 2 SCC 762 : 2001 (2) Punj LR 426 : 2001 (1) Scale 650.
919. *A Ahmed Pasha v C Gulnaz Jabeen*, AIR 2001 Kant 412.
920. *Bhoolchand v Kay Pee Cee Investments*, (1991) 1 SCC 343.

of the Act is little more than the revisional jurisdiction exercisable under section 115 of the CPC and less than the appellate powers exercisable by this court provided under the law.

Consequently, it can be concluded that this court exercising powers under section 23E of the Act shall interfere with the findings of the facts recorded by the rent control authority when the court finds that the rent control authority has misread the evidence, ignored to consider the evidence and thereby recorded a perverse finding or has committed illegality by misquoting law or misinterpreted the law applicable to the case.[921]

The high court, in revision, under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, erred in taking the view that the nature of the business which the landlord wanted to start in the premises should also have been pleaded.[922] Although the word "revision" is not employed in the proviso to section 25B(8) of Delhi Rent Control Act, 1958, it is evident from the language used therein, that the power conferred is a revisional power. Hence, it is not permissible for the high court, in the exercise of its power, to come to a different finding of fact, unless the finding arrived at by the rent controller on the facts, is so unreasonable that no rent controller should have arrived at such a finding based on the materials available.[923] The high court ought not to interfere in the absence of an actual basis to the plea of tenancy under the Bombay Tenancy and Agricultural Lands (Vidharbha Region) Act, 1958.[924] Even though the rent control law under the Kerala Buildings (Lease and Rent Control) Act, 1965 is a "court", it is not a civil court for the purposes of section 115 of the CPC. Therefore, against an interim order passed by the rent controller, no revision will lie.[925] Even though the wording of section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, is wider than section 115 of the CPC, additional evidence at the stage of revision cannot be let in.[926] In any proceedings under the Karnataka Rent Control Act, 1961, a landlord cannot question the factum of an impleadment of the legal representative of a deceased tenant, in a revision, after almost five years.[927]

The direction given by the court to the tenant to deposit the rent month by month under section 13(a) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, cannot be interfered with by the high court in the exercise of its revisional jurisdiction.[928] The concurrent findings of the rent controller and of the district judge under the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954, and the Andhra Pradesh Buildings (Lease, Rent and Eviction) Act, 1960, cannot be interfered with by the high court in revision, in the absence of any jurisdictional error or an illegal exercise of jurisdiction.[929]

The site plan of the suit shop was annexed to the eviction petition. The tenant did question its correctness. An issue was also raised. But no arguments were addressed or evidence led in support of the objection disputing the correctness of the site plan. The tenant in his evidence in fact admitted its correctness. Eviction decree was passed. Against it an appeal was filed before the appellate authority, a revision before the high court and an SLP before the Supreme

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921. *Dhannalal v Kalavatibai*, AIR 2001 MP 235.
922. *Raj Kumar Khaitan v Bibi Zubaida Khatun*, (1997) 11 SCC 411.
923. *Sarla Ahuja v United India Insurance Co Ltd*, (1998) 8 SCC 119; *Shiv Sarup Gupta v Mahesh Chand Gupta*, (1999) 4 LRI 105.
924. *DM Deshpande v Janardhan Kashinath Kadam*, (1998) 8 SCC 315.
925. *NP Balakrishnan v R Mariyumma*, AIR 1997 Ker 89 (DB).
926. *Voora Mahalakshmamma v C Veera Reddy*, AIR 1995 Mad 200.
927. *Vrishendraani v K Venugopal Rai*, AIR 1995 Kant 230.
928. *Satya Prakash v Madan Lal*, AIR 1995 Raj 112; *Firm Sagarmal Vishnu Bhagwan v Gauri Shankar*, (1988) 4 SCC 719.
929. *Chandmal v Firm Ram Chandra*, (1991) 3 SCC 130.

Court and in none of those proceedings this issue was agitated. The tenant did not hand over possession to the landlady despite undertaking given to high court. The landlord was compelled to file an execution petition. In the execution petition, repeated attempts were made by the tenant to again revive the issue of identity of the property as also the description of the boundaries of the suit property. The executing court time and again rejected this contention holding that the issue was already settled in the original ejectment proceedings, hence, same could not be reopened. The respondents even moved the high court in between in revision challenging the rejection of their prayer as to the identity of the property which also came to be rejected by the high court observing strongly that all these were attempts on the part of the respondents-tenants to delay the execution proceedings. It was only after such attempts of the tenant having failed before the high court, the landlady was given possession of the suit property by the bailiff under the orders of the executing court by breaking open the lock with police help, the issuance of delivery warrant was challenged by tenant before high court in revision. The high court allowed the revision directing executing court to first consider the objections raised by the respondents before taking steps to issue warrants of possession and during the pendency of such consideration it further directed restoration of possession in favour of the tenant. On these facts it was held that the order passed in revision was wholly erroneous. Courts of law should be careful enough to see through such diabolical plans of the judgment-debtors to deny the decree-holders the fruits of the decree obtained by them. This type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing laws delay and bringing bad name to the judicial system.[930]

The question involved was whether occupants are sub-tenants or tenants. On an evaluation of evidence, the rent controller upheld the pleas raised in the written statements and directed the eviction petition to be dismissed. Owners preferred an appeal which was allowed. The appellate authority held that there were no weighty and material circumstances enabling drawing of an inference contrary to the apparent tenor of the transaction and relationship created by documents in writing. The appellate authority found the averments made in the eviction petition proved and hence directed the tenant and sub-tenants (the occupants) to be evicted. The occupants preferred a revision petition before the high court. The high court entered into re-evaluation of the entire evidence, drawn factual inferences and, based thereon, held that the lease deed incorporated a sham transaction intended to get over the restriction of the Rent Act. The high court also held that subletting and changes in the suit premises were with the oral consent. In the result, the high court directed the eviction petition to be dismissed. The owners, petitioners before the rent controller, preferred the appeal by special leave and the Supreme Court allowed the appeal and judgment of the high court was set aside.[931]

In *SF Engineer v Metal Box India Ltd*,[932] the Supreme Court has held that drawing inference from the facts established is not purely a question of fact. It is always considered to be a point of law insofar as it relates to the inferences to be drawn from finding of fact. The court observed that when inferences drawn do not clearly flow from the facts and are not "legally legitimate", any conclusion arrived at on that basis becomes absolutely legally fallible.

If the judgment-debtor categorically asserts that entire property had been delivered, he should not have been aggrieved by the delivery tenant warrant issued by the executing court. If really entire property is delivered as asserted, the judgment-debtor should not be in possession

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930. *Ravinder Kaur v Ashok Kumar*, AIR 2004 SC 904 : (2003) 8 SCC 289 : 2003 (8) Scale 721.
931. *Gurdial Singh v Raj Kumar Aneja*, AIR 2002 SC 1003 : (2002) 2 SCC 445.
932. *SF Engineer v Metal Box India Ltd*, AIR 2014 SC 2189 : (2014) 6 SCC 780 : JT 2014 (4) SC 284.

of any portion of the schedule property. In such an event, even if the delivery warrant is executed, nothing will happen to the judgment-debtor as it is already out of possession of the scheduled property. No harm, injury or prejudice would be caused to it. If the assertion of the judgment-debtor were to be true, this revision petition should not have been filed challenging the order issuing delivery warrant. When the specific assertion is that entire property had been delivered to the decree holders, there was no occasion for the judgment-debtor to continue the litigation. If the decree holder wants to execute the delivery warrant against any person in occupation or possession of any portion of the scheduled landlord property, judgment-debtor having delivered entire property should allow the decree holders to have full satisfaction of the decree for eviction obtained by them. If there is delivery of entire schedule property to the decree holders, the high court failed to understand for what purpose the revision petition was filed seeking setting aside the delivery warrant issued by the executing court and so it held that the revision petition was liable to be dismissed *in limine*.[933]

Where tenant filed a review petition before the trial court, but by filing said review petition no advantage, benefit or claim or privilege was derived by appellant tenant and the tenant did not induce landlord in any manner while pursuing her review petition and in not filing appeal earlier, it cannot be said that she has abandoned her rights to appeal. Further, since no appeal lies against order rejecting review, the civil revision against order rejecting review petition was held maintainable.[934]

[s 115.74] Arbitration Act, 1940

The civil court had no jurisdiction to entertain a suit after an application under section 8 of the Act is made for arbitration. Therefore, the trial court failed to exercise its jurisdiction vested in it under section 115 of the CPC when it rejected the application of the appellant filed under sections 8 and 5 of the Arbitration and Conciliation Act, 1996. In such a situation, refusal to refer the dispute to arbitration would amount to failure of justice as also causing irreparable injury to the appellant. For the said reason, the high court has erred in coming to the conclusion that the appellant was not entitled to the relief under section 115, CPC.[935]

It is true in the Arbitration and Conciliation Act, 1996 application of the Code is not specifically provided for but what is to be noted is: Is there an express prohibition against the application of the CPC to a proceeding arising out of the Act before a civil court? There is no such specific exclusion of the Code in the present Act. When there is no express exclusion, it cannot be held that the CPC is not applicable. It has been held by the Supreme Court in more than one case that the jurisdiction of the civil court to which a right to decide a *lis* between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the CPC in specific terms except of the extent stated in section 37(2), no inference can be drawn that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable. This general principle apart, this issue is settled by the judgment of a three-judge

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933. *A Venkatasubbaiah & Co v BS Rajanna Chetty*, AIR 2002 Kant 400.
934. *Rita Wangdi v Loden Tshering Bhutia*, AIR 2006 Sikkim 19.
935. *HP Corp Ltd v Pinkcity Midway Petroleums*, AIR 2003 SC 2881 : (2003) 6 SCC 503.

bench of the Supreme Court in a case[936] decided on 13 March 2002 wherein while dealing with a similar argument arising out of the Act, this Court held:

> While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion.

It is to be noted that it is under this part, namely, Part I of the Act, that section 37(1) of the Act is found, which provides for an appeal to a civil court. The term "court" referred to in the said provision is defined under section 2(e) of the Act. From the said definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the CPC; therefore, the remedy by way of a revision under section 115 of the Code will not amount to a judicial intervention not provided for by Part I of the Act. To put it in other words, when the Act under section 37 provided for an appeal to the civil court and the application of CPC not having been expressly barred, the revisional jurisdiction of the high court gets attracted. If that be so, the bar under section 5 will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the CPC also.[937]

The Arbitration and Conciliation Act of 1996 by provision contained in section 37(3) of the said Act only takes away the right of second appeal to the high court. The remedy of revision under section 115 of the CPC is neither expressly nor impliedly taken away by the said Act.[938] However, the Supreme Court has held that the analysis made in *ITI Ltd*[939] to the effect that merely because the 1996 Act does not provide CPC to be applicable, it should not be inferred that the Code is inapplicable seems to be incorrect, for the scheme of the 1996 Act clearly envisages otherwise and the legislative intendment also so postulates and has referred the same to a larger bench for reconsideration.[940]

Merely because a second appeal against an appellate order is barred by the provisions of sub-section (3) of section 37, the remedy of revision does not cease to be available to the petitioner, for the city civil court deciding an appeal under sub-section (2) of section 37 remains a court subordinate to the high court within the meaning of section 115 of the CPC[941]

In a case, neither the arbitrators nor the trial court awarded *pendente lite* interest to the decree holder. The executing court also refused to grant *pendente lite* interest to the decree holder and the same was upheld by the high court in the revision petition filed against the order of the executing court. However, the position would be different where the judgment of a court provides for *pendente lite* interest and decree omits to mention such interest. Such a mistake could be corrected under section 152, CPC.[942]

Section 152 provides that a clerical or arithmetical mistake in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties. The question,

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936. *Bhatia International v Bulk Trading SA*, AIR 2002 SC 1432 : AIR 2002 SCW 1285 : (2002) 4 SCC 105.
937. *ITI Ltd v Siemens Public Communications Network Ltd*, AIR 2002 SC 2308 : (2002) 5 SCC 510.
938. *ITI Ltd v Siemens Public Communications Network Ltd*, AIR 2002 SC 2308: (2002) 5 SCC 510.
939. *ITI Ltd v Siemens Public Communications Network Ltd*, AIR 2002 SC 2308: (2002) 5 SCC 510.
940. *Mahanagar Telephone Nigam Ltd v Applied Electronics Ltd*, (2017) 2 SCC 37.
941. *Nirma Ltd v Lurgi Lentjes Energietechnik GMBH*, AIR 2002 SC 3695 : (2002) 5 SCC 520. See also *Shyam Sunder Agarwal & Co v UOI*, AIR 1996 SC 1100 : 1996 SCC (2) 471 : JT 1996 (1) SC 79 : 1996 (1) Scale 133.
942. *K Rajamonli v AVKN Swamy*, AIR 2001 SC 2316 : 2001 (5) SCC 37 : 2001 (3) SCR 473.

therefore, arises is whether, omission of *pendente lite* interest to the decree by the trial court was an accidental or clerical error. The omission in not granting the *pendente lite* interest could not be held to be accidental omission or mistake and therefore, neither the trial court nor the appellate court has power to award *pendente lite* interest under section 152 of the CPC.[943]

It is well celebrated principle of law that the arbitrator need not follow the technical rules of evidence laid down in the Indian Evidence Act, 1872. Even if the arbitrator admits inadmissible evidence and unless misconduct is proved, the award based on such evidence cannot be interfered with lightly because the arbitrator is not bound by rules of evidence and strict formality of procedure. Arbitrator is a court selected by the parties and, therefore, may conduct any proceedings in any manner he thinks fit so long he acts in accordance with the principles of natural justice, equity and good conscious. In the present case, this arbitration tribunal is statutory one and procedure is prescribed by the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, section 8, sub-section (3) wherein, it is provided that the tribunal admits the reference under sub-section (2), it shall, after recording evidence if necessary, and after perusal of the material on record and on affording an opportunity to the parties to submit their arguments, make an award or an interim award giving its reasons therefor. This finding of the tribunal based on the principle of natural justice requires no interference in revisional jurisdiction."[944] As arbitration petition is a proceeding within the meaning of the term "other proceedings" as provided in section 115 of the CPC, no appeal is provided against the order of the impugned nature. Therefore, the civil revision is maintainable against the order passed in arbitration proceedings deciding venue of arbitration.[945]

Where an order directing the arbitrators to pass interim award was challenged in revision on the ground that an application for setting aside *ex parte* interim award was pending before the court, it was held that that is not a ground to render revision infructuous and not maintainable, more so, when both the proceedings arise out of different orders.[946] The point whether any claim before the arbitrator is barred by limitation can be urged before the arbitrator and cannot be permitted to be urged before high court in revision.[947]

Where the lower court, misconceiving the doctrine of waiver and estoppel, finds that an award was passed beyond time and refuses thereupon to pass a decree in terms of the award it fails to exercise jurisdiction vested in it by section 17 of the Arbitration Act, 1940 (replaced by the Arbitration & Conciliation Act, 1996).[948]

Where the lower court came to a conclusion of negligence on the part of the arbitrator, which is a finding of fact and, unless there is any "material irregularity", it cannot be interfered with, in revision.[949]

[s 115.75] Trust

It is clear that before granting leave to institute the suit, proceedings for granting leave have to be held in court. In these proceedings, the court has to be satisfied that the trust is a public trust and the persons who want to institute the suit are interested in the trust. It is only on the

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943. *K Rajamonli v AVKN Swamy*, AIR 2001 SC 2316 : 2001 (5) SCC 37 : 2001 (3) SCR 473; *Dwaraka Das v State of Madhya Pradesh*, AIR 1999 SC 1031 : AIR 1999 SCW 663 : (1999) 3 SCC 500.
944. *Gujarat Housing Board v Vipur Corp*, AIR 2004 Guj 319.
945. *AES Orissa Distribution Pvt Ltd v Grid Corp of Orissa Ltd*, AIR 2004 Ori 198.
946. *UOI, North Eastern Railway v Om Construction and Supply Co*, AIR 1994 All 334.
947. *Haryana State Electricity Board v Sunil Engineering Works*, AIR 1998 P&H 296.
948. *Ganesh Chandra v Artanana*, AIR 1965 Ori 17 : (1964) Cut 685.
949. *Manohar Singh Sahai & Co v Jogender Singh Kalra*, AIR 1984 Pat 3.

satisfaction of the aforesaid conditions that the permission to institute the suit can be granted by the court for the relief mentioned in the said section 92, CPC.

Analysing the provisions of section 115, CPC, in this background there can be no doubt that the revision under section 115 against refusal to grant leave is maintainable.[950]

An order of court granting permission to file suit against trust under section 92 is an administrative order and not a judicial one. Such an order is not revisable under section 115.[951]

[s 115.76] Appeal

Clause 15 of the Letters Patent, as amended in March 1919, provides that no appeal lies from an order made in the exercise of revisional jurisdiction. Prior to the amendment, there was a conflict of opinion as to whether or not, an appeal lay to the high court under clause 15 of the Letters Patent, from the judgment of a single judge, delivered in the exercise of revisional jurisdiction under this section. The matter stood thus: clause 15 of the Letters Patent, as it stood before the amendment, stated that an appeal shall lie to the high court from the judgment of one judge of the high court or one judge of any division court, pursuant to section 13 of the Charter Act, 1813. Section 13 of the Charter Act, 1813 provides for the exercise, by the judges of the high court, of the original and appellate jurisdiction vested in the high court. This gave rise to the question as to whether the division of jurisdiction into "original" and "appellate" was exhaustive or not. If the division was exhaustive, revisional jurisdiction must be treated as comprised in appellate jurisdiction, so that an appeal would lie, under clause 15, from the judgment of a single judge, exercising revisional jurisdiction. If the division was not exhaustive, so that revisional jurisdiction was something outside the original and appellate jurisdiction, the case would not fall within section 13 of the Charter Act, 1813, and no appeal could, therefore, lie under clause 15 of the letters patent. It was held by the High Courts of Madras,[952] and Calcutta,[953] that the division of the jurisdiction of the high courts into "original" and "appellate" was exhaustive, and that, revisional jurisdiction was included in appellate jurisdiction, and that an appeal, therefore, lay under clause 15 of the Letters Patent from an order of a single judge made under the present section, provided that such an order amounted to a "judgment" within the meaning of that clause. The contrary view was held by the High Court of Bombay.[954] It does not, however, appear that there was any "judgment" in that case.[955]

In *Jogendrasinhji Vijaysinghji v State of Gujarat*[956], the Supreme Court dealt with an issue relating to the maintainability of letters patent appeal before the division bench of the High Court of Gujarat, under clause 15 of the Letters Patent, against the orders of the single judge bench of the high court issued in exercise of writ jurisdiction. The Supreme Court laid down following principles:

> 1. Whether a letters patent appeal would lie against the order passed by the learned single judge that has travelled to him from the other tribunals or authorities, would depend upon many a facet.

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950. *Baba Bhoot Nath Dharmart Nyas v Tajander Singh*, AIR 2003 All 160.
951. *Raju Pillai v VP Paramasivan*, AIR 1995 Mad 253.
952. *Chappan v Moidin Kutti*, (1899) 22 Mad 68; *Tuljaram v Nagappa*, (1912) 35 Mad 1; *Srinivasa v Ramaswami*, (1916) 39 Mad 235.
953. *Shew Prosad v Ram Chander*, (1914) 41 Cal 323; *Debendranath v Bibudhendra*, (1916) 43 Cal 90.
954. *Hiralal v Bai Asi*, (1898) 22 Bom 891; *Nasir Ali v Ali*, (1906) 28 All 133.
955. See *Shew Prasad v Ramchunder*, (1914) 41 Cal 323.
956. *Jogendrasinhji Vijaysinghji v State of Gujarat*, (2015) 9 SCC 1.

2. The order passed by the civil court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India which is different from Article 226 of the Constitution and as per the pronouncement in *Radhey Shyam*[957], no writ can be issued against the order passed by the civil court and, therefore, no letters patent appeal would be maintainable.

3. The writ petition can be held to be not maintainable if a tribunal or authority that is required to defend the impugned order has not been arrayed as a party, as it is a necessary party.

4. The tribunal being or not being party in a writ petition is not determinative of the maintainability of a letters patent appeal.

[s 115.77] Cross-objections

No memorandum of cross-objection lies in a revision petition.[958] However, the court can, in an appropriate case, interfere, by virtue of its inherent powers, with an erroneous finding.[959]

[s 115.78] Laches

An application for revision will not be entertained unless it is made without unreasonable delay,[960] except when the opposite party can be compensated with costs.[961] The Mysore High Court has held that, in a case where the court decides that a particular document is a promissory note and is duly stamped under the Indian Stamp Act, 1899, the order has to be challenged in revision without delay, and cannot be kept for adjudication at a later stage.[962] A revision should, as a rule, be filed within the period prescribed for filing an appeal[963] but, a delay in the presentation of revision can be condoned where it is due to the conduct of the respondent,[964] or where the circumstances are exceptional.[965]

[s 115.79] Change of Law Pending Revision

It has been held, in some cases, that a court of revision cannot take into account any change in the law brought about during the pendency of the revision, as its function is only to see whether the courts have acted within their jurisdiction and that the order was right when it was passed.[966] In support of this position, recourse has been had to the rule of construction, namely that, a change in substantive law has no retrospective operation.[967] However, when an ordinance was issued during the pendency of the revision, avowedly for being applied to pending matters, the court of revision took that into account.[968] It is the practice of the Madras

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957. *Radhey Shyam v Chhabi Nath*, (2015) 5 SCC 423 : 2015 (3) SCR 197.
958. *Venkatarama Naicker v Ramaswami Naicker*, AIR 1952 Mad 504 : (1951) 2 Mad LJ 32 : 64 LW 438.
959. *Jia Lal v Mohan Lal*, AIR 1960 J&K 22; *Pattammal v Krishnaswami Iyer*, AIR 1928 Mad 794.
960. *Thakur Chandra Pratab v Thakur Bindeswari Prasad*, AIR 1942 Oudh 340; *Durga Prasad v Sheo Charan*, (1882) 4 All 154; *Balmakund v Sheo Jatan*, (1884) 6 All 125.
961. *Basuki Prasad Singh v Satya Kindar Sahana*, AIR 1950 Pat 470.
962. *Raghundath v Seetharama*, AIR 1972 Mys 344.
963. *Ahmad Sheikh v Paris Museum*, AIR 1959 J&K 76; *Rohtas Industries v PN Gour*, AIR 1957 AP 16; *Nani Lal De v Tirthalal De*, AIR 1953 Cal 513 : (1953) 57 Cal WN 232; *Gordhan Singh v Suwalal*, AIR 1959 Raj 156; *Pantu Kanti Bai v Shambubhai Chota Bi Patel*, (1990) 3 SCC 154
964. *Inder Dev v State of Punjab*, AIR 1959 P&H 91.
965. *Gordhan Singh v Suwalal*, AIR 1959 Raj 156.
966. *MM Kathanar v KE Kathanar*, AIR 1954 TC 178 : (1953) TC 1170; *Pappathi Ammal v Sivagnanam Pillai*, AIR 1954 TC 526 : (1954) TC 929; *Shah Kantilal Manilal v Kothari Gopaldas*, AIR 1963 Guj.
967. *G Seethamma v D Balakistiah*, (1962) 2 Andh WR 195.
968. *Parvatibai Vasudeo Abhyankar v Shridhar Nagesh Kapre*, 60 Bom LR 1175.

High Court to take note of subsequent facts events in disposing off revision petitions, and to grant relief in accordance with altered circumstances.[969]

[s 115.80] Whether Revision Barred by Acceptance of Benefit Under the Order

A party aggrieved by an interlocutory order, as for eg, an order of amendment, is not precluded from filing a revision against it by reason of his having accepted costs under the impugned order, unless it is conditional.[970]

[s 115.81] Dismissal of Petition

A claim for the recovery of compensation was filed by a widow for herself and her children, after the death of her husband in a motor accident. The widow was an indigent and illiterate person. The accident claims tribunal ordered the payment of the compensation amount to the counsel engaged by her initially, in spite of the widow's express application for payment of the amount only to her. The counsel deposited a partial amount in the name of the children of the widow. The widow applied in revision. Later, her counsel prayed for its dismissal, as the same had not been pressed in the first application. It was held that the application for dismissal of revision, not having been filed by her willingly, such an application, procured from the widow, would not be an impediment in the way of making a suitable direction for achieving the ends of justice. The counsel was directed to pay the balance amount.[971] Also, the revision petition should not be dismissed without assigning reasons for the same.[972]

[s 115.82] Death of Parties

An application for setting aside the abatement of a suit was dismissed by the trial court, one of the grounds being that the application was made after the limitation period had expired. However, the revision court found that the applicants were "*Pardanashin*" women who were ignorant of the law. Revision was thus allowed.[973] As there is absolutely no limitation for a revision petition, it would be anomalous to hold that limitation is contemplated by the law for a petition to bring on record the legal representatives after the death of a party. Order XXII of the CPC does not apply to revision.[974]

Under the Uttar Pradesh Amendment to section 115, the decision of the district judge in an appeal or revision, in a suit valued at less than Rs 20,000, cannot be revised by the high court.[975] Under the Madhya Pradesh Civil Courts Act, 1958, an Additional District Judge enjoys concurrent jurisdiction with the district judge. He is not a subordinate to the district court and his order cannot be revised by the district judge under section 115, as amended by the Madhya Pradesh Amendment Act of 1984.[976] The high court cannot revise a revisional

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969. *State of Madras v Asher Textiles Ltd*, AIR 1960 Mad 130 : (1960) 1 Mad LJ 263 : 73 LW 760.
970. *Sankara Warrie v Radha*, AIR 1961 Ker 112 : (1960) Ker LJ 889 : 1960 Ker LT 993; *Nalinakha Sinha v Ram Taran Pal*, AIR 1927 Cal 733; *Venkatarayudu v Chinna Rama Krishnayya*, AIR 1930 Mad 268 : 58 Mad LJ 137; *Prayag Dossjee v Venkataperumal*, AIR 1933 Mad 410; *Komaraswami v Venkatavamana Rao*, AIR 1956 Mad 105 : (1956) 1 Mad LJ 40; *State of Madras v Muniappa Chetty*, AIR 1956 Mad 679.
971. *Umraji v RC Bajpal*, AIR 1985 MP 267.
972. *Harbans Sarma v Pritam Kaur*, (1982) 3 SCC 386.
973. *Radha Devi v Ramesh Kumar*, AIR 1988 All 262.
974. *Nathooram Kapoor v E Karbansilal Tuli*, AIR 1983 AP 278.
975. *Vishdnu Avtar v Shiv Avtar*, (1980) 4 SCC 81.
976. *Badrilal Sobhraj & Sons v Girdharilal*, AIR 1988 MP 24.

order of the district judge passed under section 115, as amended in Uttar Pradesh.[977] Under section 25, Provincial Small Cause Courts Act, 1887, revision does not lie to the high court. The Act is a self-contained one, and has its own scheme, which excludes the application of section 115 of the CPC.[978] The high court has powers which are co-extensive with the powers of the lower court, to satisfy itself about the sufficiency of the cause for default in appearance and delay in moving the application for condonation of delay. In a particular case, the order dismissing the suit for default in appearance deserved to be set aside, and in doing so, the lower court did not commit any "illegality" or "material irregularity" in the exercise of its jurisdiction. The impugned order did not deny justice and did not cause any injury to the applicant, much less any irreparable injury. No interference by the high court was called for.[979] Under section 115, as amended in Uttar Pradesh, an order passed in a divorce petition, rejecting the application for examination of witnesses on commission, cannot be considered "deciding an issue", so as to amount to a "case decided". In section 115, Explanation (as amended in Uttar Pradesh), the words "order made" also do not appear.[980]

Where the concurrent finding of fact that the applicant is not the widow and legal heir of the deceased, based upon appreciation of facts and the entire evidence adduced by the parties concerned, and the finding of fact stand concluded by two concurrent judgments of the court then the evidence cannot be re-examined to record a different finding of fact in the revision.[981]

[s 115.83] Adverse Remarks Against Subordinate Judicial Officer

The primary purpose of pronouncing a verdict is to dispose of the matter in controversy between the parties before it. A judge is not expected to drift away from pronouncing upon the controversy, to sitting in judgment over the conduct of the judicial and quasi-judicial authorities whose decisions or orders are put in issue before him, and indulge into criticising and commenting thereon unless the conduct of an authority or subordinate functionary or anyone else than the parties comes of necessity under review and expression of opinion thereon going to the extent of commenting or criticising becomes necessary as a part of reasoning requisite for arriving at a conclusion necessary for deciding the main controversy or it becomes necessary to have animadverted thereon for the purpose of arriving at a decision on an issue involved in the litigation. This applies with added force when the superior court is hearing an appeal or revision against an order of a subordinate judicial officer and feels inclined to animadvert on him. The wisdom of a superior judge, for making observation on a subordinate judge, before ventilating into expression, must pause for a moment and read the counsel of CARDOZO.

> Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which event you can only smite your breast, and pray for deliverance thereafter.[982]

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977. *Vishesh Kumar v Shanti Prasad*, AIR 1980 SC 892 : (1980) 2 SCJ 111 (history of section 115 traced).
978. *Aundal Ammad v Sadasivam Pillai*, (1978) 1 SCC 183 : (1987) 1 SCJ 636.
979. *Shakeel Ahmad v Sabina Khatoon*, AIR 1990 All 11.
980. *Pramod Saraswati v Ashok Kumar Saraswati*, AIR 1981 All 441.
981. *Dulia Devi v Dulia Devi*, AIR 2001 All 195.
982. Essays on Jurisprudence, Columbia Law Review, 1963 at p 315; as quoted in the case of *In the matter of 'K' a Judicial Officer'*, AIR 2001 SC 972 : (2001) 3 SCC 54 : 2001 (1) SCR 581 : 2001 Cr LJ 1157.

Though the power to make remarks or observations is there but on being questioned, the exercise of power must withstand judicial scrutiny on the touchstone of following tests: (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. The overall test is that the criticism or observation must be judicial in nature and should not formally depart from sobriety, moderation and reserve.[983]

[s 115.84] State Amendments

Bombay Regulation 2 of 1827.—The High Court of Bombay has the power, independently of section 115 of the Code of Civil Procedure, to call for the proceedings of any subordinate civil court and to issue orders thereon under the Bombay Regulation 2 of 1827, ch 1, section 5(2).[984] There is no provision in the Amendment Act, 1976, amending or affecting this Regulation. Section 97(1) of the Amendment Act, speaks only about an amendment made, or a provision inserted in the principal Act by a state legislature or a High Court, as it stands repealed, except to the extent that it is consistent with the provisions of the Amendment Act. However, there is nothing in section 97(1), which speaks of this Regulation.

Amendment in Uttar Pradesh.—For Section 115 of the Code of Civil Procedure, 1908, as amended in its application to Uttar Pradesh, the following section shall be substituted, namely:

Uttar Pradesh.—(i) For section 115, substitute the following section, namely:—

115. Revision.—(1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has—

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of its jurisdiction illegally or with material irregularity;

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the District Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the District Court.

(3) The superior court shall not, under this section, vary or reverse any order made except where,–

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the superior court.

Explanation I.—In this section,—

(i) the expression "superior court" means–

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983. *In the matter of 'K' a Judicial Officer'*, AIR 2001 SC 972 : (2001) 3 SCC 54 : 2001 (1) SCR 581 : 2001 Cr LJ 1157; see also *State of Uttar Pradesh v Mohd Naim*, AIR 1964 SC 703 : [1964] 2 SCR 363 : (1964) 1 Ori LJ 549.

984. *Bombay Steam Navigation Co Ltd v Vasudev*, AIR 1928 Bom 5 : (1928) 52 Bom 37; *Adaikappa Chettiar v Chandra Sekhara Thevar*, AIR 1948 PC 12 : 74 IA 264 : 52 Cal WN 275.

(a) the District Court, where the valuation of a case decided by a court subordinate to it does not exceed five lakh rupees;

(b) the High court, where the order sought to be revised was passed in a case decided by the District Court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the District Court exceed five lakh rupees;

(ii) the expression "order" includes an order deciding an issue in any original suit or other proceedings.

Explanation II.— The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement.

[*Vide* Uttar Pradesh Act 14 of 2003, section 2 (w.e.f. 1-7-2002)].

Note—Also see for the effect of subsequent central amendment — section 97(1) of the CPC (Amendment) Act, 1976 given in the Appendix.

For effect of the Amendment Act, 1976, see *Mangal Ram v Leelavati.*[985]

Scope.—A revision against orders passed on interlocutory applications, while an appeal or revision is pending before the appellate or the revisional court is not maintainable. The legislature had emphasised the words "original suit" in section 115 of the Code of Civil Procedure. It lays down that a revision would lie to the High Court "in cases arising out of an original suit or other proceedings, of the value of twenty thousand rupees and above". The proceedings pending in appeal or in revision, filed against a decision of the trial court cannot be held to be an original suit. Moreover, the amendment in section 115 of the Code of Civil Procedure was necessary, as is apparent from the statement of objects and reasons appended to the Amendment Act, 1970, to help in reducing the pressure of work on the High Court. For that purpose, the legislature has laid down that the decision of an appeal or a revision of the District Court is not amenable to the revisional jurisdiction under section 115 of the Code of Civil Procedure.[986] A revisional court can take notice of subsequent events. However, such notice is taken in order to shorten litigation, to preserve the rights of both the parties, and to subserve the ends of justice.[987]

Madhya Pradesh Amendment Act, 1994.—An order passed by the District Judge, in the exercise of its mutually exclusive jurisdiction under section 115, conferred by the Amendment Act of 1984, and later restoring it to the High Court under section 115 by the Amendment Act of 1984, would not be amenable to revisional jurisdiction under section 115 before the High Court, merely on the ground that the court rendering the decision is a court sub-ordinate to the High Court. The words "other proceedings", used in the Explanation to section 115, will cover the proceedings of revision as the proceedings of the court of civil jurisdiction. The words "or other proceedings" used in the Explanation, as amended, cannot enlarge the scope so as to entertain a further revision against an order of the District Judge, passed in the exercise of revisional jurisdiction under section 115, as conferred on it by the Amendment Act of 1984.[988]

Orissa Amendment Act, 1991.—For section 115 substitute the following section, namely—

Section 115. Revision—The High Court, in cases arising out of original suits or other proceedings of the value exceeding one lakh rupees, and the District Court, in any other case including a case arising out of an original suit or other proceedings instituted before the commencement of the Code of Civil Procedure (Orissa amendment) Act, 1991 may call for the record of any case which has been decided by any court subordinate to the High

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985. *Mangal Ram v Leelavati*, AIR 1978 All 46.
986. *Sri Kunj Behari v Sri Krishna Dutt*, AIR 1994 All 1998; *Satyendra Prasad Jain v State of Uttar Pradesh*, AIR 1996 All 77; *Kaniyaha Lal v Urmilla Devi*, AIR 1995 All 379; *Vishnu Avatar v Shiv Avatar*, (1980) 4 SCC 81; *Vishesh Kumar v Shanti Prasad*, (1980) 2 SCC 378.
987. *Laxmi & Co v Anant R Deshpande*, (1973) 1 SCC 37.
988. *Universal IMP (USSR) Electrical Ltd Satna v Shiv Bihari*, AIR 1997 MP 115.

Court or the District Court as the case may be, and in which no appeal lies thereto, and if such subordinate court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court or the District Court, as case may be, make such order in the case as it thinks fit:

Provided that in respect of cases arising out of original suits or other proceedings of any valuation decided by the District Court, the High Court alone shall be competent to make on order under this section:

Provided further that the High Court or the District Court shall not, under this section, vary or reverse any order, including an order deciding an issue, made in the course of a suit or other proceeding, except where—

(i) the order, if so varied or reversed, would finally dispose of the suit or other proceedings; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made;

Explanation.—In this section, the expression "any case which has been decided" includes any order deciding an issue, in the course of suit or other proceeding.

Saving.—The amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any jurisdiction already exercised, and any proceeding instituted or commenced in the High Court under section 115 of the Code of Civil Procedure, 5 of 1908, prior to the commencement of this act shall, notwithstanding such amendment, continue to be heard and decided by such court.

[*Vide* —Orissa Act 26 of 1991, section 2 (w.e.f. 7-11-1991)].

Section 115A. District Courts' Powers of revision — West Bengal — After section 115, the following section shall be inserted:

115A. District Court's powers of revision.—(1) A District Court may exercise all or any of the powers which may be exercised by the High Court under Section 115.

(2) Where any proceeding by way of revision is commenced before a District Court in pursuance of the provisions of sub-section (1), the provisions of section 115 shall, so far as may be, apply to such proceeding and references in the said section to the High Court shall be construed as references to the District Court.

(3) Where any proceeding for revision is commenced before the District Court, the decision of the District Court on such proceeding shall be final and no further proceeding by way of revision shall be entertained by the High Court or any other Court.

(4) If any application for revision has been made by any party either to the High Court under Section 115 or to the District Court under this section, no further application by the same party shall be entertained by the High Court or any other Court.

(5) A Court of Additional Judge shall have and may exercise all the powers of a District Court under this section in respect of any proceeding which may be transferred to it by or under any general or special order of the District Court."

[*Vide* West Bengal Act 15 of 1988, section 3 (w.e.f. 1-2-1989)].

West Bengal Amendment.—It is the settled position of law that when a decree is to be executed the execution must be in full and final satisfaction. The bailiff was issued writ for the purpose of execution of decree, the assistance of police was given only to help the bailiff in executing the decree and in fact, the police is not the executive body. Therefore, the police has no authority to make an endorsement that the physical possession has been given. It is admitted position that the police without authority made the endorsement and admission is also there on behalf of the petitioner/judgment-debtor that local people

immediately thereafter put the judgment-debtor/petitioner in possession of the suit premises. The decree, therefore, was not in full and final satisfaction. Therefore, in the case the question of re-execution does not arise here. Another very vital point is this, that against this order impugned in this revisional application, the respondent no 2 moved a revisional application under section 115A being civil revisional application no 67 of 2002 and that was dismissed by the learned Additional District Judge, Fast Track Court, at Alipur by an order dated 4 April 2002 and in that revisional application this petitioner/ judgment-debtor no 2 was a party. In that view of the matter also, the other revisional application cannot be said to be maintainable.[989]

989. *Shib Sankar Radra v Jyotirmoy Rudra*, AIR 2004 Cal 54.

PART IX

SPECIAL PROVISIONS RELATING TO THE [1][HIGH COURTS [2][NOT BEING THE COURT OF A JUDICIAL COMMISSIONER]]

[S 116] Part to apply to certain High Courts.—This Part applies only to High Courts[3] [not being the Court of a Judicial Commissioner].

Changes in the section.—By the Adaptation of Laws Order 1950, the words "for Part A States" were substituted for the words "which are or may hereafter be constituted by His Majesty by Letters Patent". Also, by section 14 of the Code of Civil Procedure (Amendment) Act, 1951, the words "and Part B States" were added in this section and in the heading to this part the words "High Courts for Part A States and Part B States" were substituted for the words "Chartered High Courts".

By the Adaptation of Laws Order 1956, the words "not being the Court of a Judicial Commissioner" were substituted for the words "for Part A States and Part B States".

[S 117] Application of Code to High Courts.—Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

SYNOPSIS

[s 117.1] "Save as Provided in this Part"—See Section 120 1487
[s 117.2] "Save as Provided in Part X"—See Section 129 1488
[s 117.2.1] Changes in the Section 1488
[s 117.2.2] Rules as to Original Civil Procedure of high courts 1488
[s 117.3] Rules 1489

[s 117.1] "Save as Provided in this Part"—See Section 120

The following provisions shall not apply to the high court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

As to rules not applicable to high courts, see O XLIX, rule 3.

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1. Substituted by Act 2 of 1951, section 14 for "CHARTERED HIGH COURTS" (w.e.f. 1-4-1951).
2. Substituted by the Adaptation of Laws (No. 2) Order, 1956 for "FOR PART A STATES AND PART B STATES". Earlier the words "FOR PART A STATES AND PART B STATES" were inserted by Act 2 of 1951, section 14 (w.e.f. 1-4-1951).
3. Substituted by the Adaptation of Laws (No. 2) Order, 1956, for "for Part A States and Part B States". Earlier the words "for Part A States and Part B States" were inserted by Act 2 of 1951, section 14 (w.e.f. 1-4-1951).

Sub-section (2) of this section, by which it was provided that "nothing in this Code shall extend or apply to any Judge of a high court in the exercise of jurisdiction as an insolvent Court" has been repealed by the Presidency Towns Insolvency Act, 1909, section 127.

A suit for damages for illegal execution of legal process is not cognisable by Small Causes Court. In case the suit was instituted in the *munsif's* court, the decree was reversed on first appeal by the subordinate judge. Second appeal before the High Court was held to be maintainable.[4]

[s 117.2] "Save as Provided in Part X"—See Section 129

Notwithstanding anything in the Code of Civil Procedure, 1908 (CPC), any high court (not being the court of a judicial commissioner) may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of the CPC.

[s 117.2.1] Changes in the Section

The words "not being the court of a Judicial Commissioner" were substituted for the words "for a Part A State or a Part B State".

[s 117.2.2] Rules as to Original Civil Procedure of high courts

Rules made under section 122 must not be inconsistent with the provisions in the body of the CPC. Under this section, any high court may make rules to regulate its own procedure in the exercise of its original civil jurisdiction. Such rules may not be consistent with the provisions in the body of the CPC, but they must not be inconsistent with the laws establishing it.[5]

Where a rule has been made by a high court under this section, the provisions of the CPC do not apply. Thus, the rules of the Calcutta High Court contain provisions for default of payment by an auction-purchaser at a sale under a mortgage decree on the original side of the high court and, therefore, O XXI, rule 86 does not apply to such sales.[6] But as the Calcutta rules contain no provision for setting aside a sale on deposit, the provisions of O XXI, rule 89 do apply.[7] Likewise O IX, rule 5 is applicable to suits instituted on the original side of the High Court of Calcutta, as there is nothing in the rules framed by the high court which is repugnant to it, and therefore where the summons was returned unserved and the plaintiff failed to apply for fresh summons within three months, the suit was dismissed.[8]

A rule made by the Bombay High Court under this section empowers the court to make a pay order enforceable as a decree for the payment of the taxed costs of an attorney. This rule is valid, and the pay order may be transferred for execution to another court.[9]

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4. *Shyam Sundai Das v Municipal Council, Baripada*, AIR 1980 Ori 145.
5. *Shevaram Thadaram v Indian Oil Corp Ltd*, AIR 1969 Bom 117 : (1968) 70 Bom LR 546.
6. *Gowal Das Sidany v Luchmi Chand Jhawar*, AIR 1930 Cal 324 : (1930) 57 Cal 106.
7. *Virjibun Dass Moolji v Bissesswar Lal Hargovind*, AIR 1921 Cal 169 : (1921) 48 Cal 69 : (1919-20) 24 Cal WN 1032.
8. *Shaw & Co v Sisir Mukherjee*, AIR 1954 Cal 369 : (1956) 1 Cal 187.
9. *Shiv Dial Bakhtawar Lal v Kanga & Co*, AIR 1936 Lah 369.

[s 117.3] Rules

"Rules" means rules contained in the First Schedule or made under section 122 or section 125.[10]

[S 118] Execution of decree before ascertainment of costs.—Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith except as to so much thereof as relates to the costs; and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

[s 118.1] Costs

Rule 289 of the Bombay High Court Rules provides that whenever costs are awarded and either party is desirous of having the decree or order drawn up before the same are taxed, the award of the costs will be inserted followed by the words "when taxed and noted in the margin hereof". It has been held that when a decree or order has been drawn up under this rule, it becomes executable without the direction of the court as required by the section.[11]

[S 119] Unauthorised persons not to address Court.—Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

SYNOPSIS

[s 119.1] Letters Patent 1489
[s 119.2] "To Examine Witnesses" 1489

[s 119.1] Letters Patent

See Letters Patent, clauses 9 and 10.

[s 119.2] "To Examine Witnesses"

To examine or cross-examine a witness is not "acting".[12]

The Delhi High Court following the earlier Division Bench decision in *Saraswati v Tulsi Ram Seth*, (*supra*) held that conducting examination and cross-examination of witnesses by person holding the status of Senior Advocate is not restricted and the plea that a Senior Advocate can only plead and not act on behalf of a litigating party is unsustainable. It was further held that section 119 of the Code was not applicable.[13]

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10. See section 2(18), See also O XLIX, rule 3.
11. *JP Tiwari v Bhimraj Harlalka*, AIR 1959 Bom 357.
12. *Ashwin Shambhuprasad Patel v National Rayon Corp Ltd*, AIR 1955 Bom 262; *Saraswati v Tulsi Ram Seth*, AIR 1971 Del 110; *contra Govind Narain v Chhoti Devi*, AIR 1966 Raj 170.
13. *Ramesh Kumar v Ashish Arora*, (2006) 131 DLT 58 : 2006 (4) Ker LT 632 : (2006) Punj LR 144 Del 1.

[S 120] Provisions not applicable to High Court in original civil jurisdiction.— (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

[14][***]

SYNOPSIS

[s 120.1] "Shall not apply to high court" 1490
[s 120.2] Changes in the section 1490

[s 120.1] "Shall not apply to high court"

As to rules not applicable to high courts, see O XLIX, rule 3.

[s 120.2] Changes in the section

Sub-section (2) of this section by which it was provided that "nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court" has been repealed by the Presidency Towns Insolvency Act, 1909, section 127. In *Sumer Builders Pvt Ltd v Narendra Gorani,*[15] the Supreme Court has held that the high courts in exercise of their original civil jurisdiction, are not bound by the provisions contained in sections 16, 17 and 20 of the CPC and section 120 expressly excludes the application of these provisions to High Courts. Therefore, the provision contained in clause 12 of its Letters Patent would govern the exercise of its original civil jurisdiction in Bombay High Court.

14. Sub-section (2) repealed by Act 3 of 1909, section 127 and Sch III.
15. *Sumer Builders Pvt Ltd v Narendra Gorani*, AIR 2015 SCW 6290 : (2016) 2 SCC 582 : (2015) 10 Scale 752 : JT 2015 (11) SC 32 : (2016) 3 SCJ 51.

PART X

RULES

[S 121] Effect of rules in First Schedule.—The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

SYNOPSIS

[s 121.1] "Body of this code" 1491
[s 121.2] "Annulled or altered" 1491

[s 121.1] "Body of this code"

The expression "body of this Code" means the sections in the Code of Civil Procedure, 1908 (CPC) and not the rules in the First Schedule. The only thing that the section does is to give to these rules, the effect as if they were enacted in the body of the CPC, until, of course, they are annulled or altered.[1]

[s 121.2] "Annulled or altered"

As to the annulment and alterations of rules, see section 124.

[S 122] Power of certain High Courts to make rules.—[2][High Courts [3][not being the Court of a Judicial Commissioner]] [4][* * *] may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

SYNOPSIS

[s 122.1] Amendments in the section 1492
[s 122.2] Section 122 and Section 129 1492
[s 122.3] Section 122 and Article 254 — Assent of President Not Necessary 1493
[s 122.4] Rules To Be Made by High Court 1493
[s 122.5] Need for framing rules 1495
[s 122.6] Rules in the First Schedule 1495
[s 122.7] Rules and limitation 1496

1. *Chandra Bhushan Misra v Jayatri Devi*, AIR 1969 All 142; *Mahalaxmi Tent Factory v Kamla Devi*, AIR 1975 Raj 13; *State of Uttar Pradesh v Chandra Bhushan Mishra*, (1980) 1 SCC 198.
2. Substituted by the AO 1950, for "Courts which are High Courts for the purposes of the Government of India Act, 1935".
3. Substituted by the Adaptation of Laws (No. 2) Order, 1956, "for Part A States and Part B States". Earlier the words "for Part A States and Part B States" were inserted by Act 2 of 1951, section 15 (w.e.f. 1-4-1951).
4. The words "and the Chief Court of Lower Burma", repealed by Act 11 of 1923, section 3 and Sch II.

[s 122.8] Rules and their Validity 1498
[s 122.9] Plaintiff represented through General Power of Attorney 1499
[s 122.10] First hearing of suit—meaning 1499
[s 122.11] Filing of Affidavit 1500
[s 122.12] Subsistence Allowance and Travelling Allowance to Witness 1502
[s 122.13] Appeal Against Order of Registrar — Delhi High Court Rules 1502
[s 122.14] Death of party 1502

[s 122.1] Amendments in the section

The words, "High Courts, constituted by His Majesty by Letters Patent and the Chief Court of Oudh" were replaced by the words, "Courts which are High Courts for the purposes of the Government of India Act, 1935" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. The latter expression was again replaced by the words "High Courts for Part A States" by the Adaptation of Laws Order 1950. The words "and Part B States" were added by section 15 of the Code of Civil Procedure (Amendment) Act, 1951.

The words "not being the court of a Judicial Commissioner" were substituted for the words "for Part A States and Part B States" by the Adaptation of Laws Order 1956.

Rules made under this section by the various high courts are set out in appendices at the end of this work.

[s 122.2] Section 122 and Section 129

In *Shevaram Thadaram v Indian Oil Corp Ltd*,[5] the High Court of Bombay has observed that the high court derives power to frame rules in regard to its original civil jurisdiction, both under section 122 and section 129 and that it is not correct to say that because section 129 gives such a power specifically, it cannot frame rules under section 122, in regard to its original civil jurisdiction. The powers under these two sections overlap to a certain extent. But if the high court were to make rules under section 122, in regard to its original civil jurisdiction, those rules cannot be inconsistent with the provisions in the body of the Code of Civil Procedure, 1908 (CPC). On the other hand, if it were to make rules in exercise of its power under section 129, such rules can be inconsistent with the body of the CPC but not inconsistent with the Letters Patent or any other law establishing the High Court in question.

In *Ganpat Giri v Second Additional District Judge, Ballia*,[6] the question considered was with regard to the overriding provision contained in section 97(1) of the Code of Civil Procedure (Amendment) Act of 1976. The said provision reads thus:

> Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.

It is obvious that what was done by section 97(1) of the Amending Act was to sweep away amendments made or provisions inserted in the principal Act by the state legislature, or the high court in exercise of its delegated powers of legislation, and to declare that all such amendments inconsistent with the provisions of the CPC would stand repealed. Section 129 is neither an amendment made by the state legislature, nor by the high court, and as such, it does not get overridden by section 97(1) of the Code of Civil Procedure (Amendment) Act,

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5. *Shevaram Thadaram v Indian Oil Corp Ltd*, AIR 1969 Bom 117 : (1968) 70 Bom LR 546.
6. *Ganpat Giri v Second Additional District Judge, Ballia*, AIR 1986 SC 589 : (1986) 1 SCC 615.

1976. Though, both the sections, sections 122 and 129 were noticed in *Ganpat Giri*'s case,[7] it was not held that the impact of section 129 was, in any way, watered down by section 122. The following observations in para 5 of the judgment were quoted by Supreme Court in its subsequent decision.[8]

> The object of Section 97 of the Amending Act appears to be that on and after February 1, 1977 throughout India wherever the Code was in force there should be same procedural law in operation in all the civil courts subject of course to any future local amendment that may be made either by the State Legislature or by the High Court, as the case may be, in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should govern the procedure in civil courts which are governed by the Code. We are emphasizing this in view of the decision of the Allahabad High Court which is now under appeal before us.

Section 97 of the Amending Act does not, in any way, affect the special hierarchical status given to the proceedings before the chartered high courts on its original side. It was merely intended to standardise and make uniform the law as to civil procedure in other civil courts.[9]

[s 122.3] Section 122 and Article 254 — Assent of President Not Necessary

It is not a legislative power that is exercised by the high court under section 122 of the CPC. The high court is given power under section 122 by the Parliament itself to suitably amend the provision to the First Schedule. The only requirement that is necessary is that it should be investigated by a rule committee approved by the high court and sanctioned by the government. It is not an Act requiring the consent of the governor for coming into operation. It can be said to be a delegated power given to the high court.[10]

[s 122.4] Rules To Be Made by High Court

Sections 122–28, excepting section 125, provide for rules to be made by the high courts for regulating their own procedure and the procedure of the civil courts subject to their superintendence. The sections in the CPC which constitute its body are jurisdictional provisions giving substantive rights which can only be withdrawn or altered by the Legislature. This section, therefore, does not authorise, as is made clear by section 128, the high courts to make rules which are inconsistent with the body of the CPC.[11] But the section does authorise the high courts to make rules regulating their procedure as also the procedure of the civil courts subject to their superintendence and also by such rules to annul, alter or add to all or any of the rules in the First Schedule. These rules are, of course subject to the previous approval of the authorities mentioned in section 126. The Allahabad High Court has held that this power is not confined to rules strictly of the nature of procedure, but extends to each and every rule in the First Schedule.[12] Under section 122, the High Courts can make rules regulating their own procedure. The preamble to the Madras High Court Original Side Rules specifically states, that the rules are framed by virtue of the CPC and other enactments, set out in the Annexure.

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7. *Ganpat Giri v Second Additional District Judge, Ballia*, AIR 1986 SC 589 : (1986) 1 SCC 615.
8. *Ganpat Giri v Second Additional District Judge, Ballia*, AIR 1986 SC 589 : (1986) 1 SCC 615.
9. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : (2005) 2 SCC 145.
10. *Aboobacker Babu Haji v Edakkode Pathummakuty Umma*, AIR 2002 Ker 313 (DB).
11. *Menkabai Mukundrao v Manohar Mukundrao Deshpande*, AIR 1971 Bom 21 : (1971) 73 Bom LR 473.
12. *Prakash Chandra v Ram Swarup*, AIR 1969 All 400; *State of Uttar Pradesh v Chandra Bhushan Misra*, (1980) 1 SCC 198.

In that sense, the modifications contained in the original side rules can be treated as part of the CPC.[13]

To regulate the filing of petitions by societies/unions and for payment of court fee, the Registrar General of the Chhattisgarh High Court issued a Circular which, *inter alia*, directed that petitions filed by several persons having similar but separate and distinct interest in the subject-matter of controversy involving common questions of law and facts may file a common petition but each petitioner shall pay a separate court fee. In a writ petition, the high court directed all members of the society to be impleaded as parties and further directed payment of necessary Court-fee by every member. It was held by the high court that whenever in a given case, the members of the society/union have jural-relationship having common, equal and equitable rights, for protection of such rights they have a common interest and cause, if they approach this Court, all of them need not be impleaded except the authorised person and they need not pay separate Court-fee as well.[14]

Rule 208 of the Calcutta High Court Civil Rules and Orders (1935) provides for the decree-holder to seek police help where there is "anticipated" or actual resistance to execution. It was held by the Calcutta High Court that Rule 208 is essentially different from the provisions of rule 97 of O XXI of the CPC. Procedural law under O XXI, rule 97 of the CPC cannot be used to obstruct a valid decree being put into execution, by reason of resistance of persons who cannot even put forward a *bona fide* claim of not being bound by the decree. It was further held that rule 208 has been specifically provided to enable the court to pass necessary orders for police help for execution of a decree even where resistance to execution was merely "anticipated".[15]

A Division Bench of the Rajasthan High Court interpreted rule 134(1) of the Rules of the High Court of Rajasthan, 1952 in order to regulate its procedure in respect of its supervisory jurisdiction under Article 227 of the Constitution and the interpretation is of far reaching consequence. It was held that the intra-court appeal, as per sub-rule (1) of rule 134 of the Rajasthan High Court Rules (1952) (as amended by Notification dated 28 June 2005) is not maintainable against any order passed by the high court (Single Judge) in supervisory jurisdiction under Article 227 of the Constitution.[16] It was observed by the Division Bench in the above case as follows:

> Section 115 of the Code of Civil Procedure was amended with object to reduce the delay in the proceedings before Civil Court and that amendment in Section 115 narrowed the High Court's jurisdiction in entertaining revision petition, therefore, only the orders passed by the subordinate courts are now challenged in writ jurisdiction of the High Court. Therefore, also in fact the High Court exercises its revisional or supervisory jurisdiction only when any order of subordinate court is challenged in writ jurisdiction. Any other interpretation resulting into providing further appeal against the order passed by the High Court in such matters will frustrate the purpose for which the Code of Civil Procedure was amended.[17]

Repelling the contention of the appellant in the above case that intra-court appeal against any order passed by the single Judge of the high court is provided under Rule 8-B of the high court of Judicature for Rajasthan Case Flow Management Rules, 2006, it was further held by the Division Bench that the language of rule 8-B is clear and it nowhere provides that any

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13. *B Soundar Apandian v Industrial Finance Corp of India*, AIR 1982 Mad 206.
14. *VG Tamaskar v State of Chattisgarh*, AIR 2008 Chhat 33 (DB).
15. *Bandana Das v Saroj Kumar Das*, AIR 2009 Cal 82.
16. *Sukh Dev v Prakash Chandra*, AIR 2010 Raj 153 : 2010 (4) Raj LW 3025 (DB).
17. *Sukh Dev v Prakash Chandra*, AIR 2010 Raj 153, 168, p 168, para 43 : 2010 (4) Raj LW 3025 (DB).

appeal shall be maintainable before the Division Bench from the judgment of the single Judge if passed in supervisory jurisdiction of the High Court, obviously, under Article 227 of the Constitution or in revisional jurisdiction.[18]

[s 122.5] Need for framing rules

The Supreme Court had once observed that even for the civil courts in the Union Territory of Delhi, no rules of practice have been framed by the high court. It is a sad state of affairs that the High Court of Delhi has not given its thought in this regard. It is high time that the high court framed appropriate rules of practice to be observed by all the courts in the territory subordinate to it. The registrar is directed to send copies of this judgment to the concerned department of the Central Government as well as the High Court of Delhi so that appropriate rules may be made by them respectively with regard to the proceedings under the Delhi Rent Control Act, 1958 and the proceedings in the regular civil courts. The high court is requested to give its immediate attention to this matter and also cause periodic inspection of the courts subordinate to it and issue such circulars as may be necessary in order to plug the loopholes then and there.[19] In a Karnataka case, the notification was issued by the registrar as per orders issued by the Chief Justice of the high court providing for posting of public interest litigation, only before the division bench dealing with a particular subject as per sitting list is legal and not contrary to provisions under the Karnataka High Court Act, Rules, or the Constitution of India.[20]

[s 122.6] Rules in the First Schedule

Section 122 enables the high court to make, add or alter all or any of the rules in the First Schedule. It does not enable the High Court to amend any other law. Thus, if as a matter of fact, under section 60 of the Transfer of Property Act, 1882, a right is given for depositing the amount before confirmation of the sale, that right cannot be taken away by the amendment to O XXXIV. Thus, there is no merit in the contention regarding the challenge of constitutional validity of O XXXIV which was substituted by notification in the Kerala Code.[21]

There is certain difference in the provisions of O XXXIV enacted by the High Court of Kerala, they would affect the litigants in Kerala merely because the CPC prescribes two decrees; preliminary decree and final decree, whereas, the Kerala Code prescribes only one decree, any prejudice will be caused to the party by having one decree or two decrees. As far as the question of redemption of mortgage or sale is concerned, if the amounts are determined as per the mortgage, then there should not be any prejudice to the party.[22]

Rules made under section 122 may alter and annul the rules in the First Schedule. The Allahabad High Court had framed rules to be added to the rules in O XXI. rule 122 of these rules was held to be inconsistent with the First Schedule, O XXI, rule 23 which, by inadvertence, was not altered. It was held, however, that the effect was to alter rule 43 by implication.[23]

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18. *Sukh Dev v Prakash Chandra*, AIR 2010 Raj 153, 168, p 168, para 43 : 2010 (4) Raj LW 3025 (DB).
19. *Mohan Singh v Amar Singh*, (1998) 6 SCC 686.
20. *AV Amarnathan v The Registrar, High Court of Karnataka*, AIR 1999 Kant 404 (DB).
21. *Aboobacker Babu Haji v Edakkode Pathummakuty Umma*, AIR 2002 Ker 313 (DB).
22. *Aboobacker Babu Haji v Edakkode Pathummakuty Umma*, AIR 2002 Ker 313 (DB).
23. *Shakir Hasain v Chandu Lal*, AIR 1931 All 567 : (1932) 54 All 263.

The form prescribed under O XXXIV, rule 5, by the Calcutta High Court, requires notice to parties affected before a final decree is passed, and when an *ex parte* decree was passed without such notice, it was held that the judgment-debtor was entitled to apply to set it aside under O IX, rule 13, as the form becomes part of the CPC under this section.[24] The right to deposit the amount due to the mortgagee and avert the sale of mortgage property is conferred on a mortgagor-judgment-debtor under scheme under O XXXIV as substituted in Kerala (Kerala court) only prior to the sale itself and not subsequent to the sale. It can not be said that in term of section 122 of the CPC, the scheme envisaged by the Kerala Code could not be adopted in the state.[25] In a Bihar case, under the Bihar Sugar Undertakings (Acquisition) Act, 1976, rules were not framed for four years. The high court issued mandamus to make and publish rules within six months.[26] In so far as the Delhi Rent Control Act, 1958 is concerned, section 56 enables the Central Government to make rules. Rule 23 of rules framed under the Act, provides that the controller and the Rent Control Tribunal are, as far as possible, to be guided by the provisions contained in the CPC. It is absolutely necessary for the controller and the Rent Control Tribunal to see that the provisions of the statute, rules and the CPC are strictly complied with in all the proceedings before them.

[s 122.7] Rules and limitation

None of the courts empowered under this section to frame rules has power, by any rule, which it may make to alter the period of limitation prescribed by the Limitation Act, 1963.[27]

It has been held that a rule of the high court specifying the period within which an application to it should be made relates to a matter of procedure and is not *ultra vires*. Thus, rule 41A(2) of the Madras High Court Rules which prescribes a period of 90 days for presentation of civil revision petition has been held to be valid.[28] The question which was before the full bench for consideration was whether the period of 90 days mentioned in rule 44 of the rules of the Rules of the High Court of Kerala, 1971, be treated as prescription for the period of limitation in the matter of filing of revision petition under section 20 of Kerala Buildings (Lease and Rent Control) Act, 1965. It was held, if rule 22 has to be taken as a provision prescribing period of limitation, it would certainly take the colour of substantive law. A reading of section 125 would clearly show that the power given to the high court thereunder is only for making rules regarding procedural matters. Therefore, the provisions contained under rule 44 cannot be taken as one providing a period of limitation in the matter of filing revision petition under section 20 of the Act. More so, while the legislature has specifically made the provision for limitation in the filing appeal under section 18 of the Act, no such period is prescribed under section 20.[29]

It should be noted that there is no article in the Limitation Act, 1963, providing any period of limitation for a revision petition. It has also been held that rules extending section 5 of the Limitation Act, 1963 to applications under O IX, rule 9 or O IX, rule 13, are *ultra vires*.[30] That

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24. *Suresh Chandra Banerjee v United Bank of India*, AIR 1961 Cal 534 : (1960-61) 65 Cal WN 535; See notes to section 2(1) above.
25. *K Rajendra Prasad v South Indian Bank*, AIR 1998 Ker 215 (DB).
26. *Chandra Shekar Chaudhary v Sub Divisional Officer, Darbhanga*, AIR 1984 Pat 200, 203.
27. *Narsingh Sahai v Shiv Prasad*, ILR (1918) 40 All 1, p 7 (FB); *(Shakoor) Abdul Ganny v IM Russel*, AIR 1930 Rang 228 : ILR (1930) 8 Rang 380.
28. *Velu Pillai v Seenga Perumal Pillai*, AIR 1958 Mad 392 : (1958) 1 Mad LJ 300 : (1958) ILR Mad 392
29. *Thenuh Moideen Koya v Kannan Kunhammad Haji*, AIR 1999 Ker 324 (FB).
30. *Kanhaiyacharya v Sitaragamma*, (1924) ILR 47 Mad 824; *Pandharinath Kikabhai v Dahanu Shevkhandi Vani*, AIR 1929 Bom 262 : (1929) ILR 53 Bom 453 : (1929) 31 Bom LR 484.

section applies on its own terms to any other application to which it might be made applicable by or under any enactment.

An appellant is entitled as of right under section 12 of the Limitation Act, 1963, to exclude the time requisite for obtaining copies of the decree or order appealed from and of the judgment on which such decree may be or is founded, this right is not affected by any rules made by any high court that such copies need not accompany the memorandum of appeal.[31]

The application of section 5 of the Limitation Act, 1963 to proceedings arising under O XXI of the Code has been subject of judicial interpretation is several cases. In *Ayappa Naicker's case,*[32] it was observed as follows:

> Therefore having regard to the above language, it was permissible to have such a provision wherein the position is clearly changed at present. Section 5 of the present Limitation Act, 1963, states that any appeal or any application under any of the provisions of Order 21, Civil Procedure Code, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The Explanation is omitted as unnecessary. Therefore, with reference to applications under Order 21, Civil Procedure Code, there is the statutory bar in applying section 5 of the Limitation Act. It may also be relevant to note section 32 of the Limitation Act before it was repealed by Central Act LVI of 1974. It is stated under that section that the Indian Limitation Act, 1908 is hereby repealed. Therefore, after 1st January, 1964, sub-rule (4) of rule 105 of Order 21, Civil Procedure, could no longer be applied, because of the express language of section 5 of the Limitation Act. That is why the Central Code in rule 106 of Order 21, Civil Procedure Code, did not make any reference to the same saying that section 5 of the Limitation Act would be applicable. In view of this, the order of the Court below ought to be upheld.

It was further held in the above case as follows:

> The question of invoking inherent powers under section 151, Civil Procedure Code, does not arise in this case. That is because of the specific provision contained under rule 106 of Order 21, Civil Procedure Code. If, therefore, there is repugnancy between the Central Code, under rule 106, and the Madras Amendment under sub-rule (4) of rule 105 of Order 21, it is section 97 of the Civil Procedure Code, in relation to repeal and savings that would apply. That says that any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment or provision is consistent with the provisions of the principal Act, as amended by this Act, stand repealed.[33]

Approving the above view of the high court, the Supreme Court, in relation to a case from Kerala, observed as follows:

> **13.** It is also not in dispute that the Kerala amendment providing for application of Section 5 of the Limitation Act in Order XXI, Rule 105 of the Code became inapplicable after coming into force of the Limitation Act, 1963, (Act LVI of 1964).
>
> **14.** It is also trite that the civil court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of applicability of the provisions of Section 5 of the Limitation Act, the court cannot invoke its inherent power.
>
> **15.** It is well-settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to.
>
> **16.** An application under section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order XXI of the Code. In that view of

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31. *Jijibhoy v TS Chettyar,* AIR 1928 PC 103 : (1927-28) 55 IA 161; *Additional Collector of Customs, Calcutta v Best & Co,* AIR 1966 SC 1713 : (1966) Supp SCR 46.
32. *Ayappa Naicker v Subbammal,* (1984) 1 Mad LJ 214 : (1983) 96 Mad LW 542.
33. *Ayappa Naicker v Subbammal,* (1984) 1 Mad LJ 214 : (1983) 96 Mad LW 542.

> the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the court cannot be invoked.[34]

However, a Full Bench of the Andhra Pradesh High Court in the undernoted case,[35] held that under section 122 of the code, the high court added sub-rule (4) after sub-rule (3) of rule 106 of O XXI of the CPC which lays down that the provisions of section 5 of the Limitation Act shall apply to all applications under sub-rule (3). The Full Bench decision distinguished the decision of the Supreme Court in *Damodaran Pillai's case* (*supra*) on the ground that the decision of the Supreme Court was with respect to a case from Kerala where there was no amendment to O XXI, rule 106 as is the case in the State of Andhra Pradesh. Explaining the rule making powers of the high court under section 122 of the Code for regulating its own procedure and the procedure in civil courts under the superintendence of the said high court, VVS Rao, J, speaking for the Bench, observed as follows:

> **12.** A reading of Section 122 of CPC, leaves no doubt that in exercise of that power the High Court can even annul, alter or add Rules in the First Schedule. To our mind - at least in the field of civil judicial procedure; power conferred on High Court under Section 122 of CPC is greater than the power to amend provisions of CPC. Historically it is recognized that High Court of a State shall exercise powers of supervision and superintendence over all the courts and Tribunals subordinate to it. This power has been recognized by Constitution of India by enacting Articles 225 and 227. Under Article 227(2)(b) power is conferred on High Court to make and issue general rules and prescribe forms for regulating the practice and proceedings of subordinate courts. Therefore, the power conferred on High Court to annul, alter or add the Rules in First Schedule to CPC is not an ordinary delegated power. It is the power referable to the power conferred on the High Court by Constitution itself. In exercise of such power, it may be reiterated, High Court can even annul any of the Rules in First Schedule or add or alter any such Rules. Section 122 of CPC, which remained as it, without any substantial amendments since 1908 has been subject matter of interpretation by various High Courts in India. In all these, it is categorically held that power of High Court under Section 122 to annul, alter or add any of the Rules in First Schedule is absolute power and that even if such a Rule is in conflict with previous existing rule, it must be by implication deemed to have been annulled or/and altered by new rule.

[s 122.8] Rules and their Validity

A rule extending the provisions of O XXXVII of the CPC to suits in city civil court has been held to be *ultra vires*.[36] The court has its discretion under rule 227 of Bombay High Court (Original Side) Rules, 1957, as to whether to permit the summons for judgment to be withdrawn and enable the plaintiff to take out fresh summons for judgment after amending the plaint or to grant unconditional leave.[37] As also rule 21 of the Madras High Court Appellate Side Rules, 1965 prescribing the form of the *vakalat* to be filed and the stamp payable thereon.[38] It has been held that the addition made by the Bombay High Court to the Explanation to O XXXIII, rule 1, that in determining whether an applicant to sue *in forma pauperis* is possessed of sufficient means, the subject matter of the suit must be excluded, is *ultra vires* of section 122 as its purpose is not to regulate its own procedure or the procedure of civil courts subject to its superintendence.[39] But the same high court has held that neither rules 142–148A of the Ahmedabad City Civil Court Rules, 1961 nor the amendment

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34. *Damodaran Pillai v South Indian Bank Ltd*, AIR 2005 SC 3460 : (2005) 7 SCC 300.
35. *Krishnaiah v Prasada Rao*, AIR 2010 AP 19 : 2009 (6) Andh LD 195 (FB).
36. *Laxmidas Devidas Kapadia v Mathuradas Dwarkadas*, (1955) 57 Bom LR 1118.
37. *United Western Bank Ltd v Marmago Steel Ltd*, AIR 1999 Bom 202.
38. *Re Kodanda Ramaswami Vin Devasthanam*, AIR 1957 AP 950 : (1956) Andh WR 637 : (1956) Andh LT 551.
39. *Parshotam Parbhudas v Bai Moti*, AIR 1963 Guj 30.

of O XXXVII, rules 1 and 2 by the Bombay High Court are inconsistent with section 27 of the CPC and are not therefore *ultra vires* the rule-making power of the high court under this section.[40] The rules framed by the Nagpur High Court operate after the reorganisation of states within the area previously subject to the jurisdiction of that court, and have no application to other territories forming part of Madhya Pradesh.[41] Clause (b) to proviso to O XXI, rule 90 framed by the Allahabad High Court, requiring the applicant to deposit costs or give security for costs, is not in excess of the rule-making power under this section, as it relates to a matter of procedure.[42] The second proviso to O XXXIX, rule 1, as amended by the Patna High Court providing that an injunction shall not be granted to restrain a sale or confirmation of a sale; or to restrain delivery of possession where the applicant cannot lawfully prefer a claim to the property or an objection to its attachment or sale, before the executing court, is within the rule-making power under this section.[43]

The Full Bench of the Bombay High Court has held that for the purpose of regulating civil proceedings brought before it, the high court is empowered, under clause 37 of the Letters Patent, to make rules and orders provided that the court has to be guided in making such rules and orders as far as possible by the provisions of the CPC. The CPC provides section 122 for the power of the high courts (not being courts of a judicial commissioner) to make rules regulating their own procedure and even to annul, alter or add to all or any of the rules of the First Schedule of the CPC. Even the high courts which are courts of a judicial commissioner are empowered to make rules under section 128 so as to provide matters including procedure in suits and also "delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, *quasi*-judicial and non-judicial duties".[44]

[s 122.9] Plaintiff represented through General Power of Attorney

The requirement is that when General Power of Attorney-holder is representing the party, the judge is required to record in writing that he is permitted to appear and act on behalf of the party. In the instant case, the procedure prescribed under rule 32 of Civil Rules of Practice has been followed.

When a person files a suit on behalf of the party, as a General Power of Attorney-holder, he enters into the shoes of that party, and except to the extent of personal knowledge, he is entitled to depose on other facts. In the instant case, what was relied upon by the plaintiffs is entirely documentary evidence, which are public documents and no personal knowledge was required to be pressed into service to establish the case of plaintiff.

Under these circumstances, no presumption adverse to the interests of plaintiffs can be drawn.[45]

[s 122.10] First hearing of suit—meaning

The definition in rule 3(6) of the Civil Rules of Practice defines "first hearing" thus:

> 'First hearing' includes the hearing of a suit for settlement of issues, and any adjournment thereof.

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40. *Keshavlal Parbhudas Chokshi v Manubhai I Vyas*, AIR 1968 Guj 223 : (1968) 9 Guj LR 177.
41. *Munnilal Kailash Chandra v Akabai*, AIR 1960 MP 130 : (1960) Jab LJ 514.
42. *Dhoom Chand Jain v Chaman Lal Gupta*, AIR 1962 All 543 : (1962) All LJ 729.
43. *Radhamohan Sundara Mohapatra v Sura Dei*, AIR 1962 Ori 181.
44. *Prem Siddha Coop Housing Society v High Power Committee–II*, AIR 2016 Bom 253.
45. *Secretary to Govt of India, Minister of Defence, New Delhi v Indira Devi*, AIR 2003 AP 329 (DB).

The word "first hearing" appears in the CPC in several places. Under O X, the court has the power to ascertain whether the allegations in the pleadings are admitted or denied at the first hearing of the suit. The oral examination of parties to elucidate matters in controversy is also permissible at the first hearing of the suit under O X, rule 2, CPC. Order XIII, rule 1, before the 1976 amendment, had dealt with the production of documentary evidence at first hearing. Since this led to some controversy, the words "first hearing" in the heading of O XIII, rule 1. were replaced by the words "at or before the settlement of the issues" and rule 1 was amended by replacing the words "at first hearing of the suit" with "at or before the settlement of the issues". Order XIV, Code of CPC again contains the words "at the first hearing". Order XIV, rule 1(5), deals with settlement of issues and this again uses the words "at the first hearing of the suit". The court frames the issues for deciding the case right after examination under O X, rule 2, CPC, and hearing the parties or other pleaders and after reading the plaint and written statement at the first hearing of the suit. O XIV, rule 6, provides that the court need not frame and record issues where the defendant at the first hearing of the suit makes no defence. Therefore, the first hearing of the suit obviously extends up to the point issues are framed. If the defendant is set *ex parte*, the court does not frame or record issues. That is why the definition of "first hearing of the suit" is an inclusive definition. Under O XIV, the court is empowered to pronounce judgment at the first hearing of the suit if it appears that the parties are not at issue. In fact, the heading of O XV itself reads thus: "Disposal of the suit at the first hearing". Then, sub-rule (3) of O XV deals with the manner in which suit shall be disposed where parties are at issue. The rule says that where issues have been framed, since parties are at issue, the court can still pronounce judgments, if, without further argument or evidence than the parties can at once adduce is required, the court may still proceed to determine such issues and pronounce judgments. If not, rule 2 requires the court to postpone the further hearing of the suit and thereafter, fix a date for production of further evidence or for further arguments as the case requires. The court is empowered to adopt the procedure under sub-rule (1) of rule 3 or sub-rule (2) irrespective of whether summons has been issued for the settlement of issues only or for the final disposal of the suit. But, if the summons has been issued for final disposal of the suit, then rule 4 provides that the court, in the absence of either party producing evidence on which he seeks to rely, may pronounce judgments or may after framing and recording issues, adjourn the suit for production of such evidence that is necessary for decision on those issues. Therefore, from this, it is clear that the first hearing of the suit can be any of the dates up to the date on which issues are actually framed and hence Civil Rules of Practice, rule 3(6) defines "first hearing" to include the date on which the suit is posed for hearing for settlement of issues at any adjourned date. So, the words "first hearing of the suit" may be extended to any date until the issues are actually settled.

If the words "first hearing of the suit" is so understood, then under section 12(2) of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, the defendant can plead either by written statement or otherwise the defence relating to improper valuation of suit or insufficiency of court fee before the first hearing of the suit. If the issues have been settled, the first stage before which the defendant could have raised his objection has passed.[46]

[s 122.11] Filing of Affidavit

Since rule 59 of the Andhra Pradesh Civil Rule of Practice, 1990 does not mandate that the application has to be supported by the affidavit of the concerned petitioner and since there

46. *RC Sundravalli v TD Shakila*, AIR 2002 Mad 82.

is no provision in the rules which mandates that the applications filed without the affidavit sworn to by the party concerned should not be entertained, the fact that the respondent did not swear the affidavit in support of the application is not of any consequence.[47]

There is no legal bar in giving the affidavit by the pleader's clerk himself in support of the petition filed in this case seeking to set aside the *ex parte* decree. There is no legal bar, as discussed above, to give the affidavit either by the counsel or by his clerk or by some third party, on behalf of the party, who is filing the petition. Who should give the affidavit in support of a particular interlocutory application, of course, depends upon the facts peculiar in each case. Therefore the observation of the court below that the affidavit has not been filed by the party himself and in consequence thereof, the petition should fail, cannot, therefore, legally be sustained.[48]

A combined reading of the rules 59, 54 and 48 of Civil Rules of Practice prescribed by the high court with the previous approval of the Governor of Andhra Pradesh, shows that the interlocutory application need not necessarily be signed by the party himself. It can either be signed by the party himself or his counsel. Every interlocutory application shall be accompanied by an affidavit, which affidavit should contain the statement of facts made on information or belief of the deponent and the source or ground of such information or belief. Nowhere has it been mentioned that the affidavit filed in support of the petition shall be given by the party himself. Anybody who is conversant with the statement of facts which are necessary to be furnished for maintaining an interlocutory application can therefore give the affidavit.[49]

> The practice of advocate filing his affidavit in a petition filed under Order 9, Rule 9 CPC is totally wrong and illegal. Such practice has to be deprecated. Order 9, Rule 9 or Order 9, Rule 13, CPC contemplates that the application has to be filed by the party concerned only and not by the counsel. The counsel only is permitted to represent his client, he cannot step into the shoes of a client. Admittedly this order passed by the learned judge is totally wrong and illegal. But any way this practice is prevalent in the State of Andhra Pradesh. Therefore, as an exception this time the order is sustained. All concerned should note the law laid down by this Court. Under these circumstances only this Court does not wish to interfere with the said order.[50]

With reference to Andhra Pradesh Civil Rules of Practice, 1990, rules 59, 54, 48 in interlocutory applications, affidavit, can be signed either by party himself or by an advocate or anybody, including the clerk of the advocate, who is conversant with statement of facts, which are necessary to be furnished for maintaining interlocutory application.[51]

The Kerala High Court has held that the language of rule 27(1) of the Civil Rules of Practice does not admit of any doubt that the pleader accepting the *vakalat* is not entitled to attest the *vakalat* despite him personally knowing the executant and making an endorsement regarding the same on the *vakalat*. It was further hold that the corresponding rule in the Criminal Rules of Practice, which permit the pleader accepting *vakalat* to attest the same, is irrelevant.[52]

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47. *Gadiraju Vidyulatha v India Venkateswarlu*, (2005) 2 Andh LT 587 : (2005) AIHC 1575.
48. *G Satyanarayana v M Shankar*, (2001) 1 ALT 365.
49. *Hussaini Begum v B Ramachandraiah*, (1976) 1 Andh WR 325.
50. *Pasupuleti Subba Rao v Nandavarapu Anjaneyulu*, AIR 2003 AP 445.
51. *G Krishna Murthy v Hematha Chit Funds Pvt Ltd, Warangal*, AIR 2006 AP 398 (DB) : (2006) 3 Andh LT 416 (DB).
52. *S Balachandran v N Krishnamoorthy*, AIR 2009 Ker 118 : 2009 (1) Ker LT 975 (DB).

[s 122.12] Subsistence Allowance and Travelling Allowance to Witness

About payment of witness of subsistence allowance and travel allowance the provisions of law designed in the civil rules of practice relating to payment of witness is far from satisfactory and requires a thorough review.[53]

[s 122.13] Appeal Against Order of Registrar — Delhi High Court Rules

Appeal would lie under rule 4 of the Delhi High Court (Original Side) Rules, 1967 against any order made by the registrar under rule 3, irrespective of fact whether any appeal has been provided under CPC or the Delhi High Court Act, 1966.[54]

[s 122.14] Death of party

The judgment should contain full particulars of the parties and decree has to follow the judgment. In case name of a deceased party (originally impleaded) is washed off while substituting legal representatives, it is likely to mislead as it shall not be possible in future to ascertain extent of rights to be determined with respect to the estate of a deceased party. When a person dies, right of substitution is not on the basis of succession, but a person, who is competent to represent the estate of a deceased party and has no interest adverse to the deceased's estate will be permitted to be substituted as his legal representative.

To ensure to keep the record straight and to avoid misconception and/or ambiguity in future; statutory provisions specifically provide that when a party to a suit/proceeding dies, a note be made to that effect against said party and "legal representatives" be brought on record as per rule 37, General Rules (Civil) and Allahabad High Court Rules.

It, therefore, naturally follows that in an application for substitution of legal representatives, prayer for deletion/striking off/or washing off/to erase/removal of the name of "deceased party" on record, is misconceived, untenable and not approved in law, prayer to the above effect in the amendment application for substitution of legal representatives is totally misconceived and cannot be legally allowed. It is not permissible in law to erase the name of original deceased party and to do the contrary is also being uncalled for.

Once party is impleaded and/or brought on record, proceedings started must be concluded with their names and continue till perpetuity. In the matter of death of any such party, in case of substitution of legal representative "on an application made in that behalf, court shall cause legal representative of the deceased, plaintiff/defendant to be made a party to proceed with the suit" "and if legal representatives are not to be substituted, then a note shall be made against a party of his death, but in no case the name of the deceased party shall be deleted or removed or struck-off".[55]

[S 123] Constitution of Rule Committees in certain [56][States].—(1) A Committee to be called the Rule Committee, shall be constituted at [57][the town

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53. *Tippanna v Ghanshyam*, AIR 2004 Kant 446.
54. *Akash Gupta v Frankfinn Institute of AIR Hostess Training*, AIR 2006 Del 325 : 2006 (127) DLT 188 : (2007) AIHC (NOC 81) 35.
55. *New Okhla Industrial Development Authority v Pooran Singh*, AIR 2004 All 218 (DB).
56. Substituted for "Provinces" by AO 1950.
57. Substituted by Act 13 of 1916, section 2 and Sch for "each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon".

which is the usual place of sitting of each of the High Courts [58][***] referred to in section 122].

(2) Each such Committee shall consist of the following persons, namely:—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or [59][***] a Divisional Judge for three years,

[60][(b) two legal practitioners enrolled in that Court,]

[61][(c)] a Judge of a Civil Court subordinate to the High Court, [62][***]

[63][[64][***]]

(3) The members of each Committee shall be appointed by the [65][High Court], which shall also nominate one of their number to be President:

[66][* * *]

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the [67][High Court] in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the State in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said [68][High Court] may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee who shall be appointed by the [69][High Court] and shall receive such remuneration as may be provided in this behalf [70][by the State Government].

SYNOPSIS

[s 123.1] State Amendments ..... 1503 | [s 123.2] Amendments to the Section 1504

[s 123.1] State Amendments

Assam and Nagaland.—The following amendments were made by CPC (Assam Amendment) Act, 1953 (Assam Act 8 of 1953), S. 2, dated 18 April 1953 and Nagaland Act 27 of 1962 (w.e.f. 1-12-1963).

For clause (a) of sub-section (2) of section 123 substitute the following clause namely,—

"(a) three judges of the High Court established at the town at which such committee is constituted, provided that the Chief Justice may appoint only two Judges of the

58. The words "and of the Chief Court" omitted by Act 11 of 1923, section 3 and Sch II. These words were again inserted by Act 32 of 1925, and subsequently omitted by the AO 1948.
59. The brackets and words "(in Burma)" repealed by Act 11 of 1923, section 3 and Sch II.
60. Substituted by Act 2 of 1951, section 16, for clauses (b) and (c).
61. Clauses (d) and (e) re-lettered as clauses (c) and (d) respectively by Act 2 of 1951, section 16 (w.e.f. 1-4-1961).
62. The word "and" omitted by Act 38 of 1978, section 3 and Sch II. (w.e.f. 26-11-1978).
63. Clauses (d) and (e) re-lettered as clauses (c) and (d) respectively by Act 2 of 1951, section 16 (w.e.f. 1-4-1961).
64. Clause (d) omitted by Act 38 of 1978, section 3 and Sch II (w.e.f. 26-11-1978)
65. Substituted by Act 104 of 1976, section 44 for "Chief Justice or Chief Judge" (w.e.f. 1-2-1977).
66. Proviso omitted by Act 104 of 1976, section 44 (w.e.f. 1-2-1977).
67. Substituted by Act 104 of 1976, section 44 for "Chief Justice or Chief Judge" (w.e.f. 1-2-1977).
68. Substituted by Act 104 of 1976, section 44, for "Chief Justice or Chief Judge" (w.e.f. 1 -2-1977).
69. Substituted by Act 104 of 1976, section 44 for "Chief Justice or Chief Judge" (w.e.f. 1-2-1977).
70. Substituted by AO 1937 for "by the G.G. in C. or by the L.G., as the case may be".

High Court on the Committee if the number of Judges of the High Court does not exceed three".

Tamil Nadu.—The following amendments were made by Tamil Nadu Act 15 of 1970, section 2, dated 10 June 1970.

(i) In sub-section (2), in clause (b) for the words "two legal practitioners" substitute the words "three legal practitioners".

(ii) In clause (d), omit the word "Madras" –Tamil Nadu Act (15 of 1970) (10 June 1970)

Sikkim.—The following modifications were made by Gazette of India, dated 18 October 1982, Part II, section 3(ii), Extra., page 2 (No. 476).

In its extension to the State of Sikkim omit Section 123.

[s 123.2] Amendments to the Section

The Amendment Act, 1976 leaves sub-sections 1 and 2 of the section intact. Under sub-section 3 of the section, as it stood before the amendment, the members of the rules committee were appointed by the chief justice or the chief judge as the case may be. There was also a proviso to sub-section 3 which provided that if the Chief Justice or the Chief Judge were elected to be a member of the committee, the number of other judges appointed to be the members, should be two and the chief justice or the chief judge should be the president of the committee. In view of the amendment that the members of the committee shall be appointed by the high court and not by the chief justice or the chief judge, there can no longer be any possibility of the chief justice or the chief judge electing to be a member and then acting as the president of the committee. In consonance with the amendment of sub-section 3, the proviso thereto is now omitted. Since it will be the high court and not the chief justice who is the appointing authority the words "Chief Justice" or "Chief Judge" appearing in sub-sections 4 and 5 are replaced by the words "High Court".

[S 124] Committee to report to High Court.—Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules; and before making any rules under section 122 of the High Court shall take such report into consideration.

SYNOPSIS

[s 124.1] State Amendment 1504
[s 124.2] Rule Committee 1504

[s 124.1] State Amendment

Sikkim.—The following modifications were made by Gazette of India, dated 18 October 1982, Part II, section 3(ii), Extra., page 2 (No. 476).

In its extension to the State of Sikkim, omit section 124.

[s 124.2] Rule Committee

The provisions as to rule committees apply to rules to be made under section 122. Rules under that section can only be made after the High Courts have taken the opinion of the rules committee attached to them.

[S 125] Power of other High Courts to make rules.—High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions [71][as [72][the State Government] may determine]:

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

SYNOPSIS

[s 125.1] Rules Should not be Inconsistent..... 1505
[s 125.2] Rules for Referring Matter to Lok Adalat, Arbitration..... 1505

[s 125.1] Rules Should not be Inconsistent

Rules under this section should not be inconsistent with the provisions in the body of this CPC.[73]

[s 125.2] Rules for Referring Matter to Lok Adalat, Arbitration

One of the modes to which the dispute can be referred is arbitration. Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (Arbitration Act) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of 1996 Act. Section 8 of the Arbitration Act deals with the power to refer parties to arbitration where there is arbitration agreement.[74] The Arbitration Act, however, does not contemplate a situation as in section 89 of the CPC where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration. Section 82 of the Arbitration Act enables the high court to make rules consistent with this Act as to all proceedings before the court under the Arbitration Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to arbitration among four ADRs is not contemplated by the Arbitration Act, and, therefore, section 82 or section 84 has no applicability where parties agree to go for arbitration under section 89 of the CPC. For the purposes of section 89 and O X, rules 1A, 1B and 1C, the relevant sections in Pt X of the CPC enable the high court to frame rules. If reference is made to arbitration under section 89 of the CPC, Arbitration Act would apply only from the stage after reference and not before the stage of reference when options under section 89 are given by the court and chosen by the parties. On the same analogy, the Arbitration Act in relation to conciliation would apply only after the stage of reference to conciliation. The Arbitration Act does not deal with a situation where after a suit is filed, the court requires a party to choose one or other ADRs including conciliation. Thus, for conciliation also, rules can be made under Pt X of the CPC for purposes of procedure

71. Substituted by CPC (Amendment) Act 38 of 1920, section 2 and Sch I, Pt I for "as the G.G. in C. may determine".
72. Substituted by the AO 1937 for "in the case of the Court of the Judicial Commissioner of Coorg. the G.G. in C. and in other cases the L.G."
73. See section 128, and contrast section 129. As to sanction, see section 126.
74. *Salem Advocate Bar Association, Tamil Nadu v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344. See also *P Anand Gajapathi Raju v PVG Raju*, AIR 2000 SC 1886 : AIR 2000 SCW 1489 : (2000) 4 SCC 539.

for opting for "conciliation" and up to the stage of reference to conciliation. Thus, there is no impediment in the ADR rules being framed in relation to civil court as contemplated in section 89 upto the stage of reference to ADR. The Arbitration Act comes into play only after the stage of reference, up to the award. Applying the same analogy, the Legal Services Authority Act, 1987 or the rules framed thereunder by the state governments cannot act as impediment in the high court making rules under Pt X of the CPC covering the manner in which option to *Lok Adalat* can be made being one of the modes provided in section 89. The Legal Services Authority Act, 1987 also does not deal with the aspect of exercising option to one of the four ADR methods mentioned in section 89. Section 89 makes applicable the Arbitration Act and the Legal Services Authority Act, 1987 from the stage after exercise of options and making of reference.

A doubt was expressed about the applicability of ADR rules for dispute arising under the Family Courts Act, 1984 since that Act also contemplates rules to be made. It is, however, to be borne in mind that the Family Courts Act, 1984 applies the CPC for all proceedings before it. In this view, ADR rules made under the CPC can be applied to supplement the rules made under the Family Courts Act, 1984 and provide for ADR in so far as conciliation/mediation is concerned.[75]

[76][**[S 126] Rules to be subject to approval.**—Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the [77]State in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any [74]State, to the previous approval of [78][Central Government].]

[S 127] Publication of rules.—Rules so made and [79][approved] shall be published in the [80][Official Gazette], and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

[S 128] Matters for which rules may provide.—(1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely:—

(a) the service of summons, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;

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75. *Salem Advocate Bar Association, Tamil Nadu v UOI*, AIR 2005 SC 3353: (2005) 6 SCC 344.
76. Substituted by the AO 1937, for section 126.
77. Substituted for "Province" by AO, 1950.
78. Substituted by the AO 1950, for "Governor General".
79. Substituted by Act 24 of 1917, section 2 and Sch I, for "sanctioned".
80. Substituted by the AO 1937, for "Gazette of India or in the local Official Gazette, as the case may be". Strictly the substitution would read "Official Gazette or in the Official Gazette, as the case may be", but the latter words have been omitted as being redundant.

(b) the maintenance and custody, while under attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale;

(c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction;

(d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract express or implied; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or

on a trust; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or *mense profits*, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;

(g) procedure by way of originating summons;

(h) consolidation of suits, appeals and other proceedings;

(i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

[S 129] Power of High Courts to make rules as to their original civil procedure.—Notwithstanding anything in this Code, any High Court [81][not being the Court of a Judicial Commissioner] may make such rules not inconsistent with the Letters Patent [82][or order] [83][or other law] establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

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81. Substituted by the Adaption of Laws (No. 2) Order 1956 for "for a Part A State or a Part B State".
82. Inserted by the AO 1950.
83. Inserted. by Act 2 of 1951, section 17 (w.e.f. 1-4-1951).

SYNOPSIS

[s 129.1]	Changes in the section 1508	[s 129.7]	Letter Patent Not Subordinate Legislation to the Code of Civil Procedure, 1908 1511
[s 129.2]	Effect of 1976 Amending Act 1508	[s 129.8]	Plea as to Jurisdiction of High Court — Two Inconsistent Decisions 1512
[s 129.3]	Section 122 and Section 129 1508	[s 129.9]	Power of High Court to Frame Rules for Trial of Election Petition 1512
[s 129.4]	*Non-obstante* clause 1509		
[s 129.5]	Purpose 1509		
[s 129.6]	Rules as to Original Civil Procedure of High Courts 1509		

[s 129.1] Changes in the section

The words "not being the court of a Judicial Commissioner" were substituted for the words "for a Part A State or a Part B State".

[s 129.2] Effect of 1976 Amending Act

Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 (Amending Act, 1976) reads thus:

> Any amendment made, or any provision inserted in the principal Act by State Legislature or a High Court before the commencement of this Act shall except insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.

It is obvious that what was done by section 97(1) of the Amending Act, 1976 was to sweep away amendments made or provisions inserted in the principal Act by the state legislature, or the high court in exercise of its delegated powers of legislation, and to declare that all such amendments inconsistent with the provisions of the CPC would stand repealed. Section 129 is neither an amendment made by the state legislature, nor by the high court, and as such, it does not get overridden by section 97(1) of the Amending Act, 1976.[84]

> ... The object of Section 97 of the Amending Act appears to be that on and after February 1, 1977 throughout India wherever the Code was in force there should be same procedural law in operation in all the civil courts subject of course to any future local amendment that may be made either by the State legislature or by the High Court, as the case may be, in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should govern the procedure in civil courts which are governed by the Code. We are emphasising this in view of the decision of the Allahabad High Court which is now under appeal before us.[85]

Section 97 of the Amending Act, 1976, does not, in any way, affect the special hierarchical status given to the proceedings before the chartered high courts on its original side. It was merely intended to standardise and make uniform the law as to civil procedure in other civil courts.[86]

[s 129.3] Section 122 and Section 129

See notes under the same heading in section 122.

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84. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : (2005) 2 SCC 145.
85. *Ganpat Giri v Second Additional District Judge, Ballia*, AIR 1986 SC 589 : (1986) 1 SCC 615.
86. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : (2005) 2 SCC 145.

[s 129.4] *Non-obstante* clause

Section 129 begins with a *non-obstante* clause and seems to suggest something to the contrary. At least as far as chartered high courts are concerned, section 129 seems to invest them with the power to make rules with regard to the regulation of their own procedure, which may be inconsistent with the CPC itself, as long as such rules are consistent with the Letters Patent establishing the high courts. The section also ends with the words: "nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code".[87]

Taking into account the extrinsic evidence, i.e., the historical circumstances in which the precursor of section 129 was introduced into the Code of Civil Procedure, 1882 by a specific amendment made in 1895, the *non-obstante* clause used in section 129 is not merely declaratory, but indicative of Parliament's intention to prevent the application of the CPC in respect of civil proceedings on the original side of the high courts.[88]

[s 129.5] Purpose

Far from doing away with the Letters Patent, the Amending Act of 2002 has left unscathed the provisions of section 129 and what follows therefrom.[89]

The purpose of retaining section 129 in the present form is exactly the purpose for which it was inserted, in the first place, in the Code of Civil Procedure 1882 by Amending Act No 13 of 1895, namely, "to recognise the practical expediency of leaving such high courts some latitude in the direction of adapting the provisions of the ordinary law to meet their requirements", and further, "it had been found by experience that these provisions were not in all respects convenient in the case of original proceedings in those Courts". The amendment, therefore, became necessary "to bring the Code into perfect harmony with the provisions of the Letters Patent and to enable the High Courts referred to regulate the exercise of their original civil jurisdiction accordingly".[90]

[s 129.6] Rules as to Original Civil Procedure of High Courts

Rules made under section 122 must not be inconsistent with the provisions in the body of CPC. Under section 129, any high court may make rules to regulate its own procedure in the exercise of its original civil jurisdiction. Such rules may not be consistent with the provisions in the body of the CPC, but they must not be inconsistent with the laws establishing it (Letter Patent or other law establishing the high court in question).[91]

The petition does not mention the names of the persons who attested the Will. However, as required by rule 374 of the Bombay High Court (Original Side) Rules 1980, the plaintiff has filed the original Will and annexed a copy thereof to the petition which mentions the names of two attesting witnesses. But that does not satisfy the requirement of proper pleadings regarding the Will having been duly attested. It is not enough to aver in the petition that Will was duly executed but it must be averred specifically that the Will was duly executed. Execution of document and attestation thereof are two different things. Execution of a document consists

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87. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : (2005) 2 SCC 145.
88. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : (2005) 2 SCC 145.
89. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : (2005) 2 SCC 145.
90. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514 : (2005) 2 SCC 145.
91. *Shevaram Thadaram v Indian Oil Corp Ltd*, AIR 1969 Bom 117 : (1968) 70 Bom LR 546.

of signing a document written of, read over and understood. It does not consist of merely signing a paper or document which are not required to be attested, but only those documents which law requires, are required to be attested by witnesses, for example, a mortgage deed and a Will. These documents cannot merely be executed but they necessarily have to be attested by witnesses. Attestation means the act of witnessing the executant signing the document and subscribing the name of witnesses in testimony of such fact. By attestation, it is meant that signing of the document to signify the attestor and his witness to the execution of the document.[92]

Where a rule has been made by a high court under this section, the provisions of the CPC do not apply. Thus, the rules of the Calcutta High Court contain provisions for default of payment by an auction-purchaser at a sale under a mortgage decree on the original side of the high court and, therefore, O XXI, rule 86 does not apply to such sales.[93] But as the Calcutta rules contain no provision for setting aside a sale on deposit, the provisions of O XXI, rule 89 do apply.[94] Likewise O IX, rule 5 is applicable to suits instituted on the original side of the High Court of Calcutta, as there is nothing in the rules framed by the high court which is repugnant to it, and therefore where the summons was returned unserved and the plaintiff failed to apply for fresh summons within three months, the suit was dismissed.[95] Except for the objection taken that the plaint had not been accompanied by an affidavit in support of the pleadings, it is nobody's case that the plaint had not been otherwise verified in keeping with the unamended provisions of the CPC and rule 1 of Chapter VII of the Original Side Rules. In fact, as has been submitted at the Bar, the plaint was accepted, after due scrutiny and duly registered and only during the hearing of the appeal was such an objection raised.

In a case from Himachal Pradesh, It was held that where the defendant did not file written statement even during the extended time allowed by the court, it would not mean that the defendant has lost his right to file the written statement after ninety days of the service of summons as provided under rule 1 of O VIII of the CPC, because O VIII, rule 1 is not applicable in suits filed in the Original side of High Court of Himachal Pradesh. Proceedings on Original side of high court shall be governed by Original Side Rules, 1997 even if one or more rules are inconsistent with the provisions of the CPC.[96]

In a case under the Bombay High Court (Original Side) Rules, 1980, it has been held by the Supreme Court that where the respondent was a *caveator* in the beginning but later became a party to the suit, she was certainly an interested person in the suit. As such she would be entitled to certified copy of miscellaneous application which enacted out of the said suit, containing allegations of perjury against her adversary, the appellant. But by mere grant of certified copy, the respondent would not be entitled to participate in the perjury application. It was for the court to decide the issue as to whether the respondent can join the said proceedings.[97]

Even though the amended provisions of O VI are attracted in the matter of filing of plaints in the original side of the Calcutta High Court on account of the reference made to O VI and

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92. *P Ramachandran Nair v Suparna Tapan Das*, AIR 2003 Bom 457.
93. *Gowal Das Sidany v Luchmi Chand Jhawar*, AIR 1930 Cal 324 : (1930) ILR 57 Cal 106.
94. *Virjibun Dass Moolji v Bissessuar Lal Hargovind*, AIR 1921 Cal 169 : (1921) 48 Cal 69 : (1919-20) 24 Cal WN 1032.
95. *Shaw & Co v Sisir Mukherjee*, AIR 1954 Cal 369 : (1956) 1 Cal 187 : (1953-54) 58 Cal WN 327.
96. *Shobit Construction v TK International Ltd.*, AIR 2006 HP 4 : (2006) AIHC 725.
97. *Ila Vipan Pandya (3) v Smita Ambalal Patel*, AIR 2008 SC 2183 : (2008) 7 SCC 435.

rule 1 of Chapter VII of the Original Side Rules, non-compliance thereof at the initial stage did not render the suit *non-est*.[98]

In the case of arrest of a ship/vessel, it is usual and common practice to issue warrant of arrest if the affidavit filed under rule 4 of Calcutta High Court Rules (Original Side) contains all particulars required. Thus, it cannot be said that arrest of the ship was obtained by plaintiffs suppressing material facts which would warrant stay of admiralty suit by the court.[99] Considering article 3(1) of the Brussels Convention, 1952 and also rule 52 of the Colonial Courts of Admiralty Act, 1890 (53-54 victoria, ch 27), Bombay High Court (Original Side) Rules, 1957 and also rule 367 of the Rules of the High Court of Bombay (Original Side) 1957. The claimant was liable in damages for wrongful arrest of the ship. It was also stated that the wrongful arrest caused irreparable loss and damages to the ship owner. Therefore, the plaintiff was liable to compensate the defendant as the arrest of the ship was found to be wrongful, and was liable to pay damages to defendant for wrongful arrest. The wrongful arrest caused irreparable loss and damages to the ship owner.[100]

Where in a suit invoking admiralty jurisdiction, order of arrest and state of vessel directing advocate commissioner to disburse expenditure amount and deposit remaining amount in High Court, subsequent suit invoking admiralty jurisdiction was filed in another high court — order of attachment was passed in subsequent suit, there was failure of plaintiff in subsequent suit to bring to notice of court, that the other high court had already seized the matter, and such suit in that high court was filed much earlier, it was held that claim should be filed by plaintiff under O XLII, rule 11 of Madras High Court Rules.[101]

In a suit based on contract for insurance premia for a "fleet", where the term of contract of insurance policy provided for exercising lien on any member of the fleet jointly or severally, and the insurance premium for each ship in the fleet was also capable of being identified separately, then, the plaintiff could maintain action in *personam* and seek reliefs in those proceedings against the "fleet" but action *in rem* in respect of ship constituting fleet is not maintainable.[102]

A rule made by the Bombay High Court under this section empowers the court to make a pay order enforceable as a decree for the payment of the taxed costs of an attorney. This rule is valid and the pay order may be transferred for execution to another court.[103]

[s 129.7] Letter Patent Not Subordinate Legislation to the Code of Civil Procedure, 1908

Are the Letters Patent, and the rules made thereunder by the high court for regulating its procedure on the original side, subordinate legislation and, therefore, must give way to the superior legislation, namely, the substantive provisions of the CPC? There are two difficulties in accepting this argument. In the first place, section 2(18) of the CPC defines "rules" to mean "rules and forms contained in the First Schedule or made under section 122 or section 125". The conspicuous absence of reference to the rules regulating the procedure to be followed on the original side of a chartered high court makes it clear that those rules are not rules as

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98. *Vidyawati Gupta v Bhakti Hari Nayak*, AIR 2006 SC 1194 : (2006) 2 SCC 777 : (2006) 2 AWC 1580 (SC) : (2006) 2 CTC 146.
99. *Mayer (HK) Ltd v Owners & Parties, Vessel MV Fortune Express*, AIR 2006 SC 1828 : (2006) 3 SCC 100.
100. *MV Asean Jade v Jaisu Shipping Com Pvt Ltd*, AIR 2003 Guj 241.
101. *Petromarine Products Ltd v Ocean Marine Services Co Ltd*, AIR 2004 Mad 498 (DB).
102. *Liverpool & London Steamship Protection and Indemnity Association Ltd v MT Symphony*, AIR 2003 Bom 417.
103. *Shiv Dial Bakhtawar Lal v Kanga & Co*, AIR 1936 Lah 369.

defined in the CPC. Secondly, it is not possible to accept that the Letters Patent and rules made thereunder, which are recognized and specifically protected by section 129, are relegated to a subordinate status.[104]

To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters Patent. As has been held in *Vinita Khanolkar's* case[105] and *Sharda Devi's* case,[106] a Letters Patent is the charter of the high court. As held in *Shah Babulal Khimaji's* case[107] a Letters Patent is the specific law under which a high court derives its powers. It is not any subordinate piece of legislation. As set out in aforementioned two cases, a Letters Patent cannot be excluded by implication. Further, it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the concerned high court. The CPC is a general law applicable to all courts. It is well-settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail.[108]

[s 129.8] Plea as to Jurisdiction of High Court — Two Inconsistent Decisions

The trial court has negatived the plea relating to lack of jurisdiction apparently on the finding that the entire cause of action arose within the jurisdiction of Madras High Court. If the contention of the appellant would be accepted now, it would give rise to two inconsistent decisions. So far as principal amount (subject to the question of adjustment of amount already paid) is concerned, it will be taken as if the court had jurisdiction, whereas, so far as other contentions are concerned, such as grant of interest at a higher rate and the adjustment of amount paid first towards principal would give rise to another inconsistent finding to the effect that the Madras High Court did not have jurisdiction to deal with the suit in the absence of any leave as contemplated under clause 12 of the Letters Patent. Obviously, the court cannot countenance such a contention which would give rise to two inconsistent conclusions. Therefore, the contention of the appellant, so far as jurisdiction is concerned, is bound to be rejected.[109]

[s 129.9] Power of High Court to Frame Rules for Trial of Election Petition

There is no provision in the Representation of the Peoples Act, 1951 which empowers the high court to frame the rules governing the procedure of trials before the high court. However, the high court is not entirely powerless in the matter of framing the rules of procedure. Article 225 of the Constitution of India confers powers on the high court, *inter alia*, to make rules of court for the purpose of hearing, trying and deciding any matter lying within the jurisdiction of the high court. The high court can thus frame rules of procedure regarding the trial of election petitions under Article 225 of the Constitution of India. This source of power emanates from the Constitution of India and, is therefore, very potent. Section 129 of the CPC is another source of power of high court to make rules to regulate its own procedure in

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104. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514: (2005) 2 SCC 145; *PS Sambhappan v Andhra Bank Ltd*, AIR 2004 SC 5152 : (2004) 11 SCC 672 : AIR 2004 SCW 5934 : (2004) JT 8 SC 464.
105. *Vinita M Khanolkar v Pragna M Pai*, AIR 1998 SC 424 : (1998) 1 SCC 500 : AIR 1997 SCW 4415 : (1997) JT 9 SC 490 : (1997) (7) Scale 356.
106. *Sharda Devi v State of Bihar*, AIR 2002 SC 1357 : (2002) 3 SCC 705 : (2002) 2 SCR 404 : AIR 2002 SCW 86 : (2002) JT 3 SC 43 : AIR 2002 Jhar HCR 511.
107. *Shah Babulal Khimji v Jayaben D Kania*, AIR 1981 SC 1786 : (1982) 1 SCR 187.
108. *Iridium India Telecom Ltd v Motorola Inc*, AIR 2005 SC 514: (2005) 2 SCC 145.
109. *Andhra Bank Financial Services Ltd v Tamil Nadu Newsprint & Paper Ltd*, AIR 2006 Mad 276 (DB).

the exercise of its original civil jurisdiction. This will include election petitions also as they are tried in the original civil jurisdiction of the high court.[110]

[111][**[S 130] Power of other High Courts to make rules as to matters other than procedure.**—A High Court [112][not being a High Court to which section 129 applies] may, with the previous approval of the [113]State Government, make with respect to any matter other than procedure any rule which a High Court [114][for a [115][***] a State] might under [116][Article 227 of the Constitution], make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a presidency-town.]

[s 130.1] Changes in the Section

By the Adaptation of Laws Order 1956, for the words "for a Part A State", the words "for a State" were substituted.

[S 131] Publication of rules.—Rules made in accordance with section 129 or section 130 shall be published in the [117][Official Gazette], and shall from the date of publication or from such other date as may be specified have the force of law.

[s 131.1] Date of Publication

The rules referred to in this section have the force of law from the date of publication.[118]

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110. *Kailash v Nanhku*, AIR 2005 SC 2441 : (2005) 4 SCC 480.
111. Substituted by the AO 1937, for section 130.
112. Substituted by the AO 1950, for "not constituted by His Majesty by Letters Patent".
113. Substituted for "Provincial Government" by *ibid.*
114. Substituted by the AO 1950, for "so constituted".
115. The words and letter "Part A" omitted by the Adaptation of Laws (No 2) Order, 1956.
116. Substituted by the AO 1950, for "section 224 of the Government of India Act, 1935".
117. Substituted by the AO 1937, for "Gazette of India or in the local Official Gazette, as the case may be". Strictly the substitution would read "Official Gazette or in the Official Gazette, as the case may be", but the latter words have been omitted as being redundant.
118. *Baijnath v Doolarey Hajam*, AIR 1928 All 708 : (1928) ILR 50 All 865.

PART XI

MISCELLANEOUS

[S 132] Exemption of certain women from personal appearance.— (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

SYNOPSIS

[s 132.1] Appearance in Court..... 1515
[s 132.2] "Custom and Manners of the Country" 1516
[s 132.3] "Personal appearance" and "personal attendance"..... 1516

[s 132.1] Appearance in Court

Whether the woman is a *pardanashin* is a question of fact, which must, if in dispute, be decided on evidence adduced.[1] When once it is found that the woman is a *pardanashin*, then she is entitled, as a matter of course, to be examined on commission, unless the application is made mala fide and amounts to an abuse of the process of court.[2] It is not a ground for refusing to issue a commission to examine a *pardanashin* lady that the application has been delayed,[3] or that she has appeared in public in her father's village, unless she is shown to have abandoned the custom of *parda*.[4] But it has been held that a change in the mode of life of a particular lady can be taken into consideration in exercising a discretion in the grant of the application for examination on commission.[5] The fact that the junior wife of a Muslim does not observe *gosha*, does not mean that his senior wife has also done so, so as to disenable her from claiming exemption under this section.[6] This section provides for exemption of *pardanashin* ladies from personal appearance in court but not from, attendance in court. The word "appearance" means that a *pardanashin* lady shall not be compelled to come forth into view or to become visible to

1. *Motibai v Champalal*, AIR 1957 MB 184.
2. *Mahomed Ismail v Wazir Bibi Saheba*, (1951) ILR Mad 311 : (1951) Mad 433 : (1950) 2 Mad LJ 385 : 64 LW 1057; *Mohomed Thambi v Sheik Farid*, (1915) 2 Mad LJ 524; *Chandrani Bahoo v Hukumchand*, AIR 1953 Ngp 37; *Gyarsibai v Mangilal*, AIR 1958 MP 25.
3. *Chandrani Bahoo v Hukumchand*, AIR 1953 Ngp 37.
4. *Rahuria Ramkali Kuer v Chhathoo Singh*, AIR 1961 Pat 210; *Katheesakutty v Ibrayan*, (1961) Ker LJ 502 : (1961) Ker LT 433; *Akasam Peda Sanyasi v Prabhakara Murty*, AIR 1961 AP 222.
5. *Motibai v Champalal*, AIR 1957 MB 184.
6. *Talkis Beevi v Jubeda Beevi*, AIR 1972 Mad 29 : (1971) 2 Mad LJ 130.

the public gaze. The court, therefore, has power to order a *pardanashin* lady to give evidence in court provided she is not compelled to come forth into view or to become visible to the public gaze.[7]

[s 132.2] "Custom and Manners of the Country"

The phrase "custom and manners of the country" mean current custom and manners not of the country as a whole but of the particular community, class or section to which the woman belongs, or, it may be of a particular locality, but not of any particular person.[8]

[s 132.3] "Personal appearance" and "personal attendance"

The Allahabad High Court has held that the words "personal appearance" mean "personal attendance" and that a *pardanashin* lady cannot be compelled to attend court either as a party or as a witness.[9] The Madras High Court has also held that whatever the etymological difference between the words "attendance" and "appearance", the Code of Civil Procedure, 1908 makes no distinction between them.[10]

[S 133] Exemption of other persons.—[11][(1) The following persons shall be entitled to exemption from personal appearance in Court, namely:—

(*i*) the President of India;

(*ii*) the Vice-President of India;

(*iii*) the Speaker of the House of the People;

(*iv*) the Ministers of the Union;

(*v*) the Judges of the Supreme Court;

(*vi*) the Governors of States and the administrators of Union territories;

(*vii*) the Speakers of the State Legislative Assemblies;

(*viii*) the Chairman of the State Legislative Councils;

(*ix*) the Ministers of States;

(*x*) the Judges of the High Courts; and

(*xi*) the persons to whom Section 87B applies.]

[12][(2) * * *]

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7. *Re Bilasroy*, AIR 1929 Cal 528 : (1929) 56 Cal 865; *Mariam Bai v Abdul Hamid*, AIR 1946 Bom 340; contra *Kissen Lal v Purshottam Das*, AIR 1942 Cal 143 : (1941) 2 Cal 155; *Mohammad Ismail v Wazir Bibi Saheba*, AIR 1951 Mad 433 : (1950) 2 Mad LJ 385 : (1951) ILR Mad 311 : 64 LW 1057. (Distinction made between appearance and attendance in *Bilasroy*'s case not approved.) See notes to O XXVI, rule 1: "Persons exempted from attending court."
8. *Mahammad Ismail v Wazir Bibi Saheba*, AIR 1951 Mad 433 : (1950) 2 Mad LJ 385 : (1951) ILR Mad 311 : 64 LW 1057; *Ayesha Bibi v C Ali*, (1959) Ker LJ 1075 : (1959) Ker LT 1068 : (1959) Ker LR 992 (a case of a *Moplah* woman).
9. *Sunder Devi v Dattatraya*, AIR 1933 All 551 : (1933) 55 All 666.
10. *Mahomed Ismail v Wazir Bibi*, AIR 1951 Mad 433 : (1950) 2 Mad LJ 385 : (1951) ILR Mad 311 : 64 LW 1057.
11. Substituted by Act 66 of 1956, section 12, for sub-section (1) (w.e.f. 1-1-1957).
12. Sub-section (2) omitted by CPC (Amendment) Act 66 of 1956, section 12.

(3) Where any person [13][* * *] claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

SYNOPSIS

[s 133.1] History of the Section 1517
[s 133.2] Constitutionality of the Section 1517
[s 133.3] Members of Tribunals 1518

[s 133.1] History of the Section

Sub-section (1) was substituted by the Code of Civil Procedure Amendment Act of 1956 in place of the old sub-section which ran as follows:

> **Section 133.** (1) The State Government may by notification in the official Gazette, exempt from personal appearance in court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.
>
> Sub-section (2) which was omitted by the Civil Procedure Code Amendment Act, 1956, ran as follows:
>
> (2) The names and residences of the persons, so exempted shall, from time to time, be forwarded to the High Court by the State Government and a list of such persons shall be kept in such court, and a list of such persons as reside within the local limits of the jurisdiction of each court subordinate to the High Ccourt shall be kept in such subordinate court.

The words "so exempted" which followed the words "any person" in sub-section (3), were omitted by the Code of Civil Procedure (Amendment) Act, 1956.

[s 133.2] Constitutionality of the Section

It was held in *Shersingh v Ghansiram,*[14] that section 133 (1) as it stood prior to its amendment in 1956, was repugnant to Article 14 of the Constitution, as exemption on the basis of rank rested on no valid classification, and that accordingly a *jagirdar* who was exempted under a state notification of the year 1934 could not claim the privilege of exemption under section 133, as the notification became void on the coming into force of the Constitution. In *Rana Bashist Chand v Radhika Dei,*[15] the Punjab High Court had also held that notifications granting exemption under section 133 would be bad under Article 14. But in that case the party was the ruler of Kothi State, who had been exempted under the section by a notification of the year 1909, and it was held that the personal privilege of the ruler had been saved by the instrument of accession and that there was therefore a proper classification. Apart from any such notification, an ex-ruler cannot claim exemption under this sub-section.[16] In *Amarsinghji v Ufsar Lal,*[17] a notification issued in 1934 under the Marwar Civil Procedure Code was upheld on the ground that it exempted classes of persons and that as the word "person" in section 133 would include "persons", exemption of a class was intra vires the section. All doubts have now been set at rest by the amendment of sub-section (1) by the Amendment Act of 1956 which has substituted classes of persons in the place of a person of rank. On the section as it stands, it is no ground for issuing a commission that the person sought to be examined is a person of rank. It was

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13. The words "so exempted" omitted by Act 66 of 1956, section 12 (w.e.f. 1-1-1957).
14. *Shersingh v Ghansiram,* AIR 1954 Raj 233 : (1954) ILR Raj 450.
15. *Rana Bashist Chand v Radhika Dei,* AIR 1952 P&H 97 : (1951) ILR Punj 470 : (1952) 54 Punj LR 23.
16. *Darbar Saheb v New India Assurance Co Ltd,* AIR 1955 Bom 275 : (1955) ILR Bom 581.
17. *Amarsinghji v Ufsar Lal,* AIR 1953 Raj 57 : (1952) ILR Raj 798.

accordingly held that a bishop was not entitled to be examined on commission, because of his rank as a spiritual head and dignitary of the church and that an exemption granted under section 133 of the Travancore Civil Procedure Code was of no avail, as it ceased to operate after the Code of Civil Procedure came into force.[18]

[s 133.3] Members of Tribunals

Members of the Administration Tribunal are not immune from appearance in the court. Normally, a witness (whether a party or otherwise) is to be examined in court when the presiding officer gets an opportunity to note the demeanour of the witness and of observing the way in which various questions put to him in cross-examination are answered by him. The presiding officer makes an assessment of his credibility. Where the witness is credible, it is hardly material whether he gives evidence viva voce in court or before a commission or by affidavit or otherwise. It shall not, however, be assumed always that a witness is credible. The high court can exercise its writ jurisdiction over the Administrative Tribunal, except as regards matters specifically excluded.[19]

[S 134] Arrest other than in execution of decree.—The provisions of Sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

[s 134.1] High Court Amendment

Calcutta.—Insert the words "or the Presidency Small Cause Courts Act, 1882", after the words "under this Code". *Vide* Cal Gaz., Pt. I, dated April 20, 1967.

[S 135] Exemption from arrest under civil process.—(1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognised agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

SYNOPSIS

[s 135.1]	Alterations in the Section	1519	[s 135.4]	Parties	1520
[s 135.2]	Grounds of Exemption From Arrest	1519	[s 135.5]	Civil Process	1521
[s 135.3]	While Going to or Attending and While Returning from Court	1519	[s 135.6]	Appeal	1521

18. *AM Fermando v St Francis Xavier Church*, (1961) ILR Mad 31 : (1961) 2 Mad LJ 349.
19. *Indrajeet Roy v Bank of Baroda*, AIR 1991 Ori 45. See O 26, rule 1.

[s 135.1] Alterations in the Section

1. The words, "other than process issued by such tribunal for contempt of court," in sub-section (2), were added to give effect to a Calcutta decision.[20]

2. sub-section (3) was substituted for the words "except as provided in section 337A, sub-section (5), and sections 256 and 643," which occurred at the commencement of sub-section (2) in the Code of Civil Procedure 1882.

[s 135.2] Grounds of Exemption From Arrest

The exemption conferred here is not for the personal benefit of the individual, but for furthering public interests and the better administration of justice. In other words, the exemption is not the privilege of the person attending the court, but that of the court which he attends. If, therefore, a witness does not believe *bona fide* that his attendance was required, there is no privilege.[21] For the same reason, where a writ of attachment for contempt of court has been issued against a party to a suit, the party cannot claim privilege from arrest while proceeding to court for the purpose of attending the hearing of the suit.[22]

[s 135.3] While Going to or Attending and While Returning from Court

A party to a suit is exempt from arrest under this section, while going to or attending the court before which the suit is pending, and while returning from such court. The word "while" implies that there is a period of exemption and what period is reasonable is a question of fact to be determined by the court in each case.[23] The following are the leading cases bearing on this part of the section:

(i) Where a plaintiff who was a native of Patna, and who had instituted a suit in the High Court of Madras, left Patna on receiving a letter from his solicitors that his presence was required, and arrived at Madras on 24 October, and the suit having come on for hearing on 27 October was adjourned till 25 December, and he was arrested in execution of a decree against him on 10 November, it was held by the High Court of Madras that he was privileged from arrest.[24] This decision was disapproved by the Allahabad High Court[25] in the case cited in clause (ii) below, but it is in accordance with the decision of the House of Lords in the under mentioned case.[26]

(ii) *A*, residing in Bombay, goes to Benares to prosecute an application to set aside an *ex parte* decree passed against him by the Benares courts, and puts up at a *Dak* Bungalow in Benares. On the date fixed for the hearing of the application, *A* attends the court when his application is heard and dismissed. He then leaves the court, returns to the *Dak* bungalow, and hence proceeds to the railway station where he is arrested in execution of the decree while actually seated in the train. It is found on

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20. *John v Carter*, (1970) 4 BLROC 90.
21. *Wooma Churn v Teil*, (1875) 14 BLR App 13; *Samarapuri v Parry & Co*, (1890) 13 Mad 150, 158; *Re Omritolall*, (1876) 1 Cal 78.
22. *John v Carter*, (1970) 4 BLROC 90.
23. *Kedarnath v Nomanbhai*, AIR 1931 Bom 175 : (1931) 55 Bom 612; *Achuta Nand v Mahabir Prasad*, AIR 1938 All 356 : (1938) All LJ 500.
24. *Re Siva Bux*, (1882) 4 Mad 317.
25. *Ardeshirji v Kalyandas*, (1910) 32 All 3, 6.
26. *Persee v Persee*, (1956) 5 HLC 671; *Halsbury's Laws of England*, vol 25, p 818.

evidence that *A* had taken a ticket for Allahabad when arrested. On the above facts, the High Court of Allahabad held that *A*'s arrest was legal. The court said;

> In the present case *A* had left the court and had returned to the place where [he] was staying in Benares; he then left that place and [was] actually on his way to Allahabad, which is not his home. In these circumstances we cannot hold that he, at the time of arrest, was returning from a tribunal within the meaning of section 135.[27]

A somewhat similar case was that of a resident of Haidernagar who came to Daltonganj and put up in temporary lodgings with his pleader and attended the court there; returned to his lodgings; went for a walk; and was arrested. The Patna High Court held that the arrest was legal although he had to attend the court the next day. The court said that the same rule must apply to a person who takes lodgings to attend a court as to a person who lives at the place where the court is situated.[28]

(iii) The exemption from arrest continues during such period as is reasonably occupied in going to, attending at, and returning from the place of trial.[29] But if there is a deviation, the privilege is forfeited. A party to a suit was arrested at an office in the same compound as the court house, an hour after the court had risen for the day and as it was not shown that he was returning to his residence, the arrest was held to be legal.[30] But it is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from, and a less crowded and more convenient road adopted.[31]

(iv) A debtor, who is released from jail under an order of the court on the ground that the order under which he was committed was illegal, may be arrested under civil process immediately after he is released. He is not privileged from arrest as returning from court. It does not follow, because imprisonment followed on an order which was illegal, that he should be treated when released from jail as returning from court.[32]

(v) *A* is arrested in execution of a decree obtained against him by *B*, and is brought before the court. While he is in the custody of the court's officers, he is arrested in execution of a decree obtained against him by *C*. *A* is not exempt from arrest in execution of *C*'s decree. It cannot be said that *A*, while he was under arrest in execution of *B*'s decree, was voluntarily in court in connection with the execution of *B*'s decree.[33]

[s 135.4] Parties

A defendant in a summary suit under O XXXVII is privileged from arrests, though he has not obtained leave to defend the suit.[34] An accused ordered to attend a criminal court is entitled to the protection of this section.[35]

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27. *Ardeshirji v Kalyanm Das*, (1910) 32 All 3.
28. *Jaggarnath v Ganesh Lal*, AIR 1935 Pat 6 : (1935) 14 Pat 242; dissenting from *Kedarnath v Nomanbhai*, (1931) 55 Bom 612; distinguishing *Persee v Persee*, (1956) 5 HLC 671.
29. *Appasamy v Govindan*, (1868) 4 Mad HC 145.
30. *Ram Prasad v Emperor*, AIR 1933 Cal 11 : (1932) 36 Cal WN 1071.
31. *Re Soorendrao Nath*, (1880) 5 Cal 106; *Emperor v Bihari*, AIR 1924 All 676 : (1924) 46 All 663.
32. *Samarapuri v Parry & Co*, (1890) 13 Mad 150.
33. *Govindasamy v The Union Bank Ltd*, (1924) 47 Mad LJ 678 : (1924) ILR Mad 900.
34. *Re Soorendrao Nath*, (1880) 5 Cal 106.
35. *Cursetji v Hargovind*, AIR 1929 Oudh 426 : (1929) 5 Luck 302.

[s 135.5] Civil Process

This section applies only to witnesses and parties arrested under writs issued by courts to which the CPC applies. It does not apply where a party is arrested under a writ issued from a small cause court. As there is no provision in the Provincial Small Cause Court Act, 1887 corresponding to this section, questions as to exemption from arrest in the case of persons arrested under writs issued by small cause courts must be governed by the principles of the English law on the subject. They are very much the same, as those set forth in the present section.[36]

[s 135.6] Appeal

Where a judgment-debtor arrested in execution of a decree claims exemption from arrest under this section, but the exemption is not allowed, the order is one under section 47, and is appealable.[37]

[38][**[S 135A] Exemption of members of legislative bodies from arrest and detention under civil process.**—[39][(1) No person shall be liable to arrest or detention in prison under civil process—

(*a*) if he is a member of—

(*i*) either House of Parliament, or

(*ii*) the Legislative Assembly or Legislative Council of a State, or

(*iii*) a Legislative Assembly of a Union territory,

during the continuance of any meeting of such House of Parliament or, as the case may be, of the Legislative Assembly or the Legislative Council;

(*b*) if he is a member of any committee of—

(*i*) either House of Parliament, or

(*ii*) the Legislative Assembly of a State or Union territory, or

(*iii*) the Legislative Council of a State,

during the continuance of any meeting of such committee;

(*c*) if he is a member of—

(*i*) either House of Parliament, or

(*ii*) a Legislative Assembly or Legislative Council of a State having both such Houses,

during the continuance of a joint sitting, meeting, conference or joint committee of the Houses of Parliament or Houses of the State Legislature, as the case may be;

and during the forty days before and after such meeting, sitting or conference.]

(2) A person released from detention under sub-section (*1*) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to

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36. *Re Soorendra Nath*, (1880) 5 Cal 106.
37. *Govindasamy v Union Bank Ltd*, (1924) 47 Mad LJ 678 : (1924) ILR Mad 900.
38. Inserted by CPC (Amendment) Act 23 of 1925, section 3.
39. Substituted by CPC (Amendment) Act 104 of 1976, section 45 for sub-section (1) (w.e.f. 1-2-1977).

which he would have been liable if he had not been released under the provisions of sub-section (*1*).]

[S 136] Procedure where person to be arrested or property to be attached is outside district.—(1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probate amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay [40][* * *] the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras [41][or Bombay], as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

SYNOPSIS

[s 136.1] High Court Amendment 1522
[s 136.2] Changes in the Section 1523
[s 136.3] This Section and O XXXVIII, Rule 5—Attachment Before Judgment 1523
[s 136.4] Arrests and Attachment Otherwise than in Execution of Decree..... 1524
[s 136.5] Order of Arrest for Contempt of Court..... 1524
[s 136.6] Defective Order: Effect 1525

[s 136.1] High Court Amendment

Calcutta.—In sub-rule (1) insert the words "or the Presidency Small Cause Courts Act, 1882", after the words "provision of the Code" and before the words" "not relating to the execution". *Vide* Cal. Gaz. Pt. I, dated April 20, 1967.

40. The words "or of the Chief Court of Lower Burma", omitted by the AO 1937.
41. Substituted by the AO 1937, for "Bombay or Rangoon".

[s 136.2] Changes in the Section

In sub-clause (4), the words "West Bengal" were substituted for the word "Bengal" by the AO 1947.

[s 136.3] This Section and O XXXVIII, Rule 5—Attachment Before Judgment

In section 136 of the Code of Civil Procedure, 1908 (CPC), it is stated that the district court shall, on receipt of the order of attachment or order of arrest, as the case may be, cause the attachment or arrest to be made by its own officers or by a court subordinate to itself. The court which passes the attachment before judgment passes the same under O XXXVIII, rule 5 of CPC. The said rule gives authority to the court to pass attachment before judgment after being satisfied by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him may try to dispose of the property. Before issuing such order of attachment, the court must satisfy itself that the defendant is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.

It is only on the satisfaction of these conditions, the court can pass an order of attachment under O XXXVIII, rule 5. Rule 7 of O XXXVIII says that such attachment shall be made in the manner provided for the attachment of the property in execution of a decree.

Section 136 of the CPC lays down the procedure to be followed where the person to be arrested or property to be attached is outside the district court which passes the order of arrest or attachment. section 136 only lays down the procedure in case the property is situated outside the territorial jurisdiction of the court. The district court to which such order of attachment is sent is only effecting the attachment and the power under O XXXVIII, rule 5 is not as such exercised by that court.

The order of attachment is sent to the district court when the property is situated outside the jurisdiction of the issuing authority. It is only to maintain the comity of courts as, in some cases, the attachment order might be issued by the *munsif* / civil judge (junior division) and the property to be attached might be within the jurisdiction of the civil judge (senior division)/subordinate judge and in the fitness of things, section 136 lays down the procedure that under such circumstances, the order of attachment should be sent to the district court which is having supervisory jurisdiction over all the subordinate courts within that district. It is only a procedure and if the owner of the property raised an objection to the effect that the procedure was not complied with, court can issue appropriate direction to cure the defect in the procedure. If such an objection was not raised within a reasonable time, it does not seem that the attachment order itself could be treated as invalid.

It is also pertinent to note that by the Amending Act of 1976, a new sub-rule was added to rule 5 of O XXXVIII to the effect that if an order of attachment is made without complying with the provisions of sub-rule (1) of the said rule, such attachment shall be void. Therefore, the importance is given to the mandatory conditions under rule 5(1) of O XXXVIII and there is no such similar insertion in section 136. Therefore, the failure, if any, on the part of the court which issued the attachment order in sending the attachment order and the connected papers to the district court will not invalidate the attachment order as such.[42]

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42. *Rajender Singh v Ramdhar Singh*, AIR 2001 SC 2220 : (2001) 6 SCC 213 : (2001) 3 SCR 736 : 2002 (1) LJR 397.

[s 136.4] Arrests and Attachment Otherwise than in Execution of Decree

It is clear from the provisions of the CPC, that the powers of the executing court can be exercised only when the judgment-debtor or his property is within the jurisdiction of the court with only one exception regarding the attachment of salary. As the judgment-debtor or the garnishee in whose custody the property of the judgment-debtor is there, are not within the jurisdiction of the lower court, the order prohibiting the respondent garnishees from making payment of the judgment-debtor is beyond the jurisdiction of the court.[43]

This section prescribes the procedure to be followed where a person is to be arrested or where property is to be attached otherwise than in execution of a decree. The court may under the procedure enacted in this section, attach, before judgment, property outside the local limits of its jurisdiction and may also under O XXI, rule 58 read with O XXXVIII, rule 8, order the removal of the attachment,[44] but the actual attachment must be effected through the district court in whose jurisdiction the property is situated.[45] Where, pursuant to a warrant issued under this section by the Subordinate Judge of Kurnool to the district court, Bellary, a lorry was attached, and a claim having been preferred thereto, the district judge made an order raising the attachment on the claimant furnishing security, it was held that the only court which could hear the claim was the court which made the order for attachment and not the court which actually effected the attachment and that in consequence the order of the district judge releasing the property from attachment on security being furnished was illegal.[46]

[s 136.5] Order of Arrest for Contempt of Court

It has been held in Calcutta that a judge of the Calcutta High Court sitting on its original side has no power to direct a *mofussil* court to execute a warrant of arrest for contempt of court. But if he grants an injunction and the order is disobeyed, he may direct the arrest and detention of the offender under O XXXIX, rule 2, in which case the present section will apply.[47]

The Madras High Court has held that when an injunction issued by a division bench of the high court on the appellate side is disobeyed by a party residing in the *mofussil*, the bench has the power to send to the appropriate *mofussil* court, the warrant of arrest of execution, whether this section applies in terms or not, and the *mofussil* court, on receipt of the warrant, must proceed as provided in this section.[48] In the Madras case, the court treated the disobedience of the injunction as contempt of court. It is difficult to understand why, when an injunction had actually been granted, the court did not proceed under O XXXIX, rule 2 in which case, there could have been no doubt as to the applicability of the present section to the case.

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43. *Aditya Electronics v AS Impex Ltd*, AIR 2004 AP 321.
44. *Firm MSMM v Maing Sein*, AIR 1931 Rang 279 : (1931) 9 Rang 561.
45. *Surajbali Ram v Mohar Ali*, AIR 1941 All 212.
46. *MG Brother v Shah Tolchand Parswachand & Co*, AIR 1963 Mys 147.
47. *Salamchand v Jugul Kishor*, AIR 1928 Cal 462 : (1928) 55 Cal 777; *A Milton & Co v Ojha Automobile Co*, AIR 1931 Cal 279 : (1930) 57 Cal 1280; *Bhagabat v Rai Rebati Mohan*, AIR 1935 Pat 6 : (1934) 61 Cal 971, dissenting from *Kedarnath v Nomanbhai*, supra; distinguishing *Persee v Persee*, (1956) 5 HLC 671.
48. *Adakkala v Imperial Bank*, (1926) 50 Mad LJ 401 : (1926) ILR Mad 574.

[s 136.6] Defective Order: Effect

An order for attachment of properties under this section has to be sent to the district court within whose jurisdiction they are situated. But if the order is sent directly to the court within whose jurisdiction the properties are situated, and not to the district court, to which it is subordinate, is an attachment effected thereunder illegal? On this, judicial opinion is divided. One view is that as the question is one of procedure, it is a mere irregularity, not affecting the jurisdiction of the court, and the attachment is valid.[49] The other view is that an order addressed to any court except the district court would be a nullity, and the attachment effected might be ignored as void and where the property is actually sold, the sale must be held to be one made without any attachment, liable to be set aside under O XXI, rule 90, on proof of substantial injury.[50] The view of Mysore High Court also is that where a subordinate court affects an attachment in the absence of a direction from the district court to which it is subordinate, such attachment is invalid since such subordinate court does not get jurisdiction to give effect to the order of attachment issued by another court unless the district court directs it to do so.[51] The conflicting opinion of high courts now seem to have been put at rest by the Supreme Court in a case[52] according to which; the order of attachment is sent to the district court when the property is situated outside the jurisdiction of the issuing authority. It is only to maintain the comity of courts as, in some cases, the attachment order might be issued by the *munsif* / civil judge (junior division) and the property to be attached might be within the jurisdiction of the civil judge (senior division)/subordinate judge and in the fitness of things, section 136 lays down the procedure that under such circumstances, the order of attachment should be sent to the district court which is having supervisory jurisdiction over all the subordinate courts within that district. It is only a procedure and if the owner of the property raised an objection to the effect that the procedure was not complied with, the court could issue appropriate direction to cure the defect in the procedure. If such an objection was not raised within a reasonable time, the attachment order itself could be treated as invalid.

[S 137] Language of subordinate Courts.—(1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the [53][State Government] otherwise directs.

(2) The [53][State Government] may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English, a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

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49. *Mariamma v Ittoop Poulo*, AIR 1952 TC 159 : (1952) Ker LT 116 (FB); *Mookan Ouseph v PPM Nanu*, AIR 1963 Ker 193.
50. *Rahim Bux & Sons v Firm Samiulla & Sons*, AIR 1963 All 320.
51. *SA Patil v PK Rajput*, AIR 1973 Mys 82 : (1972) 2 Mys LJ 481.
52. *Rajendra Singh v Ramdhar Singh*, AIR 2001 SC 2220 : (2001) 6 SCC 213 : (2001) 3 SCR 736 (2002) 1 LJR 397.
53. Substituted for "Provincial Government" by AO 1950.

SYNOPSIS

[s 137.1] State Amendments 1526
[s 137.2] Scope 1526

[s 137.1] State Amendments

Rajasthan.—*The following amendments were made by Rajasthan Act 7 of 1983, section 2, (w.e.f. 16-5-1983).*

In its application to State of Rajasthan, in section 137 for sub-section (3), substitute as follows:—

(3) Wherever this Code requires or allows, anything other than the recording of evidence to be done in writing in any such Court, such writing shall be in Hindi in Devnagari script with the international form of Indian numerals:

Provided that the Court may in its discretion accept such writing in English on the undertaking of the party filing such writing, to file a Hindi translation of the same, within such time as may be granted by the Court and the opposite party shall have a right to have a copy of such writing in Hindi.

Uttar Pradesh.—*The following amendments were made by Uttar Pradesh Act, 17 of 1970, section 2, (w.e.f. 8-4-1970).*

In section 137, in sub-section (3) insert the following proviso:—

Provided that with effect from such date as the State Government in consultation with the High Court may by notification in the Gazette appoint the language of every judgment, decree, or order passed or made by such Courts or classes of Courts subordinate to the High Court and in such classes of cases as may be specified shall only be in Hindi in Devnagari script with the international form of Indian numerals.

[s 137.2] Scope

This section has come up for consideration before several high courts, with reference to enactments prescribing Hindi as the language of the court. In *LM Wakhare v State*,[54] the question was as to the validity of the Madhya Pradesh Official Language Act 24 of 1950. specifying Hindi or Marathi as the language of the courts. It was held that the enactment did not contravene any of the constitutional provisions, and was valid, and that English could be used in accordance with sub-section (3). In *Dayabhai Poonambhai v Natwarlal Sombhai*,[55] discussing the scope of the Madhya Bharat Official Language Act, 1950, the court held that as English had been the language of the court before, it could continue to be used, after the enactment as there was nothing in the Act which barred it. A similar decision was given in *Sarshwati Bai v Allahabad Bank Ltd*,[56] where the question was whether in view of rule 15 framed by the government under the powers conferred by Article 227(2)(b) of the Constitution. prescribing Hindi in *Devanagari* script as the language of the court, a plaint presented in English was valid. It was held that in the absence of an executive direction prohibiting the use of English, which had been the language of the court before, the plaint was valid. On the same reasoning, a written statement filed in Urdu was held to be valid as that was in use in the state previously.[57]

54. *LM Wakhare v State*, AIR 1959 MP 208 (the decision was given in 1953 but reported in 1959).
55. *Dayabhai Poonambhai v Natwarlal Sombhai Jalati*, AIR 1957 MP 1 : 1957 Jab LJ 22.
56. *Sarshwati Bai v Allahabad Bank Ltd*, AIR 1963 All 546.
57. *Mohd Azimuddin Ashraf v State of Uttar Pradesh*, AIR 1959 All 459 : 1959 All LJ 863.

[58]**[S 138] Power of High Court to require evidence to be recorded in English.**—(1) The [59][High Court] may, by notification in the Official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (*1*), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

[s 138.1] State Amendment

Assam, Nagaland, Meghalaya, Tripura and Manipur.—The following amendments were made by Assam Act 2 of 1941, section 2, (w.e.f. 12-2-1941) and Nagaland Act 27 of 1962, section 26 (w.e.f. 1-12-1963).

For section 138, in its application to Assam and Nagaland the following section shall be substituted namely:—

138. Power of High Court to require evidence to be recorded in English.—The High Court may, by notification in the Official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein that in cases in which an appeal is allowed, he shall take down, or cause to be taken down, the evidence in the English language and in the form and manner prescribed.

[S 139] Oath on affidavit by whom to be administered.—In the case of any affidavit under this Code—

(*a*) any Court or Magistrate, or

[60][(*aa*) any notary appointed under the Notaries Act, 1952 (53 of 1952); or]

(*b*) any officer or other person whom a High Court may appoint in this behalf, or

(*c*) any officer appointed by any other Court which the [61][State Government] has generally or specially empowered in this behalf,

may administer the oath to the deponent.

SYNOPSIS

[s 139.1] State Amendment 1527
[s 139.2] High Court Amendment 1528
[s 139.3] Clause (b) 1528
[s 139.4] Clause (c) 1529

[s 139.1] State Amendment

Uttar Pradesh.—The following amendment were made by Uttar Pradesh Act, 11 of 1981, section 2.

In its application to State of Uttar Pradesh, in section 139, the clauses (b) and (c) substituted as under and deemed always to have been so.

(*b*) any person appointed in this behalf by a High Court or by a District Court; or

58. For section 138, as applicable to Assam, see the Civil Procedure (Assam Amendment) Act, 1941 (Assam Act 2 of 1941), section 2.
59. Substituted by Act 4 of 1914, section 2 and Sch, Pt I for "L.G.".
60. Inserted by CPC (Amendment) Act 104 of 1976, section 46 (w.e.f. 1-2-1977).
61. Substituted for "Provincial Government" by IAO 1950.

(*c*) any person appointed in this behalf by such other Court as the State Government may, by general or special order, empower in this behalf.

[s 139.2] High Court Amendment

Calcutta High Court.—The following modifications were made by Calcutta Gazette, dated 20 April 1967, Part 1, p 760.

In its application to all suits or proceedings in the Court of Small Causes of Calcutta, in s 139, after the words, "under this Code", in the first line add the words, "or under the Presidency Small Cause Courts Act, 1882" and after the words "courts which", in clause (c), add the words "or by any judge whom".

[s 139.3] Clause (b)

The words "or other person" in clause (b) mean a person other than the officer of that court.

The deputy registrar of the high court is also not included within the meaning of "oath commissioner".[62]

In *Umesh Kumar,*[63] the chief secretary of the State Government filed an undated affidavit attested by a joint secretary before the Supreme Court. The Supreme Court took strong objection to filing of such an affidavit and said that the attestation of the undated affidavit is in utter disregard to the provisions of section 139. The Supreme Court Rules, 1966[64] under O XI, rule 7 therein also require adherence to the provisions of section 139. It was further held that the reply filed by the chief secretary was therefore not worth taking on record and being undated, rendered the same to be a piece of waste paper. The court did not consider it to be an excusable mistake and passed stricture against the deponent - chief secretary.

A Division Bench of the Allahabad High Court has held that the provisions contained in chapter 4 of the high court Rules do not exclude either expressly or by necessary implication the presentation of affidavits sworn before the Notaries in proceedings before the high court. Therefore, it cannot be held that only those affidavits which are sworn before the Oath Commissioners appointed by the Chief Justice of the high court can be presented and accepted in proceedings before high court.[65]

As held by the Calcutta High Court, affidavit affirmed in England before Notary Public is acceptable in absence of any notification regarding reciprocal recognition of acts done by foreign notaries in our country as per section 14 of the Notaries Act, 1952.[66]

Oath Commissioner, *ipso facto*, has no authority to administer oath and receive solemn affirmation in respect of high court. Oath Commissioner has to be appointed for the said purpose by high court as per CPC or by high court/sessions Court as per Cr PC.[67]

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62. *Shashi Bhushan Bajpai v Madhavrao Scindia*, AIR 1998 MP 31.
63. *Umesh Kumar v State of Andhra Pradesh*, (2013) 10 SCC 591 : JT (2013) 12 SC 213.
64. Please note that now the governing rules are the Supreme Court Rules, 2013 and the concerned provision is O IX, rule 7 therein.
65. *Sajjan Kumar v CL Verma*, AIR 2006 All 36 : (2006) 1 All LJ 73 (DB).
66. *Alan Kaya v Recovery Officer, Employees' Provident Fund Organisation, WB*, AIR 2006 Cal 158.
67. *Manju v Ghanshyam*, AIR 2008 MP 168 (DB).

[s 139.4] Clause (c)

See *Kamalnarain v Dwarka Prasad*,[68] reversed in appeal in *Kamal Narain v Dwarka Prasad*.[69]

In writ proceedings, the affidavit affirmed before a notary public is not admissible.[70] The history of admiralty jurisdiction has been traced in a Bombay case.[71]

For the admiralty jurisdiction of various high courts, see an Orissa judgment.[72]

[S 140] Assessors in causes of salvage, etc.—(1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

[s 140.1] Non Appointment of Surveyor—Effect

An admiralty suit instituted wherein a prayer as made for release of an arrested foreign ship. The suit was based on the allegations that the cables underneath the sea were broken on account of a certain vessel. The government did not appoint any surveyor to assist court and conclusion was arrived at that vessel in question, was one highly probable for breakage of the cables. It was held that the vessel cannot be released without imposing condition.[73]

[S 141] Miscellaneous proceedings.—The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

[74][*Explanation.*—In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.]

SYNOPSIS

[s 141.1]	State Amendment 1530	[s 141.4]	Proceedings in any Courts of Civil Jurisdiction..... 1533
[s 141.2]	Territorial Jurisdiction—This Section, Section 20(c) and Writ Proceedings..... 1530	[s 141.5]	The Procedure Provided in This Code..... 1538
[s 141.3]	This Section Does not Apply to Proceedings in Execution 1531	[s 141.6]	Explanation 1539

68. *Kamal Narain Sharma v Sri Pandit Dwarka Prasad Mishra*, AIR 1965 MP 15.
69. *Kamal Narain Sharma v Sri Pandit Dwarka Prasad Mishra*, AIR 1966 SC 436.
70. *Sudbai Sundari v State of West Bengal*, AIR 1983 Cal 1 (DB).
71. *Dimitrios Paizis v Motor Vessel Nices*, AIR 1983 Bom 178.
72. *Reena Padhi v Mootro Vessel Jaghir*, AIR 1982 Ori 57.
73. *Videsh Sanchar Nigam Ltd v MV Kapital Kud*, AIR 1996 SC 516 : (1996) 7 SCC 127.
74. Inserted by Act 104 of 1976, section 47 (w.e.f. 1-2-1977).

[s 141.1] State Amendment

HIGH COURT AMENDMENT

Calcutta.—Add the words "and in the Presidency Small Cause Courts Act, 1882", after the words "in this Code" and before the words "in regard to suits"; add the words "and except as therein otherwise provided", after the words, "be made applicable"; omit the words "be followed" after "shall" and put them after the words "otherwise provided"; substitute the words "in the Court of Small Causes of Calcutta" in place of "in any Court of civil jurisdiction" after the words "in all proceedings". *Vide* Cal. Gaz., Pt. I, dated April 20, 1967.

[s 141.2] Territorial Jurisdiction—This Section, Section 20(c) and Writ Proceedings

Although in view of section 141 of the Code of Civil Procedure, 1908 (CPC) the provisions thereof would not apply to a writ proceeding, the phraseology used in section 20(c) of the CPC and clause (2) of Article 226, being in pari materia, the decisions of the Supreme Court rendered on interpretation of section 20 (c) of the CPC shall apply to the writ proceedings also. Before proceeding to discuss the matter further it may be pointed out that the entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved, before the petitioner can obtain a decree, is the material facts. The expression, "material facts" is also known as integral facts.

Keeping in view the expressions used in clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction of cause of action accrues within the jurisdiction of the court, the court will have jurisdiction in the matter.

The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the court.[75]

In *Purno Agitok Sangma v Pranab Mukherjee,*[76] the petitioner had challenged the appointment of Pranab Mukherjee as the President of India on the ground that he held an office of profit, ie Chairman, Indian Statistical Institute. The Constitution Bench of the Supreme Court was seized of a question that whether by virtue of section 141, the provisions of the CPC can be made applicable in dealing with election petitions under the Presidential and Vice Presidential Elections Act, 1952. The majority comprising of Justices Kabir, Sathasivam and Nijjar held that section 141 of the CPC is not required to be incorporated into a proceeding taken under O XXXIX of the Supreme Court Rules, 1966[77] read with Part III of the Presidential and Vice Presidential Elections Act, 1952 which includes sections 14 to 20 of the aforesaid Act and Article 71 of the Constitution of India and held that the petition did not require a full and regular hearing. Justice Gogoi dissented, but did not give any direct finding on the applicability of section 141 of the CPC. Justice Chelameshwar held that the submission that section 141 of the CPC applies to the conduct of an election petition under the Presidential and Vice Presidential Elections Act, 1952 is untenable.

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75. *Kusum Ingots & Alloys Ltd v UOI*, AIR 2004 SC 2321 : (2004) 6 SCC 254 : 2004 SCR 841 : (2004) 5 Scale 304.
76. *Purno Agitok Sangma v Pranab Mukherjee*, (2013) 2 SCC 239 : (2012) 11 SCR 585 : (2012) 12 Scale 194
77. Now Supreme Court Rules, 2013

[s 141.3] This Section Does not Apply to Proceedings in Execution

Section 647 of the Code of Civil Procedure 1882, as it stood when that Code was first enacted, ran as follows:

> The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction *other than suits and appeals.*

The question arose under that section whether the words "proceedings other than suits and appeals" included proceedings in execution; in other words, whether that section had the effect of rendering the provisions of the Code relating to suits applicable to proceedings in execution of a decree. On the one hand, the High Courts of Allahabad[78] and Bombay,[79] held that that the section applied to applications for execution of decrees, so that the procedure relating to suits was applicable to applications for execution. On the other hand, the High Court of Calcutta held that that section did not apply to proceedings in execution.[80] In this state of authorities the legislature intervened, and an explanation was added to the section by the Code of Civil Procedure (Amendment Act) 1892, which ran as follows:

> *Explanation*—This section does not apply to applications for the execution of decrees which are proceedings in suits.

The effect of the above explanation was to supersede the Allahabad and Bombay rulings above referred to, and to give legislative sanction to the Calcutta decision.

In the meantime, one of the Allahabad cases referred to above, namely, the case of *Fakir-ullah v Thakur Prasad*,[81] was taken up to the Privy Council, and that tribunal held, in the year 1894, that independently of the explanation, section 647 (now section 141), did not apply to applications for execution, but only to original matters in the nature of suits, such as proceedings in probates, guardianships, and so forth, thus overruling the Allahabad and Bombay cases.[82] If this decision had come three years earlier, it would have made the enactment of the explanation unnecessary. The Privy Council decision and the recognition of the rule that section 647 did not apply to execution proceedings, rendered that explanation redundant and hence was omitted from the section.[83] The Supreme Court also has held that the section has no application to execution proceedings.[84] At the same time, two alterations have been made in the section, namely:

(a) the words "in regard to suits" have been added; and

(b) the words "other than suits and appeals" have been omitted.

In doing so, the legislature has now done what it could have done as well in 1892.

This section, we have said, does not apply to proceedings in execution.[85] Hence, the procedure provided in the CPC in regard to suit does not apply to applications for execution of decrees. The following are the leading decisions on the subject:

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78. *Ram Singh v Kifayat Ali*, (1885) 7 All 359; *Surju Prasad v Sita Ram*, (1888) 10 All 71; *Fakirullah v Thakur Prasad*, (1890) 12 All 179; *Radha Charan v Man Singh*, (1890) 12 All 392.
79. *Pirjade v Pirjade*, (1882) 6 Bom 681.
80. *Bunko BeharyGangopadhya v Nil Madhub Chuttopadhya*, (1891) 18 Cal 635.
81. *Fakir-ullah v Thakur Prasad*, (1890) 12 All 179.
82. *Thakur Prasad v Fakir-ullah*, (1895) 17 All 106 : 22 IA 44.
83. *Hari Charan v Manmatha*, (1914) 41 Cal 1; *Balasubramania v Swarnammal*, (1915) 38 Mad 199.
84. *Bhushayya v Ramakrishnayya*, AIR 1962 SC 1886; affirming *Katragadda Bapayya v Dokku Bhushayya*, AIR 1950 Mad 397 : (1950) 1 Mad LJ 196 : 63 LW 155 (FB).
85. *Hari Charan Ghose v Manmatha*, (1914) 41 Cal 1; A *BalasubramniaChetti v Swarnammal*, (1915) 38 Mad 199; *BabuiRittu Kuer v Alakhdeo Narain SIngh*, (1918) 4 Pat LJ 330; *Bholu v Ram Lal*, AIR 1921 Lah 67 : (1921) 2 Lah 66; *BharatIndu v Ashgar Ali Khan*, AIR 1923 All 460 : (1923) 45 All 148; *Narendra v Rakhal das*, AIR 1925 Cal 510 : (1925) 41 Cal LJ 286; *Basaratulla v Reasuddin*, AIR 1926 Cal 773 : (1926) 53 Cal 679.

(i) The provisions of section 11 relating to *res judicata* in regard to suits do not apply to applications for the execution of decrees. But though these provisions, do not in terms, apply to applications for execution, they are governed by principles analogous to those of *res judicata*.[86]

(ii) If the provisions of O I, rule 10 cannot be invoked for impleading the heirs of the deceased defendant, due to non-applicability of section 141, the heirs can certainly rely upon the inherent powers of the courts under section 151 of the CPC. What is to be noted is that rule 9 of O XXII enables only the plaintiff or the person claiming to be the legal representative of the deceased plaintiff to apply for an order to set aside an abatement—the legal representative of a deceased defendant are not so enabled.[87]

(iii) The provisions of O II, rule 2 (Code of Civil Procedure, 1882, section 431) do not apply to applications for execution. Hence, where a decree awards two distinct reliefs, an application to enforce one relief is no bar to a subsequent application to enforce the other relief, though both reliefs are awarded by the same decree,[88] or where an application for the amount of the principal due under a decree is allowed, a subsequent application for interest is not barred.[89] Where payment of the amount deposited by the judgment-debtor in court does not completely discharge a money-decree, a fresh application for the realisation of the balance due to the decree-holder is maintainable, so long as the executing court has not become functus officio.[90]

(iv) The provisions of O IX do not apply to applications for execution. Hence, if the applicant fails to appear at the hearing of the application, the court cannot dismiss the application under O IX, rule 8, though it may do so under its inherent power.[91] And where in the exercise of this power an application for execution is dismissed, the court has no power to restore it to the file under O IX, rule 9[92] as that rule does not apply to execution proceedings. But though the court has no power to restore to the file, an application, which has once been dismissed for default, such dismissal is no bar to a fresh application for execution.[93] On the power of the court to restore such applications in its inherent jurisdiction, see the under mentioned cases[94] and notes under section 151.

(v) The provisions of O XVII, rules 2 and 3 do not apply to an application for execution. Hence, an order dismissing an application for default is no bar to a fresh application for execution.[95]

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86. *Mohanlal Goenka v Benoy Krishna*, AIR 1953 SC 65 : (1953) SCR 377 : (1953) SCJ 130. See note to section 11, "Orders in execution proceedings".
87. *Sriramula Ramachandram v Sriramula Bhoodamma*, AIR 1994 AP 79.
88. *Radha v Radha*, (1891) 18 Cal 515; *Sadho v Hawat*, (1897) 19 All 98.
89. *Ram Devi v Mangan Lal*, AIR 1935 All 195.
90. *Amin Chand v Firm Chunilal Tulsi Ram*, AIR 1937 Lah 733.
91. *Dhonkal v Phakkar*, (1894) 15 All 84; *Balmukund v Prabhakar*, AIR 1955 Ngp 305 : (1956) Nag LJ 254.
92. *Hajrat v Vadhulnissa*, (1894) 18 Bom 429; *Sarat Krishna v Biswesswar*, AIR 1927 Cal 534 : (1927) 54 Cal 405.
93. *Thakur Prasad v Fakirullah*, (1895) 17 All 106 : 22 IA 44; *Bharat v Asghar*, AIR 1923 All 460 : (1923) 45 All 148, *Jethmal v Mst Sakina*, AIR 1961 Raj 59 : (1960) II R Raj 1297. See notes to O IX, rule 9 and O IX, rule 13.
94. *Eswariah v Sambamma*, AIR 1958 AP 341 : (1958) 1 Andh WR 320; *Gour Nag v Amaria Sendh*, AIR 1958 Ori 200; *Nemchand v Umed Mal*, AIR 1962 Raj 107. But see *Doma Choudhary v Ram Nawal Lal*, AIR 1959 Pat 121 (FB).
95. *Tirthasami v Annappayya*, (1895) 18 Mad 131.

(vi) An application under O XXI, rule 90 to set aside a sale in execution, is an application in execution and therefore the provisions of O XXXII, rule 7 as to consent of guardian do not become applicable to it under section 141.[96]

(vii) The provisions of O XXIII, rule 1 do not apply to applications for execution. Hence the withdrawal of an application, though it be without the leave of the court, is no bar to a fresh application for execution.[97]

(viii) See note to section 144, "Whether a proceeding under this section is a proceeding in execution".

(ix) See O XXII, rule 12.

(x) The execution court cannot refer a dispute to arbitration, and a fortiori, a court hearing an execution appeal cannot.[98] Section 141 is inapplicable in execution proceedings. Copy of sale proclamation need not be annexed to the notice to the judgment-debtor under O XXI, rule 66. It cannot be argued that by virtue of the provisions of section 141, the provisions governing suits contained in O V, rules 1 and 2 are applicable to execution applications.[99]

Other cases under this section are considered in their proper places.

[s 141.4] Proceedings in any Courts of Civil Jurisdiction

As stated earlier, the Privy Council in *Thakur Prasad v Fakir-ullah* took the view that this section did not apply to applications for execution but applied only to "original matters" in the nature of suits, such as proceedings, in probates, guardianship and "so forth". The words "so forth" used by the Privy Council were understood to mean proceedings ejusdem generis with the instances preceding them and would include proceedings such as in divorce, insolvency, for succession certificates, land and the like. In other words, this section applies to original matters, ie matters which originate in themselves and not those which spring from a suit or from some other proceeding or arises in connection therewith.[100] Thus, an application for probate may be dismissed for default under O IX and then restored.[101] Rejection of an application for restoration would be appealable under O XLIV, rule 1(e). Following the dictum of the Privy Council, the Calcutta High Court in *Sarat Krishna Bose v Bisweswar Mitra,*[102] held that this section did not make O IX applicable to proceedings under O IX. Therefore, when an application under O IX, rule 9 for restoration of a suit was dismissed for default under rule 4 of that order, no application lay under O iX, rule 9 for setting aside that order of dismissal and for its restoration. The view that the provisions of O IX had no application to a proceeding under that order, was restated by the Orissa High Court in *Kunj Behari v Chanchala Das.*[103] Likewise, a Division Bench of the Bombay High Court, following *Sarat Krishna Bose v Bisweswar Mitra,* held that where a suit is dismissed for default and an application for its restoration under O IX,

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96. *Bhushayya v Ramakrishnayya,* AIR 1962 SC 1886.
97. *Thakur Prasad v Fakirullah,* (1895) 17 All 106 : 22 IA 44; *Bunko Behary v Nill Madhub,* (1891) 18 Cal 635. See now O XXIII, rule 4.
98. *Moradhwaj v Bhudar Das,* AIR 1955 All 353 : (1955) All LJ 96 (FB).
99. *Durga Prasad v Brij Behari lal,* AIR 1981 All 172.
100. *Thakur Prasad v Fakirullah,* 22 IA 44 : (1895) 17 All 106; *Narayan v Dhondiba,* AIR 1937 Bom 111; *Rup Lal v Manohar Lal,* AIR 1936 Lah 863; *Surat Chandra v Biswaswar Mitra,* (1926) 54 Cal 405, 410; *Ram Gopal v Shanti Lal,* AIR 1942 All 85 : (1941) ILR All 807.
101. *Rup Lal v Manohar Lal,* AIR 1936 Lah 863; *Nira Kanta v Bedoi Chuttiani,* AIR 1977 Gau 70.
102. *Sarat Krishna Bose v Bisweswar Mitra,* (1927) ILR Cal 534.
103. *Kunj Behari v Chanchala Das,* AIR 1966 Ori 24.

rule 9 is also dismissed for default, a further application to restore the application under O IX, rule 9 does not attract this section, the reason given being that this section contemplates only proceedings which are original matters in the nature of suits such as proceedings in probate, guardianship and so forth and also applications which are *ejusdem generis* with such proceedings.[104] In this decision, the high court considered several decisions of different high courts stating varying views as to the applicability of this section to such matters and the view held there, that in any case, resort could be had to the inherent powers of the court under section 151. However, in *Ramkarandas Radhavallabh v Bhagwandas,*[105] the Supreme Court held that where an application is made to set aside a decree for ejectment under O XXXVII, rule 4 and the finding is that no special circumstance is made out to set aside such a decree, there is no scope for the applicability of section 151, since inherent powers are to be exercised in exceptional cases in respect of which the CPC does not lay down any procedure. This view appears to have been understood as being contrary to the decisions cited earlier, although neither this section nor O IX was involved in it. The decision, which specifically runs contrary to the Privy Council dictum in *Ramchandra v State of Uttar Pradesh,*[106] where the question canvassed was whether a proceeding before a civil court arising out of a reference under section 146 (1) of the Code of Criminal Procedure, 1973 (CrPC) is a civil proceeding as contemplated by this section. In dealing with that question, the Supreme Court observed that the expression "civil proceeding", in this section, is not necessarily confined to an original proceeding like a suit or an application for appointment of a guardian, etc, but that it applies also to a proceeding which is not an original proceeding. This observation is certainly in conflict with the Privy Council dictum followed by the Bombay, Calcutta and Orissa High Courts that this section contemplates proceedings which are original matters in the nature of suits, such as proceedings in probate, guardianship and so forth. In the light of the above observations of the Supreme Court, a proceeding under O IX for restoration of an application dismissed for default under that order, would be a civil proceeding within the meaning of this section and that there being a remedy provided by the Code, no resort can be had in such cases to section 151. Contrary to the Calcutta and Bombay view, the Punjab and Haryana High Court in decision, has held that an application under O IX, rule 9 is competent if it sought restoration of an earlier application seeking restoration of the suit in the event that the suit and the earlier application have both been dismissed for default.[107]

The Gauhati High Court has held that where an appeal is dismissed for default and an application for its re-admission is pending, such an application gives rise to a proceeding within the meaning of section 141 of the Code. Since it is merely the procedural part of the Code which is applicable to a proceeding under section 141 of the Code, the substantive part of the code, such as, section 94(c) would not be applicable to a proceeding for re-admission of an appeal under O XLI, rule 19 of the Code. Thus a court cannot grant temporary injunction during the proceeding for restoration of an appeal. However, it was further held that the court may grant such injunction taking recourse to section 151 of the Code if the situation so demands.[108]

The Allahabad High Court has held that the expression all proceedings in any court of Civil jurisdiction" in section 141 is of wide import and an application filed for restoration of second

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104. *Laxmi Investment Co v Tarachand*, AIR 1968 Bom 250.
105. *Ramkarandas Radhavallabh v Bhagwandas*, AIR 1965 SC 1144.
106. *Ramchandra v State of Uttar Pradesh*, AIR 1966 SC 1888 : (1966) SCR Supp 393.
107. *Bhajan Singh v Ganeshi Devi*, AIR 1978 P&H 257.
108. *Sri Yogesh Shah v Smt Dharmeswari Devi*, AIR 2006 Gau 87 : (2006) 1 Gau LT 623.

appeal dismissed as being abated and substitution application would fall within the ambit of the said expression. Therefore, it is open to Court to pass appropriate orders for injunction or stay during the pendency of such applications.[109]

An application under section 5(4) of the Assam Urban Area Rent Control Act, 1972 for deposit of rent in court cannot be treated as a proceeding within the meaning of section 141 of the Code as the court cannot be said to be adjudicating any dispute between the landlord and tenant. Therefore, provisions of O IX, rule 4 of the CPC do not apply for restoration of the said application.[110]

In another case, the Gauhati High Court has held that an application under O XXXIX, rule 2-A against violation of injunction order gives rise to a "proceeding" within the meaning of section 141 and therefore, the same can be adjourned invoking O XVII, rule 1 of the Code. In the same case, it has been further held that an application for temporary injunction cannot be treated as a proceeding under this section reiterating its earlier view in *Yogesh Shah's case* (supra).[111]

Where a suit was decreed *ex parte* and an application under O IX, rule 13 for restoration of the suit was also dismissed for default, in view of the amended provisions of section 141, two alternative remedies were available to the applicant. He could file an application under O IX, rule 9 read with section 141 for restoration of the application dismissed for default or an appeal under O XLIV, rule 1(c). As the CPC provides for alternative remedies, remedy under section 151 was not available.[112] In 1988, Calcutta High Court held that where a miscellaneous case (an application under O IX, rule 4, 9 or 13) is dismissed for default, application for the restoration of such miscellaneous case is maintainable under O IX, read with section 141.

Proceedings under O IX are to be treated as miscellaneous proceedings within the meaning of section 141, (as amended in 1976). Limitation for such an application for restoration would be governed by Article 137 of the Limitation Act, 1963. However, the high court observed that amendment in the law should be made so that such application would be governed by Article 122 of the Limitation Act, 1963.[113]

The proceeding within this section must be a proceeding in a court of civil jurisdiction. An application for letters of administration can be stayed under section 10, pending the disposal of such an application filed earlier in another court having jurisdiction.[114] An application under section 18 of the Religious Endowments Act, 1863, is a proceeding of this nature. Hence, it must be verified as required by O VI, rule 15, of the CPC.[115] But an application for settlement of rents made to a revenue officer under section 105 of the Bengal Tenancy Act 8 of 1885 is not a proceeding in a court of civil jurisdiction. Hence, the petition need not be signed as required by O VI, rule 14.[116] A petition by a company to the high court under the Indian Companies Memorandum of Association Act, 1895, for the confirmation of a special resolution altering the memorandum of association of the company, is a proceeding within the meaning of this section. Therefore, where the petition was dismissed and the company applied for leave to appeal to the Privy Council, the case was dealt with by the court under section 595 of the

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109. *Basant Lal v Lakshmi Chand*, AIR 2007 All 32 : (2007) 1 All LJ 158.
110. *Samiran Paul v Anubha Banik*, (2007) 4 Gau LT 484 : (2007) 59 All Ind Cas 790.
111. *Hareswar Roy v Mustt Monowara*, AIR 2010 Gau 22 : (2009) 5 Gau LT 67.
112. *Hazi Rustam Ali v Emanuddin Khan*, AIR 1981 Cal 81.
113. *Numahar Bewa v Rabindra Nath*, AIR 1988 Cal 358.
114. *Re goods of Lilian Singh*, AIR 1943 Cal 19 : (1942) 12 Cal 194.
115. *Amdoo Miyan v Muhammad*, (1901) 24 Mad 685.
116. *Hazari Lal v Ambica*, AIR 1924 Pat 104 : (1924) 3 Pat 67.

Code of Civil Procedure 1882, [now section 109].[117] Similarly an application to set aside an *ex parte* payment order made under the Indian Companies Act 6 of 1882, is a proceeding in a court of civil jurisdiction. Hence the provisions of O IX, rule 13 apply to the case.[118] An order passed by a civil court under section 120 of the Indian Companies Act, 1913, is in exercise of its power as a court of civil jurisdiction under this section.[119] Proceedings under section 187 of the Indian Companies Act, 1913, are proceedings in a court of civil jurisdiction.[120] The court has power under O XXIII, rule 3 read with section 141, to record a compromise entered into in the course of proceedings under the Companies Act.[121] It can order amendment of pleadings under O VI, rule 17.[122] It can pass interlocutory orders as provided in section 94 in proceedings under section 186(1) of the Companies Act, 1956.[123]

This section is applicable to proceedings under section 235 of the Companies Act, 1956 and where a creditor who had filed a petition under that section died, it was held that an application of his legal representative to come on record was governed by O II and must be filed within the period of limitation prescribed for petitions under O II.[124] An application under section 12 of the Guardians and Wards Act, 1890, is a proceeding in a court of civil jurisdiction. Hence, a receiver may be appointed in such a proceeding under O XL, rule 1,[125] and the receiver so appointed will have all the powers of a receiver under the CPC.[126] The court cannot dismiss an application for the appointment of a guardian summarily, and on a perusal of the pleadings, as the provisions of the Code are, under this section, applicable to proceedings under that Act and a decision should be given only after hearing the parties and taking evidence.[127] An application under O IX, rule 13, is a proceeding referred to in this section and so section 21 as to objection to jurisdiction applies to such an application.[128] But an application for a succession certificate under the Succession Certificate Act, 1889, is not such a proceeding. Hence, a receiver cannot be appointed under O XLI in such a proceeding.[129] An application for the appointment of a common manager under section 93 of the Bengal Tenancy Act 8 of 1885, is a proceeding of the kind contemplated by this section; a receiver, therefore, may be appointed under O XL, rule 1, pending the application.[130] Disciplinary proceedings taken under section 14 of the Legal Practitioners Act 18 of 1879 are "not proceedings in any court of civil jurisdiction" within the meaning of this section; therefore, the procedure provided by section 24 of the CPC does not apply to those proceedings.[131] An issue referred to a civil court under the Agra Tenancy Act, 1926, by a revenue court is an original matter in the nature of a suit and the civil court has jurisdiction under this section (read with O IX) to entertain an application for setting aside

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117. *Bombay Burmah Trading Corp v Dorabji*, (1903) 27 Bom 415.
118. *Hindustan Bank v Mehraj*, (1920) 1 Lah 187.
119. *Re Dinshaw & Co Bankers Ltd, in liquidation, Lucknow*, AIR 1937 Oudh 62.
120. *Official Liquidators DDMET Co v President, Council of Regency, Nabha State*, AIR 1936 All 286 (FB) : (1936) 58 All 742.
121. *Vadilal Chatrabhuj v Thakorelal*, AIR 1954 Bom 121 : (1954) ILR Bom 79 : (55) Bom LR 629.
122. *Bastar Transport and Trading Co v Court of Wards*, AIR 1955 Ngp 78 : (1955) ILR Nag 437.
123. *Pt Ram Roop v CRE Wood & Co*, (1958) 28 Com Cas 68.
124. *Prabhakar v Vikram Sugar Mills*, AIR 1963 MP 120; *Sriamula Ramchandran v Sriramula Bhoodamma*, AIR 1994 AP 79.
125. *Re Bai Jamnabai*, (1912) 36 Bom 20; *Chandrawati v Jagan Nath*, AIR 1925 Lah 489 : (1925) 7 Lah LJ 281.
126. *Jyoti prasad v Pearilal*, AIR 1930 Cal 384 : (1930) 57 Cal 733.
127. *Shiv Saran v Satbhirawan Trust*, AIR 1961 P&H 17 : 63 Punj LR 615.
128. *Dwarka Das v Pyare Lal*, AIR 1930 All 873 : (1930) 52 All 947.
129. *Kanhaiya v Kanhaiya*, AIR 1924 All 376 : (1924) 46 All 372.
130. *Asadali v Mahomed*, (1916) 43 Cal 986. But O XL, rule 1, is not confined to "suits".
131. *Re Janak Kishore*, (1916) 1 Pat LJ 576.

an *ex parte* decision passed by it.[132] An inquiry before a commissioner appointed by a court to ascertain the amount of mesne profits payable by one party to another is a proceeding within the meaning of this section. Hence, the provisions of O XVIII, rule 1 apply to the proceeding.[133] In a suit on a mortgage an application under O XXXIV, rule 5(3), for a final decree,[134] or under O XXXIV, rule 6 for a personal decree[135] is not a proceeding in execution, but a proceeding contemplated by this section, and so the provisions of O IX apply.[136]

The provisions of the CPC have been held to be applicable to proceedings under section 24 of the Code,[137] as also to petitions under O XXXIII, rule 1.[138] It has been observed that an application for amendment is not within this section, as it is not a proceeding original in its nature but is purely interlocutory.[139] This decision requires reconsideration in view of the Supreme Court decision in *Ramchandra v State of Uttar Pradesh.*

The Supreme Court has held that the CPC is applicable to proceedings in court under the Arbitration Act, 1940 (now replaced by Arbitration and Conciliation Act, 1996), and that where, after an award was given by the arbitrator, the parties entered into a compromise, the court has the power to record it under O XXIII, rule 3, read with this section, and make it part of the decree either by incorporating it in the operative portion thereof or the schedule thereto.[140] An arbitrator, appointed under the Defence of India Act, 1939, for purposes of settlement of compensation under section 19 of that Act, is a court of civil jurisdiction, to whose proceedings this section applies.[141] This section also applies to proceedings under the Bombay Agricultural Debtors Relief Act, 1947.[142] It has been held that the provisions of the CPC are applicable to proceedings under Displaced Persons (Debts Adjustment) Act, 1951, and so an application dismissed for default could be restored under O IX.[143] section 141 has no application to proceedings which come to a civil court under the provisions of the CrPC.[144] An order passed *ex parte* in proceedings under section 146 of the CrPC cannot be set aside under O IX, rule 13;[145] nor could petitions under section 195(1)(b) or (c)[146] or under section 476[147] of the CrPC dismissed for default of appearance be restored under O IX, rule 9, of the Code. The Supreme Court has held that even before commencement of arbitral proceedings, an application under section 9 of the Arbitration Act, 1996 can be filed and such application, being original in nature, shall be treated as to be at the same footing as the proceedings within the meaning of section 141.[148]

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132. *Basant Lal v Chiranji*, AIR 1934 All 86 : (1935) 56 All 390.
133. *Ramakka v Negasam*, AIR 1925 Mad 145 : (1924) 47 Mad 800.
134. *Sriramulu v Sriamulu*, AIR 1933 Mad 55 : (1932) 56 Mad 310.
135. *Babu Lal v Raghunandun*, AIR 1930 All 841 : (1930) 52 All 839; *AKRLPA Chattyar Firm v S Mehar*, AIR 1930 Rang 257 : (1930) 9 Rang 316.
136. See also notes to O IX, rule 9, "Dismissal for default of application to restore suit".
137. *Subba Reddi v Narayanaswami Reddi*, AIR 1949 Mad 283 : (1948) 2 Mad LJ 251.
138. *Prem Singh v Sat Ram Das*, AIR 1958 P&H 52.
139. *Manilal & Sons v Umedhbhai & Co*, AIR 1957 Cal 688.
140. *Munishi Ram v Banwari Lal*, AIR 1962 SC 903 : (1962) Supp 2 SCR 918.
141. *Sailaja Kanta v State of West Bengal*, 75 Cal WN 804 : (1971) ILR 1 Cal 256.
142. *Keshav Lal v Vithalbhai*, AIR 1965 Guj 275 : (1964) ILR Guj 1064 : 5 Guj LR 988.
143. *Sita Ram v Bashi Ram Gobind Singh*, AIR 1962 Punj 239 : (1962) 1 Punj 190.
144. *Periakarupa Thervar v Vellai*, AIR 1963 Mad 338 : (1963) 1 Mad LJ 376; *Abdul Sattar v Jankivallabh*, AIR 1961 Raj 245 : (1960) ILR Raj 742; *Sheonath Prasad v City Magistrate, Varanasai*, AIR 1959 All 467 : (1959) All LJ 365; *Both Narain v Deo Narain*, AIR (1958) Pat 308.
145. *Periakarupa Thevar v Vellai*, AIR 1963 Mad 338 : (1963) 1 Mad LJ 376.
146. *Ramanna v Nagabhushanam*, AIR 1957 AP 898.
147. *Peda v Nagabhushanam*, (1955) Andh WR 880.
148. *East India Udyog Ltd v Maytas Infra Ltd*, AIR 2015 AP 118 : (2015) 5 Andh LD 446.

It has been held that the provisions of the Code are applicable to proceedings under the Lunacy Act;[149] under the Madras Agriculturists Relief Act, 1938;[150] under the Madras Hindu Bigamy Prevention and Divorce Act, 1949.[151]

The Supreme Court has held that section 141 has no application to inquiries under sections 7 and 45 of the Administration of Evacuee Property Act, 1950.[152] The provisions of the Code have been held to be inapplicable to proceedings before the rent controller under Jaipur Rent Control Order[153] or to proceedings under UP Land Reforms (Supplementary) Act 1952.[154]

On the question whether section 141 is applicable to revision petitions, the preponderance of authority is in favour of the view that it does not.[155] The contrary view was taken in the under mentioned case.[156]

[s 141.5] The Procedure Provided in This Code

Section 141 of the Act leaves no doubt that in a proceeding where an application is filed for passing the decree on the basis of the award submitted by the arbitrator, the provisions of the CPC are applicable and there is no provision which excludes operation of O IX. Similarly, in view of section 141 of the CPC, the procedure prescribed in it is to be followed as far as it can be made applicable to all proceedings in the court of civil jurisdiction. Hence, in the proceedings initiated for making the award, a rule of the court, the provisions of the CPC, including O IX, rule 13 would be applicable. As per the explanation to section 141, the expression "proceedings" includes proceedings under O IX.[157]

Explanation 2 of section 141 of the CPC introduced by 1976 Amendment Act specifically includes proceedings under O IX within the purview of the said section. Thus, there will be no difficulty in applying section 141 to proceedings arising under O IX, CPC, including applications to restore an application filed for restoring the suit dismissed for default in view of specific inclusion of said proceedings within the ambit of section 141.[158]

This section extends the procedure provided in the CPC in regard to suits and to proceedings in civil courts. It does not confer any substantive right not expressly given elsewhere by the Code, eg, a right of appeal.[159] Hence, no appeal lies from an order passed in a "proceeding" of the kind contemplated by this section unless the order comes within the purview of O XLIII.[160]

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149. *Venkatasubba v Lalithamba*, (1955) Andh WR 320.
150. *Satyanarayana v Peddi Naidu*, AIR 1941 Mad 362 : (1940) 2 Mad LJ 940 : 52 LW 846; *Viswanatham v Sokalachand*, AIR 1947 Mad 377 : (1947) 1 Mad LJ 228 : 60 LW 218.
151. *K Venkatamma v K Seethaiah*, (1960) 1 Andh WR 1 : (1960) WR 366.
152. *Ebrahim Aboobaker v Tek chand*, AIR 1953 SC 298 : (1953) SCR 691 : (1953) SCJ 411.
153. *D Nathulal v Collector, Sawai Jaipur*, AIR 1952 Raj 36.
154. *Debi Prasas v Khelawan*, AIR 1957 All 67.
155. *Kanhiyalal v Mangal Singh*, AIR 1953 Raj 69 : (1952) ILR Raj 811; *Babulal v Mamlal*, AIR 1953 Raj 169; *Jowala Singh v Malkan*, AIR 1958 P&H 171.
156. *Chakrapani v Beharilal*, AIR 1953 MB 272.
157. *UOI v Manager, Jain & Associates*, AIR 2001 SC 809 : (2001) 3 SCC 277.
158. *T Krishnaswamy v Maniyamme*, AIR 2001 AP 37.
159. *Bhagwanti v New Bank of India*, AIR 1950 EP 309 (FB); *District Judge Hoshangabad v Seth Shri Kissen Das*, AIR 1942 Ngp 8 : (1941) ILR Nag 588; *Parasurama v Sebier*, (1904) 27 Mad 504; *Damodara v Kittappa*, (1913) 36 Mad 16; *Venkata Reddi v Ramabrahamam*, AIR 1953 Mad 417 : (1953) 1 Mad LJ 240.
160. *Chandar v Durga*, AIR 1924 All 682 : (1924) 46 All 538; *Ram v Muram*, AIR 1922 Cal 572 : (1922) 36 Cal LJ 184; *Habibar v Saidannessa*, AIR 1924 Cal 327 : (1923) 38 Cal LJ 358; *Chandra Wati v Jagan Nath*, AIR 1925 Lah 489 : (1957) 7 Lah LJ 281; *Re Jagan Nath*, AIR 1925 Lah 489 : (1925) 7 Lah LJ 281; *Janki Amma v K Narayana Pillai*, AIR 1953 TC 37.

Nor does an appeal lie from an order returning a memorandum of appeal to the proper court.[161] Further, the section does not confer upon any court entertaining such proceedings a power not expressly given elsewhere by the CPC, eg, the power to refer questions to the high court (section 113).[162]

The right conferred on a ruler under section 86 is one of substance and cannot be claimed under section 141 in a probate proceeding,[163] nor the right to apply for review, which is not a procedural but a substantive right.[164]

[s 141.6] Explanation

As against the dismissal of the restoration application under rules 2 and 3 of O IX read with section 141, CPC, a two-fold remedy is provided under rule 4 of O IX read with section 141, wherein it is provided that where the suit is dismissed under rule 2 or rule 3, CPC, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the court shall make an order setting aside the dismissal. Thus, from a plain reading of rules 2, 3, 4 and 5 read with section 141, it is clear that the plaintiff-appellant had two remedies either to bring a fresh suit or may apply for setting aside the dismissal under rule 4 of O IX with the aid of section 141CPC or may bring fresh suit (subject to law of limitation) under rule 5(2) of O IX. Both these remedies are simultaneous and would not exclude either of them. The application under O IX, rule 4 read with section 141 CPC for restoration of miscellaneous application is maintainable.[165]

Judicial opinion is divided on the question whether section 141 applies to Writ Petitions under Article 226 of the Constitution. It has been held by a Full Bench of the Punjab High Court that it applies,[166] and that is also the view of the High Court of Andhra Pradesh.[167] But a different view has been taken by the High Courts of Calcutta[168] and Madras.[169] A Single Judge of the Punjab High Court, also, has held, though without referring to that High Court's earlier decision, in *Sona Ram Ranga Ram v Central Government*, (Supra) that this section does not apply to Article 226 proceedings as the high court, when it exercises its extraordinary jurisdiction, cannot be said to be a court of civil jurisdiction.

The explanation inserted in 1976 resolves the judicial controversy both as regards the applicability of the provisions of the CPC under this section to applications for setting aside *ex parte* proceedings or orders of dismissal for default under O IX, rule 9 and also as regards the applicability of the provisions of the CPC to writ proceedings under Article 226. It, now, provides that in the case of the former, they apply and in the case of the latter they do not.

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161. *Gaizaddy v Saroj Kumar*, (1928) 32 Cal WN 693; *Raghunath v Shamo*, (1904) 31 Cal 344.
162. *Damodara v Kittappa*, (1913) 36 Mad 16.
163. *Vijaya Singhji v Maharaja Rajendra Singhji*, (1955) Bom 912 : 57 Bom LR 962.
164. *Debi Prasad v Khelawan*, AIR 1957 All 67 : (1956) All LJ 13; *N Mangi Singh v Ibomoha Singh*, AIR 1957 Mani 39; *Periyakarupa Thevar v Vellai*, AIR 1963 Mad 338 : (1963) 1 Mad LJ 376.
165. *Karmi Den Singh v Ram Chandra*, supra.
166. *Sona Ram Ranga Ram v Central Government*, AIR 1963 P&H 510 : (1963) ILR 2 Punj 341 : 65 Punj LR 599.
167. *Adinarayana v State of Andhra Pradesh*, AIR 1958 AP 16; *Assistant Dist. Panchayat Officer v Jai Narain*, AIR 1967 All 334 : (1967) All LJ 232. But see *Contra KB Manufacturing Co v Sales Tax Commissioner*, 1965 AA 517.
168. *Bharat Board Mills v The Regional Provident Fund Commr*, (1957) AC 701.
169. *Management of Rainbow Dyeing Factory v Industrial Tribunal*, (1959) Mad 75 : (1959) 1 ML 53 : (1959) AM 137 : 71 LW 835.

Though writ proceedings are not proceedings within the meaning of this section and therefore they are not governed by the CPC, the explanation does not run counter to the high court exercising its jurisdiction under Article 226 and invoking this section in doing so. This is done, not because the writ proceedings are governed by the CPC, but because its provisions are in conformity with the rules of natural justice. A writ petition dismissed for default can be restored upon a reasonable cause being shown.[170]

The high court, while exercising jurisdiction under Article 226 of the Constitution of India has jurisdiction to pass appropriate orders.[171] Proceedings under Article 226 of the Constitution of India stand on a different footing when compared to the proceedings in suits or appeals arising therefrom.[172]

Section 141 of CPC provides that procedure provided in the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction. But, the explanation to section 141 states that the expression "proceedings" does not include any proceedings under Article 226 of the Constitution of India.[173]

When the high court exercises extraordinary jurisdiction under Article 226 of the Constitution, it aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the CPC are to be applied to writ proceedings, the very object and purpose is likely to be defeated. In view of the conflicting opinions expressed by the different courts, the Parliament, by the aforesaid amending Act (1976), introduced the explanation saying that in section 141 of the Code, the expression "proceedings" does not include any proceedings under Article 226 of the Constitution and statutorily recognised the views expressed by some of the courts, that writ proceedings under Article 226 of the Constitution shall not be deemed to be proceedings within the meaning of section 141 of the CPC. After the introduction of the Explanation to section 141, it can be said that when section 141 provides that the proceedings prescribed in the CPC in regard to suits shall be followed, as far as it can be made applicable "in all proceedings in any court of civil jurisdiction" it shall not include a proceeding under Article 226 of the Constitution. In this background, it cannot be held that the provisions contained in O XXII of the CPC are applicable per se to writ proceedings.[174] Notwithstanding rule 24 of Writ Proceeding Rules, 1997 Andhra Pradesh (AP), the provisions of the CPC cannot be made applicable to any extent to any of the proceedings under Article 226 of the Constitution and the high court in dealing with such matters should be left to adopt its own procedure for granting relief to concerned person and by adopting a procedure which can be held not only reasonable but also expeditious.

With the total exclusion of the proceedings under Article 226 of the Constitution from the purview of section 141 of the CPC, there is no question of making applicable the procedure of the Code "as far as it can be made applicable to such proceedings". If, inspite of it, the provisions of the Code are made applicable to the proceedings under Article 226 of the Constitution, it would be repugnant to the extraordinary powers of the high court

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170. *Hans Raj v State of Himachal Pradesh*, AIR 1978 HP 63.
171. *Commr of Endowments v Vittal Rao*, AIR 2005 SC 454 : (2005) 4 SCC 120 : (2004) 9 Scale 660.
172. *Commr of Endowments v Vittal Rao*, AIR 2005 SC 454 : (2005) 4 SCC 120 : (2004) 9 Scale 660.
173. *Commr of Endowments v Vittal Rao*, AIR 2005 SC 454 : (2005) 4 SCC 120 : (2004) 9 Scale 660.
174. *Pooran Singh v State of Punjab*, AIR 1996 SC 1092 : (1996) 2 SCC 205; *State of Kerala v CU Scaria*, AIR 1994 Ker 35 (DB); *State of Gujarat v Vishnu Automobiles*, AIR 1999 Guj 92 (DB).

thereunder.[175] The Supreme Court, while dealing with a writ petition under Article 226 of the Constitution, has not totally excluded the possibility of allowing oral application made under Article 226 in emergent cases. It is so, because the procedural provisions of the CPC are not made applicable to writ proceedings under Article 226 by virtue of the explanation to section 141 of the CPC. It was observed that the practice of entertaining oral application and issuing interim orders by any court in matter of consequence without any affidavit having been shown to as a prima facie proof of allegation and without any record being kept before the court, may lead to very serious abuse of the process of the court. However, if some grossly iniquitous act is about to be perpetrated and any delay would result in the fait accompli of a monstrosity, urgent oral applications may be moved and urgent interim orders issued. But even in such cases, at least a skeletal application setting out the bare acts and the questions involved should be insisted upon. A detailed application could be permitted to be filed later.[176]

[S 142] Orders and notices to be in writing.—All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

[s 142.1] State Amendment

HIGH COURT AMENDMENT

Calcutta.—Insert the words "or of the Presidency Small Cause Courts Act, 1882", after the words "of this Code" and before the words "shall be in writing". *Vide* Cal. Gaz., Pt. I, dated April 20, 1967.

[S 143] Postage.—Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made:

Provided that the [177][State Government] [178][* * *] may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

[s 143.1] State Amendment

HIGH COURT AMENDMENT

Calcutta.—Insert the words "or the Presidency Small Cause Courts Act, 1882", after the words "issued under this Code" and before the words "and forwarded by post". *Vide* Cal. Gaz. Pt. I, dated April 20, 1967.

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175. *Hon'ble Secretary and Correspondent, Badruka College of Commerce and Arts v State of Andhra Pradesh*, AIR 1997 AP 179 (FB). See also *Board of Education of STB Churches, Nellore v State of AP*, AIR 2001 AP 319 (DB).
176. *Samarias Trading Co Pvt Ltd v S Samuel*, (1984) 4 SCC 666.
177. Substituted for "Provincial Government" by AO, 1950.
178. The words "with the previous sanction of the G.G. in C." omitted by Act 38 of 1920, section 2 and Sch I.

[S 144] Application for Restitution.—(1) Where and in so far as a decree [179][or an order] is [180][varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order] shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as well, so far as may be, place the parties in the position which they would have occupied but for such decree [179][or order] or [181][such part thereof as has been varied, reversed, set aside or modified] and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly [182][consequential on such variation, reversal, setting aside or modification of the decree or order].

[183][*Explanation.*—For the purposes of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include,—

(*a*) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(*b*) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(*c*) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.]

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

SYNOPSIS

[s 144.1]	State Amendment	1543	[s 144.12]	Restitution — Not Discretionary	1550
[s 144.2]	Changes in the Section	1543	[s 144.13]	Restitution — Three Conditions	1550
[s 144.3]	Scope	1544	[s 144.14]	Restitution — Properly Consequential	1551
[s 144.4]	Doctrine of Restitution	1545	[s 144.15]	Ordinary Case for Restitution	1551
[s 144.5]	Act of Court	1546	[s 144.16]	Interim Order	1552
[s 144.6]	Duty of the Court	1546	[s 144.17]	Mesne Profit	1552
[s 144.7]	Restitution	1547	[s 144.18]	Interest	1553
[s 144.8]	Restitution—Ambiguous Term	1549	[s 144.19]	Execution of Decree by Trial Court—Appeal does not Become Infructuous	1554
[s 144.9]	Restitution—Three Senses	1549			
[s 144.10]	Quantum of Restitution	1550			
[s 144.11]	Exclusion of Restitution — Effect	1550			

179. Inserted by CPC (Amendment) Act 66 of 1956, section 13 (w.e.f. 1-1-1957).
180. Substituted by Act 104 of 1976, section 48, for "varied or reversed, the Court of first instance" (w.e.f. 1-2-1977).
181. Substituted by Act 104 of 1976, section 48, for "such part therof as has been varied or reversed" (w.e.f. 1-2-1977).
182. Substituted by CPC (Amendment) Act, 1976 (104 of 1976), section 48(i)(c), for "consequential on such variation or reversal" (w.e.f. 1-2-1977).
183. Inserted by CPC (Amendment) Act, 1976 (104 of 1976), section 48 (w.e.f. 1-2-1977).

[s 144.20] Effect of Tripura Land Revenue and Land Reforms Act, 1960 Before Restitution 1554
[s 144.21] Splitting of Claim for Restitution 1555
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[s 144.35] Restitution and Compromise 1578
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[s 144.38] Appeal..... 1578
[s 144.39] Court-Fees 1579
[s 144.40] State Amendment 1579

[s 144.1] State Amendment

Uttar Pradesh.—The following amendment were made by Uttar Pradesh Act 24 of 1954, section 2 and Schedule, Item 5, entry 7, dated 30 November 1954.

In Section 144, for sub-section (1), the following shall be substituted:—

(1) Where and in so far a decree or an order is varied or reversed in appeal, revision or otherwise, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made, as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

HIGH COURT AMENDMENT

Calcutta High Court.—The following modification were made by Calcutta Gazette, dated 20 April 1967, Pt 1, page 760.

Section 144 extended to all suits or proceedings in the Court of Small Causes, Calcutta

[s 144.2] Changes in the Section

The corresponding section before it was restructured by the Code of Civil Procedure 1908 (CPC) was section 583 of the Code of Civil Procedure 1882. The section then provided that

"when a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the court which passed the decree against which the appeal was preferred; and such court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits". The language of the section confined the relief of restitution only in cases where the decree was reversed or varied in appeal preferred against the original decree and not to variation or reversal otherwise than in appeal, nor to a reversal or variation by the Privy Council in appeal[184] or in review by the same court.[185] The section was recast by the CPC to give legislative sanction to a practice which had been established by that time under which a wider interpretation was given to the section. As to recast, the section did not contain any limitation as to the manner in which a decree was varied or reversed as did the old section 583 which contained, the words "a decree passed in an appeal." The effect of the change was to extend the operation of the section to all cases where the decree was varied or reversed including reversal by a superior court, by the same court in the same proceedings or by a different court in different proceedings.[186] The Civil Procedure (Amendment) Act, 1976, inserted the words "or an order" after the word "decree", the effect of which was to extend the application of the section to cases where an order also was varied or reversed.

The Amendment Act, 1976 has, for the words "varied or reversed, the court of first instance" in sub-section 1, substituted the words "varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the court which passed the decree". It has also, for the words "Such part thereof as has been varied or reversed" substituted the words "such part thereof as has been varied, reversed, set aside or modified." Lastly, it has, for the words, "consequential on such variation or reversal" substituted the words, "consequential on such variation, reversal, setting aside or modification of the decree or order." The effect of these changes in sub-section (1) is to clarify, what some of the high courts had already done, that the benefit of the section shall also apply to variation or reversal, of the original decree, not only in appeal by a superior court but also by the same court in the same proceedings by review and to modification or setting aside of the decree by another competent court in a separate suit for setting aside the decree on grounds such as fraud, want of jurisdiction. The Explanation has been added because the words "the court of first instance" in the unamended sub-section (1) would obviously be inapposite in cases where the decree was set aside or modified by another court in a separate suit filed for that relief or where the court which passed the original decree has ceased to exist or has ceased to have jurisdiction to execute it.

Sub-section (2) has been retained unaltered.

[s 144.3] Scope

The principle of restitution has been statutorily recognised in section 144 of the CPC. section 144 of the CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order.[187]

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184. *Sadiq Hussain v Lalta Prasad*, (1898) 20 All 139.
185. *Collector of Meerut v Kalka Prasad*, (1906) 28 All 665.
186. *Devi Ram Chand v SV Bastikar*, AIR 1968 Bom 57 : (1967) 69 Bom LR 121.
187. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.

The Hon'ble Supreme Court[188] laid down the grounds in which section 144 CPC is applicable:

1. Restitution sought must be in respect of a decree or order which has been varied or reversed;
2. The party applying must be entitled to the benefit of restitution;
3. The relief which is claimed must be consequential to the reversal or variation of the decree or order.

In the present case there is no decree or order by the trial which mandate to hand over the possession to the defendant and hence, the present case is not fit for applicability of section 144 CPC.

[s 144.4] Doctrine of Restitution

The doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of a decree, and the decree, or part thereof, is subsequently varied or reversed on appeal by the judgment-debtor, or even in a separate suit[189] or otherwise, as for instance, on an application under the Bengal Money Lenders Act or Agriculturist Relief Act.[190] *A* filed a suit for a declaration that grant of *bhumidari* rights by the revenue authority in favour of *B* was illegal and sought for recovery of possession. The suit was decreed by the trial judge. A first appeal against the decree was dismissed. In second appeal, the high court held that civil courts had no jurisdiction to entertain a suit relating to *bhumidari* rights under section 84 of the Delhi Land Reforms 1954, and dismissed the suit. On such dismissal, *B* became entitled by way of restitution to possession of the land from *A* who had taken possession in execution of the decree passed by the trial judge.[191]

In a suit for injunction the plaintiffs claimed to be the owner of the property and obtained interim order of injunction from the court allegedly by making false statements and raised construction during the operation of the interim order. Later, the plaintiff got the suit dismissed for default after raising the construction. It was held the petition under section 144 of the Code by defendant for removal of construction and restoration of *status quo* is not maintainable, because admittedly, the questions whether the plaintiffs are owners of the property or the defendant occupied the same as owners were not decided by a competent court and the rights of both parties were under question.[192]

Where the appellants admittedly took benefit of the interim order passed by the Supreme Court,[193] they cannot, having regard to the doctrine of "unjust enrichment", retain the undue advantages derived by it, and were accordingly asked to pay back the amount received either directly or indirectly on account of MSIL Distributor Public Sector Undertaking; the doctrine of restitution was, thus, applied.[194]

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188. *Murti Bhawani Mata Mandir Rep Through Pujari Ganeshi Lal (D) Through Lr Kailash v Ramesh*, AIR 2019 SC 679 : 2019 (1) JLJR 380 : 2019 (2) Mad LJ 214 : 2019 (1) PLJR 452 : 2019 (2) ALD(SC) 214 : 2019 (1) OLR 962 : 2019 (1) RCR(Civil) 935 : (2019) 2 Scale 555.
189. *Jogendra Nath Singh v Hira Sahu*, AIR 1948 All 252 (FB) : (1948) ILR All 62; *Maqbool Alam Khan v Khodaija Begum*, AIR 1949 Pat 133 (FB) : (1948) 27 Pat 873.
190. *Alapati Ankamma v Pavulari Basava*, AIR 1945 Mad 360.
191. *Shatrughan B Singh v Mange Mir Singh*, AIR 1972 Del 212.
192. *Hiranand v TN Khambati*, AIR 2006 AP 103 : (2006) 1 Andh LT 613 : (2006) 3 Civil Court C 434.
193. *Khoday Distilleries Ltd v State of Karnataka*, AIR 1996 SC 911 : AIR 1996 SCW 308 : (1996) 10 SCC 304.
194. *KT Venkatagiri v State of Karnataka*, AIR 2003 SC 1819 : 2003 AIR SCW 1270 : (2003) 9 SCC 1 : (2003) 1 SCR 1081.

Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act, 1978.[195]

Where the decree remains valid and unaltered but becomes inexecutable due to intervening circumstances, such as enforcement of a new law, the doctrine of restitution is not available.[196]

[s 144.5] Act of Court

The legal maxim *actus curiae neminem gravabit*, means that an act of court shall prejudice no man.[197]

That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party.[198]

The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so.[199]

Having considered the submissions made on behalf of the respective parties and having gone through the materials on record, the Supreme Court was inclined to accept the submissions made on behalf of the decree holder/respondent. Having withdrawn the Special Leave Petition which had been filed by (appellant) against the order by which his share in the suit property had been conveyed to the decree holder/respondent, the question of restitution to the position prior to the execution of the decree does not and/or cannot arise. In Supreme Court's view, the order passed by the Madras High Court in CRP having become final with the withdrawal of SLP is no longer open to the judgment debtor/appellant to pray for restitution notwithstanding the decision in the case of *Hameed Joharan*[200] or that of *Prasanna Kumar Roy Karmakar*.[201] The fact situation is such that it does not call for any interference with the impugned order passed by the High Court at Madras and the appeals must, therefore, fail and were dismissed.[202]

[s 144.6] Duty of the Court

The procedure to be adopted by the judgment-debtor is to apply under this section to the court of first instance for restitution of the property and for consequential relief. On such application being made, the court shall cause restitution to be made to the judgment-debtor (the successful appellant). The duty of the court, when awarding restitution under section 144 of the CPC, is imperative. It shall place the applicant in the position in which he would have

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195. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
196. *Khyali Ram v Mast Ram*, AIR 1977 HP 41.
197. *ONGC v Association of Natural Gas Consuming Inds*, AIR 2001 SC 2796 : (2001) 6 SCC 627.
198. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
199. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
200. *Hameed Johran(D) v Abdul Salam*, AIR 2001 SCW 3261 : (2001) 7 SCC 573.
201. *Prasanne Kumar Roy Karmakar v State of West Bengal*, AIR 1996 SCW 1585 : (1996) 3 SCC 403.
202. *V Hucheswaran v Madras Hardware Mart*, AIR 2006 SC 50 : (2005) 8 SCC 496.

been if the order had not been made and for this purpose, the court is armed with powers (the "may" is empowering, not discretionary) as to *mesne* profits, interests and so forth.[203]

When a claim for restitution is ordered under this section, it is the duty of the court to make all consequential orders, and not refer the parties to a suit.[204] In *Lala Bhagwandas v Lala Kishen Das*,[205] stating the principle underlying this section, the Supreme Court observed that:

> On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case.

To make restitution for what a party has lost, it is the duty of the court to do so, unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same.[206]

The very *ex parte* decree made in suit was set aside in view of the restoration of the suit. In such cases, the court has got a duty to enforce its obligation to restitute the property to the applicant who was deprived of his possession based on the decree or order, inasmuch as it is a settled law that whenever an *ex parte* decree or order is set aside, the party who was dispossessed or evicted in pursuance of such *ex parte* decree or order is entitled to restitution forthwith, in spite of the fact that, ultimately, on merits, he might lose the cause; and that whenever an *ex parte* decree or order is set aside, no person who has entered into possession through the party obtaining the *ex parte* decree or order, can resist or obstruct restitution on the ground that he is a *bona fide* transferee.[207]

[s 144.7] Restitution

The word "restitution" in this section means restoring to a party, on the variation or reversal of a decree, what has been lost to him in execution of the decree or directly in consequence of that decree, though not through proceedings under it.[208] The Amendment Act, 1976 has now clarified that the remedy by way of restitution would extend to cases where a decree has been varied or reversed in proceedings other than an appeal or revision or review, that is, where it is set aside or modified in a separate suit in another competent court filed for that purpose. The section does not apply unless the property was lost in execution of the decree or directly in consequence of that decree.[209] Where the decree was for payment of money and the judgment-debtor sold his house to the decree-holder voluntarily and independently of the decree and on reversal of the decree in appeal, he applied for possession of the house it was held that though the sale was for satisfaction of the decretal debt, he was not entitled to the possession of the house as the sale was not a direct consequence of the decree.[210] The principle of the doctrine of restitution is that on the reversal of a decree in appeal, the law imposes an obligation on

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203. *Guran Ditta v TR Ditta*, AIR 1935 PC 12 : (1935) All LJ 251 : 37 Bom LR 162.
204. *Lakshmana Nadar v Peruma Pillai*, AIR 1953 TC 612 : (1953) Ker LT 394 (FB).
205. *Lala Bhagwandas v Lala Kishen Das*, AIR 1953 SC 136 : (1953) SCR 559 : (1953) SCJ 188; *Doraisami Iyer v Annasami Iyer*, ILR 23 Mad 306 : 10 Mad LJ 307; *Binadyak Swain v Ramesh Chandra*, AIR 1966 SC 948; *Ram Ratan v Mathura Prasad*, AIR 1971 MP 69.
206. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
207. *Kandan v K Periasnamy*, AIR 2004 Mad 425.
208. *Md Hanif v Khairat Ali*, AIR 1941 Pat 577 : (1941) 20 Pat 346; *Robert Skinner v Lt James Skinner*, AIR 1943 All 202 : (1943) ILR All 312.
209. *Baikuntha Nath v Prosonnamoyi*, AIR 1924 Cal 769 : (1924) 51 Cal 324; *Niadar Mal v Ratan Lal*, AIR 1927 Lah 625 : (1927) 8 Lah 356.
210. *Purshottam v Suryakant*, AIR 1978 Bom 303.

the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost.[211] Section 144 is founded on the equitable principle that one who has taken advantage of a decree of a court should not be permitted to retain it, if the decree is reversed or modified. The word "restitution" in the marginal note of section 144(1) in its etymological sense, means resorting to a party on the modification, variation or reversal of a decree. In such a proceedings, the party seeking restitution is not required to satisfy the court about its title or rights to the property save and except showing its deprivation under a decree and the reversal and variation of decree.[212]

However, in *Binayak v Ramesh Chandra*,[213] the Supreme Court reversed the judgment of the Orissa High Court in *Ramesh Chandra v Binayak*[214] where the high court had refused restitution on the ground that though the decree was reversed in appeal, the suit was remanded and on remand, the same decree was confirmed. The Supreme Court held that the subsequent passing of the same decree did not validate the execution of the decree which was reversed in appeal.

The restitution to be made must be such as will, so far as may be, place the parties in the position which they would have occupied but for the decree appealed from or such part thereof as has been varied or reversed.[215]

In directing restitution, it is to be noted that the parties must be placed in the same position as they were previously in irrespective of any other rights accruing to any of them during the litigation.[216] Thus tenants who had been ejected under a decree of court land who became subsequently entitled to recover possession by way of restitution under the UP Zamindari Abolition and Land Reforms Act, 1951, cannot claim *adivasi* rights on the basis of section 20(b) of the Act as those rights were created subsequent to their ejectment.[217] Where an order is made against a party for restitution, but restitution is not made, the order may be enforced by sale of his property [section 36].[218]

ILLUSTRATIONS

(i) *A* obtains a decree against *B* for possession of immovable property (or a decree for the recovery of movable property, say timber, or a decree for a sum of money), and in execution of the decree obtains possession of the property (or obtains the timber or recovers the money). The decree is subsequently reversed in appeal *B* is entitled on an application under this section to restitution of the property (or of the timber or of the money), though there may be no direction for restitution in the decree of the appellate court.[219]

(ii) *A* obtains a decree against *B* for Rs 5000 and recovers the amount in execution. The decree is subsequently reversed in appeal. *B* is entitled on an application under this section to a refund of the money together with interest, up to the date of repayment, though the appellate decree may be silent as to interest. In *Rodger v Comptoir d'Escompte de Pois*,[220] which is the leading case on the subject, Lord Cairns, in delivering the judgment of the Privy Council, observed as follows:

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211. *Dorasami v Annasawi*, (1900) 23 Mad 306, 311.
212. *Zafar Khan v Board of Revenue*, 1984 (Supp) SCC 505.
213. *Binayak v Ramesh Chandra*, AIR 1966 SC 948.
214. *Ramesh Chandra v Binayak*, AIR 1962 Ori 11.
215. *Hurro Chunder v Shoorodhonee*, (1868) 9 WR 402; *Siddareddigari v Mohammal*, AIR 1945 Mad 133.
216. *Gunga Prasad v Brojo Nath Das*, (1908) 12 Cal WN 642.
217. *Vindhyachal Tewari v Board of Revenue*, AIR 1956 All 663 : (1956) All LJ 325.
218. *Parbhu Dyal v Kalyan Das*, 43 IA 43; *Mahadeo v Rama*, (1916) 40 Bom 194.
219. *Munshi Dinesh Prosad v Shanker*, (1904) 9 Cal WN 381; *Balvantrao v Sadrudin*, (1889) 13 Bom 45; *Ummat-ul-Hasnain vBhagwan*, (1896) 18 All 262.
220. *Rodger v Comptoir d'Escompte de Pois*, (1871) LR 3 PC 465.

It is contended on the part of the respondents here (that is, *A* in the present illustration), that the principal sum being restored to the present petitioners (that is, *B* in the present illustration), they have no right to recover from them any, interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after lapse of a considerable time, but they will recover it without the ordinary fruit which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed by the person who by mistake and by wrong obtained possession of the money under a judgment which, has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination, which it must be the object of all courts to arrive at, will not have been arrived at unless the persons who have, had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.

These observations apply equally to mesne profits which form the subject of the next illustration.

(iii) *A* obtains a decree against *B* for possession of certain immovable property and in execution of the decree obtains possession of the property. The decree is subsequently reversed in appeal. *B is* entitled to possession of the property together with mesne profits during the period of dispossession.[221] If the property has, in the meantime, been let out by *A* to tenants, *B* is entitled to remove any tenant who refuses to vacate.[222]

(iv) *A* obtained a decree against *B* for possession. *B* filed an appeal against the decree and obtained stay of delivery. The appeal was allowed and the suit dismissed. Against the dismissal, *A* preferred a second appeal and that was allowed and the decree of the trial court restored. *A* applied in restitution for mesne profits from the date of the stay order of the first appellate court to the date of the decree of the second appellate court. It was held that he was entitled to do so under this section.[223]

[s 144.8] Restitution—Ambiguous Term

It was observed in *South Eastern Coalfields Ltd v State of Madhya Pradesh*,[224] *as follows:*

> The *Law of Contracts* by John D Calamari and Joseph M Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done.
>
> Often, the result in either meaning of the term would be the same.... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed.

[s 144.9] Restitution—Three Senses

In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another.[225]

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221. *Vindhyachal Tewari v Board of Revenue*, AIR 1956 All 663 : (1956) All LJ 325.
222. *Rohni Singh v Hodding*, (1894) 21 Cal 340.
223. *Inderam v Ramdin*, AIR 1961 MP 200.
224. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482.
225. See *Black's Law Dictionary*, 7th Edn, p 1315, as quoted in *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482.

[s 144.10] Quantum of Restitution

The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been, had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice.[226]

[s 144.11] Exclusion of Restitution — Effect

Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation.

Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. Therefore, the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.[227]

The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so.[228]

[s 144.12] Restitution — Not Discretionary

The granting of restitution, however, is not discretionary.[229] The words "so far as may be" are empowering and not discretionary.[230]

[s 144.13] Restitution — Three Conditions

In order that section 144 of the CPC, would be applicable, three conditions are necessary to be satisfied, namely:

(i) the restitution sought must be in respect of the decree or order which had been varied or reversed;

(ii) the party applying for restitution must be entitled to a benefit under a reversing decree or order; and

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226. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
227. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
228. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
229. *Devi Ramchand Vaswani v SV Bastikar*, AIR 1968 Bom 57 : 69 Bom LR 121.
230. *State of Andhra Pradesh v GR Rice Mill Contractors Co*, AIR 1965 AP 398.

(iii) the relief claimed must be properly consequential on the reversal or variation of the decree or order.[231]

This is so also where the decree is varied or reversed in other proceedings or where it is modified or set aside in a separate suit filed for that purpose. It arises automatically on the reversal or modification and necessarily carries with it the right to restitution of all that has been done under the erroneous decree[232] and the court in making restitution is bound to restore the parties, as far as they can be restored, to the same position they were in, at the time when the court, by its erroneous action, had displaced them from it.[233]

[s 144.14] Restitution — Properly Consequential

The restitution, moreover, must be "properly consequential" on the variation or reversal of the decree,[234] or on its being modified or set aside.

For the purpose of making such restitution as aforesaid, the court may make any orders, including orders for the refund of costs,[235] and for the payment of interest,[236] damages,[237] compensation and mesne profits,[238] which are property consequential on such variation or reversal. The underlying principle is that when the main judgment or order is varied or reversed on appeal, all orders consequential or depending upon it are affected and wrongs done under them have to be corrected by granting restitution.[239]

[s 144.15] Ordinary Case for Restitution

The ordinary case for restitution is where something has been taken from a party in execution of a decree which has been varied or reversed, but the section is not confined within these precise limits, for a person against whom a decree for possession has been made may very well give up possession without insisting that any process of execution should be taken against him. When a person gives up possession in consequence of a decree, which is afterwards varied

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231. *Punni Devi Sahu v Jagannath Mahapatra*, AIR 1994 Ori 240.
232. *Kunwar Rohani v Thakur Har Prasad*, AIR 1943 PC 189.
233. *Hurro Chunder v Shoorodhonee*, (1868) 9 WR 402; *State of Andhra Pradesh v GR Rice Mill Contractors*, AIR (1965) AP 398.
234. *Arjun v Musammat Parbati*, AIR 1922 All 465 : (1922) 44 All 687.
235. *Watkins v Mahomed*, (1897) 1 Cal WN 197; *Venkatappaya v Ramaswami*, AIR 1941 Mad 36 : (1941) ILR Mad 212.
236. *Rodger v Comptoir d'Escompte de Paris*, (1871) 3 LR 465, (PC); *Forester v Secretary of State*, (1878) 3 Cal 161 173 : 4 IA 137; *Phul Chand v Shanker*, (1896) 20 All 430; *Ummat-ul-Husnain vBhagwan*, (1896) 18 All 262; *Ayyavayyar v Shastram*, (1886) 9 Mad 506; *Collector of Ahmedabad v Lavji*, (1911) 35 Bom 255, (Land Acquisition Act 1894); *Hirabhai v Maneklal*, AIR 1925 Bom 313 : (1925) 27 Bom LR 485; *Indra Chand v Forbes*, (1917) 2 Pat LJ 149; *Venkatarama v Govindarajulu*, AIR 1931 Mad 561 : (1931) 54 Mad 887, (interest on cost); *Gokul Prasad v Ram Devi*, AIR 1921 All 241 : (1921) 19 All LJ 771, (interest on cost); *Hanuman v National Bank of India*, AIR 1926 Lah 488 : (1926) 7 Lah 232; *Rajendra v Rajendra*, AIR 1932 Cal 313 : (1932) 35 Cal WN 1305; *Asuram v Sub-Collector*, AIR 1930 Mad 577 : (1930) 53 Mad 708.
237. *Balvantrav v Sadrudin*, (1889) 13 Bom 485.
238. *Raja Singh v Kooldip*, (1894) 21 Cal 989; *Mookoond v Mohomed*, (1887) 14 Cal 484; *Kalianasundram v Egnavedeswara*, (1888) 11 Mad 261; *Vasudeva v Narayana*, (1901) 24 Mad 341; *Hardat v Izat-Un-Nissa*, (1899) 21 All 1; *Prag Narain v Thakur Kamakhia Singh*, 36 IA 197; *Prabhu Dayal v Ali Ahmed*, (1910) 32 All 79; *Parbhu Dyal v Kalyan Das*, 43 IA 43.
239. *Taqir v Raja Ram*, AIR 1943 All 267 : (1943) ILR All 510.

or reversed, he is entitled to restitution under this section.[240] The principle applies with equal force whether restitution has or has not been directed in the appellate decree.[241]

[s 144.16] Interim Order

The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not, or ought not, to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.[242]

[s 144.17] Mesne Profit

As regards mesne profits, the test is not what the party excluded would have made but what the party in possession has or might reasonably have made: *Surendra v Sultan*.[243] If the landlord has taken possession in execution of a decree against a tenant and the decree is subsequently reversed, the tenant is entitled to get credit for the rent due to himself. In *Tagore v Mathura Kanta Das*,[244] where a suit for possession by a usufructuary mortgagee and a suit by mortgagors for redemption were tried together and the former was decreed and latter dismissed and the mortgagee obtained possession in execution, but the decree of dismissal was reversed on appeal and an account was directed to be taken and it was found that the mortgagors were entitled to redeem without having to pay anything, it was held that they were entitled to recover possession under this section but that, as regards the claim for mesne profits, the mortgagees were held to have been in possession in their character as mortgagees and were liable to account only as provided in section 76 of the Transfer of Property Act, 1882.[245] When a decree under which possession has been taken is reversed, mesne profits should be awarded in restitution from the date of dispossession and not merely from the date of the decree of reversal.[246]

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240. *Gopal Parsi v Swarna Bewa*, AIR 1931 Cal 14 : (1931) 34 Cal WN 707; *Narain Singh v Bachan Singh*, AIR 1927 Lah 37 : (1927) 8 Lah 41; *Surya Dat v Jamna Dat*, (1920) 42 All 568; *Nidhin v Krishna Prabhu*, AIR 1951 TC 226; *Madras Kanthimathi Mills v Special Land Acquisition Officer*, AIR 1960 Mad 278 : (1959) 2 Mad LJ 506; *Chowringhee Properties Ltd v Bengal Stores Ltd*, 60 Cal WN 584.
241. *Balvantrav v Sadrudin*, (1889) 13 Bom 485; *Raja Singh v Kooldip*, (1894) 21 Cal 989; *Ummat-ul-Hasnain v Bhagwan*, (1896) 18 All 262, 263; *Munshi Dinesh Proshad v Shanker*, (1904) 9 Cal WN 381; *Prabhu Dayal v Ali Ahmad*, (1910) 32 All 79, *UOI v Ummer Sait*, AIR 1969 Mad 212.
242. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
243. *Surendra v Sultan*, AIR 1935 Cal 206 : (1935) 62 Cal 217.
244. *Tagore v Mathura Kanta Das*, AIR 1937 Cal 478 : (1937) 41 Cal WN 1015.
245. *Venkataraju v Raghavayya*, AIR 1958 AP 593 : (1957) ILR AP 477.
246. *Madhavan Pothi v Subramaniam*, AIR 1951 TC 14 : (1950) Ker LT 278.

[s 144.18] Interest

Interest is part of normal relief given in restitution[247] and that is not controlled by the provisions of the Interest Act[248] of 1839 or 1978.[249] The question has frequently come up for consideration before the courts whether the decree-holder is liable to pay interest on money deposited into the court by the judgment-debtor under O XLI, rule 5, pending an appeal preferred by him and not drawn by him and the decree is thereafter varied or reversed in appeal. Judicial opinion on this question has not been uniform.[250] The trend of the authorities in Madras was in favour of the view that the judgment-debtor was entitled to interest as a matter of course. The question was fully considered by a Full Bench of the Madras High Court in *Pappu v Ramanatha*,[251] and on an elaborate review of the decisions, the court thus summed up the law:

> We may now briefly classify the case in which a question of payment of interest as part of restitution might arise: (1) Where money is paid under the erroneous decree to the decree-holder; (2) Where money is deposited in court in satisfaction of the decree and no restriction is placed on the decree-holder drawing the amount; (3) Where money is deposited towards the decree and there is an obstacle to the withdrawal of the amount like furnishing of security, but the decree-holder furnishes such security and draws the amount. (Really in such a case, the obstacle must be held to have been removed, albeit by the act of the decree-holder who thereafter will have the benefit of the money); (4) Where money is deposited towards the decree and there is an obstacle placed like furnishing of security but the decree-holder either because he is unwilling to or unable to furnish the required security, allows the money to remain in court and does not use it. In the first two of the four cases, the decree-holder would be bound to pay interest on the amount which he is obliged in repay from the date of payment of deposit. In the third class of case he will be bound to pay interest on such amount from the date when the obstacle is removed as laid down in AIR 1943 Pat 427. In all the above cases, there is a correlation between the benefit to the decree-holder and the detriment to the other party.

The fourth class of cases presents a difficulty. Normally speaking, the decree-holder would not be liable for interest on moneys which he could not take on account of the conditions imposed as to its withdrawal. This is the case contemplated by Balakrishna Aiyar, J.[252] But even this cannot be laid down as an invariable rule. There may be circumstances in which the court might come to the conclusion notwithstanding the fact that the money was not withdrawn, that the decree-holder should be directed to pay the interest. Those however are exceptional and indeed extraordinary cases.[253] In cases of restitution, interest when awarded must be not only up to the date of the reversing judgment but up to the date when payment is made

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247. *Guran Ditta v TR Ditta*, AIR 1935 PC 12 : (1935) All LJ 251 : 37 Bom LR 162.
248. *Subramonia v Janardhanan*, AIR 1962 Ker 297 : (1961) Ker LT 871 : (1961) Ker LJ 1082.
249. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
250. *Shanmugasundara v Ratnavelu*, AIR 1933 Mad 33 : ILR 55 Mad 1025; *Sitaramayya v Venkanna*, AIR 1940 Mad 15 : (1939) 2 Mad LJ 509; *Periakaruppan Chettiar v Veerappan Chettiar*, AIR 1944 Mad 46 : (1943) 2 Mad LJ 441; *Madras Kanthimathi Mills v Special Land Acquisition Officer*, AIR 1960 Mad 278 : (1959) 2 Mad LJ 506; *Lakambal Achiky Srinivasa Pillai*, AIR 1961 Mad 160 : (1961) 1 Mad LJ 370; *Collector of Ahmedabad v Lavji Mulji* ILR 35 Bom 255 : 13 Bom LR 259; *Hirabhai v Maneklal*, AIR 1925 Mad 313; *Asutosh Goswami v Upendra Prasad Mitra*, AIR 1917 Cal 188 : 24 Cal LJ 467; *Dalu Ram v Ramanand*, AIR 1929 Pat 593; *Gawri Dutt v Madho Prasad*, AIR 1943 Pat 427.
251. *Pappu v Ramanatha*, AIR 1963 Mad 45 : (1962) ILR Mad 1091 : (1962) 2 Mad LJ 362 : 75 LW 585; overruling *Shanmuga Sundara v Ratnavelu, Sitaramia v Venkanna and Kanthimathi Mills v Special Officier, Land Acquisition*, AIR 1960 Mad 278 : (1959) 2 Mad LJ 506; reversing *Ramanatha Iyer v Pappu Reddiar*, AIR 1959 Mad 558 : (1959) 2 Mad LJ 184.
252. *Lokambal Achi v P Srinivasa Pillai*, AIR 1964 Mad 160 : (1961) 1 Mad LJ 370.
253. *State of Andhra Pradesh v GR Rice Mill Contractors Co*, AIR 1965 AP 398.

or the amount withdrawn from the court is re-deposited.[254] If there was an obstacle against withdrawal by the decree-holder, interest would become payable from the date of removal of such obstacle.[255] When agreement for supply of natural gas were entered into between the ONGC and different industries,[256] ONGC was entitled to claim interest from the purchasers for the delayed payment of the principal amount.[257]

Where the mortgagors obtained a decree for redemption and having deposited the amount due under the decree into court recovered possession in execution, and on appeal, the suit was dismissed as time-barred, it was held that while the mortgagees were entitled by way of restitution to recover possession of the properties with mesne profits, the mortgagors were entitled as a matter of equity to credit for interest on the amount deposited by them into court and that it did not matter that the mortgagees had not withdrawn it.[258] Variation of rate of interest ordered in two appeals pertaining to two different banks by the Supreme Court is possible keeping in view rate at which interest was allowed by special courts in two suits.[259]

[s 144.19] Execution of Decree by Trial Court—Appeal does not Become Infructuous

When the decree has been executed the question is whether the appellate court, on the said ground can dismiss the appeal of the appellants without considering the case of the appellants on merits appellate court without considering the provisions of section 144 of CPC has disposed of the appeal. If the appellate court on merits had come to the conclusion that the judgment and decree granted by the trial court shall require to be set aside in such an event appellate court had every power to allow the appeal and dismiss the suit of the plaintiffs by reversing the judgment and decree of the trial court. In such an event, appellants were entitled to invoke the provisions of section 144 of CPC and request the court for restitution. But if appellate court, without considering the provisions of section 144 of CPC and the case of the appellants on merit, has dismissed the appeal as having become infructuous. The procedure followed by the appellate court is bad in law and order of appellate court requires to be set aside.[260]

[s 144.20] Effect of Tripura Land Revenue and Land Reforms Act, 1960 Before Restitution

The respondents had been dispossessed from the suit lands in execution of a decree which then existed in favour of the appellant. The decree was set aside in appeal. As a consequence thereof, the respondents were entitled to be restored possession of the lands. Even if the respondents were unauthorised occupants of the lands, since they were dispossessed in execution of a decree which had been set aside on appeal, they were entitled to restoration of the possession. In the normal course it may be correct to say that possession obtained in execution of a decree has to be restored to the party dispossessed, on the decree being set aside. But a statute has intervened. The Tripura Land Revenue and Land Reforms Act, 1960

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254. *State of Andhra Pradesh v GR Rice Mills Contractors*, AIR 1965 AP 398.
255. *Amalgamated Elec Co v Municipal Council, Ajmer*, AIR 1968 Raj 327.
256. *ONGCC v Association of Natural Gas Consuming Industries*, AIR 2001 SC 2796 : (2001) 6 SCC 627.
257. *ONGCC v Association of Natural Gas Consuming Industries*, AIR 2001 SC 2796 : (2001) 6 SCC 627.
258. *Wasik Ali Khan v Nand Kishore*, AIR 1954 All 119 : (1953) All LJ 549.
259. *Citibank N A v Standard Chartered Bank*, AIR 2005 SC 94 : (2004) 8 SCC 348 : (2005) 1 UJ 248 SC : (2004) 9 Scale 74.
260. *Sanjeevamme v G Krishna*, AIR 2004 Kant 338.

contains a vesting provision as a result whereof the land in suit automatically vested in the state government. The statute has taken away the right of possession of the lands of the party who was earlier in possession of the lands. The statutory provision has such a salutary effect that even if somebody was in actual possession of the land on the date of promulgation of the statute, he/she would lose the right to possession and would have to hand over the possession to the state government. Therefore, the respondents do not have any right to ask for possession of the lands by way of restitution.[261]

[s 144.21] Splitting of Claim for Restitution

It has been held by the High Courts of Patna, Calcutta, Madras and Allahabad that the provisions of O II, rule 2 do not apply to a proceeding under this section. *A* obtains a decree against *B* for possession of certain immovable property, and recovers possession of the property pursuant to the decree. *B* appeals from the decree, and the decree is reversed in appeal. *B* then applies for restitution of the property, and the property is restored to him. Subsequently *B* applies for mesne profits for the period during which *A* was in possession of the property. Is *B* debarred from claiming mesne profits on the ground that he ought to have included the claim for mesne profits in the application for restitution of the property? No.[262] Similarly, a judgment-debtor who applies for and obtains restitution of a sum of money on reversal by the appellate court, of the decree pursuant to which he had paid the sum to the decree-holder, is not precluded from making a fresh application for recovery of interest for the period during which the decree-holder had the use of the money.[263]

[s 144.22] Names of Parties

An application for restitution should not be thrown out merely on the ground that there was a dispute as to whether the defendant was a proprietary concern or a partnership firm.[264] An indivisible decree cannot be interfered with unless all the parties in whose favour such decree was passed are before the court. Hence, where during pendency of an appeal before the Supreme Court, some of the heirs of one of the judgment-debtor are deleted from the array of party at the risk of appellant, it was held since the decree passed in restitution proceeding had been made in favour of the judgment-debtor, any variation of the said decree I not possible in the absence of the judgment-debtor and in whose favour the impugned decree was passed by the high court.[265]

[s 144.23] Inherent Power to Grant Restitution

Section 144 of the CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from section 144, the court has inherent jurisdiction to order restitution so as to do complete justice between the parties.[266]

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261. *Sudhangshu Mohan Deb v Niroda Sundari Debidhup*, AIR 2004 SC 1781 : (2004) 4 SCC 389.
262. *Krupasindhu v Mahanta*, (1918) 3 Pat LJ 367; *Surendra Lal v Sultan Ahmed*, AIR 1935 Cal 206 : (1935) 62 Cal 217.
263. *Somasundaram v Chokkalingam*, (1917) 40 Mad 780; *Ram Dei v Mangan Lal*, AIR 1935 All 195.
264. *LB Ghosh & Sons v Ashok Kumar*, (1982) 2 SCC 116.
265. *Tasaddug Husain Khan v Shiv Nath Sahu*, (1998) 9 SCC 634.
266. *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.

Section 144 states that on the reversal or modification of a decree or order, the party who received the benefit of any such erroneous decree or order shall restitute to the other party for the loss. The Supreme Court in *Citibank NA v Hiten P Dalal*[267] has summarised the principles that shall be followed while ordering restitution. It observed thus:

> In the ultimate analysis we find that the law on restitution under Section 144 CPC is quite well settled. It vests expansive power in the court but such power has to be exercised to ensure equity, fairness and justice for both the parties. It also flows from more or less common stand of parties on the principle of law that for ascertaining the value of the property which is no longer available for restitution on account of sale., the court should adopt a realistic and verifiable approach instead of resorting to hypothetical and presumptive value. It is also one of the established propositions that in the context of restitution the court should keep under consideration not only the loss suffered by the party entitled to restitution but also the gain, if any, made by other party who is obliged to make restitution. No unmerited injustice should be caused to any of the parties.

The Supreme Court also held that:

> Section 144 accords a statutory recognition to an already existing rule of justice, equity and fair play and, therefore, even apart from section 144, the courts have inherent jurisdiction to order restitution so as to do complete justice between the parties.

The power of a court to grant restitution is not confined to the cases covered by the provisions of this section. It extends also to cases which do not come strictly within this section. The reason is that a court has an inherent power under section 151 irrespective of this section to order restitution.[268] The power of restitution is not confined to section 144 of the CPC, as the court has inherent power to grant restitution in exercise of power under section 151 of the CPC.[269] It was held in *Wahid v Jubeda Begum,*[270] that section 144 has no application to orders passed under the Guardian and Wards Act, 1890, as they were not decrees under the CPC and that accordingly, no restitution could be ordered under this section. But this decision is no longer law after the amendment of the section in 1976 under which there can be restitution even when an order is varied or reversed. Where the standard rent fixed by the rent controller under the West Bengal Premises Rent Control Act, 1950, was reduced in appeal, it was held that a claim for restitution of the excess rent paid under the order of the controller was not maintainable under this section but it could be sustained on general principles of restitution.[271]

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267. *Citibank NA v Hiten P Dalal,* AIR 2015 SC 3523 : 2015 AIR SCW 5256 : (2016) 1 SCC 411 : JT 2015 (7) SC 454.
268. *Mookoond v Mohomed*, (1887) 14 Cal 484; *Raja Singh v Kooldip Singh*, (1894) 21 Cal 989; *Collector of Meerut v Kalka Prasad*, (1906) 28 All 665; *Shiam Sundar Lal v Kaisar Zamani Begam*, (1907) 29 All 143; *Jugan Nath v Fatteh Chand*, (1917) Punj Rec No 61 p 218; *Rai Charan v Debi Prasad*, AIR 1922 Cal 28 : (1921) 26 Cal WN 408; *Gujar Mal v Narain Singh*, AIR 1926 Lah 849 : AIR 1934 Mad 320; *Sufai Chandra v Surendra Nath*, AIR 1935 Lah 322 : (1934) 60 Cal LJ 44; *Mam Chand v Ali Mohammad*, AIR 1934 Lah 1023; *Rego v Anathamathi*, AIR 1942 Mad 472; *Biswakessan Ramanaj Das v Krushna Chandra Singh*, AIR 1951 Ori 148; *Kaku Singh v Gobind Singh*, AIR 1959 P&H 468; *Kavita Trekan v Balsara Hygiene Product*, (1994) 5 SCC 380; *KN Krishnappa v TR Gopalkrishna Setty*, AIR 1997 Kant 152.
269. *Mookoond v Mohomed*, (1887) 14 Cal 484; *Raja Singh v Kooldip Singh*, (1894) 21 Cal 989; *Collector of Meerut v Kalka Prasad*, (1906) 28 All 665; *Shiam Sundar Lal v Kaisar Zamani Begam*, (1907) 29 All 143; *Jugan Nath v Fatteh Chand*, (1917) Punj Rec No 61 p 218; *Rai Charan v Debi Prasad*, AIR 1922 Cal 28 : (1921) 26 Cal WN 408; *Gujar Mal v Narain Singh*, AIR 1926 Lah 849 : AIR 1934 Mad 320; *Sufai Chandra v Surendra Nath*, AIR 1935 Lah 322 : (1934) 60 Cal LJ 44; *Mam Chand v Ali Mohammad*, AIR 1934 Lah 1023; *Rego v Anathamathi*, AIR 1942 Mad 472; *Biswakessan Ramanaj Das v Krushna Chandra Singh*, AIR 1951 Ori 148; *Kaku Singh v Gobind Singh*, AIR 1959 P&H 468; *Kavita Trekan v Balsara Hygiene Product*, (1994) 5 SCC 380; *KN Krishnappa v TR Gopalkrishna Setty*, AIR 1997 Kant 152.
270. *Wahid v Jubeda Begum,* AIR 1952 Ngp 190 : (1951) ILR Nag 780.
271. *Ram Prosad v British Insulated Calenders Cables Ltd*, AIR 1954 Cal 13 : 57 Cal WN 540.

The principle of restitution will be of no avail as against a party to the suit who get the property otherwise than under the decree or the order of the court. Hence, where the petitioner gets the possession of the property under executive order, its restitution cannot be ordered.[272] In *Jai Berham v Kedar Nath Marwari*,[273] the Lordships of the Privy Council said:

> It is the duty of the court under section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved.

As was said by Cairns, LC, in *Rodger v Comptoir descompte de Paris*:[274]

> One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors and when the expression, the act of the court is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes off the case."

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it.[275] In *Jai Berham's* case, a sale in execution of a decree was set aside on the ground that the sale certificate comprised property different from that which was attached. The property was purchased by a stranger to the decree, and the price paid by him in to court was applied towards satisfaction of the decree. The judgment-debtor applied for possession. Their Lordships held that both under section 144 and section 151, the purchaser was entitled to be paid the excess of the purchase price over the mesne profits. This decision, it is submitted, is an authority for the proposition that where an application for restitution does not come strictly within the purview of this section e.g. where the sale alone is set aside in execution proceedings, but the decree is not "varied or reversed",[276] or where the decree and the sale are set aside in a separate suit, the court may entertain the application under the inherent power conferred upon it by section 151. The Allahabad High Court has however taken the view that a case for restitution would fall within the terms of section 144, even when the decree is set aside in a separate suit,[277] or where the court itself sets aside its own *ex parte* decree.[278] This view has now been confirmed by the Amendment Act, 1976 which declares in express terms, that restitution is available in cases where a decree is set aside or modified in another subsequent suit filed in another court for that purpose. Where subsequent to the decree, the UP Zamindari Abolition and Land Reforms Act, 1951, was enacted and under rule 5 framed under the Act, the suit abated and the decree became a nullity, it was held that this section applied in regard to a claim for restitution based on the statute as the reversal of the decree could not merely be in appeal but also in another suit and even by a process of legislation.[279] The High Courts of

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272. *Monthrampallipadipura Attakoya v Neelathupura Kunhiseethikoya Thangal*, AIR 1996 Ker 286.
273. *Jai Berham v Kedar Nath Marwari*, AIR 1922 PC 269 : 49 IA 351; *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
274. *Rodger v Comptoir descompte de Paris*, (1871) LR 3 PC 456, 475; *Gangadhar v Raghubar Dayal*, AIR 1975 All 102 (FB); *SM Deshmukh v GK Khare*, AIR 1975 Bom 82; *State Govt v M Jeevraj & Co*, AIR 1973 AP 27; *Ghangayya v Sub-Collector*, AIR 1966 AP 4 : (1965) ILR AP 1094; *South Eastern Coalfields Ltd v State of Madhya Pradesh*, AIR 2003 SC 4482 : (2003) 8 SCC 648.
275. *AA Nadar v SP Rathinasami*, AIR 1971 Mad 162 : (1971) 1 Mad LJ 220.
276. *Davar v Ganesh Dutta*, AIR 1940 Lah 1959.
277. *Jogendra Nath Singh v Hira Shahu*, AIR 1948 All 252, (FB) : (1948) ILR All 52.
278. *Allahabad Theartres Ltd v Ram Sajiwan Misra*, (1949) ILR All 313.
279. *Vindhyachal Tewari v Board of Revenue*, AIR 1956 All 663 : (1956) All LJ 325.

Madras,[280] Madhya Pradesh,[281] and Patna[282] have also held that section 144 will apply when the decree or order is reversed, otherwise than in appeal as in an independent proceeding or by legislation. When a sale was set aside on an application under O XXI, rule 90, the judgment-debtor was awarded mesne profits under section 151 from the decree-holder purchaser for the period he was in possession.[283] When the judgment-debtor's property was sold in execution, the execution court impliedly holding that the decree was then alive and the judgment-debtor made a deposit under O XXI, rule 89 and on appeal by the judgment-debtor against another order of the executing court the appellate court held that the decree was barred by limitation and the Allahabad High Court held that the judgment-debtor was entitled on an application to get back his deposit.[284] In another case,[285] *A*, in execution of a money decree, brought property to sale as of his judgment-debtor and purchased it himself. *B* and *C* who held decrees against the same judgment-debtor, applied for rateable distribution. *A*, therefore, paid the sale proceeds into court and they were rateably distributed between *A, B* and *C*. Co-sharers of the judgment-debtor then obtained a decree exempting part of the property from the operation of the sale. The amount available for rateable distribution was, therefore, reduced and *A* was held entitled to a proportionate refund from *B* and *C*. But the Bombay High Court has held that an application under this section cannot be made if the decree under which a party has been deprived of property or other benefit is set aside by a decree in a different suit between some of the parties to the first decree and strangers.[286] This decision is no longer good law after the 1976 amendment of the section which makes restitution available where the decree is set aside or modified in a separate suit. In a decision, the high court held, even before the amendment was made, that the section would apply when a decree is varied or reversed in whichever way such variation or reversal is brought about.[287]

An order of attachment before judgment without following the procedure is void. The defendant can bring it to the notice of the court that the order of attachment was a void order, and was not one which could be acted upon. Defendant could ask the court to recall the same under section 151, as also to review the same under section 144 as being one patently without jurisdiction and void.[288] In a Bombay case, possession of land was delivered under a decree. Subsequently, ad interim stay was granted under O XLI, rule 5. It was held that possession could not be ordered to be restored either under section 144 or under section 151.[289] The plaintiff, in a suit for injunction against the defendants for restraining them from interfering with the construction of a wall in a passage, wrongly obtained an *ex parte* interim injunction by misleading the court, inasmuch as the sale deed, on the basis of which the plaintiff claimed ownership of the suit property was not placed before the court and the defendants were not heard before passing the order of interim injunction. After obtaining the order, the plaintiff completed the construction of the wall and then applied for the withdrawal of the suit and prayed for dismissal of the injunction application, as "not pressed". It was held that the order

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280. *Ankamma v Basavapunniah*, AIR 1945 Mad 360 : (1945) 1 Mad LJ 368.
281. *Choudhary Hariram v Pooran Singh*, AIR 1962 MP 295 : (1962) Jab LJ 220.
282. *Harihar Sao v Bhagwan Das*, AIR 1963 Pat 333.
283. *Ram Rattan v Banarsi Lal*, AIR 1930 Pat 280 : (1930) 9 Pat 685; *Jagdip v Holloway*, (1917) 2 Pat LJ 206; *Subbamma v Chennayya*, (1918) 41 Mad 467.
284. *Md Taquir Khan v Raja Ram*, AIR 1943 All 267 : (1943) ILR All 510.
285. *Amba Lal v Ram Gopal*, AIR 1933 All 218 : (1933) 55 All 221.
286. *Shivappa v Ramlingappa*, AIR 1937 Bom 173 : (1937) 29 Bom LR 112.
287. *SM Deshmukh v GK Khare*, AIR 1975 Bom 82.
288. *Kamla Panda v Krishna Cloth Stores*, AIR 1989 Ori 229.
289. *JS Maydare v LM Mundae*, AIR 1983 Bom 363.

passed by the court under section 151 for demolition of the wall would be justified, even if section 144 was not applicable.[290]

In the exercise of their inherent power, the courts have applied the principle of this section to other cases which were not strictly within the terms of the section. Thus, where *A* sued *B* to establish his right to a fund in court, and *B* was allowed to draw the money on giving an undertaking to the court to repay it if *A* succeeded in the suit, and *A* succeeded in establishing his title, it was held that though the undertaking given by *B* did not provide for the payment of interest, the court had inherent power to order *B* to repay the money with interest.[291]

The Andhra Pradesh High Court has held that a decree, be of any court, including the Apex Court, can be subjected to execution and enforced by different modes, may be, under the provisions of O XXI, rule 35 or section 144 or section 151 of the CPC, depending upon the facts and circumstances of each case, and the imperative need to give quietus to the litigation expeditiously and forever. It is a matter of option of the decree-holder who succeeded in the litigation and it is for the court to execute such decree by applying appropriate provisions for effective enforcement of the decree.[292]

Where a tenant had instituted a suit for possession of immovable property, alleging that he was forcibly dispossessed by the person who claimed to have purchased the property from the landlord, obtained possession in execution of *ex parte* decree, the application for restitution by the landlord, after having the *ex parte* decree set aside, cannot be challenged by the tenant on basis of plea that the facts that he was a tenant and was unlawfully dispossessed, should be taken into account to refuse the restitution, when he withdrew the suit after the *ex parte* decree was set aside. The question of plaintiff being a tenant and having been dispossessed forcibly were the questions, which could not have been validly considered in order to determine an application under section 144 of the CPC. The extent of inquiry under section 144 cannot be enlarged to usurp the jurisdiction of the regular court, especially when that court has the question raised before it, by the parties but was not permitted to adjudicate finally. The court cannot enter upon right of the parties, which were, in fact, the subject matter of the suit and decide them in the proceedings under section 144 of the CPC.[293] The evictee was not considered entitled to restoration of possession in view of the fact that it was a chronic defaulter and did not cooperate in the matter of ascertainment of arrears of rent. Tenant however, could be compensated for the period he had been kept out and awarded Rs 1,00,000 as compensation for the loss caused due to forcible dispossession.[294] So long as the *status quo* order and ad interim injunction maintaining the possession of the respondent continue to subsist, the execution of the decree in the suit filed by the appellant, though became final without impleading the said respondent is to overreach the order of the injunction and is the abuse of the process of court.[295] Landlord, in suppression of the material fact and in brazen violation of the provisions of West Bengal Municipal Act, succeeded in demolishing the suit premises with the help of police and the chairman of the local corporation. It was held that the court can direct restitution of tenant in demolished premises by directing landlord and municipality to reconstruct the building, if necessary, and put the tenant in original possession.[296]

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290. *Rakesh Singhal v Fifth Additional District & Session Judge, Bulandshahr*, AIR 1990 All 12.
291. *Alagappa v Muthukumara*, (1918) 41 Mad 316; *Indra Chand v Forbes*, (1917) 3 Pat LJ 149.
292. *Pentakota Krishna Bhagvan v Alla*, AIR 2007 AP 208 : (2007) 3 Andh LJ 103.
293. *Dilip Kumar Dey v Vishwa Mitra Ram Kumar*, AIR 1995 Cal 31(DB).
294. *Amrit Varsha Hindi Dainik v Bihar State Agricultural Mktg Board*, AIR 1999 Pat 181.
295. *Sati Rani Sain v Indian Standard Casting*, (1997) 5 SCC 149.
296. *Priya Brata Maity v State of West Bengal*, AIR 2000 Cal 32.

In an appeal from a preliminary decree, the high court allowed the parties to withdraw, pending the appeal money deposited to the credit of the suit up to the limit of their shares as fixed by the district court. As a result of the appeal, those shares were reduced and when the case went back to the district court for a final decree, that court was entitled under its inherent jurisdiction to order a refund of the amounts overdrawn.[297] The inherent jurisdiction to pass an order in restitution can be exercised by a persona designata entrusted with functions of a court as for example by a district munsiff to whom the decree is transferred for execution under section 66 of the Madras Village Courts Act, 1889.[298]

Municipal corporation is under a statutory obligation to see that public streets are not encroached upon by anyone. In case the encroachment is made, then the same should be got removed at the earliest possible. Thus, where the municipal corporation demolishes the encroachment, during the period when the stay was vacated, a claim for restoration of the demolished structure by invoking provisions and relief under section 144 of the CPC, cannot be granted.[299] In case of unjust enrichment of the government cess and levies, the government is entitled to invoke the doctrine of restitution to recover the unjust enrichment made by the other party.[300] Where a decree is held to be not binding on the plaintiffs, the sale of property in execution of a decree would also not bind them and consequently plaintiffs would be entitled to the restitution of the property.[301]

[s 144.24] Place the Parties in the Position Which They Would Have Occupied but for Such Decree as has Been Reversed, Varied, Modified or Set Aside

These words have to be applied with attention to the substance and reality of the matter. The court of first instance awarded the plaintiff Rs 49 as costs and in execution of this decree for costs two *jotes* were sold and purchased by the plaintiff. In appeal, the decree was varied and the costs reduced to Rs 36. The defendant then claimed to recover the two *jotes* by way of restitution. Rankin, CJ held that he could not recover the *jotes* unless he showed that the sale of the *jotes* was in substance and in truth a consequence of the error in the original decree. As the defendant gave no evidence that if the original decree had been for Rs 36 he would have been able to pay it and save the *jotes*, he was only held entitled to recover the difference between the two amounts with interest.[302] A party is not entitled under this section to restitution of property which was not in his possession before suit, but was in possession of the opposite party, and which, therefore, could not have been taken out of his possession under any decree of the court. *A* applies for letters of administration to the estate of *X*. *B* sets up a will of the deceased. The movable properties in dispute are in the possession of *B*. *B* delivers the properties to a commissioner appointed by the court who locks them up in a room under seal. The high court directs probate of the will to be granted to *B*. Thereafter on *B*'s application, the movables are handed over to her. Subsequently, the order of the high court is reversed by His Majesty in Council and letters of administration are directed to be granted to *A*. *A* then applies under this section for restitution of the properties to him. *A* is not entitled to restitution. The case

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297. *Arunachalam v Pratapasimha*, AIR 1930 Mad 988 : (1930) 60 Mad LJ 79.
298. *Padma Gowda v Yuvaraja Hegde*, AIR 1960 Mys 377. See notes below, "Where a decree is varied or reversed".
299. *Banarsi Dass v Ram Krishan*, AIR 1995 MP 147.
300. *Tata Iron and Steel Co v UOI*, AIR 2000 Cal 56 (DB).
301. *Bhanwar Lal v Prem Lata*, (1990) 1 SCC 353.
302. *Doyal Sarkar v Tari Deshi*, AIR 1932 Cal 303 : (1932) 59 Cal 647.

is not one of restitution at all, for *A* was never in possession of the properties.[303] Again, the plaintiff sued for redemption of a mortgage and deposited the mortgage money in court and the court allowed redemption but directed that the plaintiff should get possession of only three out of the four properties mortgaged. The lower appellate court varied the decree and directed that plaintiff should have possession of the fourth property also. The plaintiff then applied for mesne profits of the fourth property from the date of deposit of the mortgage money until he got possession. The high court held that the claim was not maintainable under section 144 as the plaintiff had not been in possession of the fourth property.[304] But the fact that the property had been taken from a receiver appointed by the court does not affect the right of the true owner to restitution, for, the receiver was in possession on behalf of the true owner.[305]

As a result of the amendment of sub-section (1), parties have to be placed in the position which they would have occupied but for such decree or order, or even a part thereof as has been varied, reversed or set aside or modified in the same proceedings or in appeal or other proceeding or a separate suit in another court.

[s 144.25] Consequentially

The word "consequentially" lays emphasis on the obligation of the party to the suit or proceedings which received the benefit of the erroneous decree to make restitution to the other party for what he has lost. The court, therefore, is bound to restore the parties as far as they can be, to the same position, they were at the time, when the court, by its erroneous action, has displaced them from it. Equally, where a sum of money was recovered in execution by a decree which was subsequently reversed or varied, the judgment-debtor is entitled to get back not only the sum recovered but also the interest thereon or damages or compensation for the period that the amount has been retained by him. The owner or the person interested in the land when recovered the compensation under the award and decree which was reversed, varied or modified on appeal, the court is empowered under section 144 of the CPC, to restitute the amount to the state with interest or quantified damages or by way of compensation. Since granting of interest or damages or compensation is consequential to the variation, reversal or setting aside the enhanced compensation.[306]

[s 144.26] Who may Apply for Restitution

"Any party entitled to any benefit by way of restitution or otherwise" may apply under this section.

[s 144.26.1] Where Decree Proceeds on a Common Ground

The expression "any party" is not confined to parties to the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided, the appeal is in effect and substance in favour of such person.[307] This would especially be the case where the decree

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303. *Baikuntha Nath v Prosannamoyi*, AIR 1924 Cal 769 : (1924) 51 Cal 324; *Banarsi v Hari Kishun*, AIR 1932 Pat 317 : (1932) 11 Pat 553; *Darwood Hashim v Tuck Sein*, AIR 1932 Rang 148 : (1932) 10 Rang 480.
304. *Lakshmi v Krishna*, AIR 1931 Mad 81 : (1931) 60 Mad LJ 219.
305. *Bisheswar v Chandreshwar*, AIR 1928 Pat 260 : (1928) 7 Pat 319.
306. *Kartar Singh v State of Punjab*, (1995) 4 SCC 101.
307. *Ganga Prasad v Brojo Nath Das*, (1908) 12 Cal WN 642; *Gurunath v Venkata*, AIR 1937 Bom 101 : (1936) 38 Bom LR 1326.

appealed from proceeds on a ground common to all the plaintiffs or to all the defendants.[308] *A* obtains a decree against *B* and *C*. The decree proceeds on a ground common to both *B* and *C*. *B* alone appeals from the decree. The decree is reversed in appeal. *C* is entitled to claim restitution under this section, though he was not a party to the appeal. This is so because as the Calcutta High Court has pointed out the word "party" used in the section does not mean only a party in the technical senses. The words "entitled to any benefit by way of restitution or otherwise" are intended to include any beneficiary under the final judgment it be in the technical sense a party or not in the suit or appeal.[309]

Where a decree for damages was passed jointly against *A*, *B* and *C* and the amount was deposited into court by *C* and on an appeal preferred by *A* and *B*, the amount was reduced and then *A* and *B* applied for restitution, of the excess amount, it was held that *C*, who had paid the amount alone was entitled to apply for restitution and that, accordingly, an order made on the application of *A* and *B* was without jurisdiction and the sale held in execution of that order was null and void.[310] Where a decree was passed *ex parte* against *A*, *B* and *C* and their properties sold in execution and subsequently the *ex parte* decree was set aside as against *A* who thereafter applied for redelivery of possession and for mesne profits, it was held that the relief should be limited to his half share in the properties and proportionate mesne profits and that *B* and *C* could not claim restitution.[311]

[s 144.26.2] Transferee of a Decree

Further, the expression "any party" includes the transferee of a decree passed in appeal. *A* obtains a decree against *B* for Rs 5000. *B* appeals from the decree. Pending the appeal, *A* realises from *B* Rs 5000 in execution. The decree is subsequently reversed in appeal. *B* assigns the decree passed in appeal (in his favour) to *C*. *C* is entitled, as transferee of *B*'s decree, to the benefit of that decree and he may apply under this section for an order directing *A* to pay him what *B* would be entitled to, namely, Rs 5000 and interest.[312]

[s 144.26.3] Auction-Purchaser

A sale in execution of a decree may be set aside in a proper case even against a purchaser who is a stranger to the decree, either in execution proceedings, or in a separate suit, e.g., where the sale certificate comprises property different from that which is attached,[313] or when a decree is obtained on a mortgage executed by a Hindu father on behalf of himself and his minor son, and the decree and the sale of the mortgaged property, in execution of the decree are set aside in a suit by the minor against the decree-holder and the auction-purchaser on the ground that the mortgage does not bind the minor.[314] But the auction-purchaser is entitled in such cases, before restoring possession to the judgment-debtor, to be paid the purchase price by the successful judgment-debtor, less the mesne profits, if the sale is set aside in execution

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308. *Erat Madhavan v Venganat Swaraup*, (1908) 18 Mad LJ 39. See O XLI, rule 4.
309. *Jotindra Nath v Jugal Chandra*, AIR 1966 Cal 637.
310. *Laxmichand Nanhulal v Sundrabai*, AIR 1952 Ngp 275 : (1952) ILR Nag 534.
311. *Kurchan Achari v Thomas*, AIR 1957 Ker 37.
312. *Jamini Nath v Dharma Das*, (1906) 33 Cal 857, (a case under section 853 of the Code of 1882).
313. *Suddapali Satyanarayana v Ghabalamaduga Rangayya*, AIR 1941 Mad 480 : (1941) Mad LJ 469; *Jai Berham v Kedar Nath Marwari*, AIR 1922 PC 269 : 49 IA 351.
314. *Bindeshri Prasad v Badal Singh*, AIR 1923 All 394, (FB) : (1923) 45 All 369.

proceedings, under this section,[315] and, if the sale is set aside by a decree in a separate suit, under section 47 or section 151.[316] It has been held by the High Court of Rangoon that an auction-purchaser, who is not a party to the original suit or to the appeal or to the execution proceedings, is not entitled to apply under this section.[317] A party seeking restitution is not required to satisfy the court about its title or right to the property save and except showing its deprivation under a decree and the reversal of variation of the decree.[318]

[s 144.26.4] Authorised Representatives

The appellant was described as a firm and the person through whom the petition was defended in the trial court, filed application for restitution under section 144, on reversal of decree in appeal. The plaintiff objected as to maintainability of the application under section 144, on behalf of the said authorised representative, on the ground that the applicant is not the defendant from whom the possession had been recovered. The objection was dismissed as the description of the petitioner in the application for restitution being the same as in the decree court.[319]

[s 144.27] Against Whom Restitution may be Claimed

[s 144.27.1] Transferee of Decree Reversed in Appeal

In two Allahabad cases, decided under the old section, it was held that restitution could not be claimed by application under that section against the transferee of a decree reversed in appeal, though the transferee had obtained the full benefit of the decree by execution, unless he was joined as a party to the appeal.[320] The point of the decision may be explained by an illustration. *A* obtains a decree against *B*, and assigns the decree to *C*. *C* applies for execution of the decree against *B*, and obtains payment of the decretal amount. *B* appeals from the decree, and the decree is reversed in appeal. It was held under the old section that *B* could not claim restitution against *C* by summary process under that section unless *C* was joined as a party to the appeal.[321] But this decision has been dissented from and the High Court of Madras holds that a judgment-debtor from whom the assignee of a decree has realised the decretal amount in execution, is entitled to restitution when the decree is reversed on appeal.[322] On the other hand, in a Calcutta case, *A* obtained an *ex parte* decree for possession against *B* and leased the land to *C*. The *ex parte* decree was set aside and *A*'s suit dismissed. *B* then applied for restoration of possession. The court held that he was entitled to an order as against *A* but not as against *A*'s lessee *C*. This was said to be on the principle that restitution can only be had in respect of matters done under the decree or as an immediate consequence of it and that the summary procedure under section 144 is wholly unsuited for adjudicating the complicated questions that may arise if rights which strangers may have acquired in the meantime are to

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315. *Berham v Kedar Nath Marwari*, AIR 1922 PC 269 : (1922) 49 IA 351 : ILR 2 Pat 10; *Radha Bai v Jagannatha Naidu*, AIR 1937 Mad 694.
316. *Bindeshri Prasad Tewari v Badal Singh*, AIR 1923 All 394 : (1923) 45 All 369.
317. *Ma Tak v Maung Mo*, AIR 1925 Rang 215 : (1925) 3 Rang 251.
318. *Zafar Khan v Board of Revenue, Uttar Pradesh*, AIR 1984 SC 39 : (1984) Supp SCC 505.
319. *IB Ghosh & Sons v Ashok Kumar Saraf*, (1982) 2 SCC 110.
320. *Sadiq Husain v Lalta Prasad*, (1898) 20 All 139; *Bhagwati v Jamna Prasad*, (1897) 19 All 136; commented on and distinguished in *Garurdhuj Prasad v Baiju Mal*, (1906) 28 All 337.
321. *Lalta Prasad v Sadiq Husen*, (1902) 24 All 288; but see *Shiam Sundar Lal v Kaisar Zamina Begam*, (1907) 29 All 143.
322. *Kadirvelu Chettiar v Kempu Chettiar*, AIR 1941 Mad 315 : (1941) ILR Mad 498; *Govindappa v Hanumanthappa*, (1915) 38 Mad 36; *Subbarayudu v Yerram*, (1917) 40 Mad 299.

be investigated.[323] This case has been dissented from by an Allahabad Judge on the ground that the decree-holder's lessee is a representative of the decree-holder and the winning party is entitled to restitution free from all encumbrances created by the holder of the reversed decree.[324] The Bombay High Court has also dissented from the Calcutta decision and held that an order for restitution can be made against representatives in interest of the party liable to make restitution.[325] In a Gauhati case, decree-holder, having obtained possession of a property in execution, sold it to a third party. Subsequently, on the decree being reversed, the judgment-debtor applied for restitution. The third party who had purchased it from the decree-holder cannot resist restitution on the ground that his purchase was *bona fide*.[326]

Where in execution of a decree for specific performance, the plaintiff got possession of the properties and then transferred them to another person and the decree was then reversed on appeal, it was held that the defendants were entitled to get restitution under this section from the transferees from the original decree-holder.[327] Where in execution of an order of the rent controller for ejectment of a tenant, the landlord obtained possession of the lands and inducted new tenants and thereafter in a suit filed by the evicted tenant, the court declared the order of the rent controller illegal and void, it was held that the tenant was entitled to an order for possession under this section against the tenants inducted by the landlord.[328] In *Manikchand v Gangadhar*,[329] the landlord obtained a decree in ejectment against the defendant and got into possession after evicting the defendant's tenants and inducted his own tenants. The decree was reversed in appeal and thereafter the defendant applied for restitution against the plaintiff and the tenants inducted by him. It was held that though the premises were, on the date of the order, in actual possession of tenants, the defendant was entitled to recover *khas* possession in restitution and that further he was entitled to an order in restitution against the tenants inducted by the plaintiff.

The suit for arrears of rent, filed by the plaintiff as a trustee against the tenant, was decreed by the lower court pending the second appeal. The high court stayed execution of the decree, on the tenant depositing certain amount for payment to plaintiff. The second appeal was allowed and the decree was reversed on the ground that the plaintiff had no locus standi to file the suit as a trustee. In such a case, in view of the fact that the suit was filed by the plaintiff, on behalf of the trust, if the plaintiff had withdrawn the amount deposited by the tenant in pursuance of the interim order of the high court as a defect trustee and used the same for the purpose of the trust, then only the trust would be liable to pay back the amount to the tenant by way of restitution under section 144. But if the plaintiff had utilised the amount for his own purposes, then he would be bound to pay back the amount to the tenant.[330]

[s 144.27.2] Attaching Decree-holder

The Madras High Court has held that restitution can be claimed against a decree-holder who has attached and realised in execution of a decree which has been reversed on appeal.[331]

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323. *Rajjabali v Faku*, AIR 1932 Cal 29 : (1931) 58 Cal 1070.
324. *Sukhan Singh v Uma Shankar*, AIR 1935 All 65 : (1934) All LJ 1229; *Samarjut Singh v Dy Director of Consolidation*, AIR 1974 All 82; *Jagdish Lal Arora v ME Pereira*, AIR 1977 Del 12.
325. *Narayan Laxman v Vishnu Waman*, AIR 1957 Bom 117 : 59 Bom LR 205.
326. *Kamal Chandra Datta v Ram Chandra Goala*, AIR 1980 Gau 19.
327. *Hurmat Ali v Matlib Ali*, AIR 1952 Assam 111 : (1952) ILR Assam 247.
328. *Harihar Sao v Bhagwan Das*, AIR 1963 Pat 333.
329. *Manikchand v Gangadhar*, AIR 1961 Bom 288.
330. *S Alaqiriswami Naidu v Chellayee Ammal*, AIR 1982 Mad 384.
331. *JP Rego v Ananthamathi*, AIR 1942 Mad 472 : (1942) ILR Mad 949; *Angamma Reddi v Subbamma*, AIR 1930 Mad 787 : (1930) 53 Mad 796.

This is on the ground that the attaching decree-holder is for the purposes of execution a representative of the original decree-holder. The Madras High Court, in *Rego v Ananthamathi,* extended the scope of restitution under section 151. In that case, *A* had executed a mortgage in favour of *B*, alleging the mortgaged properties to be his self acquired properties. The mortgagee sued him and in the suit joined his sons *C* and *D* also as parties. *C* and *D* pleaded that the properties were ancestral family properties and the mortgage was not binding on the family properties. The trial court overruled their defence and passed a mortgage decree. During the pendency of the appeal by the sons, the mortgaged properties were sold and were purchased by the decree-holder *A*. Thereupon, the sons made a deposit under O XXI, rule 89. *X,* a creditor of *A* attached a portion of the deposit money and the portion attached was paid to him. Thereafter, the appeal of the sons was allowed and the mortgage-decree was set aside. Thereafter, the sons applied for refund from *A*'s creditor, the sum of the deposit taken by them. It was held that as *X* had not attached the mortgage decree, he was not a representative of *A,* so the case did not come under section 144, but still the court could direct *X* to refund under section 151.

[s 144.27.3] Auction-purchaser

Except in cases of the kind mentioned under the heading "Who may apply for restitution", restitution cannot be obtained under this section against a *bona fide* purchaser for value at an auction-sale held by a court which had jurisdiction to order the sale.[332] A stranger, who had purchased at the court sale pending an appeal, would be regarded as a *bona fide* purchaser even if he was aware of the pendency of the appeal; otherwise sales held pending appeal would not be likely to fetch proper price.[333] It is otherwise, however, where the decree-holder, himself is the purchaser.[334] The Patna High Court has held that restitution can be ordered under the section, against a stranger purchaser provided he was aware of the merits of the controversy in regard to the property purchased by him and was also aware that the validity of the decree was under challenge.[335] An assignee from a decree-holder auction-purchaser cannot be equated with a *bona fide* purchaser for value without notice. Persons who purchase at a court auction, who were strangers to the decree, are afforded protection by the court, because they are not any way connected with the decree. Unless they are assured of title; the court-auction would not fetch a good price and would be detrimental to the decree-holder. When outsiders purchase from a decree-holder, who is an auction-purchaser, clearly their title depends upon the title of the decree-holder auction-purchaser. It is defeasible title, liable to be defeated if the decree is set aside. A person, who takes an assignment of the property of such a purchaser, is expected to be aware of the defeasibility of the title of his assignor.[336]

A suit for declaration of title and confirmation of possession was dismissed by the trial Court on ground of limitation as the plaintiff did not move court from the date possession was delivered to the auction-purchasers. The appellate court reversed the finding by holding that the plaintiffs were found in possession of the suit land and it cannot be said that the suit was

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332. *Biswakesan Ramanuj Das v Krishna Chandra*, AIR 1951 Ori 148; *Piari Lal v Hanif-un-Nissa*, (1916) 38 All 240; *Kannan Nambiar v Krishnan Nambiar*, (1957) 1 Mad LJ 59.
333. *Mani Lal v Gunga Prasad*, AIR 1951 Pat 802.
334. *Shivbai v Yesoo*, (1919) 43 Bom 235; *Sagore v Mafijaddin*, (1919) 24 Cal WN 50; *Official Receiver v Chettiappa*, AIR 1926 Mad 78 : (1926) 48 Mad 767; *Zain-ul-Abdin v Muhammed Asghar* 15 IA 12 : ILR 10 All 166.
335. *Chota Nagpur Banking Co v Smith*, AIR 1943 Pat 325 : (1944) 22 Pat 315.
336. *Padanathil Rugmimi Amma v PK Abdullah*, AIR 1996 SC 1204 : (1996) 7 SCC 668. See note to section 65 above, 'Effect of reversal of decree upon sale'.

barred by limitation. Moreover, in an appeal filed against auction-sale the entire procedure of auction-sale was set aside. It was held by the Jharkhand High Court that the order of the first appellate court allowing the suit of plaintiffs cannot be said to be illegal or erroneous and no interference is called for.[337] MY Eqbal, J, observed in the above decision as follows:

> From the aforesaid order passed by this Court it is clear that although delivery of possession of auction sold property was taken by the defendants but that remained on paper only and the possession of the suit land actually remained with the plaintiffs at all point of time. Even assuming that by virtue of auction sale the defendants alleged to have come in possession of the suit property, but the auction sale having been set aside, the defendants cannot be allowed to become the owner of the property on alleged plea of adverse possession. It is well settled that Section 144, CPC is not an exhaustive provision but there are various circumstances in which restitution is to be ordered to restore *status quo* ante for the ends of justice. The Court has inherent power to grant restitution even in such case where Section 144, CPC does not apply.[338]

[s 144.27.4] Surety

This section applies only to the parties or their representatives and does not apply to sureties. Hence, restitution cannot be claimed under this section against a surety.[339]

[s 144.27.5] *Bona Fide* Purchaser for Value

The proceedings before the Supreme Court are a continuation of those in the original suit and the principle of lis pendens as well as restitution shall apply to proceedings before the Supreme Court.[340]

[s 144.27.6] Tenant

Where the landlord evicted the tenant in execution of an *ex parte* eviction decree but later on the eviction decree is set aside and that order has become final, the landlord becomes liable to restore possession of the premises to the tenant. The effect of setting aside the decree is that there is no eviction decree against the tenant and therefore, the landlord cannot claim or retain possession of the tenant premises. If another tenancy has been created by the landlord, the inductee or the new tenant would be liable to be dispossessed as per law. The new tenant would be deriving his title to the premises only from the landlord and if the landlord's own title was defected or not legal, he could not bestow a better title on the alleged tenant. Even if a fresh tenancy is created by the landlord in favour of the third party who had no knowledge of litigation between the landlord and the present tenant, on the *ex parte* eviction decree in favour of the landlord being set aside, he was bound to restore possession of the premises to the tenant judgement-debtor.[341]

[s 144.27.7] Insurer

It is clear that the liability of the insurer is within the limits of the statute, obviously, of necessity as may be determined after providing purposive, effective, and meaningful defence,

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337. *Smt. Sita Devi v Lalita Devi*, AIR 2007 Jhar 101 : (2007) 3 JLJR 251.
338. *Smt. Sita Devi v Lalita Devi*, AIR 2007 Jhar 101, p 104, para 9 : (2007) 3 JLJR 251.
339. *Raghubar Singh v Jai Indra Bahadur Singh*, 46 IA 228 : ILR 42 All 158; *Syed Fakir v Abdul*, AIR 1938 Ngp 101 : (1938) ILR Nag 354.
340. *Dalip Kaur v Jeevan Kumar*, AIR 1996 P&H 158.
341. *Rama Saroop v Daljit Singh*, AIR 1995 Del 351.

as available to it under section 149(2) of the Motor Vehicles Act, 1988, in view of the language of section 149 (7), and the mandate in *Itbar's* case. And at the same time, the insurer cannot be made liable otherwise than in accordance with sections 149(1) and (2) of the Motor Vehicles Act, 1988. Of course, as held by the Supreme Court in *S Kandia Insurance Co's case*,[342] as also in *Kamla's* case[343] and *Lehru's* case,[344] it is for the insurer to prove the defence, in order to successfully avoid its liability. Likewise, in view of *CM Jaya's* case[345] read with the *RSRTC's* case,[346] the insurer cannot be compelled to make payment of any amount beyond the limits of its liability, so as to, or expressly leaving it open, to the insurer to recover the amount, either wholly, or the excess part from the insured.[347]

The entire awarded compensation, seldom reaches the hands of the claimants, intact. While in the event of enforcing restitution, the insurer would obviously recover back the entire amount, and then the difficulties, the decree holder claimant is expected to face, in realising the amount from the owner, or driver by executing the award, can very well be comprehended, even in some rare cases, where, the owner or driver is possessed of means capable of satisfying the decree, leaving apart cases where the owner or driver are not possessed of sufficient means. It is to take care of this situation that the provisions of section 149(4) and (5) of the Motor Vehicles Act, 1988 can be interpreted, to be in the nature of an exception to section 144, CPC rather as an exception to the aforementioned established legal principle "*actus curie namimum gravbit*", and they have been so interpreted, with a view to make the relief provided to the claimants as real as possible, leaving the difficulties of the insurer to rest in the realm of "the Insurer's misfortune" as observed by the Supreme Court in *Itbar's* case.[348] The provisions of sections 149 (4) and (5), on being so interpreted, to provide non-restitution from the claimants, even in the event of the award of the learned tribunal being varied, reversed, or modified in the insurer's appeal and while upholding the claim, exonerating the insurer, clearly upholds the purpose and philosophy of this beneficial legislation and extends enough protection to the claimants.[349]

It cannot be laid down as a legal proposition that in every case even where the insurer is able to properly take and prove, one or more of the defences provided by section 149 (2) of the new Motor Vehicles Act, 1988, or for that matter section 96(2) of the old Act, yet the insurer should make the payment to the claimant, and then should always be left only to recover from the insured. Of course, if for any reason, or under any circumstances, somehow the insurer happens to make payment of the awarded amount, which award subsequently happens to be varied, reversed, or modified in appeal, then in that event the insurer would be entitled to recover back the amount from the insured, instead of the claimants, only, in cases where the insured is found liable, however, if the claim is completely dismissed, then of course, the ordinary principles of section 144, Code of Civil Procedure would be attracted.[350]

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342. *S Kandia Insurance Co Ltd v Kokilaben Chandravadan*, AIR 1987 SC 1184 : (1987) 2 SCC 654 : (1987) 2 JT (SC) 43.
343. *New India Insurance Co Ltd v Kamla*, AIR 2001 SC 1419 : AIR 2001 SCW 1340 : (2001) 4 SCC 342 : (2001) 4 JT (SC) 235.
344. *United India Insurance Co Ltd v Lehru*, AIR 2003 SC 1292 : AIR 2003 SCW 1695 : (2003) 3 SCC 338.
345. *New India Assurance Co Ltd v CM Jaya*, AIR 2002 SC 651 : AIR 2002 SCW 259 : (2002) 2 SCC 278.
346. *New India Assurance Co Ltd v RSRTC*, 2003 WLC UC 341 : (2003) 4 AIC 25 : (2002) 2, 3 CC 278, (Raj).
347. *United India Insurance Co Ltd v Madho Singh*, AIR 2004 Raj 131.
348. *British India General Insurance Co v Itbar*, AIR 1959 SC 1331.
349. *United India Insurance Co Ltd v Madho Singh*, AIR 2004 Raj 131.
350. *United India Insurance Co Ltd v Madho Singh*, AIR 2004 Raj 131.

[s 144.28] Sub-section (2): Bar of Suit

There was no sub-section (2) to section 583 of the CPC 1882. Under that section, proceedings for execution had to be commenced by an application for exemption of the appellate decree. This was required by the very terms of the section. The section also required that the appellate decree should be executed "according to the rules prescribed for the execution of decree in suits." These words gave rise to the question whether the rule contained in section 244 (now section 47) which provided that all questions relating to execution should be determined by the court executing the decree and not by a separate suit, was one of the rules referred to in section 583. It was held, in some cases, that it was, and that a separate suit for restitution was therefore barred. In other cases it was held that a separate suit could be maintained for restitution.[351] The section as redrafted in 1908 omitted all references to execution. It was also transferred from the chapter headed "Of appeals from original decrees" to Part IX headed "Miscellaneous". A new sub-section, sub-section (2) was added to end the controversy and which in express terms barred a separate suit where an application for restitution lay under the section. The court, under the section, is empowered to make such orders as it deems proper for restitution. Such order, if not complied with, can be enforced as a decree[352] (see also section 36). The Amendment Act, 1976 has made no change in sub-section (2).

It must be observed that the suit that is barred under this section is a suit to obtain restitution, compensation or other relief which could be obtained by application under this section. Therefore, if restitution could be had, not under this section, but under section 151 in the inherent jurisdiction, a suit would not be barred. Thus, if a sale is set aside on an application under O XXI, rule 90, a suit for mesne profits will not be barred.[353] Likewise, when an execution sale is set aside under section 23 of the Madras Agriculturist Relief Act, 1938, a suit by the judgment-debtor to recover possession is not barred under this section as the right to restitution arises under section 151 of the CPC.[354] Again, compensation awarded under this section is consequential on the variation or reversal of the decree. It follows that if the compensation claimed is not consequential on such variation or reversal, a separate suit for such compensation will not be barred under this section.[355] Where the plaintiffs obtained possession of lands in execution of a decree and that was modified by consent in appeal by declaring that all the parties were jointly entitled to the lands and to certain cash allowances, it was held that while the defendants were entitled to ask for joint possession by way of restitution, no claim can be made for sharing of cash allowances under this section, as that was not consequential on the reversal of any decree.[356] Where an auction-purchaser, in execution of a decree, redeemed a mortgage to which the properties were subject and the sale was subsequently set aside, it was held that he was not entitled to recover, in restitution, the amount paid by him in discharge of the mortgage and that his remedy as to enforce his claim in an independent, suit.[357] Where in execution of a decree, the decree-holder was put in possession of a larger area of land than he was entitled to, and he demolished certain constructions standing on the lands, it was held that while the judgment-debtor was entitled to recover possession of the excess area in restitution under section 151, the claim for compensation for demolition of buildings must be enforced

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351. *Sheo Dihal v Bhawani*, (1907) 29 All 348; *Motiram v Ramkumar*, (1908) 35 Cal 265.
352. *Parbhu Dayal v Kalyan Das*, 48 IA 43 : II R 38 All 163; *Mahadeo v Rama*, (1916) 40 Bom 194.
353. *Balaramdas v Umesh*, AIR 1931 Cal 517 : (1931) 58 Cal 465; *Joku Mal v Sudama Mal*, AIR 1955 All 526 : (1955) All LJ 417.
354. *Mukkayi v Pathavumma*, AIR 1955 Mad 175; *Ayisumma v Kunhammayan*, AIR 1958 Ker 84.
355. *Arjun v Mussammat Parbati*, AIR 1922 All 465 : (1922) 44 All 687.
356. *Narayan Laxman v Vishnu Waman*, AIR 1957 Bom 117 : 59 Bom LR 205.
357. *Durga Das v Munilal*, AIR 1953 P&J 133 : 55 Punj LR 114.

in an independent suit.[358] Where a landlord obtained possession of demised properties in execution of an *ex parte* decree and then by order of the Calcutta Corporation, one of the structures standing on the land which was in a dilapidated condition was demolished, it was held that on the setting aside of the *ex parte* decree, the defendant was entitled to get restitution of land but that his claim for compensation as regards the structure could not be enforced in restitution.[359] Conversely, where the plaintiff obtained possession of house in execution of a decree and effected improvements and on the reversal of the decree, the defendant applied for restitution, the plaintiff has no right to put forward in those proceedings a claim for improvements made by him.[360] A tenant had got the possession of the first floor, on account of the temporary injunction, which he had obtained in a civil suit. The suit was subsequently withdrawn by him and the temporary injunction stood vacated. It was held that he must restore the possession of the first floor to the landlord under section 144 of the CPC. On the facts, application for restitution was held to be the only remedy available to the landlord, since a fresh suit was barred by section 144(2).[361]

[s 144.29] Decree

An order for rateable distribution made under section 73 is not a decree within the meaning of this section.[362] After the addition of the words "or order" by the Amendment Act, 1956, the section applies in cases of orders also.[363]

[s 144.30] Where a Decree or Order is Varied or Reversed or Set Aside or Modified

The text of the old section 583 set out earlier, shows that section applied only where the decree of reversal was a decree passed in first appeal or where by virtue of section 587 (now section 108] it was one passed in second appeal. It did not apply where restitution was claimed on reversal of a decree in appeal to the Privy Council[364] or in review by the same court.[365] This was because of the words "under a decree passed in an appeal under this chapter" (i.e., chapter 41 relating to appeals from original decrees) occurring in section 583. The CPC recast the section in wider terms and was consequently held to be applicable when a decree was varied or reversed on appeal by the Privy Council.[366] By the addition, in 1956, of the words "or order", the remedy by way of restitution has been made available where an order is varied or reversed.

There was, nonetheless, a conflict of judicial opinion on the question whether the section applied where variation or reversal of a decree occurred in consequence of a decree passed in a subsequent suit filed in another court for that purpose. The Madras High Court took the view that the section applied, howsoever, the decree was varied or reversed, even if it be by a separate suit. There the transferee of a mortgage-decree obtained an order recognising the transfer and then executed the decree. The judgment-debtor then filed a suit for a declaration that the transfer was invalid. His suit ended in a decree in his favour. The high court held

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358. *Shital Prasad v Mst Tapesara*, AIR 1953 All 573.
359. *Mahadeo Prasad v Calcutta Dyeing and Cleaning Co*, AIR 1961 Cal 70.
360. *Anusuya Bai v Ramaiah Raju*, AIR 1961 Mys 238.
361. *Bhanrao v Savitribai*, AIR 1991 Bom 55.
362. *Varda v Venkataratnam*, AIR 1922 Mad 99 : (1922) 42 Mad LR 473.
363. *Mukat Bihari v Dina Nath*, AIR 1938 Lah 833 : (1938) 179 IC 386.
364. *Sadiq Husain v Lalta Prasad*, (1998) 20 All 139.
365. *Collector of Meerut v Kalka Prasad*, (1906) 28 All 665.
366. *Hanuman v National Bank of India*, AIR 1926 Lah 488 : (1926) 7 Lah 232.

that the judgment-debtor was entitled to restitution under this section, to the extent of the amount realised in execution by the transferee.[367] In reaching this conclusion, the high court relied on the Privy Council case of *Shama Prasad v Harro Prasad*[368] where Turner, LJ referred to the rule that money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was realised, remained in force and said that the rule did not apply if the original decree or judgment had been reversed or superseded by some ulterior proceeding.[369] In *Jogendra Nath Singh v Hira Sahu*,[370] a Full Bench of the High Court of Allahabad after considering a number of decisions held that there was no reason why the words "varied or reversed", though commonly applicable to a case where a decree had been set aside on appeal or revision by a superior court, could not be applied, also to a case where the decree has been set aside or varied by some other court, even if that court was competent to vary or set it aside. They also observed that the words "the court of first instance" in sub-section (1) only made it clear that the application for restitution could be made to the first court and not to any of the superior courts. For example, if a suit had been dismissed by the trial court and then on appeal, the plaintiff's suit had been decreed but it was subsequently held that the decree was vitiated by fraud or want of jurisdiction or for any other reason, the application for restitution would have to be made to the first court even though the decree was passed by the appellate court. In a later case, the same high court also held that a decree could be varied or reversed by a subsequent legislation, such as abatement of proceedings under rule 5 of the rules framed under the UP Zamindari Abolition and Law Reforms Act, 1951, and restitution in such an event could be claimed under this section.[371] This view has also been shared by the Madhya Pradesh High Court.[372] The Patna High Court also took the view that the expression "varied or reversed" was unqualified and ought to receive full force and effect. A decree, it said, may be varied or reversed not only in appeal or revision before a superior court but could also be varied or reversed in review by the same court which passed it, or by another court in another suit, such as where such decree was obtained by fraud or for want of jurisdiction. The section did not prescribe for an order of restitution to be made in a particular forum or proceeding or by any particular court.[373] The Madhya Pradesh High Court went a step further and held that there can be a reversal or variation of a decree by an order or direction in a writ proceeding, exclusion of which from the operation of section 144 would not be a correct way of interpretation of this section.[374]

Rankin, CJ, on the other hand, in *Gopal Paroi v Swarna Bewa*,[375] expressed dissent against the Madras decision and said:

> But if the decree is set aside either by a proceeding in the suit itself or if it is set aside by a decree in another suit altogether or if, without being set aside by such a decree is *'Superseded'* to use the language of Turner, LJ in a Privy Council case these are matters which are not within the words of the section. 'Varied or reversed' has a quite different

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367. *Subbarayudu v Seshasani*, (1917) 40 Mad 299; *Jogendra Nath Singh v Hira Sahu*, AIR 1948 All 252 (FB); *Maqbool A Khan v Khodaija Begum*, AIR 1949 Pat 138 (FB) : (1948) 27 Pat 873.
368. *Shama Prasad v Harro Prasad*, (1863–66) 10 MIA 203.
369. *Chittoori Venkataraju v Suryanarayanan*, AIR 1943 Mad 148.
370. *Jogendra Nath Singh v Hira Sahu*, AIR 1948 All 252.
371. *Vindyachal v Board of Revenue*, AIR 1956 All 663.
372. *Hariram Beharilal v Pooran Singh*, AIR 1962 MP 295; but see contra *Ayisumma v Kunhammayan*, AIR 1958 Ker 84.
373. *Maqool Alam Khan v Mst Khodaji Begum*, AIR 1949 Pat 133 (FB).
374. *Dangalia v Deshraj*, AIR 1974 MP 49.
375. *Gopal Paroi v Swarna Bewa*, AIR 1931 Cal 14 : (1931) 34 Cal WN 707.

> meaning for lawyers in this country and it appears to me that the observation in the case of *Subbarayudu v Seshasani*[376] failed to take account of the correct use of language in this matter.

The learned Chief Justice accordingly, held that the section applied only when a decree was varied or reversed by a superior court on appeal or revision or on reference and expressed concurrence with Calcutta and, Patna cases which had taken that view.[377] This view was also adopted by Lahore High Court.[378] But soon after *Gopal Paroi*'s case, there emerged a difference of opinion in the Calcutta High Court itself when in *Ramnath Karmarkar v Shaikh Asanulla*,[379] Mukerji, J held that the words "court of first instances" in sub-section (1) pointed to the intention of the legislature to confine the applicability of the section only to cases where variation or reversal had been made or was the consequence of an order passed by a superior court. However, Guha J sitting with him accepted the wider construction of the section as adopted by the Madras High Court. In *Shivappa v Ramlingappa*,[380] the Bombay High Court also held that the reversal or variation of the decree must be in the same proceedings between the same parties on appeal against the decree, or in review, or in any other manner, provided by the CPC, but not in another suit not connected with the suit in which the application for restitution has been made. But in a decision, a division bench of the high court, though concerned with the application for restitution arising out of setting aside of an *ex parte* decree under O IX, rule 13 observed that there was great preponderance of judicial opinion in support of a liberal interpretation of the section and that was that this section would apply whenever a decree was varied or reversed, howsoever such variation or reversal thereof was effected.[381] The Patna High Court, however, following the line of thought adopted by Rankin CJ held that if an *ex parte* decree has been set aside, restitution cannot be had under this section but can be had under the inherent jurisdiction.[382] Some cases have, however, accepted the Madras interpretation and held that where an *ex parte* decree is set aside, restitution can be had under this section.[383] In some cases where a decree or order was superseded, reference was made to section 47.[384] A suit under O XXI, rule 63 has been considered as an appeal against the order passed in the claim case and so cost decreed in the claim case and paid by him, was held to be recoverable under this section by the successful plaintiff in the suit under O XXI, rule 63.[385]

Parliament has, by the Amendment Act, 1976, stepped in and resolved the conflict of judicial opinion by substituting the words "varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purposes" in place of the words "varied or reversed" in sub-section (1), thereby accepting the wider interpretation given to sub-section (1) by the Madras and Allahabad High Courts, that remedy by way of restitution under this section is available not only where a decree or order is varied or reversed in appeal or revision to a superior court, but also where such decree or order is varied or reversed in the

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376. *Subbarayudu v Seshasani*, (1917) 40 Mad 299.
377. *Ashutosh v Kundal Kamini*, AIR 1929 Cal 614 : (1930) 57 Cal 226; *Chintaman v Chuni Sahu*, (1916) 1 Pat LJ 43.
378. *Afred Zahir v Sirajud-din*, AIR 1944 Lah 165.
379. *Ramnath Karmarkar v Shaikh Asanulla*, AIR 1931 Cal 42 : (1930) 34 Cal WN 746.
380. *Shivappa v Ramlingappa*, AIR 1937 Bom 173 : 39 Bom LR 112.
381. *SM Deshmukh v Ganesh Krishnaji Khare*, AIR 1975 Bom 82.
382. *Chintaman v Chuni Sahu*, (1916) 1 Pat LJ 43.
383. *Shivbai v Yesoo*, (1919) 43 Bom 235, contra *Allahabad Theatres Ltd v Ram Sajiwan Misra*, (1949) All 313.
384. *Swamirao v Valentine*, (1920) 44 Bom 702; *Shivbai v Yesoo*, (1919) 43 Bom 235; *Lakshminarayan v Laduram*, AIR 1932 Bom 96 : (1931) 33 Bom LR 1557; *Bindeshri Prasad v Badal Singh*, AIR 1923 All 349 (FB) : (1923) 45 All 369.
385. *Chittoori Venkataraju v Chekka Suryanarayana*, AIR 1943 Mad 248.

same proceedings, before the same court or where it is set aside or modified by another court in another suit filed for that purpose. In a decision, the Calcutta High Court has held that the word "reverse" has a wide connotation including the setting aside of an *ex parte* decree by the trial court itself, under O IX, rule 13 and the Parliament has confirmed such an interpretation by adding the words "in any appeal, revision or other proceeding" after the words "varied or reversed" in sub-section (1) as amended by the Amendment Act, 1976.[386]

Where there is no decree or order passed by a court which is either reversed or varied by the appellate court and the appellate court ordered restitution under section 151 of the Code ignoring section 144, it could not adjudicate the matter. Revision against the order of restoration against *status quo* under Article 227 of the Constitution is maintainable. The question whether appeal was available against such order and decree passed by the trial court is also one of the questions to be considered.[387]

Where a suit for declaration and possession was dismissed by the first appellate court and the order of dismissal was affirmed in second appeal, the Supreme Court held that the appellant in ordinary course would be entitled to possession of suit land from the receiver appointed during the pendency of the suit and the impugned order of the high court rejecting restitution is liable to be set aside.[388]

The term "set aside" in section 144, would carry the same meaning as in O IX, rule 13. Even if the provisions of section 144 (as amended) are not attracted, the inherent power of the court may be exercised to order restitution where a party has been injured by act of the court.[389] Restitution is now available even when the decree is set aside under O IX, rule 13 of the CPC.[390]

The claim for restitution has to be in respect of matters properly consequential on variation, reversal, setting aside or modification of the decree or order. In *Lal Bhagwan Singh v Sri Kishendas,*[391] a decree declared the amount payable by the judgment-debtors and provided that in case they failed to pay it, their properties should be sold to the decree-holders. The judgment-debtors committed default and the properties were sold to the decree-holders and put in their possession in execution. Thereafter, the decretal amount was reduced under the provisions of the UP Encumbered Estates (Amendment) Act, 1951, which was enacted subsequently. The judgment-debtor applied under this section for the cancellation of the sale and for recovery of possession and mesne profits. The Supreme Court held that as the judgment-debtors were not in a position to have paid even the reduced amount at the time of the execution, the sale was inevitable and therefore relief by way of restitution could not be granted as it was not consequential to the modification of the decree. A similar result would follow where the decretal amount is reduced in appeal but it is not proved that the judgment-debtor could have paid off the reduced amount ultimately decreed and thus prevented the sale.[392]

When the decree is neither varied nor reversed, but only the sale is set aside on an application under O XXI, rule 90, it was held that this section would not apply but relief by

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386. *JB Shaw v RN Pandey*, AIR 1977 Cal 281.
387. *Hiranand v LN Khambati*, AIR 2006 AP 103 : (2006) 1 Andh LT 613 : (2006) 3 Civil Court C 434.
388. *Rejendra Singh v Prem Mai*, AIR 2007 SC 3057 : (2007) 11 SCC 37.
389. *Garuda Singh Majhi v Dhana Bai*, AIR 1989 Ori 103.
390. *Fatima Khatoon v Swarup Singh*, AIR 1984 Cal 257 (DB).
391. *Lal Bhagwant Singh v Sri Kishendas*, AIR 1953 SC 136 : (1953) SCR 559 : (1953) SCJ 188.
392. *Dayal v Tari Deshi* 35 CEN 1298; *Baraboni Coal Co v Deva Prossonna*, (1942) Cal WN 1032.

way of restitution could be claimed under section 151.[393] The question whether restitution was ordered under this section or under the inherent jurisdiction was hardly a matter of practical importance except when a question under sub-section (2) arose as regards the bar of suit.[394] After the addition of "Order" in sub-section (1) by the Amendment Act, 1956, restitution in such cases, can be claimed under this section and not under section 151.

Restitution can be claimed not only when the decree or order is reversed but also when it is varied, or set aside or modified in another proceeding or even a subsequent suit filed for that purpose. Thus, if *A* obtains a decree against *B* for Rs 1000 and in execution, *B*'s property is sold and purchased by *A* himself, and the decree is varied in appeal by reducing the amount to Rs 100, the court has power under this section to order *A* to restore the property to *B* on payment of Rs 100 by *B*.[395] A similar order would be made where the decree is superseded in another suit filed for that purpose. A decree formally drawn up is not necessary.[396]

[s 144.31] Independent Suit when Required

Plaintiff's suit for declaration of title and for permanent injunction was decreed by the first court. On appeal by the defendants, the claim of the plaintiff in respect of the remaining portion was dismissed. The plaintiff preferred second appeal to the high court and there was a cross-objection by the defendant. The second appeal by the plaintiff was dismissed by the high court and the cross-objection by the defendant was allowed, dismissing the suit as a whole. Some of the defendants (with the consent of other defendants) took out execution petition for delivery of possession of the premises, demolishing the construction made thereon by the plaintiff. The plaintiff contested this move of the defendants, stating that the defendants could not ask for such independent reliefs. However, the lower court granted the reliefs to the defendants under section 144. It was held that section 144 did not apply. It was not the case of the defendants that the plaintiff had obtained possession pursuant to a court order or in consequence of, or under the colour of an order of the first court, or the decree of the lower appellate court. The defendants claimed that the plaintiff got into possession unlawfully, and the proper remedy was only by way of an independent suit.[397] In second appeal against a decree of ejectment, the high court granted stay on condition that certain amount should be deposited by the defendant. Because of the commencement of consolidation proceedings, the second appeal abated high court, directed that the amount deposited should be paid to the party that was successful in the consolidation proceedings. It was held that in view of the order of a superior court (high court) the trial court was not competent to order refund of the deposited amount.[398]

[s 144.32] The Court Which Passed the Decree

Before the Amendment Act, 1976 altered the section, the section provided that it would be the court of first instances which could grant relief by way of restitution. The principle is that it is the court which has passed an erroneous decree or order which must rectify its error and place the parties in the position which they would have occupied, but for such decree or

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393. *Ram Ratan v Banarsi Lal*, AIR 1930 Pat 280 : (1930) 9 Pat 685; *Jagdip v Holloway*, (1917) 2 Pat LJ 206; *Subbamma v Chennayya*, (1918) 41 Mad 467; *Ganesh Datta v Model Town Society*, AIR 1939 Lah 508.
394. *Rajjabali v Faku*, AIR 1932 Cal 29 : (1931) 58 Cal 1070.
395. *Maung Ban Gyi v Ma Ngwe Bon*, AIR 1929 Rang 157 : (1929) 7 Rang 107.
396. *Krishnadevanand Ramji v Kapildeo Das*, AIR 1951 Pat 330.
397. *Begum Janammal v Selva Avasu*, AIR 1988 Mad 174.
398. *Mansa Tewari v Subh Narain*, AIR 1981 All 169.

order, as has been varied or reversed. Where a decree or order is varied or reversed by a superior court in its appellate or revisional jurisdiction, there would be no difficulty, since it would be the court of first instance which passed the decree which was varied or reversed which would be the court where an application for restitution would have to be made. The superior court, which varied or reversed the decree or order, cannot be called upon to grant the relief by way of restitution because it is not that court which has to rectify its error. Indeed, it is not even necessary for such superior court to include, in its judgment, a direction ordering restitution; but where a decree or order is set aside or modified in a separate suit, filed in another court, for instance, on the ground of fraud or want of jurisdiction, the question would be which is the court of first instances in such a case, the court which in the first instance passed the decree or order or the court which set it aside or modified it. To clarify the position, the amendment Acts has substituted the words "the court which passed the decree or order" for the words "the court of first instance" and added an explanation defining the expression the "court which passed the decree or order." Clause (a) of the Explanation provides that where the decree or order has been varied or reversed by a superior court on appeal or revision, it is the court of first instance to which application for restitution is to be made and not the superior court. This is so, because it is the court of first instance which passed the erroneous decree or order, which it must rectify. Clause (b) provides that where the decree or order has been set aside or modified in a separate suit, filed in another court, it is again the court of first instance which has to rectify its error and there it is that court and not the court which has superseded the erroneous decree or order which has to rectify its error. Clause (c) makes provision for the situation where the court of first instance has ceased to exist or has ceased to have jurisdiction to execute it. A court ceases to exist where, for instance, it is abolished. It ceases to have jurisdiction where a part of its jurisdictional area is transferred or shifted to another court or where some special jurisdiction conferred upon it is withdrawn. Clause (c) gives a wider meaning to the expression "court which passed the decree" for the purposes of applications for restitution in that it empowers the court which, if the suit wherein the decree or order was made were instituted at the time of making the application for restitution, would have jurisdiction to try such suit.

The application for restitution is to be made to the court of first instance. The Supreme Court cannot grant restitution, the same can only be done by the trial court.[399] Section 144(1) clearly indicates that it is a "court of first instance, in which the proceedings in the suit had been initiated and a decree was passed or the suit was dismissed, but subsequently on appeal decreed or vice-versa. The court of first instance would, therefore, mean the court which passed the decree or order. The transferee executive court is not the court that passed the decree or order since the property sought to be executed or the person who is liable for execution is situated or residing within the jurisdiction of that executive court.[400]

Where the decree passed by the Andhra Pradesh High Court in partition suit was transmitted to Bangalore Court for execution and the latter court executed it but subsequently the decree was set aside by the Andhra Pradesh High Court, and interim order that the decree should not be executed, was passed, it is the Bangalore Court which was competent to entertain the application under section 144 of the CPC and could pass order for restoration of possession.[401]

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399. *State Bank of Saurastra v Chittranjan Rang Nath Raja*, (1980) 4 SCC 516.
400. *Neela Thutara Kummi Seethi v Montharatalla Padippua Attakoia*, (1994) Supp 3 SCC 760.
401. *Mohd Raja Ali v Zarin Taj Begum*, AIR 1996 Kant 274.

The words "the courts of first instance" in clauses (a) and (b) mean the court which decided the case in the first instance. The right to apply for restitution is vested in the party to make such application before the court of first instance whose decree or order has been varied or reversed. It is the court which passes the wrong order on account of the reversal of which the right of restitution arises which is the proper court to entertain the application for restitution.[402] In a suit for ejectment under the Agra Tenancy Act, 1910, the court of first instance is the revenue court which heard the suit and not the court of appeal.[403] If the court of first instance has been abolished or has ceased to have jurisdiction, it would be the court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution, would have jurisdiction to try such suit, which can give relief of restitution.[404] The court to which the decree is transferred for execution, has no jurisdiction to entertain an application for restitution under this section.[405] Where a decree for possession of lands was passed *ex parte* by court *A* and possessions taken thereof in execution and after the *ex parte* decree was set aside and the suit restored and court *A* having been abolished in the meantime, the same was transferred to court *B* which dismissed the suit. It was held that court *B* was the proper court under section 150, to entertain the application for restitution.[406]

Though the explanation uses the words "shall be deemed to include", the definition contained therein is not an inclusive definition. Such an inclusive definition ordinarily means that it includes something which would not be covered in its natural and ordinary meaning. In the context in which the expression, "the court which passed the decree or order", is used, it can only mean the court specified in clauses (a), (b) and (c). For instance, where a decree or order is varied or reversed by a superior court in its appellate or revisional jurisdiction, although such a superior court passes the ultimate decree or order, it is not that court to which a restitution application is to be made. Application to any other court except the one which passed the decree or order in the first instance, would be contrary to the principle of restitution that rectification of the error is to be caused by the court which has passed the erroneous decree or order. It is only in the cases set out in clause (c), that principle cannot be followed and therefore a wider meaning had to be given since the court of first instance does no longer exist or has lost its jurisdiction.

[s 144.33] Pecuniary Jurisdiction in Awarding Damages Under this Section

The court of first instance has jurisdiction under this section to award damages even if they exceed the pecuniary limits of its jurisdiction.[407]

[s 144.34] Whether a Proceeding Under this Section is a Proceeding in Execution.

An application for restitution under section 583 of the Code of Civil Procedure, 1882 was held to be one by way of execution.[408] There is a conflict of opinion, whether a proceeding under this section is a proceeding in execution. It has been held by the High Courts of

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402. *Regional Food Controller v Hezari Mal*, AIR 1967 All 272 : (1966) 2 All 4.
403. *Kashi Prasad v Balbhadder*, AIR 1922 All 71 : (1922) 44 All 283.
404. *Panchapakesa v Natesa*, AIR 1926 Mad 813 : (1926) 51 Mad LJ 161.
405. *Kishori Mohan v Brahma Niranjan*, AIR 1938 Cal 554.
406. *Sadashiv v Annappa*, AIR 1960 Mys 273.
407. *Balvantrav v Sadrudin*, (1889) 13 Bom 485.
408. *Prag Narain v Kamakhia*, (1909) 31 All 551 : 36 IA 197.

Madras,[409] Bombay,[410] Patna,[411] Madhya Pradesh[412] and by the Chief Court of Oudh,[413] that it is, while it has been held by the High Courts of Allahabad,[414] Calcutta[415] and Nagpur,[416] that is not. Although the Allahabad High Court holds that it is not a proceeding in execution, yet it also holds that the rules of execution proceedings do in substance apply so that the provisions of O XX, rule 2 are not applicable.[417] On the other hand, although the Madras High Court has held that an application for restitution is an execution proceeding, it also holds that it need not, in every case, be strictly in the form prescribed by O XXI, rule 11.[418] A single judge of the Rangoon High Court held in 1930 that an application for restitution is not a proceeding in execution;[419] but three years later, a bench of the same high court, without referring to this decision, held that it was.[420] In *Eliakutty v Pudukkad Public Bank,* plaintiff had attached before judgment a decree in favour of the defendant, and realised the amounts due thereunder, even before the suit was heard. The suit having been dismissed, defendants applied for recovery of the amount in restitution. It was held by the Kerala High Court that the claim did not fall under section 144, as the amount was not realised in execution of any decree but that restitution could be ordered under section 151.[421] Restitution proceeding is a proceeding in execution of a decree. Appellate Court can stay it under O XLI, rule 8. It cannot be said that the restitution proceedings cannot be stayed by the appellate court, when the decree in pursuance of which restitution is sought for is appealed against. It is settled law that the restitution is a proceeding in execution. The obligation imposed under section 144, cannot abridge or restrict the power of the appellate court to a particular category of cases.[422]

The Supreme Court has, by its decision in *Mahijibhai v Manibhai,*[423] finally resolved the conflict of opinion prevailing in the various high courts. The Supreme Court has observed that under section 583 of the Code of Civil Procedure 1882, the courts understood then, that an application for restitution was an application in execution and that such an application was governed by Article 179 of the Limitation Act, 1887, corresponding to Article 182 of the Act of 1908 (now Article 136 of the 1963 Act). It was in this background that the legislature in passing the Code of Civil Procedure 1908 (CPC) introduced section 144, therein making the section more comprehensive than the old section 583; but the section "does not either

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409. *Chittoori Venkataraju v Chekka Suryanarayana*, AIR 1943 Mad 248; *Somasundaram v Chokkalingam*. (1916) 40 Mad 780.
410. *Kurgodigouda v Ningangouda*, (1917) 41 Bom 625; *Hamidalli v Ahmedalli*, AIR 1921 Bom 67 : (1921) 45 Bom 1137.
411. *Bhaunath v Keda Nnath*, AIR 1934 Pat 246, (FB) : (1934) 13 Pat 411, overruling *Balmukand v Basanta Kumar*, AIR 1925 Pat 1 (FB) : (1925) 3 Pat 371.
412. *Choudary Hareram v Pooran Singh*, AIR 1962 MP 295 : (1962) Jab LJ 220.
413. *Chandika v Bital*, AIR 1931 Oudh 51 : (1930) 6 Luck 448; *Birendra v Bikaram*, AIR 1936 Oudh 185.
414. *Jiwaran v Nand Ram*, AIR 1922 All 223 : (1922) 44 All 407; *Baijnath v Balmukund*, AIR 1925 All 137 : (1925) 47 All 98; *Parmeshwar v Sital Din*, AIR 1934 All 626 (FB) : (1934) 57 All 26; *Badruddin v Munshi Mahyar Khan*, AIR 1939 All 66 : (1939) All 103.
415. *Saraj Bhusan v Debendra Nath*, AIR 1932 Cal 308; *Tarak Chandra v Panchanan*, AIR 1937 Cal 152 : (1937) 41 Cal WN 157; *Satis Chandra v Raja Provita Nath*, AIR 1939 Cal 612 : (1939) 43 Cal WN 859; *Birendra Nath v Surendra Kumar*, AIR 1940 Cal 260; *Kiran Sashi Devi v Chandra Bhusan*. (1951) 2 Cal 315.
416. *Khaja Alawali v Kesharimal Ramlal*, AIR 1947 Ngp 239 : (1947) ILR Nag 176; *Sitaram v Bapurao*, AIR 1953 Ngp 153 : (1953) ILR Nag 649.
417. *Ram Dei v Mangal Lal*, AIR 1935 All 195.
418. *Palaniyandi v Rasappa*, AIR 1937 Mad 173.
419. *Maung Hla v Ma Hnin*, AIR 1930 Rang 241 : (1930) 8 Rang 271.
420. *Muthukarappan v Annamalai*, AIR 1933 Rang 180 : (1933) 11 Rang 275.
421. *Eliakutty v Pudukkad Public Bank*, AIR 1963 Ker 195.
422. *Gadameetti Amrukthavalli Tayaru v Chandrapati Kondaraju*, AIR 1982 AP 80 (DB).
423. *Mahijibhai v Manibhai*, AIR 1965 SC 1477.

expressly or by necessary implication, change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of the restitution clear and unambiguous. It does not say that an application for restitution, which till the new CPC was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application, depends upon the nature of the application and the relief asked for. Where a party who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief either expressly or by necessary implication. He is recovering the fruits of the appellate decree. *Prima facie*, therefore, having regard to the history of the section, there is no reason why such an applications shall not be treated as one for the execution of the appellate decree." The court then examined several judgments of the high court and observed:

> On a procedural matter pertaining to execution when a section yields to two conflicting constructions, the court shall adopt a construction which maintains rather than disturbs the equilibrium in the field of execution. The historical background of s 144 of the Code of Civil Procedure, the acceptance of the legal position that an application for restitution is one for execution of a decree by a number of High Courts, the inevitable adoption of the said legal position by innumerable successful appellants within the jurisdiction of the said High Courts, the possible deleterious impact of a contrary view on such appellants, while there will be no such effect on similar appellants within the jurisdiction of the High Courts which have taken a contrary view, also persuade us to accept the construction that the application for restitution is one for execution of a decree.

This decision was followed by the Supreme Court a year hence in *Maqbool Alam Khan v Mst Khodaija.*[424]

With the resolution of the conflict of opinion and an application for restitution under this section having been held to be an application in execution, the distinction arising from the two conflicting positions held by the high courts in regard to limitation, court fees and the applicability of section 141 pointed out in the previous edition, no longer survives and therefore need not be considered here. An application for restitution being an application for execution of a decree it follows that a competent court entertaining such an application, must be deemed to be an executing court and therefore cannot recognise a payment made by the judgment-debtor unless certified under O XXI, rule 2(3).[425] The application for restitution under section 144 of the CPC is an application for execution of decree within the purview of section 2(2) read with O XXI of the CPC. As the application for restitution under section 144 is an application for execution of the decree, no ad valorem court fee is required on the value of the suit land or mesne profit except the required court fees for the purpose of execution of decree or order.

It is true that for the execution of decree, the provisions of O XXI, rule 11 requires formal application for execution of the decree or order. However, it is not necessary in the case of enforcement of an order passed under section 144.[426]

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424. *Maqbool Alam Khan v Mst Khodaija*, AIR 1966 SC 1194.
425. *Purshottam v Suryakant Gopal*, AIR 1978 Bom 303.
426. *Rameshandra Deb v Bariandra Kumar Chakorborthy*, AIR 1999 Gau 24.

[s 144.35] Restitution and Compromise

Where, in a proceeding for restitution, a compromise petition is filed, the court cannot dispose of the main proceeding without first dealing with the compromise petition. If the compromise is lawful and genuine and is to the satisfaction of the court and is in respect of the subject matter of the proceeding the court must act on it.[427]

Where an application was filed for restitution of suit properties in terms of the arbitral award, and a writ petition challenging the award was filed, the parties entered into a settlement during the pendency of the writ petition in a conciliation proceedings in terms of section 89 of CPC. It was held that when the parties agreed that there subsisted no dispute between then, decree can be drawn up in terms of the settlement. Hence the order restoring the suit property to original possession was held to be improper.[428]

[s 144.36] Limitation

A proceeding for restitution under this section being now settled as a proceeding in execution Article 136 of the Schedule to the Limitation Act, 1963 applies.

The starting point of limitation begins from the date when the decree becomes enforceable. Thus, where the judgment and order of the high court on appeal by decree-holder was set aside by Supreme Court and the decree of the trial court was reversed, the very cause of action which had accrued for restitution vanished. Finally the decree of trial Court was set aside on 31 October 1969 which gives rise to a fresh cause of action for restitution. Therefore, the limitation for filing application for restitution would start from that date and not from any anterior date. Consequently the restitution application was held to be within limitation.[429]

[s 144.37] Applicability of Section 141

Since an application under this section is an application by way of execution, the provisions of section 141 do not apply.

[s 144.38] Appeal

The determination of a question under this section is a decree and appealable as such[430] and this is so even if the court exercises the power of granting restitution in its inherent jurisdiction;[431] (see section 2 clause (2): definition of "decree". However, the question must be one directly covered by the section, and not one incidentally connected with or collateral

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427. *Thakur Ram Laksman Janki Virajman Mandir v Additional District Judge, Fathepur*, AIR 1989 All 6.
428. *Ashok Kumar Bansal v Sushila Devi Bansal*, AIR 2010 MP 145 : (2010) 1 MPLJ 681 (DB).
429. *Har Prasad Tiwari v State of UP*, (2008) 6 All LJ 621 : (2008) 73 All LR 265.
430. *Bhimrao v Laxmibai*, AIR 1966 Mys 112 : (1965) 1 Mys LJ 786; *Dino Nath v Jogendra*, (1914) 19 Cal WN 1167; *Adwaita v Chittagong Co Ltd*, AIR 1925 Cal 102 : (1923) 28 Cal WN 988; *Sarat Chandra v Subashini*, AIR 1930 Cal 89 : (1929) 56 Cal 550; *Shyam Prasad v Ram Chand*, (1914) Punj Rec No 10.
431. *Tarak v Panchanon*, (1937) 1 Cal 63; *Gopal Laskar v Harihar*, (1947) 51 Cal WN 302; *Bijjala Pedda v Bathula*, AIR 1941 Mad 564; *Sheonandan v Gopal*, AIR 1943 Ngp 172 : (1943) ILR Nag 699; *Champabai v Daulatram*, AIR 1938 Ngp 326; *Gopal Lasdar v Haribar Mukhya*, AIR 1948 Cal 37; contra *Syed Usman v Vegisena Sivaramaraju*, AIR 1950 Mad 463, (FB); *Sashikanta v Jalil*, AIR 1931 Cal 779 : (1931) 35 Cal WN; *Gnanada v Chandra*, AIR 1927 Cal 285 : (1927) 31 Cal WN 290; *Champabai v Shree Daulatram*, AIR 1938 Nag 326.

to the decision of any such question. Thus, a decision that an application under this section is time-barred, is a decision on a question collateral to the question of restitution and hence it is not a decree and not appealable as such.[432] The Lahore, Patna, Allahabad, Punjab and Kerala High Courts and the Oudh Court have, however, held that an order of restitution made under section 151 is not appealable.[433] It has been held in a number of decisions that the provisions of O XLI, rule 5 or 6, have no application to a decree or order for restitution, and that there can be no stay thereof.[434]

[s 144.39] Court-Fees

It has been held by the Allahabad, Rangoon and Calcutta High Courts that an appeal from an order made on an application under this section requires to be stamped ad valorem under the Court Fees Act, 1870, Sch I, Article 1, as an appeal from a decree. This proceeds on the view that an application under this rule is not an application for execution.[435] In view of the Supreme Court decision in *Manibhai v Manibhai* this view is no longer correct. Court fees payable on such appeal would be under Sch II, Article 11 of the Court Fees Act, 1870.

The Madras High Court has held that where the claim is one for restitution, no court fee will be payable but where it is in the nature of an independent claim for which a suit should have been laid, court fee would be payable.[436]

[s 144.40] State Amendment

Uttar Pradesh—In section 144, for sub-section (1), the following shall be substituted:

> (1) Where and in so far as a decree or an order is varied or reversed in appeal, revision or otherwise, the court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made, as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed; and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.
>
> (UP Act 24 of 1954, section 2 and Schedule item 5, entry 7, dated 30 November 1954.]

By this amendment, the Uttar Pradesh Legislature accepted the wider construction given to sub-section (1) by the Allahabad High Court. Now that sub-section 1 is altered by the Amendment Act, 1976, the UP Amendment has become redundant.

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432. *Ram Chand v Sham Prashad*, (1913) Punj Rec No 110, 409.
433. *Allahabad Theatres Ltd v Pandit Ram Sajiwan*, (1949) All 313; *Ganesh Dutta v Model Town Society*, AIR 1939 Lah 508; *Rameshwar Lal v Ram Charan*, AIR 1938 Pat 447; *Brij Mohan v Rameshwar Singh*, AIR 1939 Oudh 273; *Ramnandan Pandey v Jagarnath Rai*, AIR 1958 Pat 547; *Kaku Singh v Gobind Singh*, AIR 1959 Punj 468; *Subramanya Iyer v Kesavan Damodaran Poti*, (1963) 1 Ker LR 489 : (1963) Ker LJ 424 : (1963) Ker LT 531.
434. *Muthusami v Ramalinga*, AIR 1958 Mad 366 : (1958) 1 Mad LJ 408 : 70 LW 993; *Krishna Awaji v Bapu Kalu*, (1958) Bom 786 : (1958) Nag LJ 310; *Rafiuddin v Gaddam Narayana*, AIR 1962 AP 525 : (1962) 1 Andh LT 396.
435. *Baijnath v Balmakund*, AIR 1925 All 137 : (1925) 47 All 98; *Maung Hla v Ma Hnin*, AIR 1930 Rang 241 : (1930) 8 Rang 271; *Ma Tive v U Toke*, AIR 1939 Rang 32; *Tarak Nath v Punchanan*, AIR 1937 Cal 152 : (1937) 1 Cal 637. As to cases arising in Bihar and Orissa, see *Sital Prasad v Jagdeo*, AIR 1925 Pat 577 : (1925) 4 Pat 294.
436. *Amman Ammal v Muthuswami Chettiar*, (1962) 1 Mad LJ 381.

[S 145] Enforcement of liability of surety.—Where any person [437][has furnished security or given a guarantee]—

(*a*) for the performance of any decree or any part thereof, or

(*b*) for the restitution of any property taken in execution of a decree, or

(*c*) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

[438][the decree or order may be executed in the manner herein provided for the execution of decrees, namely:—

(*i*) if he has rendered himself personally liable, against him to that extent;

(*ii*) if he has furnished any property as security, by sale of such property to the extent of the security;

(*iii*) if the case falls both under clauses (*i*) and (*ii*), then to the extent specified in those clauses,

and such person shall be deemed to be a party within the meaning of Section 47:]

Provided that such notice as the court in each case thinks sufficient has been given to the surety.

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[s 145.1] State Amendment

Uttar Pradesh.—The following amendments were made by Uttar Pradesh Act 24 of 1954, section 2 and Schedule, Item 5, Entry 5, dated 30 November 1954.

For the existing Section 145, the following shall be substituted:—

437. Substituted by CPC (Amendment) Act 104 of 1976, section 49, for the words "has become liable as surety" (w.e.f. 1-2-1977).

438. Substituted by CPC (Amendment) Act, 1976 (104 of 1976), section 49, for certain words (w.e.f. 1-2-1977).

145. Where any person has become liable as surety or given any property as security—

(*a*) for the performance of any decree or any part thereof, or

(*b*) for the restitution of any property taken in execution of any decree, or

(*c*) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed in the manner herein provided for the execution of decrees—

(*i*) if he has rendered himself personally liable, against him to that extent, and

(*ii*) if he has given any property as security, by sale of such property to the extent of the security;

and such person shall, for the purposes of appeal, be deemed to be a party within the meaning of Section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Explanation.—For the purposes of this section a person entrusted by a Court with custody of any property attached in execution of any decree or order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b).

[s 145.2] Legislative Changes

Section 283 of the CPC 1882 to which this section corresponds, provided that whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. The words "decree in an original suit" led to a controversy whether the section applied to appellate decrees. Further, the section applied only to surety bonds for the performance of a decree and did not extend to surety bonds for the restitution of property, nor for payment of money under an order of the court. Section 145, as redrafted by the Code of Civil Procedure, 1908 (CPC) extended the scope of the section by applying it, not only to surety bonds for the performance of a decree or any part thereof, but also to surety bonds for restitution of any property taken in execution of a decree and to surety bonds for the payment of any money or the fulfilment of any condition imposed under an order of the court in a suit or a proceeding consequent thereon.

Even though the section was wider in scope than the corresponding section 253 of the CPC, it did not apply to surety bonds under which the surety had given a charge upon his property. By inserting clause, (ii) the legislature has, in express terms, enabled the court to sell the property where such property has been furnished as a security instead of requiring a separate regular suit for that purpose. The amended section, by inserting, in its opening part, the words "given a guarantee" has now done away with the view expressed in some decisions that the provisions of sections 133–39 of the Indian Contract Act, 1872, did not directly apply to the surety bonds which provide such guarantee.[439]

[s 145.3] Object of the Section

The section provides that where a person has become liable as surety for the performance of a decree (clause (a)] or for any of the purposes set out in clause (b) or clause (c), the party, for

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439. *Cf Adamsab v Gurushinddayya*, AIR 1967 Mys 147 : (1965) 2 Mys LJ 87.

whose benefit, security has been given, may enforce such security by executing the decree or order against the surety, to the extent to which he has rendered himself personally liable, in the same manner as if the surety was a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. The same would now be the position where such a person has, by his surety bond, given a guarantee for the performance of a decree or part of it or for restitution of property or for the payment of money or fulfilment of any condition imposed under an order of the court in a suit or a proceeding consequent thereon. Consequently, it is not necessary to institute a regular suit to enforce the security or guarantee as was held in some decisions under section 253 of the CPC. The object of the section is to provide a summary remedy in execution and to dispense with the necessity of a separate suit to the extent to which the surety has by his security or guarantee, rendered himself personally liable. The decree can be executed against a surety as though he were a party to the suit and was a principal-debtor.[440] His status, however, is not that of a person against whom a decree has been passed jointly with the judgment- debtor within the meaning of O XXI, rule 16.[441] But the view taken under the section, as it stood before the amendment of 1976, that the obligation which a surety incurs, is different from that, which arises under a contract of guarantee under the Indian Contract Act, 1872, which presupposes a tripartite agreement between the surety, the principal-debtor and the creditor[442] is, it is submitted, no longer good law. The reason is that the amended section now expressly provides that the summary remedy furnished by this section is available where the surety bond contains a guarantee. The insertion of the words "given a guarantee" in the opening part of the section dispenses with an express tripartite agreement between the principal-debtor, the surety and the judgment-creditor and extends the remedy under the section where the surety, by his surety bond, has given the guarantee for any of the purposes set out in clauses (a), (b), or (c). The judgment-debtor need not be a party to the bond and a prior agreement between him and the surety is not essential as it is the order of the court that attracts liability under this section.[443] Before, however, a surety can be made liable on the bond, there must be an order capable of execution against the judgment-debtor.[444]

It is clear that the only person against whom this section can be invoked, is the one who has placed himself in the position of a surety. Therefore, a person left in charge of an attached property by the *Amin* making the attachment is not a surety and if such person disobeys the directions of the court, as regards the property, he cannot be held liable in execution.[445] A suit can, no doubt, lie to enforce the liability.[446] A stranger to the suit against whom a prohibitory order restraining alienation of properties is made, does not become a surety and he cannot be proceeded against under this section for disobedience of the order.[447]

The section does not require that the surety should be named as a judgment-debtor in the decree or that the decree should contain a direction against the surety to pay the decretal amount.[448] The same would be the position where there is an order and not a decree directing payment of money or the fulfilment of some condition.

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440. *Katyanand v Prithichand*, AIR 1933 PC 52 : 60 IA 43; *Harendra Nath v Gurupada*, AIR 1937 Cal 452 : (1937) 2 Cal 612.
441. *Uttamchand v Sheolal*, AIR 1954 Ngp 234 : (1954) ILR Nag 447.
442. *Shyamlal v Takhatmal*, AIR 1957 MP 98.
443. *Madiraj Chiranjivrao v Venkateshwar Rao*, AIR 1955 Hyd 261 : (1955) ILR Hyd 754.
444. *S Kunja Movee Dossi v Akshoy Kumar Das*, AIR 1961 Cal 43.
445. *Nanhoon v Mt Genduja*, AIR 1935 All 768; but see *Gendiya Mal v I Sukhdarshan Lal*, AIR 1936 All 555 : (1936) All LJ 736; *Gurmukh Rai v EF Lawson*, AIR 1939 Cal 316.
446. *Thakur Bhavani Singh v Baldeo*, AIR 1935 All 373 : (1935) All LJ 335.
447. *UOI v CP Gupta*, AIR 1961 Assam 121.
448. *Prakash Chand v Madan Theatres Ltd*, AIR 1936 Lah 463.

Where a surety bond is executed by several sureties, their liability is joint and several. If a creditor seeks to enforce the surety bond against only some of the joint sureties, the other sureties do not, on that account, get discharged, nor would release by the creditor of one of them discharge the other sureties. The liability of each of them is joint and several but not distinct or separate. Hence, if an appeal against an order under this section by the sureties abates as regards one of them by reason of his legal representatives not having been brought on record upon his death pending the appeal, the entire appeal would abate.[449]

[s 145.4] Given a Guarantee

These words have been inserted by the Amendment Act, 1976 to extend the applicability of the section to undertakings given, other than by furnishing security by means of surety bonds. A contract of guarantee as defined by section 126 of the Indian Contract Act, 1872 is a contract to perform the promise, or discharge the liability, of a third person in case of his default. It implies the existence of a liability—actual or prospective—of a third person. It is not necessary that the guarantee should be in the form of a security bond, or in writing, or in favour of a court. Section 126 of the Indian Contract Act, 1872 expressly states that such a contract or guarantee may be either oral or written. But there can be no contract of guarantee, unless there is a principal-debtor and the guarantor's liability is substantially dependent on the debtor's default. A promise to be primarily and independently liable is an indemnity and not a guarantee. Where a surety guarantees payment under a decree and the judgment-debtor makes a default in payment, execution under this section against the surety is available to the judgment-creditor.

In the case of a bank guarantee, there was a clear clause in the deed of bank guarantee that liability to repay amount would continue and remain in force till the party is discharged by the court. It was held by the Bombay High Court that the bank was duty bound to obtain permission of the court before encashing the said guarantee during the pendency of the proceeding. The bank cannot absolve its own liability because of its own negligence. Thus, it was ordered that Bank was bound to deposit the amount of bank guarantee in Court.[450]

[s 145.5] Security by Party

Section 145 does not apply where security is furnished or guarantee is given by a party to the suit.[451]

[s 145.6] Security for the Performance of "any" Decree

[s 145.6.1] *Ex Parte* Decree

A obtains an *ex parte* decree against *B*. The decree is set aside under O IX, rule 13 on *C* standing surety for the performance of any decree that may be passed against *B* on a re-hearing. The suit is re-heard and a decree is passed against *B*. *A* may enforce the security by executing the decree against *C*.[452] A separate suit is not necessary.

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449. *Sri Chand v Jagdish Pershad*, AIR 1966 SC 1427 : (1966) 687 Punj LR 271.
450. *Bank of Maharashtra v Amritlal Tirathram Gupta*, (2009) 4 AIR Bom R 38 : 2009 (1) All MR 509.
451. *Board of Trustees, Marmagoa Port v Chowgule & Co*, AIR 1985 Bom 174.
452. *Sonatun v Dino Nath*, (1899) 26 Cal 222.

[s 145.6.2] Appellate Decree

The summary procedure contemplated by this section applies to suretyship for the performance of any decree, whether it be an original or an appellate decree. Under the old section, there was a conflict of decisions as to whether the summary remedy provided by that section applied at all, to suretyships for the performance of appellate decrees, it being held by the High Court of Calcutta [Calcutta HC] that it did not,[453] and by the other high courts that it did.[454] The section makes it clear that the summary procedure contemplated by this section applies to security given for the performance of appellate decrees also. The rules that provide for security for the performance of appellate decrees are rules 5 and 6 of O XLI. An illustration will make the point clear. *A* obtains a decree against *B* and applies for execution. *B* appeals from the decree and applies for stay of execution under O XLI, rule 5. Execution is stayed, on *C* standing surety for the due performance of any decree that may be passed against *B* in appeal. A decree is eventually passed by the appellate court against *B*. *A* may enforce the security against *C* by executing the appellate decree against him as if *C* was a party to the decree. According to the Calcutta decisions under the old section, *A*'s only remedy was by way of suit against *C*.

[s 145.6.3] Decree Passed or to be Passed

The expression "any decree" is wide enough to cover a decree that has already been passed as well as a decree that may be passed after the person concerned has become liable as surety.[455]

[s 145.6.4] Decree on Transfer of Suit

If a surety bond is executed in a subordinate judge's court but the suit is transferred to a District Munsiff's Court as a result of enhancement of the pecuniary jurisdiction, the bond ensures for the benefit of the plaintiff, even after the transfer of the suit and the surety would be bound to pay if the plaintiff's claim is decreed.[456]

[s 145.7] Security or Guarantee for Restitution of Property in Execution of a Decree

A obtains a decree against *B* for possession of certain lands. *B* appeals from the decree. Pending the appeal, *A* applies for execution of the decree. The court allows execution, on *C* standing surety for the restitution of the lands to *B* in the event of the decree being reversed in appeal, or for payment to *B*, of the value of the property (O XLI, rule 6, Code of Civil Procedure, 1882, section 546). The decree is eventually reversed in appeal. *B* may enforce the security by executing the appellate decree against *C*. According to the Calcutta decisions under the old section, *B* could only enforce the security by a separate suit.[457] The court has inherent jurisdiction to enforce a security bond which does not fall within any of the sections or rules of the CPC.[458]

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453. *Tokhan v Udwant*, (1895) 22 Cal 25; *Subjoo Das v Balmakund*, (1896) 23 Cal 212 (section 546).
454. *Venkapa v Baslingapa*, (1888) 12 Bom 411; *Jamsetji v Bawabhai*, (1901) 25 Bom 409; *Janki v Sarup*, (1895) 17 All 99; *Thirumalai v Ramayyar*, (1890) 13 Mad 1. But see *Lakshman v Gopal*, (1906) 30 Bom 506.
455. *Gauba v Sultan Singh*, AIR 1935 Lah 189; *K Chenchiah v V Chatragudeppa*, (1961) 1 Andh WR 147; *Jafar Ali v Ramloo*, AIR 1967 AP 234.
456. *C Kanakaiah Textiles & Co v VV Subbamma*, AIR 1968 AP 272.
457. *Subjoo v Balmakund*, (1896) 23 Cal 212.
458. *Ouseph Korathu v Gopalan Nair*, AIR 1952 Tr & Coch : (1951) Ker LT 627; *NR Batra v S Prem Singh*, AIR 1960 P&H 16 : (1959) ILR Punj 532 (writ proceedings under Article 226).

[s 145.8] Security or Guarantee for Payment of Money

The following are some of the sections and rules providing for security for the payment of money:

(i) Section 55, sub-section (4) (security on behalf of a judgment-debtor who is arrested in execution of a decree and who expresses his intention to apply to be declared an insolvent);

(ii) Order XXV, rule 1 (security for costs);

(iii) Order XXXVIII, rule 2 (security in cases of arrest before judgment);

(iv) Order XXXVIII, rule 5 (security in cases of attachment before judgment)"

(v) Order XLI, rule 10 (security for costs of respondent in first appeal);

(vi) Order XLV, rule 7 (security for costs of respondent in appeal to the Supreme Court).

[s 145.9] Security or Guarantee for Fulfillment of any Condition Imposed on any Person

Provisions under section 145 would enure to benefit of court as well as custodian to proceed against appellant in enforcement of undertaking given to the court.[459]

The summary remedy provided by section 253 of the Code of Civil Procedure, 1882 (now replaced by Code of Civil Procedure, 1908) applied only where security given was for the performance of a decree and for no other purpose. Thus, where a defendant produced certain promissory notes in court, and the plaintiff objected to their return to the defendant, but they were returned to the defendant on *C* standing surety for their production when required, it was held that the plaintiff could not, on non-production of the notes, proceed against *C* by execution, the reason given, being that the security was not given for the performance of a decree, and that his only remedy was by way of suit against *C*.[460] Under the present section, the security may be enforced by execution against *C*. Therefore, when a sale in execution is adjourned on a security bond to produce the property attached, the bond may, on default, be enforced against the surety for the value of the property by proceedings in execution.[461]

The section applies only where the court passes an order or decree which is intended to be an order or decree enforceable in execution by one party to a suit or other proceeding against the other party.[462] Therefore, a bond passed by a surety under O XXXII, rule 6(2), cannot be enforced by summary process under this section; it can only be enforced by a suit.[463] But if a next friend of a minor is allowed by the court to withdraw money paid into court by a judgment-debtor, in satisfaction of a minor's decree, on condition that he shall purchase Government Promissory Notes and deposit the Notes in court there is a proceeding consequent on the suit until the notes are deposited. Therefore, a surety bond for the deposit of the notes can be summarily enforced under clause (c) of the section.[464]

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459. *Western Press Pvt Ltd Mumbai v Custodian*, AIR 2001 SC 450 : (2001) 10 SCC 703.
460. *Narayanamma v Ramayya*, (1899) 22 Mad 268.
461. *Sankunni v Vsaudevan*, AIR 1926 Mad 1005 : (1926) 51 Mad LJ 239.
462. *Jafar Ali v Ramloo*, AIR 1967 AP 234.
463. *Kambham Ramamurthi v Sagiraju*, AIR 1949 Mad 152; *Kurugodappa v Soogamma*, (1918) 41 Mad 40; *Rajah of Venkatagiri v Surga*, (1920) 39 Mad LJ 472.
464. *Sankara v Sanyasayya*, AIR 1933 Mad 678 : (1933) 56 Mad 687.

Where the guardian of minors withdrew money belonging to them and in court, deposit after executing a bond which provided that he would pay them to the minors on their attaining majority and that, in default, the amount could be recovered from him personally and from his properties, it was held that section 145 and O XXXII, rule 6, were not mutually exclusive and that the bond could be enforced under this section.[465] The section does not apply to a surety on an administration bond under section 291 of the Indian Succession Act, 1925.[466]

A is committed to prison in execution of a decree obtained against him by *B*. *A* applies to be released from jail to enable him to make a petition in insolvency. *A* is released from prison on *C* giving security that A will appear before the executing court on the day fixed by the court. The insolvency petition fails, and *A* fails to appear in court. In such a case B, and not the government, is entitled to the security money.[467] The money is to be appropriated towards satisfaction of the decree; it is not to be given to the decree-holder as a solarium or further benefit over and above the decretal amount.[468]

[s 145.10] Deposit of Title Deeds

In an Andhra Pradesh case, the court directed the furnishing of "third party immovable property security" to the satisfaction of the court below. The petitioner furnished a third party immovable property security, and also offered to deposit title deeds and to create an equitable mortgage. It was held that if the party offers to give security by deposit of title deeds, then in the absence of any specific direction in that regard, it is left to the discretion of the court whether to accept such a security or not. Such a discretion is implicit in the words "to the satisfaction of the court below". Where a security is furnished by the deposit of title deeds, no registration is necessary.[469]

[s 145.11] Clauses (i), (ii) and (iii)

A surety:

(i) may render himself personally liable; or

(ii) he may only give a charge upon his property; or

(iii) he may undertake a personal liability and charge his property as further charge.

As the section stood before its amendment by the Act of 1976, it provided, in express terms, that the decree could be executed against the surety "to the extent to which he has rendered himself *personally* liable." Construing these words, Banerji, J in *Amir v Mahadeo*[470] observed:

> Under s 253 of Act 14 of 1882, there was a conflict of opinion in the different High Courts as to whether a mortgage made by a surety could be enforced under that section. It seems to me that in order to reconcile the divergence of opinion which arose under the old Code and to remove any ambiguity that might exist on the subject, the Legislature in

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465. *Unnikrishna Menon v Venkata Parasurama*, AIR 1957 TC 151 : (1956) TC 1156 : (1956) Ker LT 772.
466. *Ko Maung Gyi v Daw Tok*, AIR 1928 Rang 149 : (1928) 6 Rang 474. See notes to O XXI, rule 43, "Security bond to produce attached property".
467. *Basanti Lal v Chebdeo Singh*, (1912) 39 Cal 1048; *Abdul Hussein v DJ Mistri & Co*, AIR 1922 Bom 340 : (1922) 46 Bom 702, 705–06; *Dedhraj v Mahabir*, (1920) 5 Pat LJ 417; *Shiv Dayal v Muhammad*, AIR 1924 Lah 490 : (1924) 6 Lah LJ 200.
468. *Surendra Nath v Keshab Lall*, (1920) 25 Cal WN 36.
469. *Royal Printing Working v Oriental Bank of Commerce*, AIR 1990 AP 120.
470. *Amir v Mahadeo*, (1970) 39 All 225, approved by Rankin, J in *Subumani v Mugneeram*, AIR 1926 Cal 889 : (1927) 54 Cal 1, 18; *Hashmat v Barati Lal*, AIR 1934 Oudh 139 : (1934) 9 Luck, 534.

> enacting s 14 of the present Code of Civil Procedure added the word- 'personally' to, the provisions of that section, thus clearly enacting that in execution of the decree it is the personal liability of the surety which could be enforced and not the liability of the property hypothecated by him. As pointed out by the learned Chief Justice, the enforcement of the mortgage created by the surety would require the provisions of the Transfer of Property Act as regards the array of parties and the form of the decree and other matters to be complied with.

In this view, the section, as it stood unamended, could not apply to the second case, that is, the property charged could not be brought to sale under this section, for the section applied only when the personal liability of the surety was sought to be enforced and could not be invoked for the enforcement of a charge.[471]

When a surety charged his property by way of security, such security could be given either:

(i) to the court itself; or

(ii) to an officer of the court; or

(iii) any other named individual.

Where the security was given to an officer of the court or to other named individual, the property could not be sold, except by a suit on the charge. Where the security was given to the court, the court not being a judicial person, could not sue. The only mode available for enforcing the liability in such a case was by the court making an order in the suit upon an application to which the surety had to be made a party that the property charged be sold unless before a day named the surety found the money. The Privy Council so held in *Raghubeer Singh v Jai Indra Bahadur Singh*.[472] In that case the plaintiff obtained a decree for possession against the defendant. The defendant appealed against the decree. On his application, the plaintiff was let into possession, in execution of the decree upon furnishing security. The security was furnished by *S* who entered into a bond whereby he hypothecated property. The bond was passed to the court. No obligee was named in the bond. The contention on behalf of the surety was that his liability under the bond could not be enforced except by a suit under O XXXIV, rule 14 (Transfer of Property Act, 1882, section 90). The contention, however, was rejected and it was held that the proper order to make was that the property charged be sold unless, before a day named, the surety found the money. The Privy Council observed:

> In the course of the judgment in India s 145 was referred to; but whatever might have been its effect if the sureties had been personally liable it has no application now that their Lordships have construed the instrument as giving only a charge upon property.

As to the contention that the liability could only be enforced by a suit on a mortgage, their Lordships said that for such a proceeding, there must be a mortgagor and a mortgagee. Since in the instant case there was no mortgagee named in the bond, and, further, the court, not being a juridical person, cannot assign the property to any person to enable him to file a suit on the mortgage. The Calcutta High Court took the view that in such a case a suit could be instituted by the creditor on the principle that a trust was created in his favour by the security bond.[473] This view, however, has been dissented from by the Bombay High Court.[474] Where the recitals

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471. *Babulal v Hyderabad Municipal Corp*, AIR 1961 AP 413 : (1960) 2 Andh WR 510.
472. *Raghubar Singh v Jai Indra Bahadur Singh*, 46 IA 228, 236; approving *Janki Kuar v Sarup Rai*, (1895) 17 All 99; *Beti Mahalakshmi v Badan Singh*, AIR 1924 All 105 : (1923) 45 All 649; *Sukumari v Magneeram*, AIR 1926 Cal 889 : (1927) 54 Cal 1; *Daw v U Bah*, AIR 1929 Rang 126 : (1929) 7 Rang 352; *Kunhi Moidin v Koman*, AIR 1933 Mad 691 : (1933) 56 Mad 989; *Ratan v Kandan*, AIR 1934 Mad 262 : (1934) 57 Mad 803; *Rohani v Har Prasad*, AIR 1943 PC 189.
473. *Maldab District Board v Chandrateku*, AIR 1937 Cal 625 : (1937) 2 Cal 698.
474. *Prahlad Tirkaraddi v Laxmava*, AIR 1947 Bom 484 : 49 Bom LR 542.

in a bond did not show that it was executed in favour of any person, it was held that the words "to the Subordinate Judge" at the top did not alter its character and it could be enforced under this section.[475] It must be observed here that the procedure adopted by the Privy Council in *Raghubar Singh*'s case cannot be followed in cases where the surety has, prior to the sale, transferred his equity of redemption in the property to a third person.[476] The Madras High Court has held that when the security was realised under the procedure recognised in *Raghubar Singh*'s case, the surety was a party to the suit for the purposes of appeal.[477] The procedure was an exercise of the inherent jurisdiction of the court and the article of the Limitation Act, which applied was Article 182 (now Article 136 of the Act of 1963) either from the date of the bond or the day of default by the surety.[478]

In the third case also, where the security was given to the court, the property could be sold by an order of the kind made in *Raghubar Singh's* case. At the same time, the applicant could relinquish the charge and enforce the personal liability in the bond by attachment and sale of the property charged.[479] The Chief Court at Oudh took the view, however, that when a surety has, in a surety bond, undertaken personal liability and has also charged certain immovable property as security, it was the personal liability only and not the liability of the hypothecated property which could be enforced under this section.[480] On the other hand, some courts expressed the view that where the bond provided that the properties secured were liable in the first instance and that the obligor was to be liable for deficiency, the bond could be enforced under the inherent jurisdiction of the court.[481]

Instead of leaning on the inherent jurisdiction of the court and not under this section, the Amendment Act, 1976 has now introduced clauses (ii) and (iii) which empower the courts to execute the decree where the surety has furnished any property as security by sale of such property to the extent of the security and where the case falls under clause (i) and clause (ii) i.e. where the surety has rendered himself personally liable and as further security has furnished some property, to the extent specified in the security bond. It is submitted that since express power has now been conferred on the court to execute the decree against the surety by sale of the property upon which the charge is made, no questions relating to the provisions of O XXXIV or the provisions of the Transfer of Property Act, 1882 can any more arise. Such a sale in execution can now be ordered under this section and not under the inherent power of the court. The sale would be directed in the manner provided for in the CPC for execution of decrees and the surety would be deemed to be a party within the meaning of section 47.

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475. *JanakiaAmmal v Krishnaswami Mudaliar*, AIR 1960 Mad 324 : (1960) 1 Mad LJ 148 : 73 LW 22.
476. *Amir v Mahadeo*, (1917) 39 All 225; contra *Prahlad Tirkaraddi v Laxmava*, AIR 1947 Bom 484 : 49 Bom LR 542.
477. *Ayyasami v Sivakkiammal*, AIR 1933 Mad 780 : (1933) 56 Mad 909; contra *Firm Tokani Prasad v Kanailal*, AIR 1945 Cal 193 : (1944) 1 Cal 563.
478. *Jamundas v Krishan*, AIR 1933 Mad 722 : (1933) 65 Mad LJ 507.
479. *Mukta Prasad v Mahadeo*, (1916) 38 All 327; *Ganga Deo v Joti Lal*, (1917) 2 Pat LJ 197; *Gurushantappa v Gurava*, AIR 1926 Bom 279 : (1926) 50 Bom 338; *Jayappa v Shevangouda*, AIR 1928 Bom 42 : (1928) 52 Bom 72; *Kastur Lal v Goverdhan Das*, AIR 1934 Lah 138 (FB) : (1934) 15 Lah 282; *Babulal v Hyderabad Municipal Corp*, AIR 1961 AP 413 : (1960) 2 Andh WR 510.
480. *Hashmat Ara Begum v Bauli Lal*, AIR 1934 Oudh 139 : (1934) 9 Luck 530; *Malak Chand v Hira Lal*, AIR 1935 Pat 510 : (1935) 11 Luck 449.
481. *Banamali Mahappa v Swamiah*, AIR 1954 Cut 556 : 20 Cut LT 645; *Janaki Ammal v Krishnaswami Mudaliar*, AIR 1960 Mad 324 : (1960) 1 Mad LJ 148 : 73 LW 22.

Where a security bond, charging his property, is given by the judgment-debtor himself, the property can be realised in execution under section 47.[482] *A* sued for a declaration that the property attached belonged to her in her own right and not as the legal representative of the judgment-debtor. The suit was dismissed and *A*, in appeal, obtained stay of execution on giving security for loss of interest to the decree-holder during the pendency of the appeal. But when the appeal was dismissed, it was held that the security could not be realised in execution on the ground that the order regarding furnishing of security was not an executable order but was declaratory in nature.[483]

[s 145.12] Notice to Surety

The notice required to be given to a surety under this section is a condition precedent to the validity of an order for execution against him. An attachment issued without such notice is illegal.[484] When a decree is sent by the court which passed the decree to another court for execution, the notice required by this section may be given by the latter court.[485] The notice to be given to the surety should not be general but specific as contemplated by Form No 13 in Appendix H.[486] This section does not lay down that the notice should be in writing. All that is necessary is that before the attachment actually takes place, the surety should have notice of the order directing execution of the decree against him, the object being that he may be able to take objections, if any, to the order. If the objection of want of notice is not raised before the executing court, it must be taken to have been waived.[487]

[s 145.13] Discharge of Surety

The liability of the surety depends upon the terms of the bond and unless expressly limited to the original court, extends to the court of appeal.[488] If the bond has reference to the ultimate issue of the suit, it matters not that the suit has at one time been dismissed for default and then restored.[489] Where the bond provided that the surety was to be liable for the entire amount of the decree that might be passed, it was held that the liability extended to the decree which might ultimately be passed in appeal;[490] however, where a judgment-debtor, who had been arrested in execution of a decree, was released on the surety furnishing security for his appearance during the execution proceeding then pending and owing to the default of the decree-holder to appear on the due date, the execution application was dismissed and the surety was also discharged, it was held that the liability of the surety was not automatically revived by the mere restoration of the execution application.[491] A surety who has made himself liable for the performance of a decree cannot resist enforcement of the bond on the ground

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482. *Jyoti Prakash v Mukti Prakash*, AIR 1924 Cal 485 : (1924) 51 Cal 150; *Subramaniam v Raja of Ramnad*, (1918) 41 Mad 327; *Rajendra Chandra v Bipin Chandra*, AIR 1934 Cal 64 : (1933) 60 Cal 1298.
483. *Khairunnissa Bibi v Oudh Commercial Bank*, AIR 1933 All 269 : (1933) 55 All 346.
484. *Tankain v Yche si*, AIR 1925 Rang 135 : (1924) 2 Rang 567.
485. *Lakshmishankar v Raghumal*, (1905) 29 Bom 29; *Rahim-ud-din v Murli Dhar*, AIR 1938 Lah 593 : (1938) ILR Lah 624.
486. *Govind Prasad v Abriambala*, (1958) ILR Cut 309 : 24 Cut LT 404.
487. *Nanak Chand v Ibrahim*, AIR 1937 Lah 77. For Form of notice, see Appendix H, Form No 13.
488. *Irangowda v Irbasappa*, AIR 1927 Bom 84 : (1927) 51 Bom 31.
489. *Jia Bai v Joharmull*, AIR 1932 Cal 858 : (1932) 59 Cal 1450; *Veeraswami v Ramanna*, AIR 1935 Mad 365 (FB) : (1935) 58 Mad 721; *Sardar Singh v Kishorilal*, AIR 1960 MP 221 : (1959) Jab LJ 748.
490. *Narayana Rao v Francis*, AIR 1953 Mys 68 : (1953) ILR Mys 277; *G Bapaiah v V Subbaiah*, AIR 1960 AP 507.
491. *Kashmiri Lal v Chuni Lal*, AIR 1934 Lah 349.

that a consent decree is passed on a *bona fide* compromise;[492] nor on the ground that such compromise was made without his knowledge;[493] provided such a decree is not the result of any fraud or collusion between the plaintiff and the defendant;[494] nor on the ground that the judgment-debtor has consented to a decree for payment by instalments;[495] nor on the ground that the decretal amount is enhanced by the appellate court.[496] Settlement of the decree debt under the Debt Relief Act does not affect the liability of the surety.[497] But where under the surety bond, the surety agreed that if the decision was given against the defendant, he would pay whatever amount was found due, it was held that the surety was discharged if the suit was compromised.[498] There is nothing unreasonable or wrong in a surety expressly stipulating that he would be bound by his guarantee only if a decree is passed after contest.[499] A surety for the judgment- debtor executes a bond engaging that an arrested judgment-debtor will apply under section 55(4) to be declared insolvent is discharged when the judgment-debtor makes a *bona fide* application within the time specified to the court of insolvency, even though the application is rejected as not being in proper form.[500] But a surety who gave security upto Rs 1100 on a rule for stay of execution, was discharged when the rule was made absolute for Rs 5000.[501] Where, after security bond was given the decree-holder obtained an order for additional security, and that not having been furnished, the stay was cancelled, it was held that the surety was discharged.[502] The surety is not discharged by a payment which has not been certified under O XXI, rule 2 of the CPC.[503] An attachment before judgment was raised on *A* giving security. The suit was then decreed *ex parte* but the decree was set aside on *B* furnishing security. The suit was again decreed and the decree-holder applied under this section to enforce the bond against *A* under this section. It was held that the taking of security from *B* did not discharge *A* from his liability under his bond, which continued to be in force.[504] A security bond, given for appearance under O XXXVIII, rule 2, ensures only for the suit and not proceedings in execution of the decree.[505] One view was that an obligation which, a surety incurs under the bond which he gives to the court under this CPC, is excluded from the definition of a contract of guarantee as contained in the Indian Contract Act, 1872 and the provisions of sections 133–39 of that Act cannot be made applicable to the bond.[506] The other view held by the Madras High Court was that though in such cases those sections of the Indian Contract Act, 1872 would not, in terms, be applicable, the principles underlying

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492. *Haji Ahmed v Maruti*, AIR 1931 Bom 55 : (1931) 55 Bom 97; *Jia Bai v Joharmull*, (1932) 59 Cal 1450; *Kabiruddin v Debising*, AIR 1935 Nag 16; *Chakkunny v Viswanath Iyer*, AIR 1961 Ker 312 : (1961) 2 Ker 213 : (1960) Ker LJ 682 : (1960) Ker LT 866.
493. *Mohan Lal v Suraj Mani*, AIR 1973 J&K 92.
494. *AAK Murtasa v Jiv Raj Otmal*, AIR 1972 Bom 88 : 73 Bom LR 715; *Adamsab v Gurushinddayya*, AIR 1967 Mys 147.
495. *Jia Bai v Joharmull*, (1932) 59 Cal 1450; dissenting from *National Coal Co v Kshitish Bose*, AIR 1926 Cal 818 : (1926) 30 Cal WN 540, and explaining *Tatum v Evans*, (1885) 54 LT 336.
496. *Mukta Behari v Khushi Ram*, AIR 1935 Lah 21.
497. *Sivaram v Kisan*, AIR 1952 Nag 201 : (1951) ILR Nag 864.
498. *Dalip Singh v Kishan Chand*, AIR 1937 Lah 34.
499. *Adamsab v Gurushinddayya*, AIR 1967 Mys 147.
500. *Channappa v Yellappa*, AIR 1931 Bom 444 : (1931) 33 Bom LR 820.
501. *Hiralal v Manilal*, AIR 1926 Bom 565 : (1926) 28 Bom LR 517.
502. *Paily v KunjumMuhamed*, AIR 1960 Ker 11 : (1958) Ker LT 545 : (1958) Ker LJ 169.
503. *Tambi Reddy v Devi Reddy*, AIR 1926 Mad 674 : (1926) 49 Mad 325; *Rajani v Mahalukmi*, AIR 1932 Cal 729 : (1932) 59 Cal 1354.
504. *Pappusamy v Chellampalli Eswariah*, AIR 1954 Hyd 24 : (1953) ILR Hyd 526.
505. *Sardar Singh v Kishorilal*, AIR 1960 MP 221 : (1959) Jab LJ 748.
506. *Madanlal v Radhakisan*, AIR 1935 Ngp 258; *Narayan Rao v Frances*, AIR 1953 Mys 68 : (1953) ILR Mys 277.

them would be applicable where the surety bond had been executed in favour of the court.[507] This has also been the view held by the Mysore High Court.[508] The addition of the words "or given a guarantee" in the opening of the section as amended by the Amendment Act, 1976 indicates that the legislature intended to make sections 133–39 of the Indian Contract Act, 1872 applicable. In the absence of anything to the contrary in the section the word "guarantee" added in the section must be taken to have the same meaning as that given in the Indian Contract Act, 1872. The form which the contract of suretyship, takes is immaterial; it may be either in favour of the court or of the decree-holder.[509] It matters not that the bond, is not in a form prescribed by any order or rule of the CPC.[510] It may be a letter by the surety to the decree-holder and need not even be addressed to the court.[511] On the death of a surety, his liability can be enforced against his legal representatives.[512] Where the decree-holder himself had compromised with the principal-debtor and had discharged himself from the liability to the performance of the decree, in law it must be a full satisfaction of the decree under section 47 and relevant rule in O XXI of the CPC. Full satisfaction recorded in that behalf relieves the guarantor or surety from the obligation. And the decree-holder cannot seek any further remedy against the surety. In case, the compromise was with the consent of the guarantor or surety, compromise with the principal judgement-debtor is for other liability, other than the extent of the liability undertaken by the guarantor or surety; in that event, the guarantor or surety is not relieved from his liability for due performance of the decree.[513]

Where the Secretary of a society had executed a surety bond and had undertaken on behalf of the defendant-Society to produce the vehicle attached in a case if the same was released to him, the liability of the Secretary/surety does not extinguish on subsequent compromise by the decree-holder with the principal debtor-society. It was held by the Kerala High Court that the liability of surety as disclosed in the surety bond is distinct and different from the liability created on the Society as per terms of the compromise. It was further held that a surety bond executed by an officer of the Society making himself liable personally, though executed for securing a benefit for the Society would not protect such officer of Society under section 11 of the Travancore-Cochin Literary, Scientific and charitable Societies Registration Act, 1955 and such liability would not cease on his ceasing to be an officer of the Society.[514]

With respect to enforcement of surety's liability an interesting case came up before the Jammu and Kashmir High Court. In a case of land acquisition, the land owner, feeling aggrieved by the assessed compensation, sought arbitration. The arbitrator, besides awarding compensation, also allowed solatium and interest. The award of the arbitrator was maintained by the high court and the Union of India moved the Supreme Court. The Apex Court maintained the award but set aside the award of solatium and interest. The respondent, Union of India sought restitution from the legal representatives of the deceased claimant. It was held by the high court

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507. *Annadana Jadaya v Konammal*, (1932) 56 Mad 625; *Travancore National and Quilon Bank Ltd. (in liquidation) v Official Assignee of Madras*, AIR 1944 Mad 396 : (1944) ILR Mad 708; *Bankim Bihari Rao v Halima Bibi*, AIR 1962 Ori 54 : (1961) ILR Cut 365; *Trilok Nath v Kehar Singh*, AIR 1962 J&K 72.
508. *Adamsab v Gurushinddayya*, AIR 1967 Mys 147.
509. *Joyman Bewa v Easin Sarkar*, AIR 1926 Cal 818 : (1926) 53 Cal 515; *Janki Ammal v Krishnaswami Mudaliar*, AIR 1960 Mad 324 : (1960) 1 Mad LJ 148 : 73 LW 22; *Jagannath Prasad v Ram Prasad*, AIR 1958 Assam 15.
510. *Karuppan v Nagappa*, AIR 1934 Mad 186 : (1934) 57 Mad 688.
511. *Mohomed Abdul v Sundararamayya*, AIR 1935 Mad 209 : (1935) 58 Mad 777.
512. *Ramakrishna v Ratanchand*, AIR 1956 All 32.
513. *Amar Chand v Bhano*, (1995) Supp 1 SCC 550.
514. *K Verghese v Bhanuvikraman Unnithan*, AIR 2007 Ker 192 : (2007) 2 Ker LT 595.

that the legal representatives are liable only to the extent of property of the deceased inherited by them. Since the respondent in this case had not inherited any such property he is not liable as legal representative. However, the respondent had executed surety bond for 50% of the total compensation amount received by the deceased, he is liable to pay back 50% of solatium and interest.[515]

[s 145.14] Adjustment of Decree

If the surety makes an application to the executing court that an adjustment had taken place between the decree-holder and the judgment-debtor and that he is discharged as a consequence but the application is dismissed without going into merits on the ground of limitation, the surety can bring a suit for a declaration that, in view of the adjustment, he is discharged.[516]

[s 145.15] Section not a Bar to a Regular Suit Against Surety

Under section 253 of the Code of Civil Procedure, 1882, it was held that the section gave an additional, and not an exclusive remedy, against a surety and that it did not prevent the decree-holder from bringing a regular suit on the surety bond to enforce the security.[517] The present section also does not bar a regular suit.[518] It simply enables a party, for whose benefit the security has been given, to enforce the surety bond against the surety, by way of execution, to the extent to which the surety has rendered himself personally liable, or where he has furnished any property as security to the extent of the security, or where he has done both to the extent aforesaid, but no more. If the party for whose benefit security has been given, proceeds against the surety in execution, the surety is to be deemed to be a party within the meaning of section 47. The reference in the section to section 47, does not import, into this section, the provision therein contained, which bars a separate suit. Under the section before its present amendment, it was held that a surety was deemed to be a party to the suit for the limited "purposes of appeal".[519] The deletion of the words "for the purposes of appeal" by the recent amendment does not mean, it is submitted, that the bar of a regular suit under section 47 applies. section 47 has been referred to, since the execution against the surety has to be in the manner provided in the CPC. Even after the amendment of the section, the surety is still deemed to be a party within the meaning of section 47. Under section 2(2) as it stood before the Amendment Act, 1976, the determination of any question within section 47 was deemed to be a decree. The deletion of the words "Section 47" from section 2(2) means that such a determination is not to be deemed to be a decree. As a corollary to this deletion, the Amendment Act, 1976 has repeated sub-section 2 of section 47 which empowered the court to treat a proceeding under that section as a suit. Since a decision under section 47 is no longer to be deemed to be a decree, the words "for the purposes of appeal" in this section, before its recent amendment became inconsistent with the amended definition of a decree and had to

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515. *UOI v Sunil Gupta*, AIR 2009 J&K 64.
516. *Diwan Chand v Pindi Das*, AIR 1937 Lah 658.
517. *Abdul Kadir v Huree*, (1874) 6 All HC 261; *Md Ishaq v Md Basheer*, AIR 1961 P&H 8 : (1961) 1 Punj 96 : 63 Punj LR 107.
518. *Motilal v Thokore*, (1911) 36 Bom 42; *Shakir Hasan v Chandoo*, AIR 1931 All 567 : (1931) 54 All 263; *Siba Singh v CVRM Chettyar Firm*, AIR 1931 Rang 206 : (1931) 9 Rang 434; *District Board, Malda v Chandra Kanu*, AIR 1937 Cal 925 : (1937) 2 Cal 698; *Nagappa Naik v Marianath Das*, AIR 1959 Mys 165 : (1958) ILR Mys 249.
519. *Ram Kishun v Lalta Singh*, AIR 1928 All 527 : (1929) 51 All 346; *Ramaswami v Devasami*, (1920) 43 Mad 325; *Siba Singh v CVRM Chettyar Firm*, AIR 1931 Rang 206 : (1931) 9 Rang 434; *Bhagat Ram v Mohammed Baksh*, AIR 1939 Lah 175 : (1939) ILR Lah 470.

be deleted. The result is that though a surety in proceedings against him under this section is deemed to be a party within section 47, he has no right of appeal against any determination in proceedings under this section against him. This is so, because such determination is no longer a decree.

The remedy against a surety under this section is still not an exclusive remedy. Therefore, in a case where a security files objections against execution against him, if these objections were to be dismissed summarily, he would still have remedy by way of a suit to establish his claim.[520] A surety, for a deceased defendant, is not liable when a decree is passed against a person who has not been adjudged to be the legal representative. He may bring a suit to negative his liability.[521]

Where the surety bond is clear and unambiguous, there is no question of going to any antecedent evidence. Thus, where the surety has, by the terms of the bond, assumed liability for reimbursement for any loss caused by any default on the part of the receiver, from the date the receiver takes charge, the surety would be liable for damages adjudged against the receiver, even though the bond was executed after the actual loss.[522]

[s 145.16] Construction of Security Bond

The rule is that a security-bond must be strictly construed according to its terms, but where there is a doubt about its construction, the bond must be construed in the light of the order directing the security to be given.[523]

Where the bond provided that the surety would be liable if the judgment-debtor failed to deposit the decree amount, it could be enforced against the surety, only after an order for payment is made against the judgment-debtor and he commits default.[524] Where a surety had rendered himself liable for Rs 3000, he was held not liable to pay interest on that amount.[525] *A* obtained a decree against the assets of *B* in the hands of *C* and *D*. The latter filed an appeal and obtained stay on *X*, furnishing a security bond. The appeal was eventually dismissed. It was held that the liability of *X* under the bond was coextensive with that of *C* and *D* and unless an order was made against them under section 52(2) of the CPC, the surety could not be made personally liable.[526]

[s 145.17] Custodian of Movable Property

A custodian of moveable property who has been accepted as such by court, is a surety. He can, by executing, recover from the decree-holder the costs and expenses incurred by him in keeping the property. Although section 145 does not strictly apply, as for the purpose of enforcing his liability, he is to be considered to be a party to the suit, he is considered also to be

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520. *Ranamal v Firm Bachraj Chuni Ram*, AIR 1964 Raj 1.
521. *Pukhraj v Jamsetji*, AIR 1927 Bom 63 : (1927) 50 Bom 802.
522. *Howrah Insurance Co v Sachindra Mohan*, AIR 1971 Tri 40.
523. *Mohendra Nath v Roy Satish Chandra*, AIR 1934 Cal 569 : (1934) 61 Cal 890; *Seth Dawood v Ramprasad*, AIR 1938 Ngp 75; *Louis Victor Colaco v U Aung Din*, AIR 1936 Rang 168 : (1936) 14 Rang 190; *Namdeo Govind v Shrihari Laxman*, AIR 1947 Nag 91 : (1946) ILR Nag 666; *Appu Nair v Kochikrishnan Nair*, (1959) Ker LT 419 : (1959) Ker LJ 380; *Jiban Krishna v NB Coal Co*, (1965) Cal 242.
524. *Abdul Ali v Rupchand*, AIR 1953 Hyd 111 : (1953) ILR Hyd 51.
525. *Eapen Chacko v Korathu Chandy*, AIR 1957 TC 233 : (1956) Ker LT 242.
526. *Amir v Saidambai*, AIR 1960 MP 68 : (1959) Jab LJ 544.

so, when the question relates to enforcement of his rights.[527] A *supardar*, to whom properties attached before judgment are entrusted, is a person who becomes liable as a surety and his liability can be enforced under this section.[528]

[s 145.18] Appeal

As a result of the changes made in the definition of a decree in section 2(2) and in section 47 and this section, an order made hereunder is not a decree and is consequently not appealable (see the discussion above).

[s 145.19] Limitation

The article which would apply to an application under this section would be Article 136 of the Limitation Act, 1963 which replaced Article 182 of the Limitation Act, 1908. The period of limitation is now 12 years, from the date when the decree becomes enforceable or where the decree directs any payment of money, or the delivery of any property to be made at a certain date, or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place. Therefore, where a person has become liable as a surety, the period of limitation is 12 years from the date when the decree, either original or appellate, becomes enforceable against him under this section.

[s 145.20] Registration of Surety Bond

There is a conflict of judicial opinion on the question whether a bond charging or hypothecating immovable properties requires to be registered. Some decisions hold that as the bond derives its validity from the order of the court accepting it, it is a step in a judicial proceeding and does not require registration;[529] while others hold that the bond falls within section 17(1)(6) of the Registration Act, 1908, and is invalid unless it is registered.[530]

[s 145.21] Inherent Power of Court

Where a security-bond is executed as a condition precedent, though there was no order of the court, the bond can be made enforceable under inherent powers of the court. Where, in an execution case, at the time of attachment by *Amin* of court, a security bond was executed by *A*, undertaking subsequent delivery of attached property (viz crops), the bond can be enforced against *A*.[531]

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527. *Shendandan v Gopal*, AIR 1943 Ngp 172 : (1943) ILR Nag 699; *Bachhraj Dugar v Lalchand Todi*, AIR 1962 Assam 23.
528. *Jdankilal v Kalyanmal*, AIR 1961 Raj 818 : (1961) Raj LW 31.
529. *Jayappa Kokappa v Shivan Gouda Dyamagouda*, AIR 1928 Bom 42 : ILR 52 Bom 72; *Kasturilal v Govardhandas*, AIR 1934 Lah 138; *Daddoo Balaji v Kanhaialal Dhamaram*, AIR 1947 Ngp 26 : (1946) ILR Nag 49; *Subramania v Esakkimadan*, AIR 1953 Tr & Coch 364 : (1953) Ker LT 387; *Basant Lal v Jagadish Parshad*, AIR 1960 P&H 517.
530. *Sambayya v Subbayya*, ILR 31 Mad 330; *ASPSS Chettyar Firm v Lloyds Bank*, AIR 1935 Rang 138 : ILR 13 Rang 359; *Kasemali v Ajoyendu Paul*, AIR 1956 Cal 375 : 60 Cal WN 224; *RS Navigation Co v Jalim Mullla*, AIR 1957 Assam 157; *Bishnath Sahu v Prayag Din*, AIR 1958 All 820 : (1958) All LJ 353; *Chiranjilal v Chiranjilal*, AIR 1960 Pat 305.
531. *Krishnan v Dorairajan Chettiar*, AIR 1980 Ker 234.

[s 145.22] State Amendment

Uttar Pradesh—The Uttar Pradesh Legislature had, as early as 1954, amended this section by UP Act 24 of 1954. The amended section provides as follows:

145. Where any person has become liable as surety or given any property as security—

(a) for the performance of any decree or any part thereof; or

(b) for the restitution of any property taken in execution of any decree; or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the court in any suit or in any proceedings consequent thereon;

the decree or order may be executed in the manner herein provided for the execution of decrees,

(i) if he has rendered himself personally liable, against him to that extent; and

(ii) if he has given any property as security, by sale of such property to the extent of the security;

and such person shall, for the purposes of appeal, be deemed to be a party within the meaning of section 47:

Provided that such notice as the court in each case thinks sufficient has been given to the surety.

Explanation—For the purpose of this section a person entrusted by a Court with custody of any property attached in execution of any decree or order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b).

[S 146] Proceedings by or against representatives.—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

SYNOPSIS

[s 146.1] History and Object of the Section... 1595
[s 146.2] Proceeding by or Against Representatives 1596
[s 146.2.1] Appeal 1596
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[s 146.5] "Save as otherwise provided" 1599
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[s 146.1] History and Object of the Section

This section was introduced by the Code of Civil Procedure, 1908 (CPC). In the absence of a similar provision in the CPC 1882, judicial opinion was divided on the question whether the legal representatives of a deceased defendant could apply to set aside an *ex parte* decree under O IX, rule 13.[532] The controversy has now been set at rest by this section. In *Saila Bala Dassi v Nirmala Sundari Dassi*,[533] the Supreme Court observed that this section was introduced in the CPC with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment and that, being a beneficent provision, it should be construed liberally and so as to advance justice, and not in a restricted or technical sense.

532. See notes to O IX, rule 13, under the head "Application by LRs of Deceased Defendant."
533. *Saila Bala Dassi v Nirmala Sundari Dassi*, AIR 1958 SC 394 : (1958) SCR 1287 : (1958) SCJ 743 : (1959) SCA 129; *C Subbarayudu v Brahmanandan*, AIR 1970 AP 211.

[s 146.2] Proceeding by or Against Representatives

[s 146.2.1] Appeal

The proceedings contemplated by this section include an appeal.[534] That is settled by the decision of the Supreme Court in *Saila Bala Dassi v Nirmala Sundari Das.*[535] There, an appeal filed by the judgment-debtor against an order directing execution of a mortgage decree was sought to be continued by a person who had purchased the mortgaged properties from the mortgagor after the suit had been decreed. It was held that he was entitled to prosecute the appeal not under O XXII but under section 146. Discussing the scope of the section, the court observed that whoever was entitled to be, but had not been brought on record under O XXII, rule 10 in a pending suit or proceeding, would be entitled to prefer an appeal against the decree or order passed therein, if his assignor could have filed such an appeal and that further the right to file an appeal must be held to carry, with it, the right to continue an appeal, which had been filed by the persons under whom the applicant claimed. On this principle, it was again held by the Supreme Court, that where, during the pendency of an appeal against a decree in ejectment, the property was sold in execution of a decree obtained on mortgages executed by the defendant pendente lite, and purchased by the mortgagee and transferred to the applicant, the latter was entitled to continue the appeal under this section.[536] Where a suit relating to land was dismissed and thereafter the plaintiff assigned his interest in the subject matter to *A*, it was held that the latter was not entitled to appeal against the dismissal.[537] The correctness of this decision is open to question. A suit relating to land was decreed ex parte. The defendant, then transferred the lands to *X* and *Y*, and thereafter appealed under O IX, rule 13, to set aside the *ex parte* decree. That application was dismissed. Against the order of dismissal, *X* and *Y* preferred an appeal. It was held that they were entitled to do so under this section.[538]

This section does not bar a person, who is neither a party nor the representative of a party to a suit or proceeding from filing an appeal against a decision which would adversely affect him, provided he obtains the leave of the court.[539]

[s 146.2.2] Execution Proceedings

This section enables the legal representative of a deceased decree-holder to be brought on the record to carry on a pending execution proceeding.[540] The contrary opinion expressed in some decisions,[541] that the legal representatives of a deceased decree-holder cannot continue

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534. *Sitaramaswami v Lakshmi*, AIR 1919 Mad 755; *Basistha Narayan v Sankar Dayal*, AIR 1952 Pat 323; *Krishnadhan v Kanailal*, AIR 1973 Cal 422 : 77 Cal WN 450; *C Subbaruyudu v Brahmanandan*, AIR 1970 AP 211.
535. *Saila Bala Dassi v Nirmala Sundari Das*, AIR 1958 SC 394 : (1958) SCR 1287 : (1958) SCJ 743 : (1959) SCA 129.
536. *Shew Bux v Bengal Breweries Ltd*, AIR 1961 SC 137 : (1961) 1 SCR 680 : (1961) 1 SCJ 322.
537. *Kanti Chandra v Pirbhu Dayal*, AIR 1935 Lah 119.
538. *Dulhin Suga v Deorani Kuer*, AIR 1952 Pat 72.
539. *D Pullayya v A Nagabhushanam*, AIR 1962 AP 140 : (1962) ILR AP 127 : (1961) 2 Andh WR 204 : 1961 Andh LT 736.
540. *Official Receiver of Ramnad v NPAK Muttiah Chettiar*, AIR 1947 Mad 34 : (1947) ILR Mad 307; *Venkatachalam v Ramaswami*, AIR 1932 Mad 73 (FB) : (1932) 55 Mad 252; overruling *Palaniappa v Valliammai*, AIR 1927 Mad 184 : (1927) 50 Mad 1; *EA McNaught v Saraswati*, AIR 1935 Pat 117 : (1935) 13 Pat 777; *K Kallayani v Raman*, AIR 1954 TC 57 : (1952) Ker LT 481; *Ram Lobia v Mange*, AIR 1955 P&H 255; *Deva Sigamani v Venkatasami*, AIR 1959 Mys 41 : (1958) ILR Mys 227; *Sukh Lal v Kanhaiya Lal*, AIR 1960 Raj 1472 : (1960) Raj LW 681.
541. *Raipath Ram Bharose*, AIR 1927 All 165 (FB) : ILR 49 All 509; *Muhammad Sadiq Ali v Sayad Mirza*, AIR 1928 Oudh 30 : ILR 3 Luck 126.

the pending proceedings but must file a fresh petition for execution cannot be considered to be good law. The Nagpur High Court has further held that this section would enable an assignee of the decree to continue the execution proceedings started by his assignor.[542] An attaching decree-holder who has executed the attached decree, is a person, claiming under the original decree-holder, and if the attached decree is reversed on appeal, the judgment-debtor may get restitution against him.[543]

Eviction suit was filed by the agent of the real owner. Suit property was transferred by the owner to the agent's sons, during the pendency of the suit. After the death of the agent, transferees from the real owner were held to be entitled to execute the decree passed in favour of agent, since they have become owners by virtue of the assignment. Section 146 of the CPC was introduced with the object of facilitating the exercise of the rights by persons in whom the rights came to be vested by devolution or assignment and, being a beneficial provision, it should be construed liberally and so as to advance justice and not in a restricted or technical sense.[544] Where a trustee obtains an ejectment decree, the beneficiary cannot apply for execution unless there is an assignment in favour of the beneficiary.[545] Decree for injunction was obtained against sole judgment-debtor, restraining him from obstructing the plaintiff in erecting a fence on the boundary of his property. It was held that it can be executed against the legal representatives of the original judgment-debtor, on his death.[546]

A harmonious reading of O XXI, rule 16 Explanation with section 146 of the Code makes it abundantly clear that where any proceedings may be taken or application made by or against any person, then the proceedings may be taken or the application may be made by or any person claiming under him. Thus, in a rent control proceeding which had attained finality but during the execution proceedings the decree-holder transferred the property, it was held, it was held that though the decree-holder had lost title, the subsequent purchaser can continue the execution and the decree-holder can join hand with the purchaser.[547]

A receiver, acting under the authority of the court, is a representative of the real owner, and as such, he is entitled to commence or continue proceedings so as to bind the real owner, and his application in that behalf will fall under O XXII, if it is a suit and under section 146 if it is an execution proceeding.[548]

This section is wider in its amplitude than O XXI, rule 16, and enables persons who have succeeded to the interests of the decree-holder in whole or in part, to execute the decree.[549] Eviction order against tenant and one of his five sons was passed under section 7 of the Orissa House Rent Control Act, 1967. Tenant died during execution proceedings. His son was a party to the proceedings since its inception. He was a co-judgment-debtor, along with the tenant (father). On the death of the tenant, the question of bringing other legal representatives of the deceased tenant did not arise on the facts of this case. Judgment-debtor (son of deceased tenant) represented all other sons. section 146 was attracted since O XXII, rule 12 was not

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542. *Govind Rao v Ganpat Rao*, AIR 1947 Nag 116 : (1946) ILR Nag 895.
543. *Anganna v Subbaraya*, AIR 1930 Mad 787 : (1930) 53 Mad 796.
544. *Jaigobind Verma v Tejpal Sarawagi*, AIR 1981 Pat 259.
545. *Baisnab Das Sen v Bholanath Sen*, AIR 1986 Cal 118.
546. *Kathiyammakutty Umma v Jhalakkadath Kallial Karappan*, AIR 1989 Ker 133; *Clothy Theyyathan v John Thomas*, AIR 1997 Ker 249; *Rajappan v Sankaran Sudhakaran*, AIR 1997 Ker 315, (DB).
547. *P Janakraj v S Balasubrahmanya*, AIR 2008 Kar 190 : 2008 (5) Kant LJ 566.
548. *Moidin Kutty v Doraiswamy*, AIR 1952 Mad 51 : (1952) ILR Mad 622 : (1951) 2 Mad LJ 206 : 65 LW 434.
549. *Chinnan Kesavan v Gouri Amma*, AIR 1959 Ker 180 : (1958) ILR Ker 1159 : (1958) Ker LT 787 : (1959) Ker LJ 612.

applicable.[550] Where the plaintiff assigned book debts on which he had filed a suit and the suit was then decreed, it was held by the Supreme Court that the assignee was entitled to execute the decree, not under O XXI, rule 16 because there was no assignment of the decree, but under this section because he had become entitled to the benefit of the decree under the decree-holder.[551] The law is thus settled that persons claiming in the right of the decree-holder can apply to execute the decree, though they have not obtained an assignment as provided in O XXI, rule 16.[552] The opinion, therefore, expressed in some decisions[553] that it is only those persons who can bring themselves within O XXI, rule 16 that can execute the decree, is not good law. Likewise, a decree can be executed not only against the judgment-debtor on record, but against all persons represented by him. It was accordingly held that a decree for injunction obtained against *A*, in a representative capacity under O I, rule 8 could be executed against all persons represented by him.[554]

It has been held in some cases that an assignee from the heirs of a deceased plaintiff, who had themselves not been brought on record, have no right to carry on execution proceedings initiated by the deceased, either under O XXII or under section 146.[555] But the preponderance of authority is in favour of the view that though they cannot continue the proceedings under O XXII, rule 3, or rule 10, as they are neither legal representatives nor assignees of a party to the suit or proceeding, they are entitled to carry on under this section.[556]

[s 146.3] Pre-emption

It is common knowledge that the right of pre-emption is generally conferred on a co-sharer in the property or on a person who claims some right over the property, eg, a right of way or on the grounds of vicinage, ie, on an owner of the adjoining property. This right may be founded in statute or custom or in the personal law by which the parties are governed. The sole object of conferring this right of property on a co-sharer, is to keep objectionable strangers away from the neighbourhood. This right is purely personal and cannot be transferred to a third party, for the obvious reason that such transferability would defeat the very purpose of its conferment.[557] A transferee of the pre-emptor's right in the land which has vested in him by virtue of O XX, rule 14 on compliance of the requirement of payment of the purchase money by the specified date, can maintain an application for execution under section 146, or O XXI, rule 16 of the CPC. The newly added explanation to rule 16 of O XXI of the CPC makes it clear that the rule shall not affect the provisions in section 146, nor shall it affect a transferee of rights in property, which is the subject matter of the suit, from applying for execution of the decree without there being a separate assignment of the decree.[558]

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550. *Radheyshyam Modi v Jadunath Mohapatra*, AIR 1991 Ori 88.
551. *Jugalkishore Saraf v Raw Cotton Co Ltd*, AIR 1955 SC 376 : (1955) 1 SCR 1369 : (1955) SCJ 371 : 1955 SCA 440; *Hindustan Commercial Bank Ltd v Laxmi Narayan*, (1957) Cal 72 : 61 Cal WN 118; *M Gulamali Abdul Husain & Co v Binani Properties Ltd*, AIR 1978 Cal 53.
552. *Chinnan Kesavan v Gouri Amma*, AIR 1959 Ker 180; *Mani Devasiv v Varkey Scaria*, (1960) Ker LT 1077 : (1960) Ker LJ 1372.
553. *L Chempakakutti Pillai v Yachob Nadar*, AIR 1952 TC 254.
554. *Jatindra Mohan Banerjee v Kalicharan*, AIR 1960 Cal 623 : 64 Cal WN 780.
555. *Gobardhan Mukherjee v Saligram Marwari*, AIR 1936 Pat 123 : ILR 15 Pat 82; *Nizamul Haque v Bibi Sajda Khatoon*, AIR 1954 Pat 61.
556. *Anil Chandra Bannerjee v Gopinath*, AIR 1950 Cal 376 : (1951) 1 Cal 578 : 86 Cal LJ 293; *Manmanthappa v Parvati Bai*, AIR 1954 Hyd 12 : (1953) ILR Hyd 703; *Moti Lal v Mangilal*, AIR 1959 Raj 923 : (1960) Raj LW 18.
557. *Bhoop v Matadin Bhardwaj*, AIR 1991 SC 373 : (1991) 2 SCC 128.
558. *Bhoop v Matadin Bhardwaj*, AIR 1991 SC 373 : (1991) 2 SCC 128.

[s 146.4] Person Claiming

There cannot be any dispute with the proposition that the transferee had every right to file application under section 146, CPC.

In an execution petition of decree filed by the person claiming to be the transferee by assignment there was no transfer of decree by assignment in writing or by operation of law to applicant. The property in question was sold to him by heirs of deceased, applicant was thus purchaser in interest and not assignee of decree. He was therefore required to file application under section 146. Since his application under section 146 was barred by time, he has no right to move application under O XXI, rule 1, CPC.[559]

As interest in disputed land was that of holder (from *B*) of profit a prendre right to catch fish for only one year. *A* sued for permanent injunction to restrain *C* from disturbing his (*A"s*) right as licensee. It was held that on the expiry of license, the relief claimed by *A* could not be granted to *B* on the ground that *A's* interest devolved on *B*. *A's* suit was to protect his own interest. It was not identical with that of *B*.[560]

A, a party to a suit, transferred his interest in the subject matter to *B*, during pendency of suit. *B*, in turn, transferred his interest to *C*. It was held that:

(i) *C*, though not a direct transferee, can be brought on the record; and

(ii) *C* could be brought on record in the absence of the first transferee.[561]

[s 146.5] "Save as otherwise provided""

If a decree is passed against the *Karta* of a joint hindu family, the section does not enable a coparcener to appeal while the *Karta* is alive.[562] This section is expressly made, subject to the other provisions of CPC or of any law for the time being in force. Thus, the executing court cannot go behind a decree and by invoking the aid of this section, it cannot change a decree against a person into one against his legal representative with a view to apply section 73 of CPC.[563]

[s 146.6] Setting Aside *Ex Parte* Decree

See notes to O IX, rule 13, under the head: "Application by legal representative of deceased defendant". Other cases to which the section applies have been considered in their proper places.

[s 146.7] Appeal

An order under this section is not open to appeal but it can be revised,[564] subject, of course, to the restrictions now imposed on the right of revision under the amended section 115.

[S 147] Consent or agreement by persons under disability.—In all suits to which any person under disability is a party, any consent or agreement, as to any

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559. *Kedar Ram v Additional District Judge II, Ballia*, AIR 2004 All 197.
560. *Anadi Nath v Dukhe Ram*, AIR 1982 Cal 117.
561. *Sagora Bibi v SK Manik*, AIR 1987 Cal 86 (DB).
562. *Hamlata Dasi v Bengal Coal Co*, AIR 1935 Cal 738.
563. *Kallianeshwar v Shewaram*, AIR 1937 Sau 94.
564. *Anil Chandra Banerjee v Gopinath*, AIR 1950 Cal 376 : (1951) 1 Cal 578 : 86 Cur LJ 293.

proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person, were under no disability and had given such consent or made such agreement.

SYNOPSIS

[s 147.1] Rules of the Supreme Court under O XVI, rule 21 1600
[s 147.2] Any Person Under Disability..... 1600
[s 147.3] As to any Proceeding..... 1600
[s 147.4] Express Leave..... 1600

[s 147.1] Rules of the Supreme Court under O XVI, rule 21

This section has been taken from O XVI, rule 21 of the Rules of the Supreme Court of England with some alterations.

[s 147.2] Any Person Under Disability

The section applies to consent given on behalf of persons under disability, such as minors and lunatics.[565]

[s 147.3] As to any Proceeding

These words do not refer to the conduct of a suit or appeal. A next friend or guardian *ad litem,* has undoubtedly the conduct of a suit or appeal in his hands; but if he does anything in the action beyond the mere conduct of it, eg, consents not to appeal, the person under disability is not bound by it, unless it is done with the express leave of the court.[566]

[s 147.4] Express Leave

The leave must be express. In this respect, the present section differs from the English rule.

[S 148] Enlargement of time.—Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, [567][not exceeding thirty days in total,] even though the period originally fixed or granted may have expired.

SYNOPSIS

[s 148.1] State Amendment 1601
[s 148.2] Amendment in the Section 1601
[s 148.3] Scope..... 1602
[s 148.4] Amendment to Section 148 Does Not Affect Inherent Power 1602
[s 148.5] Does Enlargement of Time for Payment of Court Fee Fall in Section 148 or 149? 1602
[s 148.6] Section 148 and Section 149..... 1603
[s 148.7] Second Application—Maintainability 1603
[s 148.8] *Functus Officio*..... 1603
[s 148.9] Principles Underlying the Section 1604
[s 148.10] Act Prescribed or Allowed by This Code..... 1604
[s 148.11] Discretion of Court..... 1607
[s 148.12] Act Directed or Allowed by a Decree of Court 1608

565. See O XXXII below.
566. *Rhodes v Swithenbank*, (1989) 22 QBD 577.
567. Inserted by Act 46 of 1999, section 13 (w.e.f. 1-7-2002).

[s 148.13] Conditional Order by the Court in Which Time Cannot be Extended 1611
[s 148.14] Conditional Order by a Court in Which Time can be Extended 1611
[s 148.15] Non-Deposit 1614
[s 148.16] Specific Performance 1615
[s 148.17] Time Fixed by Contract 1616
[s 148.18] Provincial Insolvency Act, 1920: Extension of Time for Applying for Discharge 1616
[s 148.19] Period Fixed by Statute 1616
[s 148.20] Consent Order 1617
[s 148.21] Compromise Decree 1617
[s 148.22] Court to Which Application Should be Made for Extension of Time 1618
[s 148.23] Appeal 1619
[s 148.24] Award of Lok Adalat—Application of Section 148 1619

[s 148.1] State Amendment

HIGH COURT AMENDMENT

Calcutta.—Add the words "or by the Presidency Small Cause Courts Act, 1882", after the words "allowed by this Code" and before the words "the court may", *Vide* Cal. Gaz. Pt. I, dated April 20, 1967.

[s 148.2] Amendment in the Section

The words "not exceeding thirty days in total" have been inserted vide section 13 of the Code of Civil Procedure (Amendment) Act, 1999, w.e.f. 1-7- 2002.

Section 148 provides for enlargement or extension of time fixed or granted under the orders of a court. The power is discretionary and the court is entitled to consider the conduct of the party applying for extension. It must be remembered that the section only applies where the time fixed for doing of an act is prescribed or allowed by this Code. The following rules may be covered within the ambit of section 148:

(i) Order VI, rule 17 (amendment of pleadings).

(ii) Order VII, rule 11(b) (requiring plaintiff to correct valuation of suit).

(iii) Order VII, rule 11 (requiring plaintiff to supply requisite stamp paper, where the plaint is written upon a paper insufficiently stamped).

(iv) Order VIII, rule 9 (requiring written statement or additional written statement from a party).

(v) Order XXI, rule 17 (amendment of application for execution).

(vi) Order XXV, rule 2 (security for costs of suit).

(vii) Order XLI, rule 10 (security for costs of appeal).

In the opinion of the authors, the limitation to the discretion of the court in this behalf, to a total period of 30 days shall put undue fetters to the discretion of the courts, which is given for the purpose of securing the ends of Justice in case of necessity. There may be many cases where the time fixed by the court could not be adhered to for reasons beyond the control of the litigants or their counsels. It has to be seen that the ground for granting extension of time is to be identified by a court of law if the *sine qua non* is to exercise its discretionary power under section 148 of the CPC. It does not mean that after the expiry of the time already granted by the court, section 148 of the CPC will give an automatic right to the aggrieved parties to get

the extension of time. This is not the tenor of the provision of law adopted by the statute. The court must be fully satisfied with the ground and only then the wider discretion vested with the court is to be exercised in granting the extension of time.

The Law Commission in its 163rd report has also opined that no such restriction should be placed in section 148. Situations may arise where the interests of justice may call for the exercise of power under section 148, even beyond the period proposed to be stipulated. Any such restriction of time may, in some cases, even lead to a failure of justice.

[s 148.3] Scope

Section 148 of the CPC empowers the court to enlarge the time allowed by the court or prescribed by the CPC. However, by the CPC (Amendment) Act, 1999 (Amendment Act, 1999), the said provision stood amended to the effect that the period can be extended by the court not exceeding 30 days in total. section 32 of the CPC (Amendment) Act, 1999, providing for repeal and saving, does not save anything so far as section 148 of the CPC is concerned. Therefore, being procedural law, it may be held that the court may have the power to extend the period but not beyond the period of 30 days in total from the date of expiry of the period.[568]

[s 148.4] Amendment to Section 148 Does Not Affect Inherent Power

The amendment by CPC (Amendment) Act of 1999 made in section 148 affects the power of the court to enlarge time that may have been fixed or granted by the court for the doing of any act prescribed or allowed by CPC. The amendment provides that the period shall not exceed 30 days in total. Before this amendment, there was no such restriction of time. Whether the court has no inherent power to extend the time beyond 30 days is the question. There is no doubt that the upper limit fixed in section 148 cannot take away the inherent power of the court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for the reasons beyond the control of the party. However, this interpretation is not applicable to a case where time for doing an act has been prescribed under the provisions of the Limitation Act, 1963 which cannot be extended either under section 148 or section 151. But it applies to a case where the time is fixed or granted by the court for performance of an act prescribed or allowed by the court.[569]

[s 148.5] Does Enlargement of Time for Payment of Court Fee Fall in Section 148 or 149?

The enlargement of time sought for payment of court-fee cannot be granted under section 148 of the CPC. In fact, section 148 is not relevant in the present case where question is regarding enlargement/extension of time for payment of court-fee. This is because, there is specific provision, namely section 149 of the CPC dealing with power of court to permit payment of court-fee at any stage.[570]

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568. *Darshan Singh v Kewal Krishan*, AIR 2003 Raj 313.
569. *Salem Advocate Bar Association v UOI*, AIR 2005 SC 3353 : (2005) 6 SCC 344.
570. In the matter of *the Goods of Late Ravinder Kumar v Unknown*, AIR 2004 All 46.

[s 148.6] Section 148 and Section 149

A bare reading of section 148 of the CPC makes it clear that where any period is fixed or granted by the court for doing any act, the court can, in its discretion, enlarge that period from time to time, even though the period originally fixed or granted may have expired. Section 149 of the CPC provides that where the whole or any part of the fee prescribed has not been paid, the court can, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part of such court fee and upon such payment, the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance. A reading of both these provisions together leaves no room for doubt that the court was not powerless to enlarge time for making up the deficiency in the payment of court fee even though the period originally fixed by the court had expired. The view that since the time originally fixed by the court had expired it had no power to enlarge time was not accepted by their Lordships of the Supreme Court,[571] and while reversing the judgment of the high court, their Lordships observed that section 148 of the CPC, in terms allows extension of time even though the original period had expired and section 149 is equally liberal.[572]

It is to be noted that section 148 allows extension or enlargement of time fixed or granted by the court for doing any act prescribed or allowed by this Code. A limit of 30 days has been introduced in the section by Amendment Act 46 of 1999 w.e.f. 1-7-2002 for such enlargement of time. On the other hand section 149 of CPC empowers the court to allow at any stage to make up the deficiency of court fees and it permits the court, upon fair use of discretion, to allow such person to pay the whole or part of the court fees. Thus, power under section 149 is wider than the one given under section 148 of the code.[573]

[s 148.7] Second Application—Maintainability

When an application filed under section 148 of the CPC for enlarging time granted by the court is dismissed, the petitioner is not left without remedy. On the other hand, it is obvious that dismissal of such an application in respect of which a petition for restoration cannot be filed, does not bar a fresh application for the relief of enlargement of time. It is obvious that such a second application could seek extension of time not only up to the date on which the first application was dismissed, but also in respect of subsequent period also. It may be mentioned that under the same principle, the dismissal of an execution petition in default does not bar a fresh petition if it is filed within the prescribed period of the limitation.[574]

[s 148.8] *Functus Officio*

The application of this section to a case depends on the question whether the matter has been finally disposed off by the court or the court is seized of the matter and has control over it. If the order is not final and the court retains its control over it and is seized of the matter, it has full power to make any just or necessary order therein, including in appropriate cases, the extension of the time under this section. On the other hand, if the effect of the order is that in the event of non-compliance, it operates automatically and without further intervention of the court, this section cannot be applied for the obvious reason that the court ceases to be seized

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571. *Mahant Ram Das v Ganga Das*, AIR 1961 SC 882.
572. *Hukma v Manga*, AIR 2003 P&H 287.
573. *Ritesh Kumar v Smt Chandrakanta*, AIR 2007 Raj 192 : (2007) 3 Raj LW 2464 (Jaipur Bench).
574. *T Krishnaswamy v Maniyamme*, AIR 2001 AP 137.

of the matter and becomes *functus officio*.[575] In other words, it is only when the proceeding is still pending and not finally disposed of, that the court has jurisdiction to grant extension of time, under this section. So, where a final decree terminating the action has been passed, the court has no power to extend the period fixed therein.[576] Thus, when a decree has been passed directing a tenant under the Assam Non-Agricultural Urban Areas Tenancy Act to pay arrears, the court, passing the decree, has thereafter no power to grant extension of time for payment, first, because the court has become functus officio and is no longer seized of the matter and secondly, because there is no question of any act prescribed or allowed by the CPC as contemplated by this section.[577]

Conditional order was passed by the court, allowing a petition on payment of costs, with a direction that "otherwise, the petition will stand dismissed". Costs were not deposited on the specified date (or even on subsequent dates to which the case was adjourned). Case was not dismissed by the court, but was kept pending. It was held that the court had not become functus officio. It could grant extension of time for payment of costs.[578]

[s 148.9] Principles Underlying the Section

If a party seeks enlargement of time on the ground that for some valid reasons it could not perform the act which it was required to perform within the time granted by the court, it is for the party to move an application under section 148 of the CPC and the convenience of the court that the interest of justice would require extension of time whether prospectively or retrospectively under section 148 itself. It is not obligatory to move such an application in all the cases. Where the omission on the part of the party is trivial and the mistake committed by him is not of a serious nature and does not adversely affect the rights of the parties, the court may itself extend the time under section 148, so that the technical defects may be removed and the hearing of the case may proceed in accordance with law.[579]

[s 148.10] Act Prescribed or Allowed by This Code

The present section empowers the court to extend the time fixed by it even after the expiry of the period originally fixed.[580] The power is discretionary and the court is, therefore, entitled to consider the conduct of the party applying for extension.[581] It is a legislative recognition of the rule laid down in the Bombay case of *Bhagwan Das v Haji Abu Ahmed*,[582] and the cases on which that rule was based.[583] In the Bombay case, it was held that it was competent to the court to extend the time fixed under section 54 of the Code of Civil Procedure, 1882

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575. *Gaya Din v Lalta Prasad*, AIR 1936 All 477 : (1936) All LJ 566; *Beni Prasad v Om Prakash*, AIR 1938 All 497; *Surajmal v Bhubaneshwar*, AIR 1940 Pat 50; *Nawab Habibulla v Gata Asmater Khatun*, (1927) Cal WN 720; *MT Sita Kumari v RamNath Nonia*, AIR 1949 Pat 514.
576. *Sitaraman v Pattabhiraman*, AIR 1958 Mad 453 : (1958) 2 Mad LJ 255 : 71 LW 440; *Madan Gupal v Rallis, (India) Ltd*, AIR 1957 Cal 598 : 61 Cal WN 638; *Bengal Central Bank v Bizon & Co*, AIR 1951 Cal 299 : 85 Cal LJ 90; *N Raman Nair v G Raman Nair*, AIR 1952 TC 440 : (1952) ILR TC 340.
577. *Chaturbhuj v S Rahman*, AIR 1968 Assam & Nag 32.
578. *Muniammal v Sakkubai*, AIR 1988 Mad 241.
579. *Mohd Yousuf v Bharat Singh*, AIR 1999 Raj 185.
580. Earlier this power was without any restriction but now, after the CPC, (Amendment) Act 1999, w.e.f. 1-7-2002, this power has been restricted for enlarging the period upto 30 days only.
581. *Raj Nath v Vijay Nath*, AIR 1973 Del 244 : (1973) 1 Del 272.
582. *Bhagwan Das v Haji Abu Ahmed*, (1891) 16 Bom 263; *Shahjahan v Kamak Narayan*, AIR 1997 Kar 203 (DB).
583. *Dewan Amir v Nanak Chand*, (1910) 14 Cal WN 882.

(now O VII, rule 11) even after the expiry of the time originally granted. It must, however, be noted that the section applies only where time is fixed for the doing of an act prescribed or allowed by CPC. "Code" includes rules, and prescribed means "prescribed" by the rules (see section 2, clauses (1) and (16). See, for instance, the following rules:

(i) Order VI, rule 17 (amendment of pleadings);

(ii) Order VII, rule 11(b) (requiring plaintiff to correct valuation of suit);

(iii) Order VII, rule 11 (requiring plaintiff to supply requisite stamp paper, where the plaint is written upon paper insufficiently stamped);

(iv) Order VIII, rule 9 (requiring written statement or additional written statement from a party);

(v) Order XXI, rule 17 (amendment of application for execution);

(vi) Order XXV, rule 2 (security for costs of suit);

(vii) Order XLI, rule 10 (security for costs of appeal).

It has been held in *LP Jain v Nandakumar*,[584] that when the defendant applied under O IX, rule 13 for setting aside an *ex parte* decree, he was not doing any act prescribed or allowed by the CPC extended under this section. Where the plaintiff filed amended plaint after expiry of 14 days time granted by the trial court and the mistake committed by the plaintiff was not of serious nature and does not adversely affect the rights of the parties, then extension of time by court itself to file amended plaint would be proper.[585]

The Supreme Court was seized of a question that whether or not the court has the discretion to enlarge the time for doing any act prescribed by the Code or allowed by the Code.[586] It was held by referring to section 148 that when any period or time is granted by the court for doing any act, the court has the discretion from time to time to enlarge such period even if the time originally fixed or granted by the court has expired. Previously discretion was given to the court to enlarge the period fixed or granted by the court for any act prescribed or allowed by the Code. The CPC (Amendment) Act, 1999 puts a limit of thirty days on the enlargement of such period. The words "not exceeding thirty days in total" have been inserted with a view to curtail procedural delay caused by any party to the suit or proceeding. Enlargement of time, whether one-time or phased, cannot exceed thirty days. In the instant case, the high court had ordered on 3 May 2013 subject to the payment of cost of Rs 25,000/- to the respondents within a period of eight weeks from the date of the order. The appellant stated that the copy of the order dated 3 May 2010 was received in the office of its legal department on 12 May 2012 and the accounts department gave its approval for the payment of cost on 26 May 2010. The legal department thereafter prepared voucher/bill for the amount of Rs 25,000/- and the same was approved on 3 June 2013 and the accounts department issued the cheque on 15 June 2015. It was further averred that the applications were presented before the executing court to accept the cheque on 30 June 2010 and the said applications were dismissed inter alia holding that the time limit granted by the high court was over on 28 June 2010 and the executing court had no power to extend the time granted by the high court. The executing court was found correct in saying that it could not extend the time for depositing the cost as the same had been stipulated by the high court. The high court, however, had declined to

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584. *LP Jain v Nandakumar*, AIR 1961 Bom 254 : (1961) 63 Bom LR 48 : (1961) Nag LJ 100.
585. *Mohd Yousuf v Bharat Singh*, AIR 1999 Raj 185.
586. *Nashik Municipal Corp v RM Bhandari*, AIR 2016 SC 1090 : (2016) 6 SCC 245 : JT (2016) 2 SC 453 : (2016) 161 All IC 142.

extend the time, mainly on the ground that one SLP filed by the respondents was dismissed as withdrawn and that the respondents had lost their right to challenge the order passed by the high court now. The high court while declining to enlarge the time to deposit the cost did not take into consideration the sequence of dates and events stated by the appellant corporation in depositing the amount which the Supreme Court found incorrect and overturned the high court's decision.

On the question of extension of time for filing written statement in a suit, the views expressed by various high courts are not consistent. A Division Bench of the Karnataka High Court has held that a court trying a civil suit does not have any power to extend time for filing the written statement beyond what is stipulated in O VIII, rule 1 of the code, ie beyond 90 days from the date of service of summons.[587] TS Thakur, J (as he then was), observed in the above decision or follows:

> The amended provision of Order VIII, Rule 1 of the CPC effectively deals with the cause of delay in disposal of cases arising out of the unamended provision. That being so, any interpretation of Order VIII, Rule 1 of the CPC which may remove the legal barrier of a time frame for filing the written statement would result in the unamended provision re-emerging and as a consequence the mischief sought to be remedied reappearing.[588]

However, in a case, where the defendant filed written statement 8 days beyond the period of 90 days, the Jharkhand High Court accepted the plea of the defendant that he misunderstood the order of the Court adjourning the case as fixing time for filing written statement and granted extension of time on payment of cost.[589] After noticing the above-mentioned decision of the Karnataka High Court, Balasubramanyan, CJ (as he then was), dissented from the views expressed in the Karnataka decision and observed as follows:

> In a way, the decision of the Karnataka cannot be said to be not justified, taking note of the purpose with which amendment to Order VIII Rule 1 of the Code of Civil Procedure was made. But, at the same time, is it necessary to denude the Court dealing with a lis of even a limited power of granting some time to a defendant for filing a written statement in an appropriate case? No doubt, when the Parliament expressed an intention that the provision in that behalf must be followed, the Court has necessarily to proceed on that basis. But at the same time, when the power of the Court to extend some sort of a locus paenitentiae to a defendant is saved by section 148 of the Code of Civil Procedure, should the Court be deprived of that discretion? I think that on a balancing of all aspects and considering the harsh consequence that arises out of barring a defendant from filing a written statement on the ground that he has not filed it within 90 days of the receipt of summons the Court must be held to have that limited power if the defendant shows sufficient cause for extending the time beyond 90 days but within the limits of the proviso to Section 148 of the Code.[590]

The above view of the Jharkhand High Court was followed in a later decision of the same court wherein it was held that the period of 90 days from the date of receipt of summons for filing written statement can be extended by court under section 148 in exceptional circumstances for a period not exceeding 30 days. However, in this case the court held that since the defendant failed to file written statement in spite of sufficient opportunity, the refusal to accept written statement was proper.[591] In a suit against government for recovery of money for work done, the Karnataka High Court held that non-availability of documents to prepare

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587. *A Sathyapal v Yasmin Banu Ansari*, AIR 2004 Kant 246 : (2004) 4 Kant LJ 97.
588. *A Sathyapal v Yasmin Banu Ansari*, AIR 2004 Kant 246, p 254 para 28 : (2004) 4 Kant LJ 97,
589. *Lalit Chandra Raisurana v Arun Raisurana*, AIR 2005 Jhar 39 : (2004) 4 JLJR 428.
590. *Lalit Chandra Raisurana v Arun Raisurana*, AIR 2005 Jhar 39, p 41 para 41 : (2004) 4 JLJR 428.
591. *Jatinder Singh Hanspal v Tejinder Singh*, AIR 2006 Jhar 8 : (2005) 1 BLJR 722.

written statement are circumstances beyond control of a party and as such grave injustice would be caused if time is not extend for filing written statement.[592]

[s 148.11] Discretion of Court

Even though section 148 confers a discretionary power, yet the power should be exercised where necessities of the case so demand.[593] A casual reading of section 148 of the CPC would clinch the fact that extending the time of the parties to a litigation by the court of law is purely discretionary one. It has to be seen that the ground for granting extension of time[594] is to be identified by a court of law if the *sine qua non* is to exercise its discretionary power under section 148 of the CPC. It does not mean that after the expiry of time granted already by the court, section 148 of the CPC will give an automatic right to the aggrieved parties to get the extension of time of that is not the tenor of the provision of law adopted by the statute. The court must get fully satisfied with the ground and then only wider discretion vested with the court is to be exercised in granting the extension of time. Of course, it is unlimited and one cannot deny the discretionary power vested with the court.[595] The refusal, by the court, to enlarge time for making a deposit in the court is proper, where the enlargement is sought on the ground of the sudden illness of the judgment-debtor and if the medical certificate, which was required to be filed on the next date of hearing, was not filed.[596] The power given to the court under section 148, is discretionary and is given for the purpose of securing the ends of justice in case of necessity. Thus, the court has the power to enlarge the time for submitting the certified copy, even if it has been filed late, after obtaining the same, irrespective of the fact that the appeal was admitted and the appellant was allowed to file the certified copy "as soon as it is available".[597] The delay in payment of deficit court fees can be condoned and time be enlarged for submitting the same under section 148 of the CPC.[598] Where the court fixes the time for doing a thing, the court always retains the power to extend the time for doing so. The principle of section 148 of the CPC must govern not whittling down the discretion conferred on the court.[599]

In 2005, in *Welset Engineers v Vikas Auto Industries*,[600] the challenge before the Supreme Court was that the Bombay High Court had held that that O XXXIX, rule 2(a) was a specific provision to meet the contingency of breach of injunction orders and when such remedies were available, the person complaining of the breach of the injunction order should not be allowed to take up the proceedings of contempt of court. It was held that as per section 122 of the Code, if there is any conflict between the provisions of the Code with the Rules framed by a high court, the latter shall prevail. In *Quantum Securities*,[601] an attempt was made to doubt the correctness of this order but it failed.

592. *Vasanth Satyanarayan Hegde v Managing Director, Karnataka Neeravari Nigama Ltd*, AIR 2006 Kant 37 : (2006) AIHC 501.
593. *Jagadhyan Ram v Balri Ram*, AIR 1983 SC 57 : (1983) 1 SCC 844.
594. Earlier this power was without any restriction but now, after the CPC, (Amendment) Act 1999, w.e.f. 1-7-2002, this power has been restricted for enlarging the period upto 30 days only.
595. *Selva Vinayagar Temple v Karur Municipality*, AIR 1995 Mad 170; *Johri Singh v Sukh Pal Singh*, (1989) 4 SCC 403; *Shahjahan v Kamala Narayanan*, AIR 1999 Ker 203.
596. *Gobardhan Roy v Panna Lal Shaw*, AIR 1994 Cal 154.
597. *Jogdahyan v Babu Ram*, (1983) 1 SCC 26.
598. *Premnarayan v Vishnu Exchange Charitable Trust*, (1984) 4 SCC 375.
599. *Ganesh Prasad Sah Kesari v Laxmi Narayan Gupta*, (1985) 3 SCC 53.
600. *Welset Engineers v Vikas Auto Industries*, (2015) 10 SCC 609 : (2006) 32 PTC 190.
601. *Quantum Securities Pvt Ltd v New Delhi Television Ltd*, AIR 2015 SC 3699 : AIR 2015 SCW 5330 : (2015) 10 SCC 602 : JT (2015) 6 SC 115.

Under this section power can be exercised by court to extend time to deposit cost. Such extension can be granted even if the application is filed after the of the period initially fixed for payment or deposit of the amount.[602]

It has been held by the Punjab and Haryana High Court that permission for enlargement of time for paying court fees cannot be denied for want of formal application for the said purpose when specific plea was taken up by the appellant in memorandum of appeal seeking grant of time for depositing court fees. It was further held that the right to object to extension of time in making up the deficiency of court fee did not lay with the respondents but with the State as Court fee is in the nature of revenue.[603]

[s 148.12] Act Directed or Allowed by a Decree of Court

This section does not apply where time is allowed for doing an act by a decree in a suit.[604] In a Delhi case, it was held that although time was granted by the court under the decree, it was not an act prescribed or allowed by any "provision of the Code" or rules made thereunder. section 148 was not applicable and the court had no jurisdiction to extend the time fixed for the performance of an obligation under the compromise decree.[605] But, if the decree is a preliminary decree, the court keeping control over the action has full power to make any just and necessary orders therein including inappropriate cases, the extension of time. So, in a decree for specific performance of a contract of sale, the court may extend the time fixed in the decree for the payment of the price, because the decree is in the nature of a preliminary decree.[606] When, in affirming a decree for specific performance, the appellate court grants further time, that does not deprive the court of first instance of its own power to grant extension of time under this section so long as the suit had not been finally disposed of.[607] Where, however, an appeal against a preliminary decree is dismissed and the preliminary decree is confirmed, the time for payment allowed in the trial court's decree does not get automatically extended unless the appellate court has extended it, even though in the meantime the final decree has been passed.[608] The Tripura decision to the contrary requires reconsideration, in view of the Supreme Court's decision.[609] Where the decree for specific performance provides that in default of payment within a time stated the suit should stand dismissed, the court has no power to extend the time under this section.[610] In a Bombay case, a decree was passed for specific performance. Relevant clause in the decree provided that if the defendants paid certain amount by a certain date, the plaintiff would have the decree marked "fully satisfied". It was held that the time for payment could not be extended without the consent of the plaintiff.

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602. *Ram Lal Gupta v Civil Judge, Banda*, AIR 2007 All 54 : (2007) 3 Civil Court C 87.
603. *Karan Singh v Smt. Bhagmal*, AIR 2009 P&H 17.
604. *Dharmaraja v Srinivasa*, (1916) 39 Mad 876; *Bibi Sharofan v Mahomed*, (1911) 15 Cal WN 685, 690; *Hukam Chand v Hayt*, (1912) Punj Rec No 99, p 343; *Syed Qazi Ram Kishan*, AIR 1928 Oudh 32 : (1927) 2 Luck 425; *Banshi v Majaharuddin*, AIR 1933 Cal 83 : (1932) 36 Cal WN 693; *Kshetra Mohan v Gour Mohan*, AIR 1934 Cal 21.
605. *Pioneer Engineering Co v DH Machine Tools*, AIR 1986 Del 165.
606. *Gokul Prasad v Fattehlal*, AIR 1946 Ngp 29 : (1945) ILR Nag 924; *Abdul Shaker v Abdul Rahiman*, AIR 1923 Mad 284 : (1923) 46 Mad 148; *Abdur Rahim v Tamijuddin*, AIR 1933 Cal 380 : (1933) 37 Cal WN 397; *Someshwar Dayal v Widow of Lalman Shah*, AIR 1958 All 488 : (1957) 2 All 453; *Rajat Patro v Akur Sahu*, AIR 1959 Ori 74 : (1958) ILR Cut 142; *Tribeny Tewari v Ramratan Noria*, AIR 1959 Pat 460.
607. *M Venkatarami Reddi v M Adinarayana Reddi*, AIR 1960 AP 271.
608. *Sital Prasad v Kishori Lal*, AIR 1967 SC 1236 : (1967) 3 SCR 101.
609. *Kangali v Shambhu Ratan*, AIR 1965 Tri 35.
610. *Bhutnath Das v Sahabed Chandra Panja* 66 Cal WN 645.

If the clause concerned is in the nature of a penalty or a forfeiture, the court is always competent to give relief against it. The test is, whether, by allowing the decree-holder to enforce the default clause he would get more than what he deserved. If the court, in its conscience, considers that he would unjustly enrich himself by holding on to the default clause, it would interfere, be it a consent decree or otherwise.[611]

An order admitting a winding-up petition is a procedural and not a final order and the court has, in such a case, the power to extend time under rule 7 of the companies (court) rules even though it is a self operative order and the time fixed has already expired.[612] The form of a pre-emption decree is fixed by O XX, rule 14 and there is, therefore, no analogy between such a decree and a decree for specific performance of a contract of sale;[613] but as to pre-emption decrees, the cases are not consistent. It was held by the Allahabad High Court in *Saranjan v Ram Bahal*,[614] that a court has no power under this section to extend the time fixed by its decree under O XX, rule 14 for payment of purchase money in a suit for pre-emption. The Allahabad decision has been approved by the Madras High Court,[615] and the Oudh Chief Court.[616] The High Court of Patna has, however, held that the court has power, under this section, to extend the time fixed by a decree passed under O XX, rule 14.[617] But where time is fixed by a decree of the court, the section may be applied. In a case where an *ex parte* decree was set aside on condition that the defendant should pay a sum of money within a week, the Allahabad High Court held that the conditional order did not have the effect of a preliminary decree and that the lower court should have required the money to be deposited by a certain day and then passed an order setting aside the decree. In this view of the order, time was extended on defendant's default.[618]

An application for the withdrawal of a suit (with permission to bring a fresh suit) was granted on the condition of payment of costs. Such payment was not made a condition precedent, though a time was fixed. It was held that the time could be extended.[619] An appellate court passed a pre-emptory order, allowing the appellant two weeks" time to file copies of the paper book on "compulsory papers". Appellant failed to comply with the order. It was held that in the absence of the words "in default, the appeal shall stand dismissed without further reference to the Bench", the court retained control over the case and could extend the time under section 148.[620] A court directed issue of notice on the unserved respondents within stipulated time and ordered that on non- compliance with the order, the revision would stand automatically rejected. The order was not complied with; but the excuse for non-compliance (as given) was "inadvertence". It was held that neither section 148, nor section 151 could be invoked to restore the revision in such circumstances.[621] A decree for specific performance of an agreement to sell land was passed, subject to the condition that the plaintiff should deposit the sale price within the time fixed in the decree. It was held that the decree being conditional, the time

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611. *Daxa N Gandhi v Indira Maruti Varadkar*, AIR 1991 Bom 51.
612. *M&A Associates v Telarand Ltd*, AIR 1969 Bom 32, 339 Com Cas 436.
613. *Abdul Shaker v Abdul Rahiman*, AIR 1923 Mad 284 : (1923) 46 Mad 148.
614. *Suranjan v Ram Bahal*, (1913) 35 All 582.
615. *Dharmaraja v Srinivasa*, (1916) 39 Mad 876.
616. *Abdul Rahman v Banke Behari*, AIR 1934 Oudh 17 : (1934) 9 Luck 215.
617. *Abu Muhammad v Mukut Pertap*, (1916) 1 Pat LJ 92.
618. *Jaggarnath v Kamta Prasad*, (1914) 36 All 77.
619. *Jaggarnath v Kamta Prasad*, (1914) 36 All 77.
620. *Narasingha Charan Swain v Jairam Jena*, AIR 1982 Ori 75; *Jogdhyan v Babu Ram*, (1983) 1 SCC 26
621. *Mohan Prakash v Gulab Chand*, AIR 1982 Raj 99.

could not be extended. *Maruti Vishnu v Keshav*[622] has not been followed, in view of later unreported ruling of a division bench.[623] A decree for the possession of property fixed a period of one month within which the decree-holder should deposit a certain amount in court. It did not provide that if he failed to do so, the suit would stand dismissed. Decree-holder did not deposit the amount within one month, but applied for extension of time under section 148, which was granted. It was held that the court had jurisdiction to do so under section 148.[624] Suit was decreed *ex parte*, directing decree holder to deposit particular amount within a month. The decree holder contended that he could not deposit the amount in court within the time stipulated in the decree as he was not in station since he had to accompany his mother for treatment at Madras, being the only son, and there is no wilful laches or negligence on this part in depositing the amount in time. The lower court found the above explanation offered by the decree holder for his failure to deposit the amount in time as directed in the decree acceptable and condoned the delay. The high court confirmed that the impugned order passed by the lower court as being a legal, just and proper order.[625] In a decree for eviction, there was non-specification of costs and interest in the judgment. At the same time, it granted liberty to the decree-holder to execute the decree on failure, to pay costs and interest within the stipulated time. In such a case, the court is justified in condoning the delay of the defendants in making the deposit. It is well-established principle of law that no one should suffer on account of default of the court.[626]

Where a decree for payment of admitted amount by instalments was passed, an application for re-scheduling of payment or extension of time under section 148 cannot be allowed by court as a matter of course. In a case where the court had already granted enough time and no ground was made out to ask for the court's indulgence for making further extension time, it was held that extension of time cannot be granted.[627]

In a pre-emption suit, time is specified in the decree for deposit of pre-emption money. The provision of O XX, rule 14 regarding compliance with directions of deposit in decree are mandatory because failure to comply with the said directions entails dismissal of the suit. Therefore, provision of section 148 of CPC cannot be used to negate the mandatory provisions of law. Consequently, time for deposit of pre-emption money as provided in the decree cannot be extended under section 148 of the Code.[628]

In auction sale in Execution, the provisions relating to deposit of purchase money in O XXI, rule 85 are mandatory. In case of failure to deposit full amount of sale price within 15 days of the auction, sale is to be treated as a nullity. Therefore, the court cannot extend time for payment of purchase money under section 148 of the code.[629]

However, act not directed by decree of court but performed out of consent of parties would not come within the ambit of section 148 of the Code for enlargement of time. Thus, where a decree itself was not an instalment decree nor any order permitting payment of decretal amount in instalments had been made by the court in the original suit, the executing court has no power to allow payment of decretal amount by instalments. Decree-holder, however,

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622. *Maruti Vishnu v Keshav*, AIR 1970 Bom 398.
623. *HA Patil v YL Yadav*, AIR 1983 Bom 60.
624. *Suraj Singh v Raj Narain Lal*, AIR 1984 Pat 155 (DB); *Jasbir Kaur v Surjit Singh*, AIR 2001 P&H 82.
625. *Vijayan v Vivek*, AIR 2003 Ker 82.
626. *Debi Prosad Trivedi v Deb Kumar Singh*, AIR 1981 Cal 254.
627. *Magma Leasing Ltd v Development Consultants Pvt Ltd*, AIR 2006 Cal 80 : (2006) AIHC 1272.
628. *Dinesh v Lal Singh*, AIR 2007 P&H 103 : (2007) 2 RCR (Civil) 864.
629. *Satish Chopra v Suraj Prakash*, AIR 2007 P&H 198 : (2007) 4 RCR (Civil) 324.

consented for receiving decretal amount by way of instalment but the judgment-debtor committed default. It was held that extension of time for payment by instalments cannot be granted.[630]

[s 148.13] Conditional Order by the Court in Which Time Cannot be Extended

If the effect of the order is that in the event of non-compliance, it operates automatically and without further intervention of the court, the section cannot be applied, either because the order operates as a decree or because there is no previous order currently on which the order extending time can operate. Thus, if the order is that security shall be given within a month "otherwise the petition shall stand dismissed",[631] or extra court fee shall be paid within a week "otherwise the suit shall stand dismissed",[632] or "the appeal shall stand dismissed",[633] or the decree shall be a nullity,[634] or the decretal amount be paid within ten days, otherwise the application shall stand dismissed,[635] or that the application to set aside an *ex parte* decree "will stand dismissed" if costs were not paid within a specified time,[636] or that if the balance purchase money was not paid within a given time, the "suit shall stand dismissed",[637] or that an amendment application should stand dismissed if costs are not paid within a particular date,[638] no extension can be granted. Similarly, where a decree is passed on condition that payment of a certain sum is made by a specified time, the suit would be decreed and that, in default, it would be dismissed, the court after expiry of that time loses control over the suit cannot extend the time.[639] Trial court said in its order, that if costs were not paid within a specified period, the suit shall "stand dismissed". The costs were not so paid. It was held that the suit stood dismissed. The parties entered into a compromise, wherein mutual obligation had to be performed by the plaintiff and the defendant. The plaintiff was required to deliver the machine in question to the defendant's representative within three months from the date of decree and, in case of his failure to do so, his suit was to stand dismissed. The time of three months was of the essence of contract, which was the basis of the compromise decree. The plaintiff failed to deliver the machine and made an application for extension of time. It was in these circumstances that the order was passed.[640]

[s 148.14] Conditional Order by a Court in Which Time can be Extended

Where a conditional order was passed by the court allowing the petition on payment of costs, with a direction that "otherwise the petition will stand dismissed," costs were not

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630. *Khadar Baba Fancy Stores v GP Chit Fund Pvt Ltd*, AIR 2008 AP 274 : (2008) 5 Andh LD 711.
631. *Balkirshna v Parvathammal*, AIR 1928 Mad 154 : (1927) 53 Mad LJ 494.
632. *Rawlakhan Panday v Triburi Das*, AIR 1942 Pat 234; *Sajjadi v Dilawar*, (1918) 40 All 579; *Jagan Nath v Bishwa*, AIR 1933 Oudh 241 : (1933) 8 Luck 502; *Banshi v Majaharuddin*, AIR 1933 Cal 83 : (1932) 36 Cal WN 693; *Govindan v Rev Fr Joseph*, AIR 1957 TC 48 : (1956) Ker LJ 611.
633. *Rani Sheo Prasad Kaur v Bham Pratap Singh*, AIR 1946 Oudh 52; *Kshetra Mohan v Gour Mohan*, AIR 1934 Cal 21 : (1933) 37 Cal WN 878; *Raghubar Dayal v Sankatha Baksha*, AIR 1936 Oudh 125 : (1936) 11 Luck 241.
634. *Beni Prasad v Om Prakash*, AIR 1938 All 497.
635. *Mohammed Asraf Ali v Nabejan Bibi*, AIR 1939 Cal 581 : (1939) 1 Cal 468; *Girish Chandra v Annadamoni* 182, AIR 1939 Oudh 309.
636. *Peda Nasar Saheb v P Nabi Sahib*, AIR 1957 AP 780 : (1956) ILR AP 109 : (1956) Andh WR 177.
637. *Ramdhani Ram v Sital Prasad Ram*, AIR 1959 Pat 181.
638. *Krishnaswamy Iyer v Ouseph Mathai*, AIR 1961 Ker 110.
639. *Bokaro and Ramgur Ltd v State of Bihar*, AIR 1965 Cal 30 : 868 Cal WN 1117; *Mohan Lal v Ladli Prasad*, AIR 1971 All 519 : (1971) All WR 846.
640. *Kamaluddin v Chhotelal*, AIR 1987 MP 39.

deposited on the specified date (or even on subsequent dates to which the case was adjourned), the case was not dismissed by the court, but was kept pending. It was held that the court had not become *functus officio* and could grant extension of time for the payment of costs.[641] In a Madras case, a conditional order was passed for the stay of execution of a decree on payment of a certain amount. The time fixed expired and delivery of immovable property was effected. Subsequently, the court ordered extension of the time limit for payment of the amount. It was held that order for delivery was valid. Section 148 does not render such an order illegal.[642]

It was held in *Printing and Industrial Machinery v Swastika Press,*[643] that the court had the power to extend time even when the order had provided that in default of compliance within a period specified, the petition or suit should stand dismissed and the order had worked itself out as a result of default. But the Madras High Court has dissented from this decision.[644] The high court has explained that the principle of the court losing seisin of the matter applies when the suit is finally disposed off by an order. But if the order does not so dispose off the matter, and the court still retains control of it, it will have the power to make an appropriate order extending the time. Thus, where restoration of a suit is allowed on condition of payment of costs within a particular period, in default of which the application for restoration was ordered to be dismissed and to be posted for final order, the time was enlarged even after the period had lapsed.[645] As the Madhya Pradesh High Court has observed, the court does not cease to have jurisdiction on the happening of the default. There are no words in section 148, to confine it to cases in which extension is sought before the period fixed by the court expires. The court does not cease to have jurisdiction until it makes an order finally disposing off the proceeding before it.[646] The Calcutta High Court has also held that where an order was made for receiving additional written statement on payment of costs within a specified date, the time could be extended, even though there was a provision in the order that in case of default, the petition should stand dismissed.[647] If, however, the order is that deficit court fee be paid within a fortnight "otherwise the plaintiffs will not be entitled to the decree and the suit will be dismissed";[648] or if the application be made before the expiry of the period prescribed, extension can be granted.[649] The Patna High Court has held that an executing court can extend the time where an application is made for enlarging time for payment of an instalment on the ground that information about the date of such payment reached the judgment-debtor only on the previous day.[650] But the Bombay High Court has expressed the view that an application for extension of time can be made not to the executing court but to the trial court.[651] In *LP Jain v Nandakumar*,[652] after order was made on an application under O IX, rule 13, that if the applicant paid certain amount within four weeks, the expense decree would be set aside, and in default the application should stand dismissed. An application for further time was filed on the last day. It was held that this was not maintainable, as the court had become *functus officio* after passing the order. But this decision cannot be held to be good law in view of the subsequent

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641. *Muniammal v Sakkubai*, AIR 1988 Mad 241.
642. *Raman Muthuraja v M Sait*, AIR 1987 Mad 202.
643. *Printing and Industrial Machinery v Swastika Press,* 90 Cal LJ 105.
644. *Sitaraman v Pattabhiraman*, AIR 1958 Mad 453 : (1958) 2 Mad LJ 255 : 71 LW 440.
645. *Periasami Asari v Illuppur Panchayat Board*, AIR 1973 Mad 250.
646. *Budhulal v Chhotalal*, AIR 1977 MP 1 : (1977) ILR MP 191.
647. *Jyotish Chandra Sen v Rukmini Ballav Sen*, AIR 1959 Cal 35 : 62 Cal WN 588.
648. *Surajmal Bhubaneshwar*, AIR 1940 Pat 50.
649. *Ramesh Chandra v Pramatha Nath*, AIR 1936 Cal 245; *Md Jabbar Ali v Adar Rahman*, AIR 1960 Assam 126.
650. *Mohan Ram v Sardar Budh Singh*, AIR 1966 Pat 266.
651. *MV Kshirsagar v BK Jadhav*, AIR 1970 Bom 298 : 72 Bom LR 615.
652. *LP Jain v Nandakumar,* AIR 1961 Bom 254 : 63 Bom LR 48 : (1961) Nag LJ 100.

pronouncement of the Supreme Court in *Mahanth Ram Das v Ganga Das.*[653] There, an order was made in appeal that the plaintiff should pay additional court fees, both on the plaint and on this memorandum of appeal, within three months and that in default, the suit should stand dismissed. The plaintiff applied within time, for extension of time for payment, but the period had expired when the petition actually came up for hearing. The high court dismissed it on the ground that the order had worked itself out and that the court had no power to extend the time.[654] In reversing this decision, the Supreme Court held that section 148 applied and that the order, though made after the expiry of the period, would relate back to the date of petition, and so extension could be granted. The decision is not, it is submitted, an authority for the position that an application for extension could be made after the expiry of the period. It only decides that if an application is made within time, extension could be granted, even though at the time of the order, the period had expired. The Allahabad High Court has held that a court can grant extension of time even after the lapse of time originally granted, on the ground that it is not the application for grant for further time, whether made before or after the expiry of the time granted, which confers jurisdiction. The court possesses it under this section and the application merely invokes that jurisdiction.[655] But when an order stayed execution of a decree on condition that the appellant should make a payment of rent and assessment within a stated time, an extension was allowed as there was no express direction that execution should proceed in default of payment.[656] Again, when a court of appeal remanded a case under O XLI, rule 23 on condition that the appellant produced certain papers within a month, with a direction that in default "the appeal shall stand dismissed automatically upon a report made by the court below that the order of the court for filing papers has not been complied with". The Allahabad High Court pointed out that the expression "upon a report being made" contradicted the word "automatically", for the order of dismissal could only be passed upon a report being received from the lower court and held that the court had jurisdiction to extend time.[657] This is also the opinion of the Calcutta High Court.[658] The Patna High Court has held that where a court permits the plaintiff to withdraw suit under O XXIII, rule 1 with liberty to bring a fresh suit on payment of costs within a prescribed period, the court has power under this section to extend the time.[659] This decision was approved by the Madras High Court, which held that O XXIII, rule 1 did not require that costs awarded against a plaintiff who was given permission to withdraw a suit with liberty to file a fresh one, must be paid before the second suit was filed, that they might be paid. even after the second suit was filed and that even if time had been fixed in the order, it could be extended under this section.[660] While granting permission under rule 1(3) of O XXIII of the CPC to withdraw suit and to file a fresh suit it is open to a court to direct the plaintiff to pay the costs of the defendants. Even if the order for costs in a given case is construed as directing payment of costs as a condition precedent for filing a fresh suit, the defect, if any, may be cured by depositing, in court, or paying to the defendants concerned, the costs, within a reasonable time, to be fixed by the court before which the second suit is filed. If the plaintiff fails to comply with the said direction, then it will be open to the court to reject the plaint, but if the amount of cost is paid within the time fixed or extended by the court, the suit should be deemed to have been instituted validly on the date on which it was presented.

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653. *Mahanth Ram Das v Ganga Das,* AIR 1961 SC 882 : (1961) 3 SCR 763 : (1962) 1 SCJ 427.
654. *Mahant Ram Das,* AIR 1956 Pat 20.
655. *Gobardhan v Barsati,* AIR 1972 All 146.
656. *Subramaniam v Subbiah,* AIR 1933 Mad 563 : (1933) 665 Mad LJ 538.
657. *Anant Ram v Sital Din,* AIR 1933 All 262 (FB) : (1933) 55 All 326.
658. *Kshetra Mohan v Gour Mohan,* AIR 1934 Cal 21 : (1933) 37 Cal WN 878.
659. *Syed Qazi v Lachman,* AIR 1926 Pat 409 : (1926) 5 Pat 306.
660. *Chella v Chinnaswami Naidu,* (1954) 2 Mad LJ 61 : 67 LW 757.

This view is in consonance with justice and the spirit of section 148 of the CPC.[661] The Oudh Court, while holding that this section does not allow enlargement of time where the time is fixed by a decree in a suit, holds that if an appeal is referred from the decree, the appellate court may extend the time prescribed by the decree not under section 148, but under O XLI, rule 32 by varying the decree of the lower court in that behalf. It has, thus, been held that if a decree is passed for pre-emption on payment of a certain sum in court within a prescribed time, and an appeal is preferred from the decree, the appellate court has the power to extend the time for payment.[662] The Allahabad High Court has also held that time may be extended by the appellate court by varying the terms of the order under the provisions of O XLI, rule 32.[663] The section does not, in any case, empower a court to interfere with or modify its decree after an appeal has been filed against it.[664]

The Supreme Court has held that according to section 35B if costs are levied on the plaintiff for causing delay, payment of such costs on the next hearing date shall be a condition precedent to the further prosecution of the suit by the plaintiff. But the words "further prosecution of the suit" or "further prosecution of the defence," as the case may be, mean that such defaulting party is prohibited from further participation in the suit. It does not mean dismissal of the suit or defence to be struck off. In suitable cases the court has power to extend time for payment of costs with the aid of section 148 of the code.[665] Raveendran, J, speaking for the Bench in the above case, observed as follows:

> We may also refer to an incidental issue. When section 35B states that payment of such costs on the date next following the date of the order shall be a condition precedent for further prosecution, it clearly indicates that when the costs are levied, it should be paid on the next date of hearing and if not paid, the consequences mentioned therein shall follow. But the said provision will not come in the way of the court, in its discretion extending the time for such payment, in exercise of its general power to extend time under section 148 of CPC. Having regard to the scheme and object of section 35B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms.[666]

An application for extension of time fixed by the decree in a redemption suit for payment of the mortgage-debt does not fall under this section, but under O XXXIV, rule 8.[667]

[s 148.15] Non-Deposit

From the decisions on the subject, one could distinguish:

(i) the cases of non-deposit of the whole of the purchase money within the fixed time where there was no stay order granted from the appellate court from;

(ii) cases of non deposit of decretal amount consequent upon a stay order granted by the Appellate Court; and

(iii) non-deposit of small fraction amount.

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661. *Konkon Trading Co v Suresh Govind Kamath Tarkal*, (1986) 2 SCC 424; *Syed Beri v Ahmad Beri*, AIR 1959 Kant 329.
662. *Syed Qazi v Ram Kishan*, AIR 1925 Oudh 32 : (1927) 2 Luck 425.
663. *Kashi v Bansaj*, AIR 1938 All 150.
664. *Pamanand v Kripasindhu*, (1910) 73 Cal 548. See note below: "court to which, etc."
665. *Manohar Singh v DS Sharma*, AIR 2010 SC 508 : (2010) 1 SCC 53.
666. *Manohar Singh v DS Sharma*, AIR 2010 SC 508, p 510 para 6 : (2010) 1 SCC 53.
667. *Het Singh v Tika Ram*, (1912) 34 All 388.

In the first category of cases, O XX, rule 14(1) (which is mandatory), would apply. In the second category of above cases, it would be necessary to examine the nature and effect of the stay order on the deemed disposal of the suit and also to see whether a fresh period is fixed thereby. In the third category of cases, namely, non-deposit of only a relatively small fraction of the amount, whether or not caused by any action of the court, the court has discretion to extend the time, if it is satisfied that the mistake was *bona fide* and was not indicative of negligence or inaction.[668]

[s 148.16] Specific Performance

In a suit for specific performance of a contract, the compromise decree directed the defendant to execute registered sale deed in favour of plaintiff, on the plaintiff's paying the balance of sale consideration within a specified period. The amount was not deposited. Decree-holder applied for execution. It was held that the executing court was wrong in extending the time for depositing the amount, particularly when, at an earlier stage, the judgment-debtor had been given more than one extension of time before the decree was passed.[669] The power of extension of time for deposit of the consideration money has been reserved by section 28(1) of the Specific Relief Act, 1963 and under section 148 of the CPC only for the court which has passed the decree and not by any other court. For the redressal of his grievance, the plaintiff in the suit, under the law, has a right to approach that court, which passed the decree and that court has the right and jurisdiction to modify the decree by extending time.

A separate suit, seeking extension of time to deposit consideration money which was agreed, by and between the parties in the compromise decree would not be maintainable under section 28(1) of the Specific Relief Act, 1963 and section 148 of the CPC.[670]

Where the decree-holder deposits into court, what he believes to be the entire purchase money but due to inadvertent mistake, whether or not caused by any action of the court, what is deposited, falls short of the decretal amount by a small fraction thereof and the party within such time after the mistake is pointed out or resiled, as would not prove willful default or negligence on his part, pays the deficit amount into the court with its permission, the suit should not be taken to have stood dismissed under O XX, rule 14(1) of the CPC. In such cases, the court has the discretion under section 148 of the Code of Civil Procedure, to extend the time even though the time fixed has already expired, provided it is satisfied that the mistake is *bona fide* and is not indicative of negligence or inaction.

The court will extend the time when it finds that the mistake was the result of, or induced by, an action of the court applying the maxim *actus curiae neminem gravabit*—an act of the court shall prejudice no man. While it would be necessary to consider the facts of the case to determine whether the inadvertent mistake was due to any action of the court, it would be appropriate to find that the ultimate permission to deposit the challaned amount is that of the court.

There are also cases of non-deposit of the decretal-amount consequent upon a stay order granted by the appellate court. In such cases, it would be necessary to examine the nature and effect of the stay order on the deemed disposal of the suit and also to see whether a fresh period

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668. *Johri Singh v Sukh Pal Singh*, AIR 1989 SC 2073 : (1989) 4 SCC 403.
669. *Chikkabyatagaiah v A Gopala Rao*, AIR 1988 Kant 89.
670. *Uma Basu v Swapan Chatterjee*, AIR 1996 Cal 311; *Prime Promotors Pvt Ltd v Anoop Kumar Chatterjee*, AIR 1999 Cal 186.

is fixed thereby. While mere filing of an appeal does not suspend a pre-emption decree, a stay order passed by an appellate court may suspend it, in the manner ordered therein.

However, in cases of non-deposit of the whole of the purchase money, within the fixed time where there was no stay order granted by the appellate court, the mandatory provisions of O XX, rule 14(1) of the CPC, would be strictly applicable.[671]

[s 148.17] Time Fixed by Contract

A Calcutta case holds that where the time fixed by contract is not of the essence of the contract but is penal, the court can extend the time and grant relief even without the consent of the other party.[672]

[s 148.18] Provincial Insolvency Act, 1920: Extension of Time for Applying for Discharge

Section 27(2) of the Provincial Act, 1920, allows the court to extend the period during which a debtor may apply for his discharge. section 43(1) of the same Act provides that if the debtor does not apply during the period specified, the order of adjudication shall be annulled. The Madras High Court has held that under this section, the court may extend the time fixed even after the expiry of the period but before the order of amendment has been made.[673] Section 5 of the Provincial Insolvency Act, 1920 makes the CPC applicable, subject to the provisions of the Act and if section 43(1) is mandatory, it supersedes section 148 of the CPC. But the courts are agreed that section 43(1) is directory.[674]

[s 148.19] Period Fixed by Statute

The court has no power to extend a period fixed by statute and not fixed or granted by the court.[675] Therefore, the court has no power to extend the period fixed by O XXI, rule 85 of the CPC;[676] nor to extend the period prescribed by the law of limitation;[677] nor the period of one month fixed by section 55(4) of the CPC.[678] It is only reasonable to hold that the provisions of section 4A of Kerala Court Fees and Suit Valuation Act, 1959 may not have the effect of excluding the operation of sections 148 and 149 of the CPC even if the provision in the proviso is held to be mandatory. Harmonious interpretation of the above provision alone will be justifiable and acceptable when we keep in mind the principle of interpretation that no provision of an enactment should be interpreted and understood in such a manner as to render. in other provision, in the same or another enactment totally ineffective or inoperative unless there is express indication to that effect.[679]

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671. *Johri Singh v Sukh Pal Singh*, (1989) 4 SCC 403.
672. *Mangala Ghosh v Rabindra Nath*, AIR 1987 Cal 307.
673. *Palani Goundan v Official Receiver*, AIR 1930 Mad 389 (FB) : (1930) 53 Mad 288.
674. *Palani Goundan v Official Receiver*, AIR 1930 Mad 389 (FB) : (1930) 53 Mad 288; *Gopal Ram v Magni Ram*, AIR 1928 Pat 338 : (1928) 7 Pat 375; *Abraham v Sookidas*, AIR 1924 Cal 777 : (1924) 51 Cal 337.
675. *Jagjit v Sankatha*, AIR 1950 All 675, (FB); *Kathyee Cotton Mills v R Padmanabha Pillai*, AIR 1958 Ker 88 : (1957) Ker LJ 1167 : (1957) Ker LT 1175; *United Commercial Bank v Mani Ram*, AIR 2003 HP 63.
676. *Kalipada v Basanta*, AIR 1932 Cal 126 : (1932) 59 Cal 117; *Nand Lal v Siddiquan*, AIR 1957 All 558; *Thayyan Padayachi v Vilusuami*, AIR 1961 Mad 407 : (1961) II R Mad 711 : (1961) 1 Mad LJ 412 : 74 LW 110; *United Commercial Bank v Mani Ram*, AIR 2003 HP 63.
677. *Dukhno v Munshi Sahu*, (1919) 4 Pat LJ 428.
678. *Narasimha v Rangachai*, AIR 1926 Mad 689 : (1926) 50 Mad LJ 477.
679. *Shahjahan v Kamala Narayanan*, AIR 1997 Ker 203.

[s 148.20] Consent Order

Where the time for doing an act has been fixed by a consent order, it cannot be enlarged except by consent.[680] Similarly, where the executing court has extended the time for confirmation of sale even after dismissing the application under O XXI, rule 90 with the consent of parties, it cannot, thereafter, further extend the time except with the consent of the parties.[681]

[s 148.21] Compromise Decree

Where under a compromise decree a certain time is fixed for the performance of an obligation under the decree, the court has no power to vary the decree.[682] But it has been held that where the compromise decree does not provide that in default of payment, the rights of the party in default should cease, the court has jurisdiction to extend the time.[683] Time was fixed under a compromise decree for the performance of obligations under the decree. Time was the essence of the contract. Court has no jurisdiction to extend it by invoking section 148. section 148 applies only where the time is fixed for the doing of an act prescribed or allowed by the CPC, including the rules. But by invoking section 148, the court cannot extend the time fixed for the performance of an obligation under the compromise decree.[684] A suit was filed for specific performance of an agreement to reconvey property. Compromise decree stipulated payment within five weeks and the suit was to be decreed on such payment. Plaintiff applied for extension of the time laid down in the decree. It was held that the court had power to extend the time, even without the consent of the other party, "as in such a case, the time so stipulated is not of the essence of the contract and is a penal clause and such time becomes part of the court's order and the court is empowered to relieve the party concerned of the rigours of such penal clause in appropriate cases."[685] Time for depositing amount of consideration was stipulated by the parties themselves in the compromise. Order of the court in terms of the compromise was passed; question arose whether the court can grant extension of time for deposit, when the time for deposit was not stipulated earlier by any order of the court. It was held that the trial court had the jurisdiction to extend the time for depositing the consideration amount, if such extension was required to further the ends of justice or to relieve against a forfeiture clause.[686] Where the contract between the parties has merged in the order of the court, the courts' freedom to act to further the ends of justice would not stand curtailed. Although the court would not rewrite a contract between the parties, but it would relieve against a forfeiture clause. By virtue of the courts' order in terms of the compromise, the time for deposit stipulated by the parties became the time allowed by the court and this gave the court the jurisdiction to extend time. But the time would be granted in rare cases to prevent manifest injustice and it would not be extended ordinarily, nor for the mere asking.[687]

A power under section 148 for enlargement of time can be exercised only in a case where a period is fixed or granted by the court for doing of any act prescribed by the court. In a

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680. *Australasian Automatic Weighing Machine Co v Walter*, (1891) Cal WN (Eng) 170; *Amir Khan v Jhao Lal*, AIR 1934 Oudh 44 : (1934) 9 Luck 387; *Sheo Prasad v Topeshwar*, AIR 1933 Pat 563 : (1933) 13 Pat 1.
681. *Hukumchand v Bansilal*, AIR 1968 SC 86 : (1967) 3 SCR 695 : 70 Bom LR 114.
682. *Ammo v Pokkan*, AIR 1940 Mad 817 : (1940) 2 Mad LJ 311; *Bholanath v Satyasaran Mukherjee*, (1951) 2 Cal 70; *Vyankatrao v Sham Rao*, AIR 1952 Ngp 185; *Bethanna Nadar v Srinivasan*, (1962) 1 Mad LJ 418 : 74 LW 773.
683. *Bhagwat Saran Singh v Mithila Saran Singh*, AIR 1953 Pat 158.
684. *Pioneer Engineering Co v DH Machine Tools*, AIR 1986 Del 165.
685. *Sm Mangala Ghosh v Rabindra Nath Hazra*, AIR 1987 Cal 307.
686. *Pioneer Engineering Co v DH Machine Tools*, AIR 1986 Del 165.
687. *Smt Periyakkal and others v Smt Dakshyani*, (1983) 2 SCC 127.

compromise decree such as the one on hand, the stipulation that the judgment debtor is required to make the payment of the money within a specified period is a stipulation by agreement between the parties and it is not a period fixed by the court. Therefore, section 148 of the CPC has no application to such a situation.[688]

In a recovery certificate proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Bank agree for one-time settlement and the parties settled their claim before Lok Adalat. The Debt Recovery Tribunal passed detailed order recording the Award of the Lok Adalat. The borrower, however, failed to repay the amount as per Award passed by the Lok Adalat inspite of sufficient time as also extended time. It was only after the Bank proceeded recovery certificate the borrower started filing applications, after much delay. It was held that the conduct of the borrower clearly establishes gross negligence and therefore, the extension of time granted by the Debt Recovery Appellate Tribunal was not justified.[689]

In a Himachal Pradesh case, the compromise between the parties was, in fact, an agreement of sale and the object of the clause providing for payment of sale consideration within the stipulated period was simply to secure prompt payment, under threat of the respondent losing his mortgage rights, or, as the case may be, tenancy rights. This was a penal clause and could be relieved against, provided the respondent could show that he had made no wilful default in making the payment and further showed that he had offered to discharge the obligation within a reasonable period.[690] Court is not competent, under section 148, to extend the time, where there is a conditional decree. section 148 applies to procedural errors and not to conditional decrees. In the above case, the compromise decree was for payment of a sum of Rs 15,000 in three equal instalments by the respondent, by specified dates. The decree further provided as under:

> In case the respondent fails to pay either of said instalments, the appeal shall stand accepted and the suit of the plaintiff decreed. However, if the respondent fails to pay all the instalments as stated above, the appeal shall stand dismissed.

It was held that the time for payment of instalment could not be extended. The decree was a conditional decree distinguished.[691]

It was held, in *Bhupendranath v PK Biswas,*[692] that when the terms of a consent order were not carried out, owing to lawyer's default, the court has the power to grant relief.

[s 148.22] Court to Which Application Should be Made for Extension of Time

Where a decree is passed against a defendant requiring him to execute a *kabuliat* in favour of the plaintiff within two months, and an appeal is preferred from the decree, the only court that has power to extend the time, assuming the case is one under this section, is the appellate court, and not the court which passed the decree.[693] The court executing a decree has no jurisdiction to extend the time granted by the decree.[694] The meaning of the word "court" as

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688. *Shivshankar Gurgar v Dilip*, AIR 2014 SC 1182 : (2014) 2 SCC 465 : 2014 (1) Scale 52 : 2014 (1) SCR 18; *Hukamchand v Bansilal*, AIR 1968 SC 86 : 1967 (3) SCR 695 : 1968 (2) SCJ 32 relied on.
689. *P Vijaya Kumari v Indian Bank*, AIR 2008 Mad 45 : 2007 (6) Mad LJ 766 (DB).
690. *Jindu v Mahant Ram*, AIR 1985 HP 5.
691. *Parmeshri v Naurata*, AIR 1984 P&H 342; *Mahant Ram Das v Ganga Das*, AIR 1961 SC 882.
692. *Bhupendranath Nath Lahiri v PK Biswas*, AIR 1960 Cal 75.
693. *Parmandas Das v Kripasindhu*, (1910) 37 Cal 548.
694. *N Raman Nair v G Raman Nair*, AIR 1952 TC 440; *Firm Ganesh Dass v Gordhan Lal*, AIR 1955 Ajm 2. *Ram Kumar v Mahadeo Lal*, AIR 1962 Raj 54; *MV Kshirsagar v BK Jadhav*, AIR 1970 Bom 398 : 72 Bom LR 615 (But see contra *Mohan Ram v Sardar Budh Singh* 1966 AP 266).

used in section 148 is the court which passed the order and fixed the date for particular act and not any other court, much less the subordinate court.[695]

[s 148.23] Appeal

No appeal lies from an order under this section. The order is not a decree, nor is it one of the appealable orders mentioned in section 104.[696] An order of trial judge under section 148, extending the time for deposit under O XX, rule 14 can be interfered with by the high court in revision, only if the trial judge: (i) had no jurisdiction to make the order, which it has made; and (ii) acted in breach of any provision of law or committed any error which was material and may have affected the decision of the case. The high court cannot interfere, merely because it differed with the conclusions of the trial judge on questions of fact or law.[697]

[s 148.24] Award of Lok Adalat—Application of Section 148

Section 21(2) of the Legal Services Authorities Act, 1987 provides that an award made by a Lok Adalat is final and binding on the parties. Thus, in a suit for recovery of money based on promissory note, award was passed by the Lok Adalat at time for payment was not fixed by court but parties at their own volition fixed a date for payment. In such a case section 148 has no application and court has no power to extend time fixed in the award.[698]

[699][**S 148A] Right to lodge a caveat.**—(1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgment due, on the person by whom the application has been, or is expected to be, made under sub-section (1).

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator, at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.]

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695. *Allahabad Development Authority v Saiffuddin*, AIR 1999 All 40 (DB).
696. *Suranjan Singh v Ram Bahal Lal*, (1913) 35 All 582.
697. *Johri Singh v Sukh Pal Singh*, AIR 1989 SC 2073 : (1989) 4 SCC 403 : 1989 SCR Supl (1) 17.
698. *Nimma Venkateswarlu v Devireddy Krishnayya*, AIR 2007 AP 300 : (2007) 4 Andh LT 154.
699. Inserted by Act 104 of 1976, section 50 (w.e.f. 1-2-1977).

This section is salutary. Without it, parties sometimes obtained *ex parte* interim orders without any intimation to the opposite parties causing inconvenience and even detriment to them. The object of the section is two fold—firstly to provide an opportunity to such opposite parties to be heard before an *ex parte* order is made and show cause why it should not be passed, and secondly to avoid multiplicity of proceedings for, without such a provision, a person not a party to the application would have to file a proceeding to get rid of an order on the application if it affects him adversely. Sub-section (1) enables a person claiming the right to appear at the hearing of an application for an interim order to lodge a caveat. Sub-section (2) requires such a caveator to serve a notice of his caveat on the person by whom an application for an interim order has been or is expected to be made. Sub-section (3) requires the court, before such an order is made, to serve notice of it to the caveator and sub-section (4) requires the applicant to serve on the caveator a copy of his application, together with any papers or documents filed or intended to be filed in support of his application. Such a caveat will remain in force for 90 days from the date of its filing, unless the application referred to in sub-section (1) has been made before the expiry of the said period.

The application, referred to in sub-section (1) is a substantive application. Any person likely to be affected by an order that may be passed can file the caveat. He need not be a necessary party to the application. No particular form for the caveat is prescribed and therefore it can be in the form of a petition. The caveator must specify that nature of the application that is or is likely to be filed and his right to appear and oppose it at the hearing.[700]

[s 148A.1] Filing of Caveat

Requirement of specifying name of party likely to initiate proceedings under section 148A(2) is only directory in nature and the caveat petition cannot be rejected on that ground alone.

Section 148A of the CPC has to be understood as a right given to a person to lodge a caveat where an application is expected to be made or has been made in a suit or a proceedings instituted or a proceedings instituted or about to be instituted in a suit. Therefore, in cases, where it is not possible to identify the person or persons who are likely to institute a suit or a proceedings, and make an application in such a proceeding, still a caveat petition can be lodged and if such caveat petition is lodged, such a petition is required to be registered by the court. Merely because sub-section (2) of section 148A provides for service of notice of such a caveat petition on a person, who is expected to institute a suit or a proceedings and the requirement of the said sub-section cannot be complied with, cannot be a ground to refuse to reject the caveat petition. Sub-section (2) of section 148A of the CPC is required to be complied with when it is capable of being complied with. In cases where the person who is likely to institute a suit or proceedings cannot be ascertained with certainty, the question of complying with the requirement of sub-section (2) of section 148A does not arise. The substantive right provided to lodge the caveat cannot be taken away on the ground that the provisions of sub-section (2) of section 148A cannot be complied with. The provisions of sub-section (2) of section 148. must be understood as directory in nature. Wherever the requirement of the said provision is incapable of compliance, it will be within the discretion of the court, if valid grounds are made out for non-compliance of the said provision, to dispense with the compliance of sub-section (2) of section 148A of the CPC and direct the office to register the caveat. However, when a caveat petition is lodged, the caveator should specify, with certainty, the subject matter of the dispute, in a suit or proceedings likely to be instituted. If that is specified, it is open to

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700. *NC Dutta v GN Roy*, AIR 1978 Cal 492.

the court before which the caveat is lodged in its discretion, to dispense with the requirement of sub-section (2) of section 148A, if an application under section 151 of the CPC is filed seeking dispensation of such requirement.[701] Once a caveat is filed, it is a condition precedent for passing an interim order to serve a notice of the application on the caveator who is going to be affected by the interim order. Unless that condition precedent is satisfied, it is impossible for the court to pass an interim order affecting the caveator, according to the Karnataka High Court.[702] In an Andhra Pradesh case, notice of lodgment was served on the plaintiffs. It was held that it must be taken that it is the duty of the court under section 148A, to give sufficiently reasonable and definite time to the caveators to appear and also to oppose the interlocutory application intended to be moved by the plaintiffs" applicants. The court should give a specified date for hearing of the interlocutory application. The furnishing of copies of documents by the plaintiffs to the caveators informing them of the date of their moving their interlocutory application, cannot be taken as acts constituting compliance with the specific duty assigned to the court under section (3). The court, therefore, had erred in passing the impugned order of injunction against the caveators without giving them a notice of the date of hearing. But at the same time, order passed without notifying the caveator is not void.[703] It is the duty of the court under section 148A to give sufficiently reasonable and definite time to the caveators to appear and also to oppose the interlocutory application intended to be moved by the plaintiffs-applicants; and the court should give a specified date for hearing of the interlocutory application. The furnishing of copies of documents by the plaintiffs to the caveators, and informing them of the date of their moving their interlocutory application, cannot be taken as acts constituting compliance with the specific duty assigned to the court under section 148A(3). By failing to act in compliance with the requirements of section 148A(3), the court errs in passing the impugned order of injunction against the caveator without giving them a notice of the date of hearing.[704] A Division Bench of the Allahabad High Court (overruling a contrary ruling of a single judge) has held that section 148A applies to appeals also.[705] The provisions of section 148A do not apply to writ proceedings, by reason of section 141 of the Code as amended in 1976. To such proceedings, the high court rules regarding writs would continue to apply.[706] section 148A cannot be construed to mean that where the CPC itself contemplates that in levying execution no notice is required to be given, such a notice is to be enforced by the lodging of a caveat under section 148A. section 148A should not be interpreted to contemplate the enforcement of a notice, where notice is otherwise ruled out by the other provisions of the CPC.[707]

In a testamentary suit for grant of probate, a caveat was filed by the person opposing the grant of probate and affidavit in support of caveat was filed. It was held by the Bombay High Court that the principles laid down is O VIII, rule 9 of the Code would apply in the case of tendering additional affidavit and leave of Court is necessary for its acceptance. Hence, it was held that additional affidavit tendered without leave of the Court in support of the caveat cannot be taken on record.[708]

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701. *State of Karnataka v Nil*, AIR 2000 Kant 70.
702. *GC Siddalingappa v GC Veeranna*, AIR 1981 Kant 242.
703. *RBI Employees' Association v RBI*, AIR 1981 AP 246.
704. *Jugal Kishore v Dhano*, AIR 1978 SC 2508 : (1978) 2 SCC 567.
705. *Chandrajit v Ganeshiya*, AIR 1987 All 360 (DB).
706. *HG Shanker Narayan v State of Rajasthan*, AIR 1985 Raj 156.
707. *Chloride India Ltd v Ganesh Das Ram Gopal*, AIR 1986 Cal 74 (DB).
708. *Sarla Kapur v Sanjay Sudesh Kapur*, AIR 2009 Bom 117 : 2009 (1) Mah LJ 383.

However, the high court further held in the case that grant of probate is a judgment in rem and the court is required to consider whether the will set up by the propounder in the last Will of the deceased and was made out of his free Will in accordance with law. In doing so, the court cannot shut out, by technical rules of procedure, the real defence of a person having a caveatable interest. Such a person having a caveatable interest must be allowed a reasonable opportunity to show that the Will was not the last Will of the deceased validly made in accordance with law. He cannot be denied the opportunity on the ground that initially he had not pleaded so in his earlier affidavit.[709]

A careful reading of rules 28 and 30 of the Original Side Rules of Calcutta High Court makes it abundantly clear that before the proceedings are numbered as a suit by orders of a Judge for being tried as a suit as per provisions of the CPC, the court may take up as a preliminary issue, whether the caveator has a caveatable interest,[710] if such an application is filed before the court by the petitioner. Clearly the preliminary issues are triable before the proceedings are treated as a full-fledged suit under order of the Judge concerned. Whereas suit is required to be tried as per provisions of the Code, the procedure for trial of preliminary issue has been left to the discretion of the court. Rule 30 does not require the court to come out with specific findings in respect of preliminary issue because the language used in rule 30 requires the court to discharge the caveat where, upon the trial of such issue. The preliminary issue does not relate to the validity or legality of the "will" sought to be probated but only to the issue whether the caveator has an interest for which he can maintain the caveat.[711]

[S 149] Power to make up deficiency of court-fees.—Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force, and effect as if such fee had been paid in the first instance.

SYNOPSIS

[s 149.1]	Scope of the Section 1623	[s 149.6]	Condonation of Delay in Presenting Plaint Condones Delay in Filing Court Fee Also 1626
[s 149.2]	This Section and Section 4, Court Fees Act, 1870 1624	[s 149.7]	Pauper Applications 1626
[s 149.3]	Does Enlargement of Time for Payment of Court Fee Fall Under Section 148 or 149? 1625	[s 149.8]	Plaint 1628
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		[s 149.12]	At Any Stage 1631
		[s 149.13]	Law for the Time Being in Force ... 1631

709. *Sarla Kapur v Sanjay Sudesh Kapur*, AIR 2009 Bom 117 : 2009 (1) Mah LJ 383, at p 120.
710. For meaning of the words "caveatable interest" see *Krishna Kumar Birla v Rajendra Singh Lodha*, (2008) 4 SCC 300 : 2008 (4) Scale 202.
711. *Saroj Agarwalla (Dead) Thr Lr Abhishek Agrawalla v Yasheel Jain*, (2016) 10 Scale 301.

[s 149.1] Scope of the Section

The section is an enabling provision. It empowers the court to allow a party to make up the deficiency of court fees payable on plaints, memoranda of appeal, applications for review of judgment, etc, even after the expiration of the period of limitation prescribed for the filing of these documents. The section enables a defective document to be retrospectively validated if the insufficiency of the stamp is subsequently made up with the leave of the court.[712] The power, however, to make up the deficiency of court fees is subject to the discretion of the court and is not claimable as of right by a party.[713] To permit payment of deficit court fees for recovering enhanced compensation after a lapse of almost six years by the court under its inherent jurisdiction would encourage the practice of not paying the court fees in the hope that as and when the valuation is determined in appeal, the jurisdiction of the court can be invoked under section 151 of the Code of Civil Procedure, 1908 (CPC) and the benefit of enhanced compensation can be reaped by making good the deficit court fees.[714] Reading section 107(2) and section 149 of the CPC and keeping fairness of procedure in view an opportunity should have given by the court to the appellant to make good the balance court fees within a time to be indicated, and if there was a failure to comply with the direction of the court, the memorandum of appeal could have been dismissed.[715] section 149 is a discretionary provision given to the court, this discretionary power has to be exercised keeping in view the right of the respondent/decree-holder and public interest in a given case. When the extension and exemption of the court fees is a discretionary power of the court, *bona fide* of the ground should be established beyond all reasonable doubt.[716] The discretion conferred by this section is to be normally exercised in favour of the litigant except in cases of contumacy, mala fides or grounds of a similar nature.[717] An appellate court ought not to interfere with the exercise of such discretion, unless it is shown that such exercise was in violation of any recognised principle or had caused gross injustice to the other side. However, the mere fact that the opposite party was deprived of his right to plead the bar of limitation on account of time having been extinguished for paying the deficit court fees, does not warrant the conclusion that gross injustice has occurred.[718] An order under this section can be made *suo motu*.[719] Deficiency in court fee was found as paid in high court on plaint and on memo of appeal. No objection could be taken to maintainability of the proceeding.[720] The fact of non-receipt of the amount by an advocate required for the court fee cannot ordinarily be a "good cause" for extension of time, because, in such a case, non-receipt is not a "cause", it is really an effect. Similarly, when state asks for time to pay the deficit court fee, a simple statement that the amount required has not been received from the concerned authority is not sufficient at all to invoke the discretionary power conferred by section 149 of the CPC. Adequate reason must be assigned to the court to show that the appeal is being filed with deficit court fee because of

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712. *Jagtu v Badri*, AIR 1978 J&K 50.
713. *Valli v Mahmad*, (1914) 16 Bom LR 763, p 766; *Brijbhukhan v Tota Ram*, AIR 1929 All 75 : (1928) 50 All 980.
714. *Scheduled Caste Co-op Land Owning Society Ltd v UOI*, (1991) 1 SCC 174.
715. *Mohd Ahibulla v Seth Chaman Lal*, (1991) 1 SCC 529.
716. *Agartala Nail Industries v Union Bank of India*, AIR 1998 Gau 25, (DB); *State of Kerala v N Umesh Rao*, AIR 1998 Ker 391; *Land Acquisition Officer cum Collector, Kalahandi v Sumbaru Bariha*, AIR 1994 Ori 90, (DB).
717. *UOI v Roshan Lal*, AIR 1968 Del 165; *Collector Land Acquistion v Dina Nath*, AIR 1977 J&K 11.
718. *Dasondhi Ram v Kaha Ram*, AIR 1966 HP 66; *Gurdial Singh v Massa Singh*, AIR 1977 P&H 248 : (1977) 1 Punj 924.
719. *State of Punjab v Nand Kishore*, AIR 1966 P&H 332.
720. *Saimunissa v Sk Mohiuddin*, AIR 1991 Pat 183.

circumstances beyond the control of the concerned department. If negligence lies at the root of the same, the court may well refuse to invoke its discretionary power.[721] In an Orissa case, there was late payment of court fee. Appeal by the state was filed much prior to the expiry of the period of limitation. Application was made to extend the time to pay the court fee (of Rs 603) on the ground that the amount had not been received from the department and it was not possible to file the necessary challan in the Treasury for purchasing court fee stamp. It was held that the grounds were not sufficient to allow the application. However, since court fees had been paid on 29 September 1986, (when appeal could have been filed), time was extended till that date.[722] The court under sections 148 and 149 of the CPC is empowered to enlarge the time for depositing balance of consideration in decree in suit for specific performance.[723] When a higher court has fixed a time without any direction to the trial court to extend the time in deserving cases, then the power under section 149 or section 151 cannot be exercised by the trial court. The extension can be granted, only by—

(i) the court fixing the time; or

(ii) any court to which the court fixing the time is subordinate.[724]

Section 149 grants power to a court to accept the payment of court fee at a later point of time if the appeal papers had been filed within the due date. In the instant case, the appeals were presented without payment of proper court fee and the required court fee was duly paid at the time of refiling, therefore it was held by the Supreme Court that it should be construed that such payment of court fee was deemed to have been paid on the date on which the appeals were originally presented by virtue of the implication of section 149.[725]

Where due to *bona fide* mistake and through inadvertence, court fee had not been paid and there was no positive *mala fides*, it was held that discretion should be exercised in favour of defendants by extending time to pay deficit Court fee on counter-claim on payment of cost.[726]

[s 149.2] This Section and Section 4, Court Fees Act, 1870

Section 4 of the Court Fees Act, 1870 enacts that no document shall be received in any proceeding unless proper court fee, as provided in the schedules to the Act, had been paid thereon. Under this section, a plaint, memorandum of appeal, etc, which is not stamped or is insufficiently stamped will be *non-est*. The rigour of this section is mitigated by the present section under which the court can, in such cases, grant time for the payment of requisite court fee and if that is paid, the presentation will be valid. Thus, the section is in the nature of a proviso to section 4 of the Court Fees Act, 1870[727] As the Supreme Court states, section 4 of the Court Fees Act, 1870 is not the final word on the subject and the court must consider the provisions of both the Act and the CPC to harmonise the two sets of provisions which can only be done by treating this section as a proviso to section 4 of the Court Fees Act, 1870.[728]

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721. *Land Acquisition Officer cum Collector, Kalahandi v Sumbaru Bariha*, AIR 1994 Ori 90, (DB).
722. *State of Orissa v Rajani Kanta Mohapatra*, AIR 1998 Ori 56.
723. *Prime Promoters Pvt Ltd v Aroop Kumar Chatterjee*, AIR 1999 Cal 186.
724. *Bipin Behari v Asoke Marketing Ltd*, AIR 1989 Ori 11.
725. *H Dohil Constructions Co Pvt Ltd v Nahar Exports Ltd*, (2015) 1 SCC 680 : 2014 (9) Scale 503 : JT 2014 (12) 533.
726. *MT Emerald Sky v Reliance Industries Ltd*, AIR 2007 Guj 90.
727. *S Wajid Ali v Isar Bano*, AIR 1951All 64 : (1952) 1 All 561; *Jagannath v Ram Dulary*, AIR 1956 All 63 : (1956) 1 All 156; *Subash Chand v Kalavati*, (1957) AWR (HC) 75.
728. *Mannan Lal v Chhotaka Bibi*, AIR 1971 SC 1374 : (1970) 1 SCC 769.

The power vested under section 149 should be exercised only to mitigate the rigours of section 4 of the Court Fee Act. The power is not to enable the plaintiff to ask for any number of adjournments or extensions for payment of deficit court fee. For exercising power under this section the Court is bound to record the reasons for doing so. Thus, in a case where a plaint was filed with deficit court-fee and the plaint had to be returned 13 times over a period of 15 months, it was held that the court cannot be said to have exercised powers under section 149 judicially and for meeting the ends of justice.[729]

In *Tajender Singh Ghambhir v Gurpreet Singh*,[730] the Supreme Court has held that deficiency in court fee in respect of the plaint can be made good during the appellate proceedings as well. In this case, the appellant – plaintiff filed a suit and paid adequate court fee in respect thereof. Later on, the plaint was amended and on amended valuation there was deficiency in court fee. The trial court, however, did not pass any order requiring the plaintiff to make up such deficiency. In the first appeal, the issue of the deficit court fee was raised by the respondent and the first appellate court rejected the contention stating that since the trial court did not prescribe any time limit in connection with the court fee and no objection was raised by the defendants in that regard, an opportunity should be granted to the plaintiff to make for the deficiency in the interest of justice. The high court reversed the decision of the trial court, relying on section 6 of the Court Fees Act, 1870. The Supreme Court held that in the absence of any order by the trial court directing the plaintiff to pay the deficient court fee within a particular time, sections 6 (2) and (3) of the Court Fees Act, 1870 could not be invoked against the plaintiff. It also observed that the high court had failed to consider clause (ii) of section 12 of the Court Fees Act, 1870, which empowers an appellate court to direct the party to make up deficit court fee in the plaint at the appellate stage.

In a case where there was a delay of 9 months in deposit of court fees and no reason was furnished for the delay except that the appellant was a poor person, it was held that since no details of his financial position and source of earning have been furnished and no detail of his properties have been given, the court in its discretion cannot condone such huge delay.[731]

[s 149.3] Does Enlargement of Time for Payment of Court Fee Fall Under Section 148 or 149?

See notes under the same heading in section 148.

[s 149.4] Section 148 and Section 149

See notes under the same heading in section 148.

[s 149.5] Section Applies Only to Court Fee Payable at the Time of Institution of Suit

A careful reading of section 149 shows that it would apply only in respect of the court fee payable at the time of institution of the suit. If the court fee due on the plaint when instituted, is not paid wholly or partly by the person instituting the suit, the court in its discretion, may allow him to pay the court fee or deficit court fee within the period fixed by it. section 149 has no application where the court fee, due on the plaint as per the valuation of the suit,

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729. *Sivishi Associates v Jagadeeshwari Agencies*, AIR 2006 AP 186 : (2006) 2 Andh LT 704.
730. *Tajender Singh Ghambhir v Gurpreet Singh*, (2014) 10 SCC 702.
731. *Ritesh Kumar v Smt Chandrakanta*, AIR 2007 Raj 192 : 2007 (3) Raj LW 2464 (Jaipur Bench).

is fully paid, but subsequently it is found that a larger amount is due to the plaintiff. For example, if the plaintiff values the suit at Rs 2,00,000 and the court fee payable is Rs 20,000 and the plaintiff pays a court fee of Rs 10,000, on his request time for payment of balance of Rs 10,000 can be extended by the court at its discretion under section 149 of the CPC. But where the claim was Rs 2,00,000 and full court fee on Rs 2,00,000 was paid at the time of institution of the suit, and during evidence it transpires that the amount due to plaintiff is actually Rs 5,00,000 and not Rs 2,00,000, the question of permitting the plaintiff to pay deficit court fee at that stage by calling in aid of section 149, does not arise, as no court fee becomes payable at that stage. Plaintiff can increase the claim only by seeking amendment of the plaint and paying additional court fee on the amended claim. In regard to such amended claim also, section 149 may be pressed into service. But then amendment would depend on limitation and may not be permitted after the period of limitation. Where there is no deficit in court fee at the time of institution and when there is no amendment to plaint increasing the suit claim, there is no occasion for pressing section 149 into service in regard to court fee payable on plaints.[732]

[s 149.6] Condonation of Delay in Presenting Plaint Condones Delay in Filing Court Fee Also

Where plaintiff failed to make up such deficiency within time granted by court and filed application seeking condonation of delay in presenting plaint, which was allowed by trial court, in view of reasons stated by plaintiffs counsel in his affidavit. It was held, said order of trial court allowing application in question should be deemed to have condoned delay in payment of deficit court fee as well.[733]

It has been held that section 149 is in the form of a discretionary power of courts to allow a party to make good the deficiency of court fee payable on the pleadings. It also empowers courts to retrospectively validate insufficiency of stamp duties, etc. In the instant case, the appellant filed an application for extension of time for remitting the balance court fee due to financial difficulties which was rejected by the trial court. The Supreme Court held that courts must ensure *bona fide* of such discretionary power. It was observed that concealment of material fact, while filing application for extension of date for payment of court fee can be a ground for dismissal. However, in the instant case as no opportunity was given by the trial court for payment of court fee, hence the decision was set aside.[734]

[s 149.7] Pauper Applications

There is unanimity amongst the high courts that courts can, under this section, grant time to pay court fees in cases where the application to sue *in forma pauperis* is rejected. But there is a divergence of opinion as to the consequences where an application for *forma pauperis* is dismissed and no order is passed at that time to pay the court fees on the application filed as a plaint. One view is that an application to sue *in forma pauperis* is a composite document, namely:

(i) an application for permission; and

(ii) an unstamped plaint, that when the application for permission is rejected, there is still on the file of the court the unstamped plaint, that an order can be made under

732. *KC Skaria v Govt of State of Kerala*, AIR 2006 SC 811 : (2006) 2 SCC 285.
733. *Nalluri Singaiah v Bandpapti v Kishore Babu*, AIR 2006, (NOC) 1183, (AP)
734. *Manoharan v Sivarajan*, (2014) 4 SCC 163 : 2013 (12) SCR 471 : 2013 (14) Scale 347.

this section, giving time for payment of court fee and extending it, and that when court fee is paid in accordance with the order, it will take effect from the date of the original presentation.[735]

The Andhra Pradesh High Court also has taken the view that an applicant whose appeal against rejection of pauper application was dismissed without granting time to pay the court fees must apply under this section and not under section 151.[736] On the other hand, it has been held that while the court can, when rejecting an application for permission, give time to the plaintiff or appellant to pay the requisite court fees, where it has not passed such an order, and the application has been rejected, it does not have power, subsequently, to pass such an order, as there is no proceeding pending to which this section can apply, and that, if in fact court fee is paid, the plaint must be taken to be a new plaint, presented on the day when court fee is paid.[737] Further, it has been held that for the court to grant time for payment of court fees under section 149, when rejecting an application to sue as pauper, there must be a prayer to that effect.[738] This section has been applied by the Patna High Court, where the applicant paid court fees pending the decision on his application to sue *in forma pauperis* the observations made in *Chunna Mal v Bhagawati Kishore,*[739] being disapproved.[740] Before formal disposal of his application to sue as a pauper, the plaintiff offered to pay court fee, treating the application as a plaint. Court agreed to enlarge the period. It was held that if the application contains all the particulars necessary for a plaint, there can be no objection to such an order.[741] When a legal representative of a person, who was allowed to file the suit *in forma pauperis,* desires to continue such a suit on the death of such person, the court can call upon such legal representative to pay up the court fees unless he proves that he too is a pauper and on his failing to pay such court fees, the court can reject the plaint.[742]

The High Court of Allahabad is of the view that if at the time of dismissing the application for pauperism the court can grant time to pay the court fees on the unstamped plaint, it can also grant a further extension of time. It is immaterial that at the time of giving such further extension the proceedings under O XXXIII, rule 7 has come to an end.[743] Keeping in view O XLIV and O XXXIII of the CPC, it is clear that the legislature intended that the person applying to the court seeking leave to suit or to prosecute an appeal should present the application by himself. Where the concerned application was presented by the advocate, the

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735. *Nallavadivu Ammal v Subramania*, AIR 1918 Mad 103 : 9 ILR 40 Mad 687; *Brahamaramba v Seetharamayya*, AIR 1947 Mad 405 : (1947) ILR Mad 820 : (1947) 1 Mad LJ 119 : 60 LW 106; *Kr Tej Dat Singh v Dat Singh*, AIR 1948 Oudh 157; *Bhanu v Dalmia & Co*, AIR 1959 MP 169; *Sulemani v Ghulam Mohammed*, AIR 1960 AP 381 : (1959) 2 Andh WR 420; *Amar v Dharichhran*, AIR 1949 Pat 469; *Ramdharlal v Nagendra Prasad*, AIR 1967 MP 1.
736. *B Desireddi v Y Rama Rao*, AIR 1972 AP 55.
737. *Chinnathal v Bhagwat Kishore*, AIR 1936 All 584 (FB) : (1937) ILR All 22; *Kalapanath v Shyama Nand*, AIR 1955 All 159 : (1954) 2 All 617; *Devendra Kumar v Mahanta Raghuraj*, AIR 1955 All 154 : (1955) 1 All 568; *Jagadiswar Debi v Tinkari Bibi*, AIR 1936 Cal 28; *Vaman Rao Lallubhai v Pranlal Bhagwandas*, AIR 1944 Bom 63 : (1943) ILR Bom 721; *Chudaman v Babaji*, AIR 1944 Nag 357 : (1944) ILR Nag 628; *Jinatunissa Bibi v Mst Idrakunnissa*, AIR 1950 Ori 183 : (1950) ILR Cut 36; *Mathura Singh v Sudama Debi*, AIR 1954 Pat 170; *G Veeranamma v L Srinivas Rao*, AIR 1956 Hyd 201 : (1956) ILR Hyd 27.
738. *Abdul Latif v UOI*, AIR 1961 Assam 113.
739. *Chunna Mal v Bhagawati Kishore,* AIR 1936 All 584.
740. *Amar v Dharichhran*, AIR 1949 Pat 469 : (1948) 27 Pat 259.
741. *Jugal Kishore v Dhano Devi*, AIR 1973 SC 2508.
742. *Santok Singh v Radheshyam*, AIR 1975 Bom 5.
743. *Gomti Devi v Hari Shanker*, AIR 1978 All 402.

same cannot be treated or taken as presented by an authorised agent. Thus, by mandate of law, the application seeking leave to file the appeal as an indigent person, was rejected and the appellant was directed to deposit the court fees.[744]

[s 149.8] Plaint

(As to the case where a plaint is written upon paper insufficiently stamped, see notes O VII, rule 11 under the head "Clause (c)".) Payment of deficiency in court fees relates back to the date of the lodgement of the plaint.[745]

[s 149.9] Appeals and Applications for Review of Judgment

As to these, it was provided by section 582A of the Code of Civil Procedure, 1882 as follows:

> If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped and the insufficiency of the stamp was caused *by a mistake on the part of the appellant or applicant as to the amount of the requisite stamps,* the memorandum of appeal or application shall have the same effect and be as valid as if it has been properly stamped: Provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time after the discovery of the mistake to be fixed by the court.

The above section was introduced into the Code of Civil Procedure, 1882 by Act 6 of 1882 to supersede a full bench ruling of the Allahabad High Court. That ruling was to the effect that if a memorandum of appeal is not, when tendered, properly stamped, it is not at that time a memorandum of appeal and the subsequent affixing of the proper stamp cannot have a retrospective effect so as to validate the original presentation unless it has been done by order of the court, and that such an order can only be made where the defective memorandum has been received through a mistake on the part of the court or its officers, and not where the insufficiency of the stamp was due to a mistake on the part of the appellant.[746]

Section 582A applied only to appeals and applications for a review. The present section is general in its terms, and applies to all documents chargeable with court fees under the court fees Act such as plaints, memoranda of appeal or of cross-objections, applications for review of judgment, written statements pleading a set-off, or counterclaim.

The section is not limited to a mistake as to the amount of the requisite stamps and has considerably enlarged the power of the court. The court has a discretion to allow deficiency of court fee to be made good even where such deficiency is not due to mistake; and the discretion of the court under this section may be exercised after the period of limitation has expired and the appeal will then stand good as from the date when it was presented.[747] The Supreme Court has held that the high court can, in the exercise of its discretion under this section, permit the applicant to amend the memorandum of appeal and pay additional court fees and that it is not open to the respondent to attack the order on the ground that it

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744. *Agartala Nail Industries v Union Bank of India*, AIR 1998 Gau 25 (DB).
745. *Parukutty Amma v Ramanunni*, AIR 1966 Ker 150 : (1966) 1 Ker 276 : (1966) Ker LJ 111.
746. *Balkaran Rai v Gobind Nath*, (1890) 12 All 129.
747. *Faizullah Khan v Mauladen Khan*, AIR 1929 PC 147 : 56 IA 232; *Jowala Singh v Mst Dhanu*, AIR 1952 Lah 21; *Har Lal v Sri Ram*, AIR 1933 Lah 598 : (1933) 14 Lah 312; *Chori v Har Dayal*, AIR 1933 All 572 : (1933) 31 All LJ 1357.

takes away his valuable right to plead limitation as the question of court fees is one between the state and the litigant.[748] In the case of appeals, the High Court of Bombay has held that the court has no discretion and that section 107 makes O VII, rule 11 applicable, and that even if a memorandum of appeal is presented deliberately understamped on the last day of limitation, the court is bound to give the appellant time to make good the deficiency.[749] The Madras High Court has dissented as to the applicability of O VII, rule 11 to appeals.[750] All the other high courts treat memorandum of appeal on the same footing as other documents chargeable with court fee and consider the power to make good the deficiency to be subject to the discretion of the court. The Patna High Court has held that time should be given when the amount of court fee is a matter of doubt or if the party has made an honest attempt to comply with the law, but that time should not be extended if a litigant has deliberately and to suit his own convenience, paid an insufficient court fee. The mistake must be bona fide.[751] Thus, the fact that the Board of Revenue could not make up their mind whether to file an appeal or not cannot justify their lodging the appeal with deficit court fees and later on paying the deficit after considerable delay.[752] But an erroneous advice by the legal adviser coupled with failure of the registrar of the high court to raise objection as to the insufficiency of court fees has been treated as a *bona fide* mistake.[753] In other words, the section should not be construed in such a way as to nullify the express provisions of section 4 or section 6 of the Court Fees Act, 1870.[754] In *Mahabir Ram v Kapil Deo*,[755] it has been held by the Patna High Court on a review of its previous authorities that O VII, rule 11 is, by virtue of section 107, applicable to appeals and that consequently, an order rejecting a memorandum of appeal for insufficient court fee, without giving the applicant an opportunity to make good the deficiency, is bad. The Lahore High Court also disapproved the Bombay view and refused to extend time when the insufficiency of the court fee was due to the negligence of the appellant or his pleader.[756] In a judgment, the Bombay High Court has held that the discretion under this section has to be exercised judicially and not automatically for the asking and that negligence of the party or his legal adviser or his clerk can be no good ground for the exercise of this discretion.[757] The Allahabad and Calcutta High Courts have held that when an insufficiently stamped memorandum of appeal is accepted by inadvertence, time may be given to the appellant to supply the deficiency; but that if the court is aware *ab initio* of the insufficiency of the stamp, it ought to return the memorandum of appeal to the appellant in order that he may, if the case admits, represent it duly stamped and apply for an extension of time under section 5 of the Limitation Act.[758] The Oudh Court held that the appellate court has discretion under this section to allow, the appellant, reasonable time, within which to make up the deficiency in court fee before dealing with the appeal under O VII,

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748. *Ganesh Prasad v Narendra Nath*, AIR 1953 SC 431.
749. *Achut v Nagappa*, (1914) 38 Bom 41.
750. *Narayana v Venkatakrishna*, (1941) 27 Mad LJ 677; *Dhanpat v Matu Ram*, AIR 1970 P&H 273.
751. *Dhanpat v Matu Ram*, AIR 1970 P&H 273.
752. *Revenue Divisional Officier v Laxminarayana*, AIR 1975 AP 109.
753. *HC Sarkar v Jyoti Bala Chakraborty*, AIR 1970 Tri 26.
754. *Ramsahya v Kumar Lachmi*, (1918) 3 Pat LJ 74; *Amir v Mohan*, AIR 1924 Pat 663 : (1924) 3 Pat 227.
755. *Mahabir Ram v Kapil Deo*, AIR 1957 Pat 111.
756. *Gursaran Das v District Board, Jullundur*, AIR 1927 Lah 884 : (1927) 9 Lah LJ 290; dissenting from *Achut v Nagappa*, (1914) 38 Bom 41; *Lekh Ram v Ramji*, (1920) 1 Lah 234; *Satto v Amar Singh*, (1920) 1 Lah 220; *Raghubar v Sohan Debi*, AIR 1925 Lah 381 : 6 Lah 233.
757. *Basawwa v Limbawwa*, AIR 1968 Bom 309 : (1970) Bom LR 50.
758. *Brijbukhan v Tota Ram*, AIR 1929 All 75 : (1928) 50 All 980; dissenting from ILR 38 Bom 41; *Jnanadasundari Shaha v Madhabchandra Mala*, AIR 1932 Cal 482 : (1932) 59 Cal 388.

rule 11.[759] In *Amar Singh v Chaturbhuj*,[760] the Rajasthan High Court accepted the view that O VII, rule 11 has no application to appeals and held that even so when deficient court fee was paid after limitation and accepted, this section applied and the presentation became valid. In *Tilokchand v Lalchand*,[761] it was held that when an appeal memorandum was presented with insufficient court fee, the appellate court should permit the plaintiff to make good the deficiency, and that its powers in this behalf were the same as those of the trial court under section 107. It is true that under O XLI, rule 3, the appellate court is not bound to allow the appellant an opportunity to make up the deficiency in court fee. But O XLI, rule 3, in no way, whittles down the exercise of discretion of the appellate court under section 149, whereunder, an opportunity can be granted to the appellants to make up the deficiency in court fee.[762] (See also the cases noted below[763] on the application of section 149 to appeals). The Calcutta and Rangoon High Courts have also held that inability to pay the court fee on the day of presentation of the memorandum of appeal is not a ground for the exercise of the discretion under this section.[764] But this rule is subject to exception in special cases.[765] It has been held that the benefit of this section will be available even when a plaint or memorandum of appeal is filed without any court fee.[766]

In a case under the Land Acquisition Act, 1894 making a claim for enhanced compensation in appeal, the appellant had initially paid lesser court fee and thereby restricted the value of appeal. Subsequently he sought to amend the memo of appeal claiming more compensation after the compensation was enhanced in other appeals of other co-owners. It was held that the appellant having failed to amend the memo of appeal before the decision in other appeals, he cannot be permitted to amend the memo of appeal subsequently and make up deficiency in court fee.[767]

[s 149.10] Execution Application

This section applies to an executing court also. Hence, where the court fee is payable in the decree itself but no time has been fixed for its payment, the executing court can allow time under this section.[768]

[s 149.11] Revision

It has been held by the High Court of Allahabad that an order refusing to give time to a party to make up the deficiency in court fee is not capable of revision, as such an order does not amount to a decision of a "case" within the meaning of section 115 of the CPC.[769] This decision has now to be read in the light of the new Explanation added in section 115.[770]

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759. *Hussain Ali Khan v Ambika Prasad*, AIR 1937 Oudh 414 : (1938) 13 Luck 397.
760. *Amar Singh v Chaturbhuj*, AIR 1957 Raj 367 : 1957 Raj LW 354 : (1957) ILR Raj 460.
761. *Tilokchand v Lalchand*, (1959) Raj LW 96 : (1959) ILR Raj 306.
762. *Raj Kumar v Amar Singh*, AIR 1981 P&H 1.
763. *Jagannath v Ram Dularey*, AIR 1956 All 63 : (1956) 1 All 156; *Gion Singh v Surindar Lal* 65 Punj LR 300; *Ram Kishan v Nathu*, AIR 1959 Bom 86.
764. *Khatumannessa v Kurjodhone*, AIR 1934 Cal 659 : (1934) 61 Cal 663; *Vertannes v Lawson*, AIR 1935 Rang 336 : (1935) 13 Rang 50; *Wajid Ali v Isar Bano*, AIR 1951 All 64; contra *Nagabhushanam v Mohd Asharafunnisa Bahebani*, AIR 1960 AP 602.
765. *Souresh Chandra v Gosta Behar*, (1936) 40 Cal WN 1294.
766. *Baliram v Champat Zamraji*, AIR 1954 Ngp 224.
767. *Mohinder Singh v Union Territory, Chandigarh*, AIR 2007 P&H 149.
768. *Lorind Chand v Lorind Chand*, AIR 1937 Lah 720.
769. *Chhakhan Lal v Kanhaiya Lal*, AIR 1923 All 118 : (1923) 45 All 218.
770. See notes to section 115 under the head "Interlocutory Order".

[s 149.12] At Any Stage

These words authorise the court to permit payment of court fee, even after the period of limitation had expired.[771] The words "at any stage" in section 149 contemplate that the deficiency can be ordered to be made good even after the period of limitation for filing appeal or the suit has expired. The discretion can be exercised even in the case of a plaint without any court fee. When the court allows the plaintiff or the appellant, time to pay deficit court fee in exercise of its discretion, the other party cannot attack the order on the ground that it takes away his right to plead the bar of limitation, nor can he claim to have derived a vested right by the non-payment of the court fee. Under the latter part of section 149, the defective plaint or appeal memorandum is validated with retrospective effect if the deficit court fee is subsequently made up. The power to permit the party to pay the deficit court fee is not in any way affected by any bar of limitation.[772] The words "at any stage", occurring in section 149, do not contemplate that a party could ask for permission to pay the deficiency of court fee even after the disposal of the appeal. section 149 applies only to a pending case, where the relief asked for is not properly valued and court fee payable under the provisions of the Court Fees Act, 1870 has not been properly calculated and paid. Though it may be open to a court, when the case is pending before it, to permit an amendment of the claim by increasing or varying it and pay the court fees or if there is any mistake in the payment of the court fee, to permit payment of the deficient court fee, it is not open to a party to ask the court to permit an amendment of the claim after the case has been finally disposed of by that court. The appellate court also cannot do it, after it had finally disposed off the matter.[773] But when the plaint or memorandum of appeal has been rejected, there is no power in the court, thereafter, to pass an order for payment of court fee and if it is paid, the plaint will be treated as a new one.[774] A rule of the Calcutta High Court requires an additional court to be paid on a written statement which contains a counter-claim. Such additional court fee was allowed to be paid under this section during the hearing of the suit: *Ahmad Kasim v Khatun Bibi.*[775] Likewise, it has been held that where a written statement was treated as counter-claim, an order for payment of court fee could be passed after decree: *Ghulam v Ghulam Ahmed.*[776]

[s 149.13] Law for the Time Being in Force

That means the law in force when the document in the instant case, memorandum of appeal, was filed and not when the court fee was actually paid thereon.[777]

[S 150] Transfer of business.—Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

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771. *Amar Singh v Chaturbhuj* supra.
772. *VO Devasssy v Periyar Credits*, AIR 1994 Ker 405.
773. *Banta Singh v UOI*, AIR 1998 P&H 308.
774. *Gopalkrishna Pillai v Narayanan*, AIR 1959 Ker 406 : (1959) ILR Ker 895 : (1958) Ker LJ 562 : (1958) Ker LT 1024.
775. *Ahmad Kasim Molla v Khatun Bibi*, AIR 1933 Cal 27 : (1932) 59 Cal 833.
776. *Ghulam v Ghulam Ahmed*, AIR 1956 J&K 38.
777. *Kesavan Bhaskaran v State*, AIR 1953 TC 31 : (1952) ILR TC 516; *Kaman Mada v Mallai*, AIR 1926 Mad 159.

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[s 150.2] Scope of the Section..... 1632

[s 150.1] Save as Otherwise Provided

Order IX, rule 13, provides that where an *ex parte* decree is passed against a defendant, he may apply to the court by which the decree was passed for an order to set it aside. Suppose now, that an *ex parte* decree is passed by court *P* for possession of certain immovable properties and subsequently part of its territorial jurisdiction including the locality in which the properties are situated, is transferred to court *A*. Has court *A* power under this section to entertain an application to set aside the decree under O IX, rule 13? It has been held by the High Court of Madras that it has; O IX, rule 13, does not say that the court that passed the decree is the only court that can set it aside.[778]

[s 150.2] Scope of the Section

There have been conflicting decisions by the High Court of Madras as to the scope of the section. In two cases, it was held that the section is not confined to the transfer of specific business from one court to another, but also included cases in which a new court is given part of the territorial jurisdiction of an old court and is empowered to try the business arising within it.[779] But in the case of *Subramania v Swaminatha,*[780] decided in 1928, where territorial jurisdiction was transferred after the decree had been passed, the Madras High Court held that the court to which jurisdiction had been transferred, had no power to execute the decree under section 150, as that section is limited to cases where specific business is transferred. This case was approved by a full bench in *Ramier v Muthu.*[781] Also an execution case decided in 1932 and the court distinguished notifications which effect a change of jurisdiction in the future from those which effect a transfer of past business; and held that section 150 only applied to the latter. On the other hand *Subramania v Swaminatha* was dissented from by a single judge of the Madras High Court in the following case.[782]

A money suit was filed in court *X* and was transferred for trial to court *Y*. The plaintiff obtained a decree in court *Y*, and then court *Y* was abolished and its business transferred to court *Z*. Where was plaintiff to apply for the execution of his decree? Under the definition in section 37(b), court *X* was the court which passed the decree. Should the plaintiff apply to court *X*, or could he apply to court *Z* and was court *Z* empowered by section 150 to entertain the application? The judge held that he could apply to court *Z* and that section 37 should not be read, so as to deprive the decree-holder of the facility provided by section 150. Where an *ex parte* decree was passed by court *A* and then it was set aside and the suit restored, and then the court was abolished and a new court was established with jurisdiction over the territory in question, it was held that the new court was entitled, under this section, to entertain an

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778. *Ranganatha v Hanumantha*, AIR 1922 Mad 10 : (1923) 46 Mad 1; *Hanumantha Rao and Guruswami Naicker v Mahommadhu Rowther*, AIR 1923 Mad 92 : (1923) 46 Mad 83 (O XXXIX, rule 2(3)—(temporary injunction).
779. *JV Ranganatha Rao v Hanumantha Rao*, (1923) 46 Mad 1 : (1923) 46 Mad 83.
780. *Subramania v Swaminatha*, AIR 1928 Mad 746 : (1928) 28 Mad LJ 885.
781. *Ramier v Muthu*, AIR 1932 Mad 418 (FB) : (1932) 55 Mad 801; *Venkatamidi Balakrishnayya v Nannapaneni Linga Rao*, AIR 1943 Mad 449 : (1943) ILR Mad 804.
782. *Muthukumara v Thirunarayana*, AIR 1932 Mad 260 : (1932) 61 Mad LJ 307.

application for restitution.[783] Where, however, the court is not abolished but its jurisdiction over the area is transferred by a notification to another court, it has been held that this section has no application and that the old court continues to retain its jurisdiction over the matters pending before it for all purposes,[784] and that the new court has no jurisdiction over these matters, unless they are expressly transferred.[785] (See notes to section 37 under head "court of first instance").

In a Calcutta case,[786] a preliminary decree on a mortgage for nearly Rs 2000 was passed by a *munsif* who had jurisdiction upto Rs 2000. The *munsif* was transferred and as his successor did not have the jurisdiction to that amount, the final decree was passed by the subordinate judge. The succeeding munsif was then empowered to try suits up to Rs 2000; and as the suit was taken to have been transferred to him, he was held to have jurisdiction under section 150 to entertain an application for execution.

Under section 13(2) of the Bengal and Assam Civil Courts Act, 1887 business may be assigned to different *munsifs* having jurisdiction within the same local area. The Calcutta High Court has held that such an assignment of business is not a transfer within the meaning of this section.[787]

[S 151] Saving of inherent powers of Court.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

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783. *Sadashiv v Annappa*, AIR 1960 Mys 273.
784. *Ishwar Mahto v Naipal Singh*, AIR 1956 Pat 280 : ILR 35 Pat 610; *Ramlal v Daudas*, AIR 1957 Raj 241 : (1975) ILR Raj 702.
785. *Hanumayya v Venkatasubbiah*, (1963) 2 Andh WR 324; *Gopalkrishna v Lamxan*, AIR 1964 Mys 34.
786. *Aminuddin v Atarmani*, (1920) 24 Cal WN 899.
787. *Munshi v Munshi*, AIR 1922 Cal 41 : (1921) 26 Cal WN 216; *Abu Bakkar v Parimal Prova Sarkar*, AIR 1962 Cal 519 : 66 Cal WN 43.

[s 151.1] Inherent Powers of the Court: Their Nature and Objects

The Code of Civil Procedure, 1908 (CPC) is not exhaustive,[788] the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them.[789] The principle is well–established that when the CPC is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties.[790] The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act *ex debito justitiae,* and to do real and substantial justice for the administration, for which alone, it exists.[791] However, the power, under this section, relates to matters of procedure. If the ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice.[792] The law cannot make express provisions against all inconveniences such that their dispositions express all the cases that may possibly be covered. It is, therefore, the duty of a judge to apply them, not only to what appears to be regulated by their express provisions, but also to all the cases to which they can be justifiably applied, and which appear to be comprehended, either within the express provisions of the law or within the consequences that may be gathered from it.[793] It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them.[794]

The section, however, does not confer any powers, but only indicates that there is a power to make such orders as may be necessary for achieving the ends of justice, and also to prevent an abuse of the process of the court.[795] The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[796] "The inherent power," as observed by the Supreme Court in *Raj Bahadur Ras Raja v Seth Hiralal,*[797] "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it". Lord Cairns in *Roger v Comptoir D" Escompts De Paris*[798] has stated:

> One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but

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788. *Durga Dihal Das v Anoraji*, (1895) 17 All 29, p 31; *Jogendra Chandra Sen v Wazidunnissa Khatun*, (1907) 34 Cal 860.
789. *Jai Rani Puri v Vinod Kumar Puri*, AIR 1998 Del 212.
790. *Jet Ply wood Pvt Ltd v Madhukar Nowlakha*, AIR 2006 SC 1260 : (2006) 3 SCC 699.
791. *Hukum Chand v Kamalanand*, (1906) 33 Cal 927; *Shankar Hari v Damodar Vyankaji*, AIR 1945 Bom 380 : (1945) ILR Bom 463 : 47 Bom LR 104; *Vrajlal v Jadhavji*, AIR 1972 Guj 148 : (1972) 13 Guj LR 555; *Multivakaji v Kalindivakaji*, AIR 1994 Guj 42.
792. *Atul Chandra Vora v Assam Tea Brokers Pvt Ltd*, AIR 1995 Gau 73.
793. *Shankar Hari v Damodar Vyankaji*; *Hurro Chunder Roy v Shoorodhone Debia*, (1868) 9 WR 402, p 406.
794. *Manohal Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527.
795. *Md Maqsud v Hoshiar Singh*, AIR 1945 All 377 : (1945) ILR All 394; *Harnand Lal v Chaturbhuj*, AIR 1926 All 356; *Amta Ram v Beni Prasad*, (1934) 56 All 907 : AIR 1934 All 585; *Chocklingam v Maung Tin*, AIR 1936 Rang 208, (FB) : (1936) 14 Rang 173; *Mohan Singh v Roshan Lal*, AIR 1970 Del 88; *Santosh v Teja Singh*, AIR 1977 Del 110.
796. *Mamraj v Sabri Devi*, AIR 1999 P&H 96.
797. *Raj Bahadur Ras Raja v Seth Hiralal*, AIR 1962 SC 527; *Shaiwax v Masood Hussain*, AIR 1965 AP 143; *Deity Sri Shanimahatma v C Gangabai*, AIR 1994 Kant 303 : (1964) 2 Andh WR 197; *Jai Rani Puri v Vinod Kumar Puri*, AIR 1998 Del 212.
798. *Roger v Comptoir D' Escompts De Paris*, (1871) LR 3 PC 465.

the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the Case.

Discretion vested in the court is dependant upon various circumstances, which the court has to consider.[799] Discretionary power under section 151 of Code of Civil Procedure, 1908, can be exercised also on an application filed by the party.[800]

It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.[801]

[s 151.2] Amendment to Section 148 Does not Affect Inherent Power

See notes under the same heading in section 148.

[s 151.3] Inherent Powers to Amend Decrees and Order

See notes under the same heading in section 152.

[s 151.4] Dismissal of Appeal Under Section 151—Article 122 Limitation Act, 1963 is Applicable

The appeal was ordered to be dismissed on the ground that the persons interested to prosecute the appeal had not moved within time. The dismissal for non-prosecution of the appeal by persons interested in the matter could only be under section 151 of the CPC and not under any other provision of O XLI of the CPC. If an appeal is dismissed under section 151 of the CPC, Article 122 of the Limitation Act would have no application because when a court makes an order under section 151, it is implicit that such a court has the power to entertain an application to set aside its order made under section 151. The power exercised under section 151 is *ex debito justitiae*. An application invoking the inherent power of the court under section 151 is not one which a party is required to make under any provisions of the CPC for setting in motion the machinery of the court. Thus, Article 122 of the Limitation Act has no application to such an application.

If that be the correct position, an application for restoration of the appeal would be not by a party to the proceedings and will not fall within the scope of Article 122 but under Article 137 of the Limitation Act.[802] Legal opinion can"t be provided in an application under section 151 CPC.[803]

[s 151.5] This Section and O XXXIX, Rules 1 and 2

It is settled principles of law that discretion conferred under O XXXIX, rules 1 and 2 of the CPC in granting or refusing temporary injunction is discretionary and like other cases of discretion is vested in courts which is to be exercised in accordance with reasons and sound judicial principles. The sound and judicial principles which govern the exercise of discretion conferred under O XXXIX rules 1 and 2, of the CPC upon trial courts are to the effect that a person who seeks a temporary injunction must satisfy the court, first that there is a

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799. *Ramji Dayawala v Invest Import*, (1981) 1 SCC 80.
800. *Sharda v Dharmpal*, AIR 2003 SC 3450 : (2003) 4 SCC 493.
801. *Vinod Khanna v Bakshi Sachdev*, AIR 1996 Del 32, (DB).
802. *G Christhndas v Anbiah*, AIR 2003 SC 1590 : AIR 2003 SCW 969 : (2003) 3 SCC 502.
803. *Mustaqeem v Faiyaz*, 2019 SCC OnLine Del 6751,

serious question to be tried in suit to dispel cloud of doubt relating to his entitlement and there is probability of plaintiff being entitled to the relief sought by him. Secondly, the court's interference is necessary to protect him from threatened species of injuries enumerated under O XXXIX, rules 1 and 2, which the court considers irreparable before his legal right, can be established on trial. Lastly, the comparative inconvenience which is likely to ensue from withholding temporary injunction would be greater than that which is likely to arise from granting it. *Prima facie* case is not to be confused with title of the plaintiff which is to be established on evidence but it would be sufficient if substantial question at first sight needs investigation and decision whereas irreparable injury does not mean that there must be no physical possibility of compensating the injuries but it means only that injuries cannot be compensated in terms of money. In ascertaining the balance of convenience, the courts are to weigh and compare the substantial mischief that is likely to be done to the plaintiff, if injunction is refused. It is held that while courts are considering balance of convenience, the courts are also required to keep in mind the public convenience as well. It is well to remember that aforesaid three ingredients are to be proved on affidavits as envisaged under O XXXIX, rule 1. The power given to courts to act on affidavits is not subject to the provisions of O XIX, rules 1 and 2.[804]

It is further to be imbibed that all of the three conditions precedent must co-exist for granting temporary injunction under O XXXIX, rules 1 and 2. If any of them is missing, then temporary injunction applied for is to be rejected. It would be expedient to mention here that in the peculiar facts and circumstances of a case, in rarest of rare cases, if interest of justice so demands that property in dispute deserves to be preserved in its present condition till clouds of doubt are dispelled by deciding the suit on merit, in such cases temporary injunction can also be granted under section 151, which provides that nothing in the CPC shall be deemed to limit or otherwise affect the inherent power of the court to make orders necessary in the ends of justice. The inherent power has not been conferred upon the court but it is inherent by virtue of its duties to do justice between the parties. Therefore, in those cases where granting of temporary injunction is found to be imperative in the interest of justice even if any of the conditions precedent mentioned hereinabove is missing, the court can grant temporary injunction in exercise of its power under section 151. It is held that even if an application for temporary injunction under O XXXIX, rules 1 and 2 is rejected, even then the plaintiff can move fresh application under section 151 with a distinction that in case temporary injunction is granted under O XXXIX, rules 1 and 2, then miscellaneous appeal is maintainable under O XLIII, rule 1 of the CPC, but if an injunction is granted under section 151 then no miscellaneous appeal would be maintainable, only revision would be entertainable under section 115 of the CPC.[805]

The courts it has been held, have inherent jurisdiction to issue temporary injunction in circumstances, which are not covered by the provisions of O XXXIX. However, inherent jurisdiction can be exercised by the court only, which it considers necessary for the ends of justice.[806]

Where in a suit for recovery of money and for declaration as secured creditor, an application for restraining the defendant from alienating the property was filed. It was held by a Division Bench of the Calcutta High Court that injunction cannot be granted merely because the plaintiff has sought permanent injunction, when it was not the case of the plaintiff that the

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804. *Satya Prakash v First Additional Distt Judge, Etah*, AIR 2002 All 198.
805. *Satya Prakash v First Additional Distt Judge, Etah*, AIR 2002 All 198.
806. *Central Warehousing Corp v Prabhu Narain Singh*, AIR 2003 All 223. See also *Manohar Lal Chopra v Rai Bahadur Rao*, AIR 1962 SC 527; *Allahabad Bank v RSA Sangh*, AIR 1976 All 447.

defendant secured any of its properties for the alleged transaction out of which the money had become due. It was further held that section 151 of the code cannot also be invoked in absence of any fraudulent intention on the part of the defendant.[807] However, a Division Bench of the Chhattisgarh High Court that held section 151 can be invoked in rare cases where a litigant is not in a position to take recourse to any other remedy. In a case where the plaintiff was unable to institute a suit against the Municipal Corporation for want of notice as required under section 401 of the Madhya Pradesh Municipal Corporation Act, 1956 (as applicable to Chhattisgarh), it was held that in extreme urgency a litigant can file a substantive petition under section 151 to seek the relief.[808]

However, the Madras High Court has held that grant of police aid for execution/ implementation of the order of temporary injunction simultaneously by with the order granting temporary injunction without recording any reason therefor is not proper. It has been observed that the case at that point of time is in the initial stages. Since the entire materials are not before the court and the defendants have not entered appearance, the Court is not apprised of the full situation. In the circumstances the high court issued guidelines for grant of police aid in such cases.[809]

In a suit for perpetual injunction, where the court decreed the suit with respect to lesser area than that claimed by plaintiff, it was held that the plaintiff was not required to withdraw the earlier suit under O XXIII, rule 1(3) read with section 151 in order to file a comprehensive suit for the whole area. He has every right to file separate suit for the remaining area while continuing to have the earlier decree in force.[810]

Reiterating the principle laid down by the Supreme Court in an earlier decision in *Manohar Lal Chopra's* case[811] held that section 151 of the code confers power upon the court to grant injunction if the matter is not covered by rules 1 and 2 of O XXXIX of the Code. Thus, in a suit for partition, where the parties were in possession of separate flats as per mutual agreement but there was no demarcated possession according to respective shares of the parties, the plaintiff, co-owner, cannot during the pendency of the suit dispossess the defendant by putting pad-lock. Therefore, the order restoring the parties back to the same position by directing the removal of pad-lock did not call for any intervention.[812]

An owner of a property has an unrestricted right of alienation of his own property whichever way he likes and such right cannot be curtailed unless the law provides for putting any such restriction on the rights of the owner. Therefore, if the circumstances enumerated in O XXXVIII and O XXXIX do not exist, the court in exercise of inherent power cannot pass any order the effect of which would be to interfere with the substantive rights of an owner. Thus, in a case, where the plaintiff prayed for an order of injunction restraining the owner-defendant from transferring or alienating his own property over which the plaintiff had no right or for attaching the property, a Division Bench of Calcutta High Court held that such a prayer cannot be granted as it will have overriding effect over the substantive right of the owner over the said property.[813]

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807. *Fertiliser Corp of India Ltd v Indian Explosive Ltd*, AIR 2006 Cal 97 : (2006) 1 Cal HN 659 (DB).
808. *Smt Kumari Bai v State of Chhattisgarh*, AIR 2006 Chhat 52 : (2006) 3 MPHT 42 (DB); See also *Yogesh Shah v Dharmeswari Devi*, AIR 2006 Gau 87 : (2006) 1 Gau LT 623.
809. *Abdul Sukhure Bhai v Durai Kuppuswamy*, AIR 2006 Mad 186 : 2006 (4) Civ LJ 391.
810. *C Pratap Reddy v C Goverdhan Reddy*, AIR 2007 AP 21 : 2006 (6) Andh LT 95.
811. *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hira Lal*, AIR 1962 SC 527 : 1962 Supp (1) SCR 450.
812. *Tanusree Basu v Ishani Prasad Basu*, AIR 2008 SC 1909 : (2008) 4 SCC 791.
813. *Sunil Kakrania v Saltee Infrastructure*, AIR 2009 Cal 260 : (2010) I BC 61 (DB).

It was held by the Kerala High Court that no contempt proceedings would lie in respect of disobedience of an order of temporary injunction passed by a subordinate Court. Order XXXIX, rule 2-A of the CPC provides appropriate and adequate remedy. However, it was held that inherent powers under section 151 of the code can also be invoked, but contempt petition can be filed only in exceptional cases.[814]

If the applicant did not seek injunction under section 151 but filed that petition under O III, rule 1 only even without quoting section 151, CPC, that fact, by itself, may not be a ground for dismissing the petition for injunction if the applicant is otherwise entitled to the relief of injunction under section 151, because not quoting the correct provision of law is not a ground to refuse the relief if the party is entitled to such relief under some other provision which is not quoted.[815]

The jurisdiction of a civil court being plenary in nature, if it is seized of a suit, provisions contained in section 151 and O XXXIX, rules 1 and 2 are also attracted. It cannot be said that even though the civil court has the jurisdiction to entertain a suit and decide the question raised therein, it cannot entertain any application for any interim relief or entertain any other application for any other purpose. Powers under section 151 being inherent are applicable and can be invoked and exercisable by a civil court with respect to the subject matter of the suit and similarly power under O XXXIX, rules 1 and 2 of the CPC also being applicable can be invoked, applied and exercised with respect to the subject matter of the suit.[816]

The basic object of the jurisdiction under O IX, rule 1(a) of the CPC or under section 151 of the CPC is to clothe the civil court with the power to perform its duty to do justice between the parties before it.[817]

Where during hearing of a case arising out of an appeal, a specific undertaking had been given by the respondent that he has no intention of selling the property since it is needed for necessity and livelihood of the defendant-respondent. Though the court held that it has jurisdiction under section 151 of the CPC for granting an order of injunction in favour of the plaintiff-appellant, in view of the undertaking given by the defendant-respondent in high court that he has no intention of selling the property, any order of injunction is not necessary.[818]

It is well–settled that when an application for maintenance is submitted in partition suit by the plaintiff, in view of the fact that the property is in possession of the defendant and the plaintiff is entitled to have maintenance out of the joint family property, such application is entertained and decided in view of the provisions of section 151 and not under O XXXIX or any other provision. Therefore, as against such order, the miscellaneous appeal is misconceived since O XLII is not applicable to such orders.[819]

[s 151.6] Duty of Court

It is clear that if there is no specific provision which prohibits the grant of relief sought in an application filed under section 151 of the CPC, the courts have all the necessary powers under section 151 to make a suitable order to prevent the abuse of the process of court. Therefore,

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814. *K Jagdish Ponraj v A Munirajee*, AIR 2009 Kant 56 : (2009) 2 Kant LJ 39 : (2009) 2 Civil Court Cases 624 (DB).
815. *Nicholas Piramal India Ltd v Cultor Food Science Inc*, AIR 2003 AP 254, (DB).
816. *Sailendra Narayan Acharya v Ramesh Kumar Singh*, AIR 2001 Jhar 5.
817. *Dashmesh Bhatta Co v Vijender Singh*, AIR 2003 P&H 355.
818. *Haraparbati Thakurani Baje v Ramakanta Gupta*, AIR 2002 Ori 89.
819. *Sandeep Ramesh More v Narayan Deoba More*, AIR 2006 Bom 253 : (2006) 4 Mah LJ 486.

the court exercising the power under section 151 first has to consider whether exercise of such power is expressly prohibited by any other provisions of the CPC and if there is no such prohibition then the court will consider whether such power should be exercised or not on the basis of facts mentioned in the application.[820]

The mere mention of provision on the heading of the application will not render the application liable for rejection. On the contrary the prayer made in the application if found to be sound and covered under some other provision of the Code, it will not be treated as one made under section 151 CPC. Such application should be considered in the light of its otherwise merits by the court.[821]

A Division Bench of the Delhi High Court has held that in a proceeding for grant of letter of administration/probate, the court under its inherent powers is not without jurisdiction to delete or expunge material which is scandalous, defamatory or libellous. It was observed that in case of deletion of the offending matter from the will, neither the will is altered nor the distribution of properties is modified to any extent. When the court grants letters of Administration or Probate, the original will is not affected. It is only the letter of Administration or the Probate, which are documents in rem, that will not carry the deleted matter which has been obliterated from the will.[822]

Where a suit for temporary and mandatory injunction was filed and the plaintiff-tenant was in possession on the date of initiation of the suit, but was dispossessed during the pendency of the suit, it was held that the court can invoke inherent powers to pass order of restoration of possession. It was observed that exercise of inherent powers in such cases not only do substantial justice but also restore the confidence of the public in courts.[823] It has been categorically held by the Supreme Court that the delay in filing the application for restoration of possession under section 151 cannot be the reason for declining relief.[824]

Where the counsel engaged by the defendant did not appear before the court on the day fixed for hearing nor represented to the court about his absence, the court decided to proceed *ex parte* and examined the witnesses present in court and heard arguments and reserved its judgment to be pronounced later in the day. Before the pronouncement of judgment the counsel for the defendant appeared and prayed for recall of the *ex parte* order, but the prayer was rejected and *ex parte* decree was passed. The Supreme Court held that in the interest of justice the *ex parte* decree was liable to be set aside.[825]

> It is true that in view of the law laid down by this Court in Arjun Singh (*Supra*)[826] the learned District Judge could not have entertained an application under Order IX Rule 7 C.P.C. We have also no hesitation in observing that counsel of the defendant were not careful enough to inform the learned District Judge about their pre-occupation before the High Court which prevented them from being present in his Court when the case was called for hearing. But the passing of an *ex parte* decree in a case of this nature is too harsh a consequence to be upheld. The defendant cannot be made to suffer an *ex parte* decree particularly when he was not at fault, having duly instructed his counsel to appear before the Court of the learned District Judge.

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820. *Shipping Corp of India Ltd v Machado Brothers*, AIR 2004 SC 2093 : (2004) 11 SCC 168.
821. *President, Shri Chaturbhuj Sharma Sikshan Sansthan Mahavidyalaya Samiti, Orai v Awadh Bihari Tiwari*, AIR 2006 All 238 : (2006) 3 All LJ 348.
822. *HPS Chawla v Dr NPS Chawala*, AIR 2006 Del 53 : (2005) 124 DLT 124 (DB).
823. *Mohammad Salim v Smt Shahin Sah*, AIR 2006 Raj 200 : 2006 (1) Raj LR 371 (Jaipur Bench).
824. *Sushil Kumar Dey Biswas v Anil Kumar Dey Biswas*, (2015) 3 SCC 461.
825. *Lal Devi v Vaneeta Jain*, AIR 2007 SC 1889 : (2007) 7 SCC 200.
826. *Arjun Singh v Mohindra Kumar*, AIR 1964 SC 993 : (1964) 5 SCR 946.

> We are not delving into the technicalities of the legal question argued before us because we are of the view that in the facts of this case the interest of justice demands that the *ex parte* decree be set aside. We appreciate that the learned District Judge could not entertain an application under Order IX Rule 7 C.P.C., and even the application under Order IX Rule 13 was dismissed as not pressed. But nothing prevented the High Court from setting aside the *ex parte* decree in the appeal preferred against it.[827]

However, the Rajasthan High Court, following the decision of the Supreme Court in *Arjun Singh's* case.[828] held that where the Court fixed the suit for *ex parte* hearing and after completing the hearing adjourned the same for pronouncement of judgment, O IX, rule 7 would have no application and the *ex parte* order cannot be set aside by invoking O IX, rule 7 or section 151 of the Code.[829]

Where a judicial officer dismissed a suit when the order of dismissal was passed due to non-arrangement of case file as required by rules. The appellate court made adverse remarks against the judicial officer in the appellate order with a direction to place it in the service record of the concerned officer. It was held by the Supreme Court that the remarks were uncalled for and liable to be expunged.[830] P Sathasivam, J speaking for the Bench observed as follows:

> **11.** We are not undermining the ultimate decision of the High Court in remitting the matter to the trial Court for fresh disposal. However, we are constrained to observe that the higher Courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. Our legal system acknowledges the fallibility of the Judges, hence it provides for appeals and revisions. A Judge tries to discharge his duties to the best of his capacity, however, sometimes is likely to err. It has to be noted that the lower judicial officers mostly work under a charged atmosphere and are constantly under psychological pressure. They do not have the benefits which are available in the higher courts. In those circumstances, remarks/observations and strictures are to be avoided particularly if the officer has no occasion to put forth his reasonings.[831]

The primary duty of a court is to see that truth is arrived at. A party to a civil litigation is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the CPC and the Indian Evidence Act, 1872, has an inherent power in terms of section 151 of the CPC to pass all orders for doing complete justice to the parties to the suit.[832]

[s 151.7] Limits for Exercise of Power

The court has ample power under section 151 of the CPC to make such orders as may be necessary for the ends of justice. But the power must be exercised with caution and due diligence with the object to prevent miscarriage of justice or to prevent the abuse of the process of court. The limits within which this power is to be exercised has been very vividly summed up by the Hon'ble Supreme Court in the case of *Nawabganj Sugar Mills Co Ltd v UOI*.[833] In paragraph 6 of the judgment, Krishna Iyer, J approvingly quoted a passage from Benjamin Cardozo's *The Nature of the Judicial Process*[834] which is as under:

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827. *Lal Devi v Vaneeta Jain*, AIR 2007 SC 1889 : (2007) 7 SCC 200.
828. *Arjun Singh v Mohindra Kumar*, AIR 1964 SC 993 : (1964) 5 SCR 946.
829. *Sunil Kumar v Praveen Chand Chowradia*, AIR 2008 Raj 179 (Jaipur Bench).
830. *Prakash Singh Teji v Northern India Goods Transport Co Pvt Ltd*, AIR 2009 SC 2304 : (2009) 12 SCC 577.
831. *Prakash Singh Teji v Northern India Goods Transport Co Pvt Ltd*, AIR 2009 SC 2304 : (2009) 12 SCC 577, para 11 at p 2306–2307 (of AIR).
832. *Sharda v Dharmpal*, AIR 2003 SC 3450 : (2003) 4 SCC 493.
833. *Nawabganj Sugar Mills Co Ltd v UOI*, AIR 1976 SC 1152.
834. Benjamin Cardozo's *The Nature of the Judicial Process*, Yale University Press, 1921.

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in social life. Wide enough in all conscience is the field of discretion that remains.[835]

In *Bagai*,[836] the respondent initially filed a suit against the appellant for recovery of certain dues along with the interest accrued thereon. Arguments in the suit were concluded and the matter was adjourned for judgment. In the meantime, the respondent moved two applications; one under O VII, rule 14 read with section 151 and the other under O XVIII, rule 17 read with section 151 seeking permission to recall PW-1 for proving certain documents by leading his additional evidence. The trial court dismissed both the applications against which a revision petition was filed. The high court allowed the revision petition and set aside the order of the trial court. The Supreme Court considered the ratio in *Vadiraj*[837] and a subsequent decision in *KK Velusamy*[838] and conclusively allowed the appeal against the order of the High Court and set aside the same and restored the order of the trial court. In *KKVelusamy*,[839] even after considering the principles laid down in *Vadiraj*[840] and taking note of section 151 of the CPC, the Supreme Court concluded that in the interests of justice and to prevent abuse of the process of the court, the trial court is free to consider whether it was necessary to reopen the evidence and if so, in what manner and to what extent. Further, it was observed that the evidence should be permitted in exercise of its power under section 151 of the Code. In *Bagai*,[841] the Supreme Court held that at a belated stage and that too after reserving the matter for pronouncement of judgment, the plaintiff cannot be permitted to file such applications to fill the lacunae in his pleadings and evidence led by him. The court observed:

> After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

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835. *Jaipal Singh Sibia v Ashwani Kumar Bansal*, AIR 2003 P&H 280.
836. *Bagai Construction v Gupta Building Material Store*, AIR 2013 SC 3188 : (2013) 14 SCC 1 : 2013 (9) SCC 485 : 2013 (2) SCR 873.
837. *Vadiraj Naggappa Vernekar (dead) through LRs v Sharadchandra Prabhakar Gogate*, (2009) 4 SCC 410 : 2009(7) JT 202 : 2009(5) BCR 460.
838. *KK Velusamy v N Palanisamy*, (2011) 11 SCC 275.
839. *KK Velusamy v N Palanisamy*, (2011) 11 SCC 275.
840. *Vadiraj Naggappa Vernekar (dead) through LRs v Sharadchandra Prabhakar Gogate*, (2009) 4 SCC 410 : 2009(7) JT 202 : 2009(5) BCR 460.
841. *Bagai Construction v Gupta Building Material Store*, (2013) 14 SCC 1.

[s 151.8] Truth

The court must be held to have the requisite power even under section 151 of the CPC to issue direction either *suo motu* or otherwise which, according to the court, would lead to the truth.[842]

The wife had filed for divorce on the ground of impotency. To ascertain the truth, a medical examination of the husband was necessary. Therefore, the court invoking its inherent powers can direct for the medical examination of the husband. It will not infringe the fundamental right of the husband under Articles 21 or 20(3) of the Constitution.[843]

[s 151.9] Due Diligence

Though there is no limitation for applying under this section, the party invoking inherent jurisdiction, has to be diligent and also should not be guilty of laches.[844]

[s 151.10] Suppression or Concealment

If the discretion is exercised by suppression or concealment, the same must be withdrawn and the benefit recalled.[845]

[s 151.11] Stay of Suit

To get the order of stay of a suit on the ground of abuse of process, the applicant must show that plaintiff would not succeed but that he could not possibly succeed on the basis of the pleadings and in the circumstances of the case. In other words, the defendant would be required to show a very strong case in his favour. The power would be exercised by the court if defendant could show to the court that the action impugned is frivolous, vexatious or is taken simply to harass the defendant or where there is no cause of action in law or in equity. The power of the court restraining the proceedings are to be exercised sparingly or only in exceptional cases. The stay of proceedings is a serious interruption in the right, that a party has to proceed with the trial to get it to its legitimate end according to substantive merit of his case. The court to exercise the power to stay the proceedings has to keep in mind that a positive case has been made out by the defendant whereby the court can reach to the conclusion that proceedings, however, indicate an abuse of the process of court.[846]

Where an application was filed under the Allahabad High Court Rules (1952) read with section 151 of the Code for recall of an *ex parte* interim order of stay, it was held by the Allahabad High Court that it was neither proper nor permissible under the Rules of the Court when other procedure for getting the said *ex parte* interim order vacated is provided.[847]

In a civil suit damages were claimed by the plaintiff for the loss suffered by the plaintiff due to publication of some allegedly defamatory news. A criminal case was also pending in respect of the said alleged defamation, where the same set of facts were relied upon. However, the facts in the criminal case were simple and no complicated question of fact or law was involved. It

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842. *Sharda v Dharmpal*, AIR 2003 SC 3450 : (2003) 4 SCC 493.
843. *Amol Chavhan v Jyoti Chavhan*, AIR 2013 MP 61.
844. *Somar Bhuiya v Kapil Kumar*, AIR 1974 Pat 289.
845. *Hindustan Thermo Prints Ltd v DRG, (UK Ltd)*, AIR 1999 Del 202.
846. *Mayur, (HK) Ltd v Owners and Parties, Vessel MV Fortune Express*, AIR 2006 SC 1828.
847. *Ashok Kumar Chaturvedi v UOI*, AIR 2006 All 40 : (2006) 1 All LJ 116.

was held by the Orissa High Court that no prejudice is likely to be caused if both cases are proceeded with simultaneously. The refusal to stay civil suit till the disposal of the criminal case was held to be proper.[848]

[s 151.12] Settled Matters

The inherent powers cannot be used to reopen the settled matters. These powers cannot be resorted to when there are specific provisions in the Act to deal with the situation. It would be an abuse to allow the reopening of the settled matter after nearly four decades in the purported exercise of inherent powers.[849]

The petitioners filed an application under O XXI rule 90 of the CPC to set aside the auction sale. The application was rejected and therefore the application to set aside the sale under section 151 was not maintainable. The Supreme Court in *Nainsingh v Koonwarjee*,[850] emphasised that the court is not to exercise inherent power if the order can be challenged under the provisions of the CPC. The application of the petitioners in the facts and circumstances of the case under section 151 was not maintainable.[851]

Where order allowing amendment of plaint was absolutely clean and unambiguous, the court has no inherent power to review its decision duly pronounced.[852]

A government officer of Haryana filed successive writ petitions under Article 226 of the Constitution regarding his retiral benefits on voluntary retirement and both of them were dismissed and the order attained finality. Thereafter, he files a miscellaneous application under section 151 of the Code which was entertained by the high court and allowed. On appeal by the state, the Supreme Court held that when orders have been passed and they have attained finality, the matter cannot be reopened by filing miscellaneous petition.[853] LS Patna, J, speaking for the Bench, observed or follows:

> It is well-settled that the relief granted by the courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the courts tend to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of the legal reasoning and the legitimacy of the conclusions. The possession of powers under section 151, CPC, by the Court, itself is not sufficient, it has to be exercised in accordance with law. The orders of the Courts must emanate logically from legal findings and the judicial results must be seen to be principled and supportable on those findings.[854]

The Bench in the above case quoted a passage from its earlier decision in *Brahm Dutt Sharma's* case,[855] where in it has been stated as under:

> **10.** The High Court's order is not sustainable for yet another reason. Respondents' writ petition challenging the order of dismissal had been finally disposed of on August 10, 1984, thereafter nothing remained pending before the High Court. No miscellaneous application could be filed in the writ petition to revive proceedings in respect of subsequent events after two years. If the respondent was aggrieved by the notice dated January 29, 1986 he could have filed a separate petition under Art. 226 of the Constitution challenging the validity

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848. *The Servants of the People Society v Pyarimohan Mohapatra*, AIR 2006 Ori 75 : 2006 (101) Cut LT 318 (DB).
849. *State of West Bengal v Karan Singh Binayak*, AIR 2002 SC 1543 : (2002) 4 SCC 188.
850. *Nainsingh v Koonwarjee*, AIR 1970 SC 997 : (1970) 1 SCC 732.
851. *Mangno v First Additional Distt Judge, Muzaffarnagar*, AIR 2002 All 80.
852. *Kishore Motiani v Om Prakash & Sons*, AIR 2003 Del 166.
853. *State of Haryana v Babu Singh*, AIR 2009 SC 472 : (2008) 2 SCC 85.
854. *State of Haryana v Babu Singh*, AIR 2009 SC 472 : (2008) 2 SCC 85, para 17 at p 476 (of AIR).
855. *State of Uttar Pradesh v Brahm Dutt Sharma*, AIR 1987 SC 943 : (1987) 2 SCC 179.

of the notice as it provided a separate cause of action to him. The respondent was not entitled to assail validity of the notice before the High Court by means of a miscellaneous application in the writ petition which had already been decided. The High Court had no jurisdiction to entertain the application as no proceedings were pending before it. The High Court committed error in entertaining the respondent's application which was founded on a separated cause of action. When proceedings stand terminated by final disposal of writ petition it is not open to the Court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not followed there would be confusion and chaos and the finality of proceedings would cease to have any meaning.

[s 151.13] Consolidation of Suits

The Code of Civil Procedure, 1908 does not specifically speak of consolidation of suits but the same can be done under the inherent powers of the court flowing from section 151 of the CPC. Unless specifically prohibited, the civil court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need be addressed followed by one common judgment. However, as the suits are two, the court may, based on the common judgment, draw two different decrees or one common decree to be placed on the record of the two suits.[856]

However, where none of the circumstances enumerated by the Supreme Court in the *Chitivalasa Jute Mills* case (*supra*) appear, the Court cannot exercise its inherent powers to order consolidation of suits. Thus, where four different suits were filed for recovery of money, but there was no substantial similarity between parties, the issues involved were between different parties, cause of action arose on different dates and even burden of proof was on different persons, it was held by the Rajasthan High Court that the rejection of the prayer for consolidation was proper.[857]

To consolidate suits and appeals,[858] including appeals to His Majesty in Council;[859] even without the consent of the parties;[860] to order joint trial of suits.[861]

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856. *Chitivalase Jute Mills v Jaypee Reva Cement*, AIR 2004 SC 1687 : (2004) 3 SCC 85 : SC Suppl 2004 (3) CHN 56 : 2004 (1) AWC 796 SC : JT 2004 (2) SC 535.
857. *Anurag & Co v Additional Dist. Judge*, AIR 2006 Raj 119 : 2006 (2) WLC 160.
858. *Re Maharaja v Venkatagiriv*, AIR 1930 Mad 376 : (1930) 53 Mad 248, (FB); *Kali Charan v Suraj Kumar*, (1913) 17 WN 526; *Qazi v Mankumar*, AIR 1922 Pat 566 : (1922) 1 Pat 669; *Vengu Naidu v Deputy Collector*, (1918) 34 Mad LJ 279; *Kashi Prasad v Secretary of State*, (1902) 29 Cal 140; *Hukum Chand v Kamalanand*, (1906) 33 Cal 927; *Nanda Kishore v Ram Golam*, (1912) 40 Cal 955; *Ganesh Ramchandra v Gopal Lakshman*, AIR 1943 Bom 12 : (1943) Bom 104 : 44 Bom LR 819; *Philip v Bata Shoe & Co Ltd*, 1959 Ker LT 999 : (1959) Ker LT 1346; *Hansraj v Firm Hazarimal*, AIR 1959 Raj 1144; *Gupta v East Asiatic Co*, AIR 1960 All 184; *Jai Kishen v Bajramlal*, AIR 1961 Raj 117 3; *Chitivalase Jute Mills v Jaypee Rewa Cement*, AIR 2004 SC 1687.
859. *Chaudhry Hat Prasad v Brij Kishor Das*, (1918) 3 Pat LJ 446; contra *Mukunda Lal v Hasmat-un-nisa*, AIR 1937 All 105; *Asiha Begum v Kundan Jan*, AIR 1946 All 184 : AIR 1946 All 221.
860. *Hari Narain v Ram Asrh*, AIR 1957 Pat 124; *Harishchandra v Kailas Chandra*, AIR 1975 Raj 14.
861. *Kalicharan v Suryakumar*, 17 Cal WN 526; *Mohammad v Mankumar*, AIR 1922 Pat 566 : 1 Pat 669; *Suryanarayana v Venkatasubbiah*, AIR 1960 AP 75; *Mutivahuji v Kalindi Vahuj*, AIR 1994 Guj 42.

Where parties in two suits on which consolidation was sought are different, documents on basis of which cases are fought are of different dates, in both cases, plaintiff's evidence had been recorded separately, the application was filed when defendants had to start recording evidence in their respective case, consolidating them would result in misjoinder of parties and evidence, further, application being at late stage, consolidation was denied.[862]

[s 151.14] Not to be Exercised When Prohibited or Excluded by the Code or Other Statutes

It is well-settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to.

An application under section 5 of the Limitation Act, 1963 is not maintainable in a proceeding arising under O XXI of the CPC. Application of the said provision has, thus, expressly been excluded in a proceeding under O XXI of the CPC. In that view, even an application under section 5 of the Limitation Act was not maintainable. *A fortiori* for the said purpose, inherent power of the court cannot be invoked.[863]

A court has no inherent powers to do that which is prohibited by the Code. Thus, a court has no power, after the judgment is signed, to alter or to add to it, as, doing so, would be in direct contravention of the provisions of O XX, rule 3.[864] Further, this section does not invest in the court, jurisdiction over matters which are excluded from its cognizance. Thus, a court cannot, under this section, entertain a suit relating purely to a question of caste, such a suit not being of a civil nature[865] (see section 9 above); or entertain a rent suit which by special law, can be tried only by a revenue court.[866] When a purchaser through a court auction fails to make the deposit in accordance with O XXI, rule 85, the court cannot, in the exercise of its inherent powers, give him relief against forfeiture of the deposit, as provided in O XXI, rule 86[867] or extend time of 15 days prescribed under O XXI, rule 85 regarding deposit of amount of auction money.[868] Where an auction sale has been confirmed under O XXI, rule 92, the court thereafter has no inherent powers to set it aside on the ground of fraud, since O XXI, rule 90 contains a special provision with reference to it.[869] The court also cannot ignore the provisions of the law of limitation by appealing to this section.[870] With reference to section 14 of the Limitation Act, the Privy Council said:

> In their Lordships' opinion it is impossible to hold that in a matter which is governed by the Act an Act which in some respects gives the court a statutory discretion there can be implied in the court outside the limits of the Act a general discretion to dispense with its provisions.[871]

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862. *Ganeshdas v Ramesh Chandra*, AIR 2002 Raj 341.
863. *Damodaran Pillai v South Indian Bank Ltd*, AIR 2005 SC 3460 : (2005) 7 SCC 300.
864. *Rameshwar v Lala*, AIR 1925 Pat 36 : (1924) 3 Pat 775; *Adit Prasad v Ramharakh*, AIR 1925 Pat 435 : (1925) 4 Pat 180.
865. *Nagindas v Somnath*, AIR 1932 Bom 122 : (1932) 56 Bom 242.
866. *Sanketa Prasad v Sm Ram Kushi Devi*, AIR 1947 Oudh 232 : (1947) 22 Luck 207.
867. *Manilal Mohanlal v Sayed Ahmed*, AIR 1954 SC 349 : (1955) 1 SCR 108 : 1954 SCJ 509 : 1954 SCA 646.
868. *United Commercial Bank v Mani Ram*, AIR 2003 HP 63.
869. *Bajjanna v Kristappa*, AIR 1947 Mad 268 : (1947) 1 Mad LJ 10; *Moolchand v Fatima Sultana*, (1995) 6 SCC 742.
870. *Tota Ram v Panna Lal*, AIR 1924 All 668 : (1924) 46 All 631; *Krishnaswamy v Chengalraya*, AIR 1924 Mad 114 : (1924) 47 Mad 171; *Bissa Mal v Kesar Singh*, (1920) 1 Lah 363; *Ajodhya v Musammat Phul Koer*, AIR 1922 Pat 479 : (1922) 1 Pat 277; *Duni v Pritam Das*, AIR 1925 Lah 321 : (1925) 7 Lah LJ 13.
871. *Maqbal Ahmed v Onkar Pratab*, AIR 1935 PC 85 : (1935) 62 IA 80 : 57 All 242.

The court cannot, by the exercise of its inherent powers extend the period of limitation on any grounds of equity and justice.[872] Where an appeal was filed without impleading the necessary parties, it was held that the inherent powers, under this section could not be invoked in order to revive the appeal against them.[873] The court cannot, in the exercise of its inherent jurisdiction, set aside an *ex parte* decree, where the case does not satisfy the requirements of O IX, rule 13.[874] Where, however, the application under O IX, rule 13, is dismissed in default the order dismissing the application must be treated as one under section 151, and when restoration of such an application is sought, the same could be allowed under the same provision.[875] The court also cannot in the exercise of its inherent jurisdiction, set aside an *ex parte* decree, after the expiry of the period of limitation.[876] If the plaint is rejected, and the plaintiff does not take steps, within the limitation period, to set aside the order by an appeal, the court has no right to do the same under section 151 and deprive the defendant of a valuable right.[877] The court also will not sanction a procedure, which is not authorised by the Code, the law of Arbitration, or the Oaths Act, 1969.[878]

It has been held that an application under O IX, rule 13 cannot be filed by a person who was not initially a party to the proceedings and inherent powers under section 151 can be exercised by the court to redress grievances for which no remedy is provided under the CPC. In the event that an order has been obtained from the court by playing fraud upon it, appellate court can recall the said order on the application of the person aggrieved. Where fraud has been committed upon a party, it has the right to get the said judgment or order set aside, by filing an independent suit.[879] The court stated that section 151 is not a substantive provision that confers the right to get any relief of any kind, but is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in manner that is consistent with justice and equity. The Supreme Court has laid down following circumstances where power under section 151 can be used:-

(i) Inherent powers cannot be used to re-open settled matters. The inherent powers of the court must, to that extent, be regarded as abrogated by the legislature. A provision barring the exercise of inherent power need not be express, it may even be implied.

(ii) Inherent power cannot be used to restrain the execution of decree at the instance of one who was not a party to suit.

(iii) The consolidation of suit can be done in exercise of the inherent power since the same has not been provided for under any of provisions of the Code. It can be done in exercise of the powers under section 151 of the Code, where a common question of fact and law arise therein, and the same must also not be a case of misjoinder of parties. The non-consolidation of two or more suits is likely to lead to a multiplicity of suits being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits

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872. *Angalal v Munjaji*, AIR 1956 Hyd 29 : (1955) ILR Hyd 734; *MG Rubbani v BH Sabha*, AIR 1973 Pat 358.
873. *Bhojraj Krihsna Rao v Darsu*, AIR 1959 MP 52.
874. *Neelamma v Ravindranathan*, (1957) Ker LJ 942; *Uttar Pradesh State v Shib Saran*, AIR 1960 All 360 : (1959) All LJ 818; but see *Sarup Singh v Nilkant*, AIR 1953 Bom 109.
875. *Continental Construction Ltd v Continental Float Glass Ltd*, AIR 1997 Del 147.
876. *KPLSS Chettyar v Official Receiver*, AIR 1935 Rang 466 : (1935) 13 Rang 595; *Ram Yagyad v Jagannath Prasad*, AIR 1965 All 64 : 1963 All LJ 651.
877. *Saratchandra v Mrityanjay*, AIR 1935 Cal 336 : (1935) 62 Cal 61.
878. *Vijayadas v Shekhappa*, AIR 1941 Bom 396 : (1941) ILR Bom 652 : 43 Bom LR 727; *Bishambar v Sri Thakurji*, AIR 1931 All 557 : (1931) 53 All 673.
879. *Ram Prakash Agarwal v Gopi Krishna*, (2013) 11 SCC 296 : 2013 (5) Scale 670.

that are sought to be consolidated. Non-consolidation may, therefore prejudice a party, or result in the failure of justice.

(iv) In exceptional circumstances, the court may exercise its inherent powers, apart from order 9 of the Code to set aside an ex parte decree. An ex parte decree passed due to the non-appearance of the counsel of a party, owing to the fact that the party was not a fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of mistake of the court. An application under section 151 will be maintainable, in the event that an ex parte order has been obtained by fraud upon the court or by collusion. The provisions of order 9 may not be attracted, and in such a case the court may either restore the case, or set aside the ex parte order in the exercise of its inherent powers. There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a court employs a procedure to do something that it never intended to do, and there is miscarriage of justice or an abuse of the process of court, the injustice so done must be remedied, in accordance with the principle of actus curiae neminem gravabit, an act of the court shall prejudice no person.

(v) Inherent powers maybe exercised ex debito justitiae in those cases, where there is no express provision in Code. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law. In view of the several decisions of the Supreme Court reiterating it, the law on this issue stands crystallised to the effect that the inherent powers enshrined under section 151 can be exercised only where no remedy has been provided for in any other provision of the Code. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of Code.[880]

(vi) In the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised.

It was further held as follows:

(i) An application under order 9 rule 13 of the Code cannot be filed by a person who was not initially a party to the proceedings.

(ii) Inherent powers under section 151 can be exercised by the court to redress only such a grievance, for which no remedy is provided for under the Code.

(iii) In the event that an order has been obtained from the court by playing fraud upon it, it is always open to the court to recall the said order on the application of the person aggrieved, and such power can also be exercised by the appellate court.

(iv) Where the fraud has been committed upon party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit.

(v) A person aggrieved may maintain an application before the land acquisition collector for reference under section 18 or 30 of the Land Acquisition Act, 1894, but cannot make an application for impleadment or apportionment before the reference court.

There is no provision under the Hindu Adoption and Maintenance Act, 1956 for granting interim maintenance. When a claim is made for maintenance by filing a suit or appropriate proceeding, it takes reasonable time in ordinary course to adjudicate that claim. Till such time the parties cannot be asked to starve. Although there is no appropriate provision for

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880. See also *Mohit v State of UP,* AIR 2013 SC 2248 : (2013) 7 SCC 789 : 2013 (7) SCR 86 : JT 2013 (9) 205.

seeking interim maintenance, there is no prohibition in the statute for grant of such interim maintenance. Therefore, section 151 can be invoked for claiming interim maintenance pending adjudication of the claim in the main proceeding.[881]

The petitioners had challenged an order passed by the trial court granting an extension of time for payment of deposit of court fees by invoking inherent powers under section 151 CPC. The Hon'ble Bombay HC held appeal is most appropriate remedy against the order rejecting the plaint however, held that when there is no challenge to the demanded court fees, an application simplicitor seeking extension of time to pay such court fees can be filed under section 151 CPC.[882]

Under rule 1 of O VIII, the time to file written statement has been limited to thirty days from the date of service of summons though it can be extended by the Court for reasons to be recorded in writing, but not beyond ninety days. The Himachal Pradesh High Court has held that such period cannot be extended further by the court even under its inherent powers under section 151 or under section 148 of the Code.[883]

A remand of the entire case to the trial court for the purposes of taking additional evidence and then disposing it off according to law, would not be valid, it being in contravention of the specific provisions of O XIV, rules 27 and 28.[884] Similarly, a court cannot, in the exercise of the powers under this section, compel a person to undergo a medical examination,[885] nor can it compel an arbitrator to enter into a reference, such an order not being envisaged by section 28 of the Arbitration Act.[886] Further, the court cannot exercise inherent *suo motu* powers in any proceedings under Arbitration and Conciliation Act, 1996, which is not permitted to be interfered with by the court,[887] nor can it grant an injunction restraining execution of a decree which provides for the demolition of a portion of a wall, as, such demolition is neither "damage" nor "waste" within the meaning of O XXXIX, rules 1 and 2.[888] But, the mere fact that the application of the defendants was filed under section 151 would not come in the way of the court granting an injunction under O XXXIX, rule 1(a).[889] The provisions in the Rent Act and O XV, rule 5 of the Code, for striking off the defence cannot be defeated by invoking the inherent powers of the court. This is so because, the special provision must override the general provision.[890] Similarly, where the Representation of the People Act prohibits condonation in filing of a petition, the same cannot be cured by exercising the inherent powers in the interests of justice.[891]

[s 151.15] Not to be Exercised When There are Specific Provisions in the Code

In the case of *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*[892] it has been held that inherent jurisdiction of the court to make orders *ex debito justitiae* is undoubtedly affirmed

881. *Mukesh Teli v Smt Bharati Teli*, AIR 2006 AP 256 : (2006) 3 Andh LD 738.
882. *Shri Narendra Janardan Mhatre v Suburban Industries Ltd.*
883. *Shobit Construction v TK International Ltd*, AIR 2006 HP 4 : 2005 (2) Shim LC 1.
884. *Kirti Bhushan v Dipli Bikash*, AIR 1966 Pat 142; *Nityanand v Orissa Co-op Ins Society Ltd.* AIR 1975 Ori 1.
885. *Ravamma v Shanthappa*, AIR 1972 Mys 157 : (1972) 1 Mys LJ 136.
886. *UOI v Ram Nath*, AIR 1974 All 296.
887. *Anuptech Equipments Pvt Ltd v Ganpati Co-op Hsg Society Ltd*, AIR 1999 Bom 219.
888. *AE De Souza v RF De Souza*, AIR 1975 Goa 6.
889. *Central Warehousing Corp v Prabhu Narain Singh*, AIR 2003 All 223.
890. *Suresh Kumar v Prem Chand*, AIR 1994 P&H 203.
891. *Chitrasen Sinku v Bijaya Singh Soy*, AIR 1999 Pat 86.
892. *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527.

by section 151 but that jurisdiction cannot be exercised so as to nullify the provisions of the CPC. Where the CPC deals expressly with a particular matter, the provision should normally be regarded as exhaustive.[893]

Section 151 of the CPC gives inherent power to the court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court, however same is required to be exercised by the court, normally, when there is no other statutory remedy available to the parties to redress their grievance or to prevent abuse of the process of the court. Whenever there is a statutory provision remedy provided under the CPC or statute, parties to the litigation are required to exhaust those remedies and in such situation, the court is not expected to exercise inherent powers.[894]

An application was filed by the judgment-debtor for setting aside auction sale in execution of a decree. The said application was filed under section 151 of the Code on the ground of want of notice and mis-description of the property. It was held by the Andhra Pradesh High Court that the stand of the judgment-debtor that he came to know about the execution proceedings only when the warrant of delivery was issued does not appear to be *bona fide*. Moreover, allowing him to raise such objection by invoking section 47 or 151 would amount to circumventing the regular provision of O XXI, rule 90 of the Code.[895]

In a suit for specific performance of agreement to sell land, one of the defendants died during the pendency of the suit and his legal heirs, who were minors, were brought on the record. Against the decree passed in favour of the plaintiff, the minor heirs, who had attained majority did not choose to file an appeal to assert their right nor did they choose to file cross objection in the appellate court. That being so, the decree cannot be challenged by the said legal heirs through a petition under section 151 of the Code in the appellate court.[896]

In a case under the UP Imposition of Ceiling on Land Holdings Act, 1961, where the order under the Act had not been challenged in appeal provided under section 12 of the said Act, the Supreme Court held that inherent power cannot be exercised for the benefit of the litigant who has remedy under the relevant statute. Thus, application filed under section 151 long after the period provided for filing appeal under the Act was held as not maintainable.[897] Dr Pasayat, J, speaking for the Bench in the above case, explained the principles underlying the exercise of inherent powers in the following words:

> in matters with which the CPC does not deal with, the Court will exercise its inherent power to do justice between the parties which is warranted under the circumstances and which the necessities of the case require. If there are specific provisions of the CPC dealing with the particular topic and they expressly or by necessary implication exhaust the scope of the powers of the court or the jurisdiction that may be exercised in relation to a matter, the inherent powers of the Court cannot be invoked in order to cut across the powers conferred by the CPC. The inherent powers of the Court are not to be used for the benefit of a litigant who has remedy under the CPC. Similar is the position *vis-à-vis* other statutes. The object of section 151, CPC is to supplement and not to replace the remedies provided for in the CPC. Section 151, CPC will not be available when there is alternative and the same is accepted to be a well-settled ratio of law.[898]

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893. *National Institute of MH and NS v C Parameshwara*, AIR 2005 SC 242 : (2005) 2 SCC 256 : (2005) 104 FLR 369 : (2005) 2 Mah LJ 1 : (2005) 1 LLN 674.
894. *Ramesh Akre v Mangalabai Pralhad Akre*, AIR 2002 Bom 487.
895. *M Rajagopal Reddy v State Bank of India*, AIR 2006 AP 264 : (2006) 2 Andh LT 717.
896. *Amir Bala v Swaran Singh*, AIR 2007 P&H 10 : 2007 (1) Civil Court C 635.
897. *State of Uttar Pradesh v Roshan Singh*, AIR 2008 SC 1190 : (2008) 2 SCC 488.
898. *State of Uttar Pradesh v Roshan Singh*, AIR 2008 SC 1190, para 7 at p 1190 : (2008) 2 SCC 488.

For transfer of civil cases, inherent powers of the court under section 151 of the Code cannot be invoked.[899] Explaining the law in this regard, CK Thakker, J, speaking for the Bench, observed as follows:

> It is settled law that inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in the code. The said power cannot be exercised in contravention or in conflict of or ignoring express and specific provision of law. Since the law relating to transfer is contained in Sections 22 to 25 of the Code, and they are exhaustive in nature, section 151 has no application.[900]

Inherent jurisdiction must be exercised, subject to the rule that, if the Code does contain specific provisions, which could meet the necessities of the case in question, such provisions should be followed, and the inherent jurisdiction must not be invoked.[901] Such provisions need not be express, they may be implied, or even implicit, from the very nature of the provisions made for the contingencies to which they relate.[902] Accordingly, where certain orders are passed in the suit, and the suit is thereafter disposed off, an application under this section, challenging those orders as being without jurisdiction, and for the restoration of the suit, is incompetent, there being a specific remedy under the Code, by way of an appeal or a review.[903] It is only when there is no clear provision in the Code, that inherent jurisdiction can be invoked.[904] In such a case, the court may devise a procedure, which would be permissible under the law, for achieving the ends of justice.[905]

In *Ram Chand & Sons Sugar Mills Pvt Ltd v Kanhayalal Bhargav*,[906] the Supreme Court in this connection, observed that, the inherent power of the court "is in addition to and complimentary to the powers expressly conferred under the CPC; but that power will not be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of section 151 of the Code, they do not control the undoubted power of the court to make a suitable order to prevent the abuse of the process of the court." Thus, inherent powers of the court, would not include a power of revision under section 115 of the Code, even in cases to which that section is not applicable.[907] Similarly, in view of the express provision in O XXXVII, rule 4, for setting aside a decree passed under that Order, an application to do so,

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899. *Durgesh Sharma v Jayshree*, AIR 2009 SC 285 : (2008) 9 SCC 648.
900. *Durgesh Sharma v Jayshree*, AIR 2009 SC 285, para 79 at p 296 : (2008) 9 SCC 648.
901. *Jitendra Mohan v Thakurani Bindbasini*, AIR 1945 Oudh 96; *Arumugam Chettiar v KRS Serugan Chettiar*, AIR 1950 Mad 779; *Muhammed Kassim v Hajee Rahiman*, AIR 1950 TC 100 (FB); *Kanhaiyalal v Banshilal*, AIR 1950 All 444; *Shiraj Kuer v Sant Singh*, AIR 1941 All 219 : (1941) ILR All 41, 81; *Ghuznavi v Allahabad Bank Ltd*, (1917) 44 Cal 929; *Malappa v Alagiri*, AIR 1931 Mad 791 : (1931) 60 Mad LJ 475; *Laxmi Investment Co v Tarachand*, AIR 1968 Bom 250 : 69 Bom LR 629; *Maibam v Hidam*, AIR 1970 Mani 14; *Santosh v Teja Singh*, AIR 1977 Del 110; *Jagdish Balwantro v State of Maharashtra*, AIR 1994 Bom 141 (FB); *VT Hundkn v Robert C Kenny*, AIR 1996 Bom 48; *Ultra Drytech Engineering Pvt Ltd v Niraj Petrochemicals Ltd*, AIR 1994 AP 33 (DB).
902. *GK Prabhakaran & Co v David Traders*, AIR 1973 Ker 1 : (1972) 2 Ker 337.
903. *HJ Dorairaj v VR & Co*, AIR 1973 Mad 135 : (1973) 1 Mad LJ 394.
904. *Bhonrey Lal v Ram Singh*, AIR 1956 Raj 49 : (1955) Raj 175.
905. *Ganesh v Goverdhandas*, AIR 1965 MP 21.
906. *Ram Chand & Sons Sugar Mills Pvt Ltd v Kanhayalal Bhargav*, AIR 1966 SC 1899.
907. *Mukand Lal v Gaya Prasad*, AIR 1935 All 599 (FB) : (1935) 57 All 977; *Bhagwati Prasad v Collector of Etah*, AIR 1944 All 218 : (1944) All 381.

under this section, would be untenable.[908] Also, this section cannot be resorted to in order to avoid the application of O I, rule 10, when an application under that rule has been rejected.[909] If relief can properly be obtained in a separate suit, there is no justification for invoking section 151,[910] and the court will not by virtue of its inherent jurisdiction, amend a consent decree on the ground of fraud,[911] unless the fraud is a fraud upon the court;[912] or set aside a consent decree on the ground of coercion, there being a suitable remedy by way of a suit.[913] A court cannot make use of the special provisions of this section, where the applicant has his remedy provided elsewhere in the Code, and has neglected to avail of the same.[914] However, there is a reported case, in which, an order dismissing a suit under O XI, rule 21, was set aside by the court, in its inherent jurisdiction, on the ground that an appeal would be a more costly or a non-efficacious remedy.[915]

The inherent powers cannot be used to reopen the settled matters. These powers cannot be resorted to when there are specific provisions in the Act to deal with the situation.[916]

While considering the scope of the powers of the court under this section one has to bear in mind the decision of the Supreme Court,[917] wherein it was held that:

> Under the inherent power of Courts recognised by Section 151, Code of Civil Procedure 1908, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does not contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. Further, the power under s 151 of the Code cannot be exercised as an appellate power.

Therefore, once it is clear that the civil court cannot deal with the matter pertaining to the execution of the decrees passed in the partition suits in relation to the estate which are subjected to revenue to the government, it is evident that the matters pertaining to the execution of such decrees cannot be dealt with under the exercise of inherent powers under section 151.[918]

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908. *Mukand Lal v Gaya Prasad*, AIR 1935 All 599 (FB) : (1935) 57 All 977; *Bhagwati Prasad v Collector of Etah*, AIR 1944 All 218 : (1944) All 381.
909. *SC Law v KS Roy*, AIR 1974 Cal 274.
910. *Galstaun v Promotha Nath Roy*, (1929) 57 Cal 154–59; *Hubli Electricity Co v Province of Bombay*, AIR 1945 Sau 370 : 47 Bom LR 415 : (1945) ILR Bom 665.
911. *Galstaun v Promotha*, AIR 1929 Cal 470 : (1929) 57 Cal 154; *Mulchand v Sualal*, AIR 1956 Assam 65 : (1957) ILR Assam 470; *Binodilal v Virendra*, AIR 1958 MP 391.
912. *Peary Chowdhury v Soona Dassee*, (1914) 19 Cal WN 419; *Suresh Chandra Sen v Jogesh Chandra Sen*, (1939) 43 Cal WN 969; doubted in *Akina Bibi v Muhammad Ali Shah*, AIR 1941 Cal 336 : (1941) 1 Cal 405; *Sheodhar v Ramdeo*, AIR 1934 Pat 229 : (1934) 13 Pat 165; *Rahim Bux v Mohammed*, (1955) 1 Cal 25.
913. *Kewal Krishnan v Shiv Kumar*, AIR 1970 P&H 176 : (1970) 2 Punj 758.
914. *Chandra Bhan Singh v Lallu Singh*, AIR 1947 All 343 : (1947) ILR All 389; *Nageswara Prasad v Gudrimall*, (1933) 55 All 548; *Mt Sukra v Ram Harakh*, AIR 1951 All 1951 (FB); *Joshi v Jhinguria*, AIR 1924 All 446 : (1924) 46 All 144; *Vallabhbahai v Chhotalal*, AIR 1927 Bom 79 : (1927) 51 Bom 26; *Allahabad Bank v Raja Rama*, AIR 1933 Lah 671 : (1933) 14 Lah 779; *Abdul Jabar v Azizar Rahman*, AIR 1937 Cal 425; *Laraita Devi v Sia Ram*, AIR 1957 All 820; *Nainsingh v Koonwarjee*, AIR 1970 Cal 40, 42; *Namita Dhar v Amalendu Sen*, AIR 1977 Cal 187.
915. *Mohanlal & Co v Golibai*, AIR 1932 Bom 271 : (1932) 34 Bom LR 714; *Balram Ojha v Star Trading and Investment Co*, AIR 1978 Cal 160; *Bimala Devi v Aghore Chandra Mallick*, AIR 1975 Cal 80 (FB); *Bajrang Rai v Ismail Mian*, AIR 1978 Pat 339, p 347 (FB), an application under O I or O IB dismissed for default; *Bihar State Electricity Board v PK Khetan*, AIR 1978 Pat 253.
916. *State of W Bengal v Karan Singh Binayak*, AIR 2002 SC 1543 : (2002) 4 SCC 188.
917. *Nain Singh v Koonuarjee*, AIR 1970 SC 997 : (1970) 1 SCC 732.
918. *Prakash Nathyaba Bhosale v Laxman Ganabe Bhosale*, AIR 2003 Bom 41.

[s 151.16] To be Exercised Only for the Ends of Justice

No order should be made, under this section, unless it is necessary for achieving the ends of justice, or to prevent abuse of the process of the court.[919] Even though the order is without jurisdiction, the powers under section 115, CPC may not be exercised. The powers under section 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice. Where the order of the court below is in the interest of justice, the high court can refuse to interfere under section 115, even if the court below has no jurisdiction to pass such an order. The interference in revision is discretionary and should be exercised only in the interest of justice and not in a case where interference is against the interest of justice.[920] The Patna High Court restored, under this section, a suit which, through the mistake of the court, was dismissed on the failure of both the parties to appear. The high court held that, the fact that the dismissal could be revised or reviewed under O XLVII, should not come in the way of exercising power under this section.[921] Likewise, interference on the ground of safeguarding the interests of the minor, as envisaged by section 31 of the Guardians and Wards Act, 1890 was held necessary, where the court had granted permission to the guardian to sell the minor's properties, without giving notice to the minor's other relations, or fixing the approximate price, or directing the sale to be by way of public auction.[922]

The Supreme Court has held, that where the high court has refused to answer a reference under section 66(1) of the Income Tax Act, 1922 (Now repealed by the Income Tax Act, 1961) on a default to appear by the assessee, the High Court does not become *functus officio* on passing such an order, and can restore the reference and hear it again on merits, if the assessee shows sufficient cause for his default. There is no provision in the Act preventing the high court from recalling its earlier order and hearing the reference again on merits. Such a course is necessary in order to prevent gross injustice.[923] The mere fact that there is no other remedy, would not attract the application of this section.[924]

The first case in which this section was considered by the Privy Council was *Sabitri v Savi*.[925] In that case, the High Court of Calcutta dismissed an appeal under O XLI, rule 10, which provides that, upon a failure to comply with an order for the security for costs, the court shall dismiss the appeal. On an appeal to the judicial committee, it was contended that the court had inherent powers under this section, to give the appellant an opportunity to make an application for leave to continue to appeal *in forma pauperis*. Referring to this contention, their Lordships stated:

> A further point is taken, that s 151 of the Code of Civil Procedure 1908, preserves the inherent powers of the court to make such orders as may be necessary for the ends of justice, and to this general saving section appeal is made to take the present case out of the operation of the orders and rules, if they are applicable to Letters Patent appeals. How far a mere general saving clause gives power in effect to refuse to apply an appropriate rule, made in the exercise of other powers of the court and having statutory force, is another question, but for present purposes it is enough to say that in the terms of the section the inherent powers saved are such as are used to secure the ends of justice.

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919. *Ganesh v Purushottam*, (1910) 34 Bom 135.
920. *Ranjan Sharma v Rambabu Vaishya*, AIR 2003 MP 186.
921. *Bajinath Prasad v Mahto*, AIR 1971 Pat 200.
922. *Harnam Singh v K Devi*, AIR 1971 HP 25.
923. *Jaipur Mineral Development Syndicate v CIT*, AIR 1977 SC 1348 : (1977) 1 SCC 508 : (1977) 2 SCR 460
924. *Anant v Mangal*, AIR 1926 Pat 27 : (1925) 4 Pat 704.
925. *Sabitri v Savi*, AIR 1921 PC 80 : 48 Cal 481 : (1921) 48 IA 76; *Kojo Pon v Atta Fua*, AIR 1927 PC 264 : (1928) 47 Cal LJ 328.

In the end, their Lordships came to the conclusion, on the basis of the material before them, that justice did not require that the appellant should be assisted in prosecuting the appeal before the high court, and they also confirmed the order of the high court. The Bombay High Court has stated that the section should be applied with great caution, and that a court cannot, under this section, restore an application under O XXI, rule 89, which had been dismissed for default of appearance.[926] However, where the ends of justice require it, the court has inherent powers to make such orders, as it may deem proper. Accordingly, the Mysore High Court granted an interim injunction, in the interests of justice, though the case did not strictly fall under O XXXIX.[927] The inherent powers of the court under section 151, CPC have been saved, and nothing prevents the court from receiving the documents in exercise of its inherent power, in the absence of any express prohibition to that effect in the CPC.[928]

In a case where the husband doubted the paternity of the child which was born after seven months of marriage, it was held by the Madhya Pradesh High Court that matrimonial ties are based on fundamental rights of trust and healthy regard for each other. As such DNA test of the child would lay to rest unnecessary doubt created in the mind of the husband.[929] While arriving at the above conclusion, the high court has quoted with approval a passage from the decision of the Supreme Court in *Banarsi Dass v Teeku Dutta*,[930] which is as follows:

> We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) test were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

In a suit relating to alleged encroachment of cremation ground by defendant, the evidence on behalf of the plaintiff had closed, but he wanted to recall a witness for marking documents which were not traceable earlier. It was held that the documents were public documents and were of vital importance. Therefore, permission to recall witness and get the documents marked should be granted under O XXVIII, rule 17 read with section 151 of the Code.[931]

In a suit for delivery of immoveable property, the suit was dismissed by the trial court and the high court. However, the Supreme Court allowed the appeal reversing the judgment and decree of the trial court and the high court. In the meantime the judgment-debtors had taken over the possession. When an execution petition was filed by the decree-holder, it was objected to by the judgment-debtor on the ground that instead of execution petition, an application under section 144 of the Code should have been filed. It was held by the Andhra Pradesh High Court that a conjoint reading of sections 51, 144, 151 and O XXI, rule 35 of CPC and Article 142

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926. *Bhagwan v Dattatrya*, AIR 1926 Bom 377 : (1926) 50 Bom 547.
927. *Shivarava v Sharanappa*, AIR 1965 Mys 34; *Ambarain v Durga Das*, AIR 1965 J&K 35; *Manohar Lal Chopra v Seth Hira Lal*, AIR 1962 SC 527; *Narayanrao Marotiram v WamanNathuji*, AIR 1974 Bom 319; *Madan v Revti Prasad*, AIR 1977 Raj 191.
928. *Gullipalli Naram Naidu v Kinthali Kumaraswami*, AIR 2003 AP 481.
929. *Savitabai v Chandrachan Dubey*, AIR 2006 MP 135 : 2006 (2) MPHT 519.
930. *Banarsi Dass v Teeku Dutta*, (2005) 4 SCC 449 : (2005) 4 JT 627.
931. *S Rathinaswami v S Bhanumathi*, AIR 2006 Mad 221 : 2006 (1) CTC 491.

of the Constitution of India makes it abundantly clear that the decree of a court can be enforced by filing appropriate application under any of those provisions and in a way, it is the option of the person who succeeded in the litigation.[932]

Application for dispensing with the filing of certified copy of judgment and decree can be allowed only where the law permits such dispensation or in the interest of justice, provided there is urgency involved in the matter. Thus, where the appeal was presented with an application for condonation of delay, that too, an inordinate delay of 1189 days, it was held not to be a fit case where the prayer to dispense with the requirement can be allowed in exercise of inherent powers.[933]

There is no express bar in filing an application for withdrawal of the withdrawal application. Accordingly, an application for withdrawal of the withdrawal application would be maintainable.[934]

Therefore, withdrawal of application to withdraw suit in terms of O XXIII rule 1 of CPC can be permitted by the court under its inherent powers. However, such power is only to be used with a view to secure the ends of justice. In a case, the application for withdrawal of suit was supported by joint statements of the plaintiff and his counsel and an affidavit of the plaintiff in which the plaintiff had deposed that his signature on the plaint was forged. Subsequently, an application for withdrawal of the earlier application was filed on the ground that the application and joint statements were wrongly submitted by counsel. It was observed that the subsequent application exposes the counsel to a probe in his professional conduct and the plaintiff to legal action. It was held by Supreme Court that the order allowing subsequent application and the order rejecting revision against it was unjustified. Speaking for the court, J Chelameshwar, J opined as under:[935]

> 22. As rightly contended by the learned counsel for the appellant, the issue is not whether the trial court has the power to permit the withdrawal of the applications filed earlier to the withdrawal of the suit but whether such power was exercised in accordance with law and for the purpose for which it is meant. The mere existence of a power does not justify the exercise of the power. In the context of the powers of the judicial bodies, all powers are required to be exercised with a view to secure ends of justice.
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> 23. In neither of the abovementioned two cases this Court had an occasion to examine whether the inherent power of the civil court under Section 151 CPC was properly exercised. In the first case, the suit had been withdrawn by the plaintiffs and the plaintiffs subsequently sought to go back upon the withdrawal and reopen the suits on the ground that they were induced to withdraw the suit on a misrepresentation made by the defendants. In the second case, the plaintiff "changed his mind" after filing the application for withdrawal of the suit and sought to withdraw the said application even before a formal order permitting the withdrawal was passed by the Court. The argument in both the cases was that the trial court lacked the jurisdiction to permit the course of action undertaken by the plaintiffs. This Court only laid down the principle that Section 151 CPC recognises the existence of ample power in the civil court to permit the plaintiffs to pursue the course of action undertaken by them.

The court would also interfere, in the interests of justice, with an order, particularly an *ex parte* order, which has been issued through its mistake,[936] even *suo motu*.[937] However, the court

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932. *Pentakota Krishna Bhagwan v Alla*, AIR 2007 AP 208 : 2007 (3) Andh LT 103.
933. *Charminar Co-op Urban Bank Ltd v State Bank of Hyderabad*, AIR 2007 AP 339 : 2007 (4) Andh LT 337.
934. *Rajendra Prasad Gupta v Prakash Chandra Mishra*, (2011) 2 SCC 705.
935. *Rattan Bai v Ram Dass*, (2012) 3 SCC 248.
936. *UC Industries v KJFC Works*, AIR 1973 Bom 297 : 75 Bom LR 118.
937. *Devi Deayal Textile Co v Nand Lal*, AIR 1977 Del 7.

would not grant a relief under its inherent jurisdiction, if the same relief can be granted by another court, under an express provision of the Code.[938] When the trial court is satisfied, that the parties are not willing to proceed with the case, and want to delay the proceedings at any cost, then only it should exercise the discretion of not granting the adjournment.[939] The court may also close the evidence of the party, in the exercise of its discretion, where the party has been negligent in producing the evidence.[940]

Where a marriage under Hindu Marriage Act, 1955 was declared a nullity, the wife claimed return of gold and silver ornaments given to her by her parents at the time of marriage. The application claiming the said *stridhan* was filed under section 27 of the Act read with O VII, rule 7 and section 151 of the CPC. It was held that the application can be allowed under the inherent jurisdiction of the court in view of section 27 of the Act. It was further held that the Act adopts the Code so far as it is applicable in matrimonial proceedings under the Act.[941]

[s 151.17] Illustrations: When Inherent Powers Exercised

It has been held that, although the Code contains no express provisions on the matters hereinafter mentioned, the court has inherent powers—

(1) to consolidate suits and appeals,[942] including appeals to His Majesty in council;[943] even without the consent of the parties;[944]

(2) to postpone hearing of suits pending decision, of selected action;[945]

(3) to stay cross-suits on the ground of convenience;[946]

(4) to order joint trial of suits;[947]

(5) to ascertain whether the proper parties are before it;[948]

(6) to inquire whether a plaintiff is entitled to sue as an adult;[949]

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938. *Mansata Film Distribution v Sorab Modi*, AIR 1955 Bom 256 : (1955) Bom 499.
939. *Magan Lal v Chabi Lal*, AIR 1996 Raj 103.
940. *Kaushalya v State Bank of Bikaner and Jaipur*, AIR 1999 Raj 259.
941. *Manish Nema v Sandhya Nema*, AIR 2009 MP 108 : 2009 (2) MPHT 267 (DB)
942. *Re Maharaja v Venkatagiriv*, AIR 1930 Mad 376 (FB) : (1930) 53 Mad 248; *Kali Charan v Suraj Kumar*, (1913) 17 Cal WN 526; *Qazi v Mankumar*, AIR 1922 Pat 566 : (1922) 1 Pat 669; *Vengu Naidu v Deputy Collector*, (1918) 34 Mad LJ 279; *Kashi Prasad v Secretary of State*, (1902) 29 Cal 140; *Hukum Chand v Kamalanand*, (1906) 33 Cal 927; *Nanda Kishore v Ram Golam*, (1912) 40 Cal 955; *Ganesh Ramchandra v Gopal Lakshman*, AIR 1943 Bom 12 : (1943) Bom 104 : 44 Bom LR 819; *Philip v Bata Shoe & Co Ltd*, 1959 Ker LT 999 : 1959 Ker LT 1346; *Hansraj v Firm Hazarimal*, AIR 1959 Raj 1144; *Gupta v East Asiatic Co*, AIR 1960 All 184; *Jai Kishen v Bajramlal*, AIR 1961 Raj 1173; *Chitivalase Jute Mills v Jaypee Rawa Cement*, AIR 2004 SC 1687.
943. *Chaudhry Har Prasad v Brij Kishor Das*, (1918) 3 Pat LJ 446; contra *Mukunda Lal v Hasmat-un-nisa*, AIR 1937 All 105; *Asiha Begum v Kundan Jan*, AIR 1946 All 221 : AIR 1946 All 184.
944. *Hari Narain v Ram Asish*, AIR 1957 Pat 124; *Harishchandra v Kailas Chandra*, AIR 1975 Raj 14.
945. *Vithu v Narayana*, (1868) 5 Bom HC (AC) 30; *Hukum Chand v Kamalanand*, (1906) 33 Cal 927; *Amos v Chadwick*, (1877) 4 Chapter D 896 : (1879) 9 Chapter D 459; *Bennett v Lord Bury*, (1880) 5 CPC 339.
946. *Hukum Chand v Kamalanand*, (1906) 33 Cal 927, p 932; *Nanda Kishore v Ram Golam*, (1913) 40 Cal 955, pp 959–60; *Syed Abdul v Badaruddin*, AIR 1924 Cal 757 : (1923) 28 Cal WN 295; *Meckjee v Kasowjee*, (1879) 4 Cal LR 282.
947. *Kalicharan v Suryakumar*, 17 Cal WN 526; *Mohammad v Mankumar*, AIR 1922 Pat 566 : 1 Pat 669; *Suryanarayana v Venkatasubbiah*, AIR 1960 AP 75; *Mutivahuji v Kalindi Vahuj*, AIR 1994 Guj 42.
948. *Muhammad Hussain v Khusalo*, (1888) 10 All 223 (FB).
949. *Beni Ram Bhutt v Ram Lal*, (1886) 13 Cal 189.

(7) to entertain the application of a third person to be made a party;[950]

(8) to allow a defence *in forma pauperis*;[951]

(9) to decide one question and to reserve another for investigation, the Privy Council pointing out that, it did not require any provision of the Code, to authorise a Judge to do what, in this matter, was justice and was for the advantage of the parties;[952]

(10) to remand a case to which neither O XLI, rule 23, nor O XLI, rule 25, applies.[953] (See notes to O XLI, rule 23, "Remand in case of error, omission or irregularity", and notes to O XLII, rule 1, "Inherent power of high courts to remand in second appeal;")

(11) to stay the drawing up of the court's own orders, or to suspend their operation, if justice so requires;[954]

(12) to stay the proceedings in a lower court pending appeal, and to appoint a temporary guardian of a minor upon such stay;[955]

(13) to stay an execution, or operation of the order appealed from, so that the order which might be passed in appeal, might not be rendered infructuous;[956]

(14) to apply the principles of *res judicata*, to cases not falling within section 11 of the Code. See notes to section 11, "Section not exhaustive", and "Orders in Execution Proceedings", above;

(15) to add a party,[957] or to transpose parties,[958] or, where the appeal is filed against a dead person or persons, to allow the appellant to add legal representatives of the deceased, as parties in a proper case;[959]

(16) to bring the heirs on record, even if it is held that O I, rule 10 cannot be invoked;[960]

(17) to refuse permission to a co-plaintiff, to withdraw from a suit, when he does not ask for permission to institute a fresh suit on the same cause of action, or even impose terms upon him;[961]

(18) to punish summarily, by way of imprisonment, contempt of courts, committed by the publication of a libel out of the court;[962]

(19) to decide questions of jurisdiction, though, as a result of its inquiry, it may turn out, that the court has no jurisdiction over the suit;[963]

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950. *Oriential Bank v Chariol*, (1886) 12 Cal 642.
951. *Durga Churn v Nitto Kally*, (1880) 5 Cal 819.
952. *Maulvi Muhammad v Muhammad Abdul*, (1896) 24 IA 22 : 19 All 155.
953. *Manikchand v Jiwanlal*, AIR 1953 MB 16; *Narayan Vishwanath v Malappa Kasappa*, AIR 1956 Bom 246; *Kewalram v Mihilal Ram*, AIR 1960 All 655; *Brijnandan v Jadunandan Singh*, AIR 1960 Pat 41.
954. *Mst Brij Coomaree v Ramrick Das*, (1901) 5 Cal WN 781, 796.
955. *Punchanan v Dwarka*, (1905) 3 Cal LJ 29; *Hukum Chand v Kamalanand*, (1906) 33 Cal 927.
956. *State of Uttar Pradesh v Mukthar Singh*, AIR 1957 All 505 (wherein judges differed whether the court whose order is to be appealed against can itself stay it).
957. *Lakhmichand v Kacdhubhai*, (1911) 35 Bom 393; *Sri Mati Hemangini v Haridas*, (1918) 3 Pat LJ 409 (adding a respondent in an appeal).
958. *Surya Kanta v Tarak Nath*, AIR 1927 Cal 37 : (1927) 44 Cal LJ 243; *Saila Bala v Nirmala*, AIR 1958 SC 398 : (1958) SCR 1287 : 1958 SCJ 743.
959. *Alabhai v Bhura Bhaya*, AIR 1937 Bom 401 : (1937) Bom 602.
960. *Sriramula Ramachandram v Sriamula Bhoodamma*, AIR 1994 AP 79.
961. *Baiddyanath Nandhi v Shyam Sundar Nandi*, AIR 1943 Cal 427 : (1943) 1 Cal 205.
962. *Surendra Nath Banerjee v Chief Justice and Judges of the High Court of Bengal*, (1884) 10 Cal 109 : 10 IA 171; *Re Tushar Kanti Ghosh*, AIR 1935 Cal 419 : (1935) 39 Cal WN 770.
963. *Hurree Persad v Koonjo Behary*, (1962) Marsh 99.

(20) to stay proceedings, pursuant to its own order, in view of an intended appeal;[964]

(21) to rescind or modify an injunction order, granted under section 151 of the CPC;[965]

(22) to direct a party, who has applied for leave to appeal, to the King in Council, to pay the costs on the dismissal of his application;[966]

(23) to pass a conditional order, providing for the dismissal of the suit, in case the order is not complied with;[967]

(24) to take cognizance of questions, which cut at the root of the subject matter of controversy between the parties, eg, whether a deed of mortgage is attested, as required, by section 59 of the Transfer of Property Act, 1882;[968]

(25) to amend decrees and orders, in cases, not covered by section 152.[969] (See notes to section 152: "Inherent power to amend decrees and orders";)

(26) the court can, *suo motu* correct the arithmetical and clerical errors, in the nature of the proceedings;[970]

(27) to correct its own mistakes;[971]

(28) to correct an error due to laches or negligence of the officers of the court;[972]

(29) to amend the certificate of sale, and correct any incorrect description of the property;[973]

(30) to set aside an order, obtained by fraud practised upon the court, or where the court is misled by a party, or the court itself commits a mistake, which prejudices a party, who, is not to blame, e.g. when a pleader, not engaged by the defendant, consents to a decree, on behalf of the defendant;[974]

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964. *Re goods of Luchmi Narain*, (1901) 5 Cal WN 781; *Sarat Kumar v Official Assignee*, AIR 1931 Cal 79 : (1931) 34 Cal WN 631.
965. *Central Bank of India v Lakshmi Cotton Co*, AIR 1997 MP 37.
966. *Jogendra Chandra v Wazidunnissa Khatun*, (1907) 34 Cal 860.
967. *Hati Pratihari v Alekh*, (1954) Cutt 78 : AIR 1954 Ori 136.
968. *Shamu Patter v Abdul Kadir*, (1912) 35 Mad 607 : 39 IA 218.
969. *Mohabir v Chundra*, (1914) 19 Cal WN 1021; *Aziz Ullah v Collector of Shahjahanpur*, AIR 1932 All 587 : (1932) 54 All 800; *Sheodhar v Ramdeo*, AIR 1934 Pat 229 : (1934) 13 Pat 165; *Shyamal Bihari v Girish Narain*, AIR 1962 Pat 116; *Bhuyan Shyam Sundar v Nilakantha Das*, AIR 1956 Ori 165; *Manilal Gadiya v Mangilal*, AIR 1977 Mad 140; *Raj Kumar v UOI*, (1991) 2 SCC 247; *Vinod Kumar Singh v Banaras Hindu University*, (1988) 1 SCC 80.
970. *Vijaya Bank v S Bhatija*, AIR 1994 Kant 123 (DB); *National Rubber Works v Daisy Mantosh*, AIR 2003 Cal 284.
971. *Keshardeo v Radhakishen*, AIR 1953 SC 23 : (1953) SCR 136 : (1952) SCJ 633 : (1952) SCA 775; *Janakirama Iyer Pillai v PM Nilakanta Iyer*, AIR 1962 SC 633; *Biridi Chanda Mada v State of Orissa*, AIR 1958 Ori 159; *Jai Narain v Chedalal*, AIR 1960 All 385; *Levnan Bhagat v Brijnandav Prasad Singh*, AIR 1984 Pat 144.
972. *Ali Mondal v Golam Bari*, AIR 1955 Cal 526 : 59 Cal WN 513; *Manikyam v Narasimham*, AIR 1956 AP 108 : (1955) Andh WR 953.
973. *Sobla v Jethmal*, AIR 1961 Raj 191.
974. *Baldlabhdas v Sobhaji Keshari Singh*, AIR 1948 Mad 52 : (1947) Nag 344; *Benoy Krishna Mukhyee v Mohanlal Goenka*, AIR 1950 Cal 287; *Gajanand Sha v Dayanand Thakur*, AIR 1943 Pat 127 : (1943) 21 Pat 838; *Krishna Kumar v Jawad Singh*, AIR 1947 Ngp 236 : (1947) Nag 190; *Basangowda v Churchigirigowda*, (1910) 34 Bom 408; *Peary Choudhury v Sonoo Dass*, (1914) 19 Cal WN 419; *Shreemati Nath v Ram Rachpal*, AIR 1926 Oudh 315 : (1926)1 Luck 341; *Saiyed Muhammad v Ram Saroop*, (1929) 4 Luck 562 : (1929) Oudh 385 (FB); *Bankey Behari v Abdul Rahman*, (1932) 7 Luck 350 : (1932) Oudh 63; *Chacki Amma v Mamen*, (1955) Ker LT 459.

(31) the Supreme Court has held, that where a party applies to the court, for setting aside a consent decree, the court has inherent jurisdiction to do so, on the ground of lack of consent, but not on the ground of fraud;[975]

(32) to set aside a sale, brought about by fraud practised upon the court;[976]

(33) to set aside an order recording compromise obtained by fraud;[977]

(34) to restore a suit, which was dismissed for default, in cases not provided for by O IX, rule 9. See notes to O IX, rule 9;[978]

(35) to restore a suit, which was dismissed for not furnishing particulars;[979]

(36) to restore a civil revision petition which was dismissed for default;[980]

(37) to restore an application under O IX, rule 13, which had been dismissed for default;[981]

(38) to cause restoration of the suit rejected under O VII, rule 11;[982]

(39) to cause restitution to be made, on the reversal of decree.[983] See notes to section 144, "Inherent power to grant restitution;"

(40) to restrain, by injunction, a person, from proceeding with a suit in another court. (See notes to O XXIX, rule 1, "Powers of High Courts to restrain a party from proceeding with a suit pending in another court"); to restrain a decree-holder from executing the decree, though the case does not strictly fall under O XXXIX, rule 2;[984]

(41) to order restoration of possession, where the plaintiff is forcibly dispossessed in violation of an injunction granted;[985]

(42) to issue an injunction, in cases not falling under O XXXIX.[986] The decisions holding a contrary view are no longer valid;

(43) to pass appropriate orders, such that, a person who disobeys an injunction, does not retain any benefit which he had, owing to such disobedience;[987] to stay the suit to nullity, section 10 of the CPC.[988]

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975. *Dadu Dayal Mahasabha v Sukhdev Arya*, (1990) 1 SCC 189.
976. *Ishwar Mahton v Sitaram Kumar*, AIR 1954 Pat 450; *Mubarak Begam v Sushil Kumar*, AIR 1957 Raj 154 : (1957) ILR Raj 520.
977. *Bindeswari Prasad v Debendra Prasad*, AIR 1958 Pat 618.
978. *Khatizabai v Aktara Begum*, AIR 1950 Nag 194; *Subash Chandv Sarju Devi*, AIR 1960 All 569; *Lachi Tewari v Director of Land Records*, (1984) Supp SCC 431.
979. *Isub Miya v Vishnu*, AIR 1961 Bom 96.
980. *Gulam Ali v Vishwanath*, AIR 1962 MP 308.
981. *Madanlal v Tripura Modern Bank Ltd*, AIR 1953 Assam 539 : AIR 1954 Punj 468; *Nathuni Singh v Naipal Singh*, AIR 1958 Pat 107; *Kunj Behari v Chanchala Das*, AIR 1966 Ori 24; *Bisandayal & Sons v United Bank of India*, AIR 2004 Ori 40.
982. *CV Varghese v Devi Academy*, AIR 1999 Ker 185.
983. *Kaku Singh v Lal Sheoraj Bahadursingh*, AIR 1975 MP 85; *Priya Bratra Maity v State of West Bengal*, AIR 2000 Cal 32; *Kavita Trakan v Balsara Hygiene Product*, (1994) 5 SCC 380; *KN Krishnappa v TR Gopal Krishna Setty*, AIR 1997 Kant 152; *Dharam Narayan Barman v Upandra Natu Mandal*, AIR 1994 Cal 231; *Garuda Singh Majhi v Dhanna Bai*, AIR 1989 Ori 103.
984. *Surendra Singh v Lal Sheoraj Bahadursingh*, AIR 1975 MP 85.
985. *Kailash Chand Gupta v Rukum Singh Yadav*, AIR 1998 MP 310; *Surjeet Pal v Prabir*, AIR 1986 Cal 220.
986. *Manoharlal v Seth Hiralal*, AIR 1962 SC 527; *Sankara Pillai v Inez Rosario*, AIR 1971 Ker 27.
987. *State of Bihar v Usha Devi*, AIR 1956 Pat 455; *Magna v Rustam*, AIR 1961 Raj 957; *Hari Nandan v SN Pandita*, AIR 1975 All 48.
988. *National Institute of MH & NS v C Parameshwara*, AIR 2005 SC 242 : (2005) 2 SCC 256 : (2005) 104 FLR 369 : (2005) 2 Mah LJ 1 : (2005) 1 LLN 674.

(44) to hear a matter again, before the order passed by the court, at a previous hearing, is drawn up and sealed,[989] on the ground that the parties were not fully heard;[990]

(45) to set aside an order, dismissing an appeal for default, where the counsel and the parties, had no knowledge of the date of hearing;[991]

(46) to set aside an order, dismissing an application under section 4 of the Provincial Insolvency Act, 1920;[992]

(47) to order a stay of an execution, in view of an application by a judgment-debtor, to the judicial committee, for a special leave to appeal, to His Majesty in Council;[993] or to maintain *status quo* in an appropriate case, till the filing of an intended application for leave to appeal to His Majesty in Council;[994]

(48) to set aside an order of dismissal, made under O IX, rule 8, for non-appearance of the plaintiff, when the non-appearance was owing to the plaintiff's death, and the fact of the plaintiff's death was not brought to the notice of the court, thereby, dismissing the suit.[995] It was held by a Full Bench of the Patna High Court that, an order passed under O IX, rule 9, refusing to restore a suit, dismissed for default under rule 8, is open to appeal and the court, therefore, has no inherent jurisdiction under this section, to restore it;[996]

(49) to recall order permitting withdrawal of suit by way of application.[997]

(50) to set aside an order dismissing a suit for partition, after a preliminary decree had been passed therein;[998]

(51) to set aside an order, dismissing without an independent inquiry, an application asking for an inquiry under O XXXII, rule 15, as to the mental infirmity of a party to the suit;[999]

(52) to refuse to restore an execution, which was dismissed for default;[1000]

(53) to order delivery of the properties in execution, for a second time, when the first delivery was found to be unreal;[1001]

(54) to set aside an order dismissing an application under O XXI, rule 66, for non-appearance;[1002]

(55) to vacate an order obtained by fraud, as where an order is made recording the adjustment of a decree under O XXI, rule 2, and the adjustment has been brought about by fraud practised by one of the parties upon another;[1003]

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989. *Padmabati v Rasik Lal*, (1910) 37 Cal 259.
990. *Nelakanti v Summangi*, AIR 1934 Mad 506 : (1934) 57 Mad 84.
991. *Bhagwati Prasad v Ram Roop*, AIR 1962 All 622.
992. *Bishwanath v Mahadeo*, AIR 1964 Bom 40 : (1963) ILR Bom 59 : 65 Bom LR 432.
993. *Nanda Kishore v Ram Golam*, (1912) 40 Cal 955; *Sailendra Nath v Saroj Kumar*, AIR 1934 Cal 823 : (1934) 38 Cal WN 795; *Jiwan Ram v Commr for the Port of Calcutta*, AIR 1939 Cal 308.
994. *Ramendra Nath Roy v Bibhaati Devi*, AIR 1942 Cal 488 : (1942) 1 Cal 67.
995. *Debi Baksh v Habib Shah*, (1913) 35 All 331 : 40 IA 151.
996. *Doma Chowdary v Ram Naresh*, AIR 1959 Pat 121 : 37 Pat 1548; *Tulsiram v Sitaram*, AIR 1959 Cal 389 : 63 Cal WN 300.
997. *Jet Ply Wood Pvt Ltd v Madhukar Nowlakha*, AIR 2006 SC 1260 : (2006) 3 SCC 699.
998. *Bee Pathumma v Abdul Khadar*, AIR 1955 TC 714.
999. *Chatarbhuj v Harnandan*, AIR 1928 All 108 : (1928) 40 All 335.
1000. *Bahgwati Prasad v Collector of Etah*, AIR 1944 All 218 : (1944) ILR All 381.
1001. *Lekshmi Amma v Mammen Mammen*, AIR 1956 TC 87 : (1955) Ker LT 459.
1002. *Ram Kumar v Sitaram*, AIR 1961 Pat 277.
1003. *Paranjpe v Kanade*, (1882) 6 Bom 148; *Valakathala v Vayalil*, (1914) 27 Mad LJ 172.

(56) to grant police aid for the execution of a decree;[1004] or implementation of interim injunction order.[1005]

(57) to direct an auction-purchaser, where he has paid the purchase money and subsequently withdrawn it from the court, on the sale to him being set aside under O XXI, rule 91, to pay back the money the court on the sale being confirmed in appeal;[1006]

(58) to restore a suit, as was held by the Allahabad High Court,[1007] where the decree passed in the suit is set aside, on the ground that the minor against whom the suit was filed, was not properly represented by a guardian *ad litem*, and to proceed with the appointment of a fit and proper person as guardian *ad litem* of the minor defendant. However, according to the Madras High Court, the decree is a nullity, and the court has no inherent powers to restore the suit;[1008]

(59) to interfere, where its decree is being executed in a manner which manifestly varies from the purport and intent of the decree;[1009]

(60) to stay the execution of a decree obtained by *A* against *B*, pending, not only the decision of a suit by *B* against *A*, but also the decision of an appeal by *B* against *A*, from a decree passed against *B* in *B*'s suit;[1010] or to stay the execution of an award under the Arbitration Act, pending an appeal against the order, refusing to set it aside.[1011] (See O XXI, rule 29);

(61) to stay a suit brought by *A* against *B* in court *X*, in a case where, substantially, the whole cause of action arose at another place, and the material witnesses, and their books of account were at that place, if no injustice is caused to the plaintiff thereby, and if the defendant would be subjected to such injustice in defending the suit as would amount to vexation and oppression, to which he would not have been subjected if the suit were brought in another and an accessible court, where, substantially, the whole cause of action arose;[1012]

(62) to reconstruct its records, as, where they are lost by accident;[1013]

(63) to stay the criminal proceedings started under section 476 [now sections 340 (1), (2), (3) and section 343 (1) and 2 of the Code of Criminal Procedure, 1973], against a defendant, in a suit pending an appeal filed by the defendant, from the decree,[1014] but not, in general, to stay proceedings of the criminal court;[1015]

1004. *Gopi Krishna Maji v Judhistir Dey*, AIR 1995 Cal 263; *Ratnabai v Satwarao*, AIR 1995 Bom 61.
1005. *SK Yousuf v Shaik Madhar Saheb*, AIR 2003 AP 44. See also *Nirabai J Patil v Narayan D Patil*, AIR 2004 Bom 225.
1006. *Sukhdeo Dass v Rito Singh*, (1917) 2 Pat LJ 361.
1007. *Bhagwan v Param Sukh Das*, (1917) 39 All 8; *Kirpa v Babu Lal*, AIR 1924 All 225 : (1924) 45 All 606 : (1924) 45 All 606; *Talib Ali v Piarey Lal*, AIR 1930 All 644 : (1930) 52 All 924.
1008. *Arumuga v Periananjiappa*, AIR 1924 Mad 489 : (1924) 46 Mad LJ 348.
1009. *Kulada Prasad v Sadhu Charan*, (1918) 3 Pat LJ 435.
1010. *Sardarni v Rani Harnam*, (1910) Punj Rec No 82 p 239.
1011. *Mahomedalli v Dharamsey*, AIR 1931 Bom 384 : (1931) 55 Bom 801.
1012. *Bhagal Singh Bugga v Dewan Jagbir Sawhney*, AIR 1941 Cal 670 : (1941) 1 Cal 490; *Jethabhai v Amarchand*, AIR 1924 Bom 90 : (1923) 25 Bom LR 713.
1013. *Marakaruttu v Veeran*, AIR 1957 Mad 647 : (1923) 46 Mad 679; *Achutaramiah v Nagabushanam*, (1957) 2 Andh WR 280.
1014. *Harman Singh v Atri*, AIR 1925 Lah 323 : (1925) 7 Lah LJ 73.
1015. *State of Kerala v Forest Range Officier*, AIR 1960 Ker 148 : 1959 Ker LR 1090 : (1960) ILR Ker 20 : 1959 Ker LT 1036.

(64) to strike off the defence, and proceed *ex parte* where a suit is adjourned on the condition that, the defendant should pay the costs of the adjournment within a prescribed period, and he fails to do so;[1016]

(65) to review an order of dismissal of an application under O IX, rule 9;[1017]

(66) to review an order passed in a petition under Article 226 of the Constitution;[1018]

(67) to dismiss, in appeal, a suit on the ground that it is premature, even if the point was not taken in the lower court;[1019]

(68) to order refund of court fee, paid by inadvertence or by mistake,[1020] as also, excess court fee paid on a memorandum of appeal.[1021] Judicial opinion is divided on the question whether the refund of court fee can be ordered, under this section, apart from when it is a mistake. Some decisions hold that the court can order refund,[1022] while others hold that it cannot.[1023] Where a suit is transferred, under clause 13 of the Letters Patent, the plaintiff is not entitled to a refund of court fee, being the difference between the court fee payable, if the suit had been instituted in the high court, and the court fee was actually paid in the subordinate court;[1024]

(69) to stay a suit, even if it does not come within section 10 of the Code;[1025] as for instance, to stay a suit pending before it, pending decision of a selected action,[1026] and to stay proceedings in the execution of a decree passed in another suit;[1027]

(70) to hear objections again, to an execution application, after they have been dismissed for default;[1028]

1016. *East Indian Railway Co v Jit Mal*, AIR 1925 All 280 : (1925) 47 All 538; *Venkatacharyulu v Yesoba*, AIR 1932 Mad 263 : (1932) 61 Mad LJ 477.
1017. *Sarat Chandra v Bisweswar*, AIR 1927 Cal 534 : (1927) 54 Cal 405 : (1927) 54 Cal 405 : (1927) 54 Cal 405; *Surendra Nath v Jatindra Nath*, : AIR 1927 Cal 17 : (1928) 32 Cal WN 811.
1018. *Shivdeo v State of Punjab*, AIR 1963 SC 1909.
1019. *Muhammad v Abdullah*, AIR 1927 Oudh 455 : (1927) 2 Luck 731.
1020. *Ahmed Ibrahim v Govt of the Province of Bombay*, AIR 1943 Bom 50 : 44 Bom LR 912; *Re Munna Lal*, AIR 1930 All 471 : (1930) 52 All 546; *Chandradhari v Tippan*, (1918) 3 Pat LJ 452; *Jainandan Singh v Krishnandan Singh*, AIR 1952 Pat 260; *Sawaldas v Arati Cotton Mills Ltd*, AIR 1955 Bom 332 : 1955 Bom 540; *Ranchhodlal v Maneklal*, AIR 1953 Bom 436 : (1954) ILR Bom 165; *Punjab & Sind Bank v Ramji Das Khanna*, AIR 2002 Del 305 (DB).
1021. *Firm Tirath Ram & Sons v Free India General Insurance Co Ltd*, AIR 1961 P&H 79.
1022. *Chettiyar Firm v Ke Yin Gye*, AIR 1929 Rang 158 : (1929) 7 Rang 88; *Thammayya v Venkataramanamma*, AIR 1932 Mad 438 : (1932) 55 Mad 641; *Galstaun v Janaki Nath*, AIR 1934 Cal 615; *Ahmed Ibrahim v Govt of the Province of Bombay*, AIR 1943 Bom 25; *Kumund Nath v Govt Pleader*, AIR 1936 Cal 347 : (1936) 39 Cal WN 1074; *Vijayalakshmi v Shrinivas*, AIR 1934 Mad 84 : (1934) 57 Mad 542; *Arjuna Govinda v Amritha Keshiba*, AIR 1956 Ngp 281; *Abodh Govinda v Radha Rani*, 55 Cal WN 417 : (1952) ILR Cal 210; *Maya Sankar v Gowrishankar*, AIR 1954 Cal 256 : 58 Cal WN 463.
1023. *Chockalingam v Maung Tin*, AIR 1936 Bom 208 (FB) : (1936) 14 Rang 173; *Indu Bhushan v Secretary of State*, AIR 1935 Cal 707 : (1935) 40 Cal WN 309; *Karfule Ltd v AD Varghese*, AIR 1953 Bom 73 : (1953) ILR Bom 170; *Tarachand v Radhakrishna Sugar Mills*, AIR 1955 Cal 52 : 58 Cal WN 87; *Discount Bank of India v AN Mishra*, AIR 1955 P&H 165; *Re Sarojini Devi*, AIR 1960 AP 34 : (1959) ILR AP 618 : (1959) 1 Andh WR 389.
1024. *Tara Chand v State of West Bengal*, 55 Cal WN 550.
1025. *Laxmi Bank Ltd v Harikishan*, AIR 1948 Ngp 297 : (1948) ILR Nag 403; *Kandu Mal v Tilak Ram*, AIR 1929 Lah 12 : (1928) 10 Lah LJ 470.
1026. *Atulbala Dasi v Nimpawa Dosi*, AIR 1951 Cal 561; *Radhe Shyam v Kashinath*, AIR 1960 MP 169.
1027. *Raghaviah v Lakshminarayana*, AIR 1955 AP 4; *Bhame Amma v Venkappa*, AIR 1961 Ker 178.
1028. *Akhoy Kumar v Krishna*, AIR 1932 Cal 569 : (1932) 36 Cal WN 367.

(71) to set aside a sale, held in a manner which contravenes a direction of the court;[1029] to undo any steps taken in the execution, in contravention of a stay order, of which, the court had no knowledge, when such steps were directed by it;[1030]

(72) to review an interlocutory order made in chambers;[1031]

(73) to review an interlocutory order relating to the service of summons or the production of evidence;[1032]

(74) to set aside an interlocutory order, made by consent, which is not a final order or judgment;[1033]

(75) apart from clause 15 of the Letters Patent, to hear an appeal in a matter affecting an award of the court;[1034]

(76) to stay the execution of a final decree, pending an appeal, from the preliminary decree;[1035]

(77) to modify a scheme prepared, by itself, under section 92;[1036]

(78) to recall and cancel its invalid order,[1037] or orders which cause injustice;[1038]

(79) to set aside an order which in execution, directing the delivery of the possession of properties, in contravention of the provisions of the Rent Control Order;[1039]

(80) to restore an application in the execution proceedings, which has been dismissed for default, notwithstanding the fact that, the applicant has another remedy open;[1040]

(81) to set aside a court sale on the ground of the minority of the purchaser;[1041]

(82) to order security for costs in a revision application, in an appropriate case;[1042]

(83) to allow a claim to set off in execution even in a case which does not strictly come under O XXI, rule 19, of the Code;[1043]

1029. *Govinda v Velu Marugayyua*, AIR 1933 Mad 399 : (1933) 64 Mad LJ 586; *Mul Raj v Bura Mal*, AIR 1931 Lah 344 : (1931) 12 Lah 602; *Medatunnissa v Sewak Ram*, AIR 1933 Pat 161 : (1933) 12 Pat 77.
1030. *Mul Raj v Murti Raghunathji Maharaj*, AIR 1967 SC 1386 : (1967) 3 SCR 84.
1031. *Yusuf v Abdullabhoy No 1*, AIR 1930 Bom 294 : (1931) 55 Bom 368.
1032. *Naganath v Khandaba Balaba Misal*, AIR 1961 Mys 101.
1033. *Yusuf v Abdullabhoy No 2*, AIR 1930 Bom 362 : (1931) 55 Bom 372.
1034. *Jalbhai v Jerbai*, AIR 1931 Bom 193 : (1931) 55 Bom 145.
1035. *Janki Das v Sheo Prasad*, AIR 1932 All 238 : (1932) 54 All 344.
1036. *Gangaram Govind v KR Vinchurkar*, AIR 1948 Bom 146 : (1947) Bom 466 : 49 Bom LR 757; *Ram Nath v Goverdhan*, AIR 1936 All 97 : (1936) 58 All 538.
1037. *Champa Dei v Asa Dei*, AIR 1938 All 8 : (1938) All 71.
1038. *Sitaram v Kedarnath*, AIR 1957 All 825.
1039. *Patankar v Sastry*, AIR 1961 SC 272 : (1961) SCR 591 : (1961) 1 SCJ 221.
1040. *Raja Bajrang Bhadur Singh v Thakur Suraj Narain*, AIR 1945 Oudh 201 : (1945) 20 Luck 317; *Mst Semabai v Ganpatrao*, AIR 1944 Nag 59 : (1944) Nag 451; *Acharji Bibi v Swami Shesh Sahai*, AIR 1939 Lah 223; *Sailendra v Shillong Co-op Town Bank Ltd*, AIR 1952 Assam 127 : (1952) ILR Assam 206; *Mst Ram Dulari v Udai Bhan*, AIR 1954 All 98; *Surendra v Mohini*, AIR 1954 Cal 73 : 57 Cal WN 488; *Pratap Singh v Ambadas*, AIR 1955 Nag 297; *Khemchand v Niranjanlal* 1953 Raj 267 : AIR 1954 Raj 15; *Gauri Kumari v Krishna Prasad*, AIR 1957 Pat 575 : 36 Pat 323; *Nemichand v Umedmal*, AIR 1962 Raj 107; *Anundya v Suraj Prasad*, AIR 1963 Pat 59; contra *Bagavathy Prasad v Collector of Etah*, AIR 1944 All 218 : (1944) ILR All 381; *Narayana v Muthu*, AIR 1926 Mad 980 : 50 Mad 67; *Abdul Salam v Lourdusami*, (1962) 1 Mad LJ 319; *Bimla Devi v AC Mallick*, AIR 1975 Cal 80 (FB).
1041. *Ram Prakash v Peoples' Bank*, AIR 1937 Lah 72.
1042. *Hiralal v Monghibai*, AIR 1938 Bom 510 : (1938) Bom 743.
1043. *Bank of Dacca v Gour Gopal Saha*, AIR 1936 Cal 409; *Krishna Chandra v Pabna Dhanabhandar Co*, AIR 1935 Cal 225 : (1935) 62 Cal 298.

(84) to restore an appeal dismissed for non-payment of deficit court fee;[1044]

(85) to restore an insolvency petition, dismissed on compromise, and order substitution of another creditor;[1045]

(86) to direct a plaint, filed on behalf of a firm, to be taken off the file, on the application of the majority of partners;[1046]

(87) to set aside an order of abatement in a partition suit, even though, such an application by the legal representatives is not maintainable;[1047]

(88) to restore a copy application dismissed for default;[1048]

(89) to stay the trial of a suit pending a foreign arbitration, section 34 of the Arbitration Act being inapplicable to it;[1049]

(90) to mould the relief in accordance with the law, as on the date of the decree;[1050]

(91) to grant reliefs on the basis of subsequent events,[1051] or subsequent legislation;[1052] or to admit evidence which comes into existence, subsequent to the date of the first hearing;[1053]

(92) to direct the parties to deposit additional fee to a commissioner;[1054]

(93) to stay the proceedings under the Hindu Marriage Act, for non-compliance with an order passed under section 24;[1055]

(94) to pass appropriate interim orders, to preserve status quo, pending an intended appeal to the Privy Council,[1056] and now, to the Supreme Court;[1057]

(95) to set aside an *ex parte* order, passed on a time-barred application, of which, no formal notice was given to the opposite party;[1058]

(96) to permit interrogatories, with a view to shorten the prolonged course of interlocutory proceedings;[1059]

1044. *Radhanath v Bachalal*, AIR 1955 Pat 370 : 34 AC 723; *Rajkishore v Pushraj*, AIR 1964 Ori 86.
1045. *Chandramouleswaran v Krishnaswami*, AIR 1953 Mad 993 : (1952) 2 Mad LJ 148.
1046. *House Ltd Agency v Paints and Lacquers Ltd*, AIR 1954 Cal 409.
1047. *Provat Chandra v Rabindra Nath*, AIR 1960 Cal 291.
1048. *Hari Prasad v Chief Conservator of Forests*, (1958) 2 Mad LJ 552.
1049. *Serajuddin & Co v Michael Golodetz*, AIR 1960 Cal 47 : 63 Cal WN 717.
1050. *Indermull Loniya v Subordinate Judge, Secunderabad*, (1957) 1 Andh WR 196 : 1957 Andh LT 445.
1051. *Ram Gobind v Ram Ranbijai*, AIR 1958 Pat 279 : 36 Pat 1231; *Dhirendra v Naresh*, AIR 1958 Cal 453 : 62 Cal WN 569; *Satischandra v State of West Bengal*, AIR 1960 Cal 278; *Khalil Sufi v Aziz Bhat*, AIR 1960 J&K 132; *Bhola Ram v Peari Devi*, AIR 1962 Pat 168; *Govind v Jairam*, AIR 1963 Mad 456; *Mangarao v Kishan Rao*, AIR 1956 AP 98; *KC Alexander v Nair Service Society*, AIR 1966 Ker 286.
1052. *Sarbo Gopain v Antalal*, AIR 1958 Pat 613; *Assistant Settlement Officer v Karunagiri Muthaiah*, AIR 1960 Mad 117 : 73 LW 16; *Nair Service Society v KC Alexander*, AIR 1968 SC 1165.
1053. *Lachhamandas v Deepchand*, AIR 1974 Raj 79.
1054. *Syamala Pictures v Siva Sarma*, AIR 1960 AP 387.
1055. *Bhuneshwar v Dropta Bai*, AIR 1963 MP 259; *Neeta Shreyas Joshi v Shreyas Siddharth Joshi*, AIR 1999 Guj 251.
1056. *Nanda Kishore v Ram Golan Sahu*, (1913) 40 Cal 955.
1057. *SP Jain v Kalinga Tubes Ltd*, AIR 1964 Ori 72; *Ramendra Narain v Bibhavati Devi*, AIR 1942 Cal 488 : (1942) 1 Cal 67; *Kalyan Singh v State of Uttar Pradesh*, AIR 1961 All 619 : (1961) ILR All 246; *Purnachand v Chamra Bariha*, AIR 1954 Ori 114; *Gurnam Singh v Association of Radha Swami*, AIR 1972 Raj 269.
1058. *Om Sarup v Gur Narain*, AIR 1965 P&H 367 : 67 Punj LR 634.
1059. *Ganga Devi v Krushna Prasad*, AIR 1967 Ori 19.

(97) to allow the amendment of an execution petition;[1060]

(98) to recall an order passed contrary to the terms of a statute or precedents;[1061]

(99) to restore a decree set aside without the knowledge of the dismissal of an appeal against it;[1062]

(100) to reinstate a legal practitioner, dismissed for misconduct, in view of satisfactory assurances of good behaviour;[1063]

(101) to pass an order of priority on an application, to the executing court, by the Income-tax officer, in respect of arrears of Income-tax.[1064]

(102) to recall an order or a decree passed under section 17 of the Arbitration Act, without serving a notice under section 17(2), or before the expiry of the time for application, for setting aside the award, or before the dismissal of such an application, where it is filed;[1065]

(103) to recall witnesses for cross-examination where the counsel could not be present during the examination, for reasons beyond his control;[1066]

(104) to hold a trial, or part of it, in camera, if satisfied, that the ends of justice required such a course;[1067]

(105) to permit an insurer to defend an action, where the insured neglects to do so;[1068]

(106) to enhance compensation, in exceptional cases, under the Motor Vehicles Act;[1069]

(107) to grant interim relief in the case of death due to negligence;[1070]

(108) to remove the obstruction with the help of police;[1071]

(109) to order demolition of structures, and the removal, the people, in cases, where it endangers public health and human life;[1072]

(110) to prohibit further, new construction, in an area which is not fit for human habitation;[1073]

(111) to grant interim maintenance under Hindu Adoptions and Maintenance Act;[1074]

(112) to exercise inherent powers even against a high functionary;[1075]

(113) however, an application for stay in an arbitration proceedings, under the inherent powers, has to justify the exercise of jurisdiction;[1076]

1060. *Kalipada v Mahalaxmi Bank Ltd*, AIR 1966 Cal 585.
1061. *Sriramulu v Board of Revenue*, AIR 1965 AP 395.
1062. *Kantilal v Chiba Bava*, AIR 1967 Bom 310 : 68 Bom LR 461.
1063. Re *Shri Inder Singh*, AIR 1968 P&H 328.
1064. *UOI v Mahadeo Prasad*, AIR 1966 Raj 152 : (1966) 16 Raj 33.
1065. *Sarajmull v Golden Fibre Products*, AIR 1969 Cal 381.
1066. *Chairman, Notified Area Council v KL Patra*, AIR 1974 Ori 17.
1067. *Naresh Sridhar v Maharashtra*, AIR 1967 SC 1 : (1966) 3 SCR 744.
1068. *Jupiter Ins Co v Mohd Malik*, AIR 1969 Raj 315.
1069. *Divisional Controller KSRTC v JD Sigamany*, AIR 1998 Kant 274.
1070. *RSEB v Jai Singh*, AIR 1997 Raj 141.
1071. *Mangi Lal v Ichku Devi*, AIR 1999 Raj 6.
1072. *Bayer (India) Ltd v State of Maharashtra*, AIR 1995 Bom 290.
1073. *Bayer (India) Ltd v State of Maharashtra*, AIR 1995 Bom 290.
1074. *Madhukar v Bhima*, AIR 1983 Bom 480. *Madhukar v Bhima*, AIR 1983 Bom 480.
1075. *Shivajirao v Mahesh Madhave Gosave*, AIR 1987 SC 294 : (1987) 1 SCC 227.
1076. *Ramji Dayawala & Sons v Invest Import*, (1981) 1 SCC 80.

(114) to grant an installment, in payment, to a bank, of its debts;[1077]

(115) to set aside the grant of an *ex parte* order, passed against a party, who had engaged three counsels (none of whom appeared);[1078]

(116) to exercise its inherent powers to set aside an *ex parte* order;[1079]

(117) to allow the withdrawal of a suit after the court had passed an order for the withdrawal of the suit;[1080]

(118) to mould the relief, by considering subsequent circumstances;[1081]

(119) to compel the production, by the secretary, of documents of co-operative society, at the instance of the President of the society;[1082]

(120) to, *suo motu*, restore an execution petition, which was dismissed in default, owing to the ignorance of fact;[1083]

(121) to ignore an inadvertent misdescription of proceedings as revision, instead of appeal.[1084]

(122) to direct refund of court fee by the revenue authorities, which the LPA found to be incompetent, in view of section 100A;[1085]

(123) to appoint receiver for execution of decree inspite of provision in section 51(d).[1086]

(124) to permit withdrawal of amount deposited in court with appropriate conditions.[1087]

(125) to condone delay of 698 days in refiling the appeal.[1088]

(126) to direct the plaintiff to furnish copy of document to defendant where the suit is based on document and furnishing of copy of the document is necessary or imperative in the interest of justice.[1089]

(127) to permit the defendant to file written statement beyond the period of 90 days, where the department files application invoking the inherent powers of the court seeking the relief as envisaged under O VIII, rule 1 of the Code labelling the application under section 151 of the Code.[1090]

(128) to direct recall of the order dismissing suit striking off defence due to non-payment of costs, as the provisions of O IX, rule 9 of the Code would not applicable.[1091]

1077. *Nrusingha Daran Baisakh v State Bank of India*, AIR 1988 Ori 132.
1078. *Lachi Tewari v Director of Land Records*, AIR 1984 SC 41 : (1984) Supp SCC 43.
1079. *Ramanath v Ganeshwar*, AIR 1986 Ori 26.
1080. *Rameshwar v State*, AIR 1986 Cal 192.
1081. *Sayeed Jaleel Zana v P Venketa Murlidhar*, AIR 1981 AP 328 (DB).
1082. *Harcharan Singh v State of Punjab*, AIR 1984 P&H 382.
1083. *Gopal Chandra Naskar v Hairyane Prova Moulick*, AIR 1981 Cal 338.
1084. *Gulam Mohd Kenu v Gulam Rasool Chacckoo*, AIR 1981 J&K 1.
1085. *Sakal Engineering Works Bom v Rustum Jahangir Vakil Mills Ltd*, AIR 1981 Guj 110.
1086. *Shib Sankar Rudra v Jyotirmoy Rudra*, AIR 2004 Cal 54.
1087. *Leela Capital & Finance Ltd v Modiluft Ltd*, AIR 2003 Bom 111.
1088. *Karnail Singh v Piara Singh*, AIR 2002 P&H 376.
1089. *Sreenivas Basudev v Vineet Kumar Kothari*, AIR 2007 Gau 5 : 2007 (50) All Ind Cas 241.
1090. *Trend Setters v North Delhi Power Ltd*, AIR 2008 Del 107.
1091. *Piaro Devi v Anant Ram*, AIR 2008 HP 107 : (2008) 3 Shim LC 133.

[s 151.18] Illustrations: When Inherent Powers not Exercised

The court has no inherent jurisdiction:

(1) to restore a suit dismissed for default, on account of non- payment of court fee under O VII, rule 11;[1092]

(2) to return a plaint which is to be filed in a court with proper jurisdiction;[1093]

(3) to extend the time for deposit, under section 6 of the West Bengal Rent Control Act;[1094]

(4) to grant interim relief, which properly, ought to be granted, only by the decree, after the determination of the points in controversy;[1095]

(5) to grant interim maintenance, in suits for maintenance or partition, where the right of the plaintiff is denied;[1096]

(6) to compel the parties to submit to medical examination;[1097] or to blood tests;[1098]

(7) to reconsider or to review an order;[1099]

(8) to set aside an *ex parte* decree;[1100]

(9) to vary a consent decree conferring a limited estate, into one giving absolute estate;[1101]

(10) to expunge, or to delete passage, from the judgment of a high court, delivered by a single judge;[1102]

(11) to appoint a commissioner, to seize the books of account in the possession of the plaintiff;[1103]

(12) to refund the court fee, paid on an appeal, which was withdrawn before it was numbered;[1104]

(13) to refund the court fee, paid on a review application, when the review is granted on a ground other than a mistake of law or a fact;[1105]

1092. *Atul Krishna v Bhowrilal*, AIR 1952 Assam 149 : (1952) ILR Assam 262; *Muthammad Yunus v Sugra Begum*, AIR 1955 Hyd 156 : (1955) ILR Hyd 56; *Ram Das v Ganga Das*, AIR 1956 Pat 20; *Hubraj Singh v Rama Dasi*, AIR 1954 All 719.
1093. *Surinder Kumar Grover v Jayanta Roy*, AIR 1996 Cal 88.
1094. *Ramani Mohan v Jogesh Chandra*, AIR 1953 Cal 771 : 57 Cal WN 53 : (1953) ILR Cal 328.
1095. *Mahomed Abdul Rahman v Tajunnissa Begum*, AIR 1953 Mad 420 : (1953) ILR Mad 99 : (1952) 2 Mad LJ 846; *Basavarajappa v Basavannappa*, AIR 1959 Mys 152 : (1959) ILR Mys 105; *Jain v Jain*, AIR 1968 Cal 405 : 73 Cal WN 78.
1096. *Muniammal v Ranganatha*, AIR 1955 Mad 571 : 67 LW 1186.
1097. *Ranganathan v Lakshmi Achi*, AIR 1955 Mad 546 : (1955) 1 Mad LJ 260; *Sreeramamurti v Lakshmikasntam*, AIR 1955 AP 207 : 1955 Andh WR 13.
1098. *Venkateswarlu v Subbayya*, AIR 1951 Mad 910 : (1951) 1 Mad LJ 580 : (1952) ILR Mad 150; *Ramchandra v Shankar*, AIR 1968 Bom 388 : 70 Bom LR 222.
1099. *Kalika Prasad v Additional Commr*, AIR 1956 All 103; *Krishnan v Muthu Gounder*, AIR 1997 Mad 57.
1100. *Baikunth v Muhammad Sadique*, AIR 1958 Pat 27.
1101. *Venkataraman v Laxmi Ammal*, AIR 1961 Mad 32 : 1960 Mad 871 : (1960) 2 Mad LJ 157.
1102. Re *Veasntha Pai*, AIR 1960 Mad 73 : (1960) 1 Mad LJ 21 : (1959) ILR Mad 958 : 72 LW 585.
1103. *Padam Sen v State of Uttar Pradesh*, AIR 1961 SC 218 : (1961) 1 SCR 884 : (1961) 2 SCJ 79.
1104. *Ahmedmiya v Fatmabu Abubuker*, AIR 1961 Guj 31.
1105. *Dwarka Singh v Nagdeo Singh*, AIR 1961 Pat 390 (FB).

(14) to set aside a finding given by the revenue court, on a matter within its exclusive jurisdiction;[1106]

(15) to set aside a decree passed under O XXXVII, rule 2(2), on the failure of the defendant to comply with a conditional order;[1107]

(16) to remit an award, for engrossing it on stamp paper, and registering it;[1108]

(17) to restore an election petition which was dismissed for default;[1109]

(18) to bring on record, the legal representatives of a deceased respondent, after the appeal had abated;[1110]

(19) to strike out a defence;[1111]

(20) to vacate the decree passed by the lower court on an allegation that fraud had been practised by the opposite party, by suppressing certain documents;[1112]

(21) to grant an interest by way of restitution;[1113]

(22) to strike out, under this section, the defence on the ground of failure to pay arrears of rent, in view of the express provisions of section 11(4) of the Bombay Rents, Hotel & Lodging House Rates Control Act;[1114]

(23) to grant interim maintenance in a partition suit, before the plaintiff's rights in the family estate are determined;[1115]

(24) to impose a condition that the judgment-creditor will not enforce the decree against a surety, until he has exhausted his remedy against the principal debtor.[1116]

(25) to modify the decree, under section 152 by increasing the amount decreed, in terms of rupees, on the basis of a rise in the value of yen;[1117]

(26) to stay an earlier suit, pending disposal of a subsequent suit;[1118]

(27) to allow an amendment of a decree, on an application by the auction-purchaser;[1119]

(28) to amend the decree, and award additional benefits, in view of any subsequent amendment of the Act;[1120]

(29) to grant maintenance under section 25 of the Hindu Marriage Act, in the absence of proceedings under section 9 to 14 of the Act;[1121]

1106. *Babkuni v Mahadeo*, AIR 1962 All 624.
1107. *Ramaben Bhagubhai v Hindustan Electric Co Ltd*, AIR 1963 Bom 85.
1108. *Rikhabdass v Ballabhdas*, AIR 1962 SC 551.
1109. *Sambamurty v Gopasundra*, (1962) 2 Andh WR 21.
1110. *UOI v Ramcharan*, AIR 1964 SC 215.
1111. *Vemula Nagendram v Ramasubhas*, (1958) Andh LT 966; *Chendraiah v Seetharamiah*, AIR 1961 AP 102.
1112. *Ranganayakamma v Venkatachalapati*, AIR 1966 AP 91.
1113. *M Gadngaraju & Sons v State of Andhra Pradesh*, AIR 1965 AP 60.
1114. *Pirubhai v Trikamalal*, AIR 1969 Guj 285 : 10 Guj LR 747.
1115. *Ramji Gir v Elaichi Devi*, AIR 1974 Pat 280.
1116. *Bank of Bihar Ltd v Damodar Prasad*, AIR 1969 SC 297 : (1969) 1 SCR 620.
1117. *Chiyoda Corp v National Fertilizer Ltd*, (1995) Supp 3 SCC 455.
1118. *Tara Devi v Kamla Gupta*, AIR 1999 Pat 103 (DB).
1119. *Valisetti Tirumala Purnachandra Rao v Syndicate Bank*, AIR 1998 AP 245.
1120. *UOI v Rangila Ram*, (1995) 5 SCC 585.
1121. *Abbayolla M Subba Reddy v Padmamma*, AIR 1999 AP 19.

(30) to impose a condition for furnishing of security for court fees, after granting permission to sue as an indigent person;[1122]

(31) to grant permission to dig a borewell/tubewell in the backyard of the suit premises, in case of a premises falling under the Delhi Rent Control Act;[1123]

(32) to allow the filing of an un-registered award of an arbitrator under the Arbitration Act, 1940 (Now repealed by the Arbitration & Conciliation Act, 1996);[1124]

(33) to order the return of security to a party in the absence of any prayer in the plaint;[1125]

(34) however, the inherent powers cannot be invoked as a substitute for appeal, review or revision;[1126]

(35) to enable a party to evade the law of limitation;[1127]

(36) to grant interim maintenance, where the right of maintenance itself, is in dispute;[1128]

(37) to entertain an application for stay under section 151 of the CPC, independent of section 34 and 41 of the Arbitration Act, 1940 (Now repealed by the Arbitration & Conciliation Act, 1996);[1129]

(38) to grant an injunction in proceedings under the Provincial Small Causes Courts Act;[1130]

(39) to consolidate a suit based on different claims;[1131] or parties[1132]

(40) to direct a husband, alleged to be impotent, to undergo a second medical examination, more particularly, when the first examination declared him to be potent;[1133]

(41) to restore a plaint rejected for non-payment of deficit court fee, within the prescribed time;[1134]

(42) to challenge the validity of a compromise decree, on the ground that all the parties had not signed the compromise, or that the terms of compromise were vague or uncertain.[1135]

(43) to extend time of 15 days prescribed under O XXI rule 85 regarding deposit of amount of auction money.[1136]

(44) to decide rights of parties regarding disposal of property given at the time of marriage in a case pending before matrimonial court. The Jammu and Kashmir

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1122. *K Yashoda v State of Kerala*, AIR 1997 Ker 130.
1123. *Akesh Kumar Jain v Harmeet Singh Bakshi*, AIR 1999 Del 191.
1124. *Capt Ashok Kshyap v Sudha Vasisht*, (1987) 1 SCC 717.
1125. *Delhi Lotteries v Rajesh Aggarwal*, AIR 1998 Del 332.
1126. *Velayudhan Nair v Kerala Kurus*, AIR 1988 Ker 223.
1127. *Abdul Kader v Chimmnaswamy Padayachi*, AIR 1980 Mad 116.
1128. *Serwan Rani v Amar Nath*, AIR 1980 P&H 162.
1129. *State of Madhya Pradesh v Harsh Food Products Ltd*, AIR 1989 NOC 12 (MP).
1130. *Dhanraj v Chunni Bai*, AIR 1987 Bom 1.
1131. *Bharat Nidhi Ltd v Sheetal Prasad Jain*, AIR 1981 Del 251.
1132. *Ganeshdas v Ramesh Chandra*, AIR 2002 Raj 341.
1133. *Gulam Mohd Khan v Hassina*, AIR 1988 J&K 62.
1134. *Joy Deb Mukherjee v Williams Jacks & Co (I) Ltd*, AIR 1981 Cal 267; *Ganges River Transport v Reliance Jute Industry*, AIR 1982 Cal 290 (DB); *Mable v Dolres*, AIR 2001 Ker 353 (DB).
1135. *Satendra Nath Roy v Mohd Alim*, AIR 1983 Cal 180.
1136. *United Commercial Bank v Mani Ram*, AIR 2003 HP 63.

Civil Procedure Code, (1977) is applicable to proceedings under the Hindu Marriage Act, 1955 only for regulating the proceedings under the Act.[1137]

(45) to allow prayer for revocation of authority of the arbitrator or change of arbitrator appointed under Arbitration and Conciliation Act, 1996 on the ground that the arbitrator does not possess the technical qualification and there is also some aspersion and doubt about his integrity.[1138]

[s 151.19] Prevent Abuse of Process of the Court

In the Law Lexicon[1139] the words "abuse of process of court, are define as follows:

> Abuse of process of court, is the malicious and improper use of some regular legal proceedings to obtain an unfair advantage over an opponent. Nothing short of obvious fraud on the part of a debtor would render him liable to have his petition for insolvency dismissed on the ground of "abuse of process of court", *Tin Va v Subya*.[1140] The term is generally used in connection with action for using some process of the court maliciously to the injury of another person, Per Abdur Rahim J in *Thathunaik v Condu Reddi*.[1141] Abuse of process of court generally applies to proceeding wanting in *bona fides* and is frivolous, vexatious or oppressive. Making use of the process of court as a devise to help the jurisdiction of a civil court is an abuse of the process of the court. *Narappa Reddy v Chandramouli*,[1142] Contempt of Courts Act, 1952, s 3.

It is only in case where the proceedings are fraud, vexatious or want of *bona-fide*, malicious and improper, then it comes within the meaning of abuse of the process of the court.[1143]

A court has the inherent jurisdiction to stay any suit, which results in an abuse of the process of the court.[1144] (See notes to O XVI, rule 1, "Whether witness summons can be refused," and the undermentioned case.[1145])

Where the court is bound to grant an application, and has no discretion to refuse it, it has no power to dismiss it on "so treacherous a ground of decision, as an "abuse of the process of the court".[1146] Also, where a decree of the first appellate court has become final, by its not having been interfered with in the second appeal, an application for stay of its execution, cannot be granted on the ground, either of abuse of the process of court or in the interests of justice, merely because a review application against such a decree is pending.[1147]

In a decree for partition and separate possession, the decree-holder was also directed to file separate application for mesne profits. However, the decree-holder during the pendency of the appeal against the decree filed a separate suit for various reliefs and also moved an application for interim injunction for protection of his possession. It was held that filing of subsequent suit was an abuse of the process of law. If the decree-holder was in possession, he should have prayed for injunction in partition suit and could have filed an application in appeal to continue the interim relief.[1148]

1137. *Jai Krishan Pandita v Nana Kumari*, AIR 2008 J&K 21 : (2008) 2 JKJ 625.
1138. *State of Jharkhand v Rites Ltd*, AIR 2010 Jhar 86 : 2010 AIHC 2804.
1139. *Sri P Ramanatha Aiyer*, 2nd Edn (reprint), 2001, p 17.
1140. *Tin Va v Subya*, 6 LBR 146 (FB).
1141. *Thathunaik v Condu Reddi*, (1909) 1 Ind Cas 221 : 5 Mad LT 248.
1142. *Narappa Reddy v Chandramouli*, AIR 1967 AP 219.
1143. *MV Rajashekhar v MV Rajamma*, AIR 2004 Kant 280.
1144. *Hindustadn Assurance Ltd v Rail Mulraj*, (1914) 27 Mad LJ 645.
1145. *Shah Velchand v Lieut Liston*, (1914) 38 Bom 638.
1146. *Chhatrapat Singh v Kharag Singh*, (1917) 44 IA 11 : 44 Cal 535.
1147. *Satyesh Dutt v Munnoo Devi*, AIR 1968 All 362 : 1968 All LJ 733.
1148. *Ushaben Jitendra Kumar Dholariya v Bhagvanjibhai Chakubhai Ughad*, AIR 2006 Guj 18 : 2006 AIHC 1105.

Where a suit was only for declaration and perpetual injunction and no relief of possession was either claimed in the plaint or inserted through amendment, it was held that grant of additional reliefs of possession and mesne profits in the decree beyond the pleadings by invoking the provisions of section 151 of the Code was improper.[1149]

Where a special leave petition was filed by the State of Kerala, out of the way to help the landlord, who also happened to be the mother of the municipal corporator, and where no interest of the government was involved, the apex court imposed costs of Rs 10,000/- on the State of Kerala. This amount was to be collected from the salaries of all the persons responsible for taking the decision of filing a special leave petition, as they were responsible for the abuse of the process of the court.

[s 151.20] Appeal

An appeal, and a second appeal, have been held, by the Madras High Court to lie from an order made under section 151, in execution, or for restitution (see section 144 heading "Appeal");[1150] whereas, the Lahore and Patna High Courts have held that no appeal lies from an order made by a court in its inherent jurisdiction.[1151] An order mentioned in rule 3 of the Assam High Court (Jurisdiction over the district council courts) Order 1954, includes an order made under this section. Hence, an appeal against such an order can be to the high court.[1152] (As to whether an appeal lies from an order made under section 151 remanding an appeal, refer to note "Appeal from remand under the inherent power" under O XLI, rule 23). An order made in execution, though made under section 151, is no longer a decree, in view of the amendment of section 2(2), and hence, no appeal would henceforth lie.

It is well settled that when an application for maintenance is submitted in partition suit by the plaintiff, in view of the fact that the property is in possession of the defendant and the plaintiff is entitled to have maintenance out of the joint family property, such application is entertained and decided in view of the provisions of section 151 and not under O XXXIX or any other provision. Therefore, as against such order, the miscellaneous appeal is misconceived since O XLII is not applicable to such orders. Thus, the miscellaneous appeal as against the order of maintenance was not tenable in law.[1153]

[s 151.21] Review

The review/recall petition against the consent decree would not lie. If the evidence on record discloses that one party has played fraud on the other party, in such event the only remedy left over to the party against whom the fraud is played to file a separate suit for setting aside the decree obtained by fraud. But, if it is proved that one of the party has played fraud on the court, then only the review petition is maintainable under section 151, CPC.[1154]

1149. *Kanaklata v Subhadra*, AIR 2009 MP 268.
1150. *Govinda v Vela Murugayya*, AIR 1933 Mad 399 : (1933) 64 Mad LJ 586; *Akshia v Govindrajulu*, AIR 1924 Mad 778 : (1924) 47 Mad LJ 549; *Sheonandan v Gopal*, AIR 1943 Ngp 172 : (1943) Nag 699; *Mehman Bibi v Ramch*, AIR 1978 Cal 365.
1151. *Sukhdeo Das v Ritu Singh*, (1917) 2 Pat LJ 361; *Hari Singh v Bulaqi*, AIR 1930 Lah 20 : (1930) 11 Lah 93; *Banwari Lal v Shahzadi*, AIR 1933 Pat 139 : (1933) 12 Pat 202; *Sukh Nand*, AIR 1934 Lah 812.
1152. *Ka Krepe Sohlang v Ka Kmensi Nonghlawu*, AIR 1975 Gau 46.
1153. *Sandeep Ramesh More v Narayan Deoba More*, AIR 2006 Bom 253.
1154. *Anita v R Ram Bilas*, AIR 2003 AP 32 (DB).

Where order allowing amendment of plaint was absolutely clean and unambiguous, the court has no inherent power to review its decision duly pronounced.[1155]

[s 151.22] Revision

After carefully examining the various provisions of the CPC which provides or contemplates filing of an appeal, Supreme Court found no such provisions available to the appellant to file an appeal against the order made by the trial court on an application filed under section 151. Therefore, revision petition against the said order is maintainable.[1156] Order rejecting application under O XXVI, rule 9, read with section 151 for appointment of approved valuer to fix valuation of plaint and machinery is not revisable, in view of the provisions of section 115 and considering the fact that the impugned order rejecting the application has not disposed off the suit or proceeding.[1157]

There is neither any merit nor any scope for interference by high court, particularly when the very application under O XXI, rule 29 read with section 151, CPC was not tenable. There is no justification to interfere with the impugned order in the exercise of revisional jurisdiction under section 115.[1158]

The order even if not regular may not be interfered within revision if it is made irregularly or even improperly unless grave injustice or hardship would result from a failure to do so. Where the interference is likely to work, not in the interest of justice but rather against it, the high court will not interfere in its revisional jurisdiction.[1159]

[S 152] Amendment of judgments, decree or orders.—Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application any of the parties.

SYNOPSIS

[s 152.1]	Amendment of Decrees or Orders	1672	[s 152.10]	Accidental Slip	1680
[s 152.2]	Basis—Two Principles	1674	[s 152.11]	May	1682
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[s 152.4]	No Second Thought or Reconsideration	1675	[s 152.13]	Amendment and its Effect on Limitation	1683
[s 152.5]	Amendment of court proceedings	1676	[s 152.14]	Parties to the Application	1684
[s 152.6]	Amendment in the Order to Express Meaning of the Court	1677	[s 152.15]	By which Court Amendment Could be Made	1684
[s 152.7]	Inherent Power to Amend Decrees and Orders	1677	[s 152.16]	Revision	1686
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[s 152.9]	Accidental Omission	1679	[s 152.18]	Consent Decree	1688
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1155. *Kishore Motani v Om Prakash & Sons*, AIR 2003 Del 166.
1156. *Shipping Corp of India Ltd v Machado Brothers*, AIR 2004 SC 2093 : (2004) 11 SCC 168.
1157. *Ashok Paper Mills Ltd v Sanghi Textiles Ltd*, AIR 2004 Gau 162.
1158. *Ashok Shamanne v Nayeem Khan*, AIR 2003 Kant 390.
1159. *Ranjan Sharma v Rambabu Vaishya*, AIR 2003 MP 186.

[s 152.20]	Defect in Court Record as to Identity of Immovable Property ... 1689	[s 152.23]	Omission in Granting Interest..... 1691
[s 152.21]	Amendment Without Notice..... 1690	[s 152.24]	Proceedings Under the Land Acquisition Act 1691
[s 152.22]	Successive Applications for Amendment: *Res Judicata*..... 1690	[s 152.25]	Appeal..... 1692

[s 152.1] Amendment of Decrees or Orders

This section has been taken from O XXVIII, rule 11 of the Rules of the Supreme Court of England.

There are only two cases in which the court can amend or vary a decree or order after it is drawn up and signed, namely:

(i) under its inherent powers, when the decree or order does not correctly state what the court actually decided and intended; and

(ii) under this section, where there has been a clerical or arithmetical mistake, or an error arising from an accidental slip or omission.

The Supreme Court has reiterated that an application for modification or clarification of a final order passed by the Supreme Court is not contemplated by the provisions of the Supreme Court Rules, 1966[1160] which specifically provides the remedy of review and also lays down the procedure governing the consideration of a review application by the court.[1161]

Where the registrar of the Supreme Court had declined to register the application seeking modification/clarification of the judgment passed in *Collector v Cine Exhibitors*[1162] stating that it would amount to seeking review of the Judgment and order passed, an appeal was filed before the Supreme Court. It was held by the Supreme Court that the practice of overcoming the provision for review under O XL of the Rules by filing an application for re-hearing/ modification/ clarification has to be deprecated. It was further held that a party cannot be permitted to circumvent or by-pass the circulation procedure and indirectly obtain a hearing in the open court and "what cannot be done directly, cannot be permitted to be done indirectly".[1163]

Section 206 of the Code of 1882 made no reference to errors in judgments and under that section, it was held that if the decree was in conformity with the judgment, the court has no power to vary or amend the decree,[1164] even if the judgment was erroneous in law.[1165] But this section allows clerical or arithmetical mistakes in judgments to be corrected. The question then arises whether, if the decree agrees with the judgment, but the error has arisen at an earlier stage of the transaction in a deed in which the property has been incorrectly described, can the mistake be corrected under this section? In some cases, it has been held that the section

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1160. Now Supreme Court Rules, 2013.
1161. *Satya Jain (Dead) v Anis Ahmed Rushdie (Dead)*, (2013) 8 SCC 147 : JT 2012 (12) SC 30.
1162. *Collector v Cine Exhibitors*, AIR 2012 SC 1239 : (2012) 4 SCC 441 : 2012 (2) SCR 932.
1163. *Cine Exhibition Pvt Ltd v Collector*, AIR 2013 SC 3669 : (2013) 2 SCC 698 : 2013 (1) SCR 130 : JT 2013 (1) SC 494 : 2013 (1) Scale 317.
1164. *Parameshraya v Seshagirappa*, (1889) 22 Mad 361; *Shahab Din v Siraj-ud-din*, (1913) PR 47, p 185.
1165. *Lakho v Salman*, (1898) 20 All 337.

applies.[1166] In other cases, it has been held that the section does not apply.[1167] In one case, it was said that the applicant might apply for amendment of the plaint, before the decree had been executed and then apply for amendment of the judgment and decree to correspond with the amended plaint.[1168] In some cases, the amendment was allowed under the inherent power to make corrections necessary for the ends of justice.[1169] In a case where there was a misdescription of the name of the defendant in the plaint, judgment and decree, it was held that the decree could be corrected under O I, rule 10(2), read with section 151.[1170] Where, in a suit based on a deed, the description of the properties in the plaint followed, that in the deed and the decree was in accordance with the plaint and an application for amendment was made on the allegation that there had been a mistake in the description of the property agreed to be dealt with, it was held that the court could order an amendment, if there was an accidental slip or mistake but not if there was a dispute as to the identity of the property.[1171] This is so, because power under this section is not confined to correct only mistakes in the drafting of decrees. It extends even to correct mistakes or errors in the plaint and even in a document, on the strength of which the plaint was prepared and filed.[1172] It has also been held that where there is a mistake, it is sufficient to amend the decree without amending the pleadings or documents to which the mistake is traceable.[1173] A consent decree can ordinarily be corrected with consent of the parties thereto, if the correction is a substantial one. However, if the correction is of a clerical error committed by a mutual mistake of the parties in preparing their compromise petition there is no reason why such correction cannot be made under this section.[1174]

The Punjab and Haryana High Court has held that correction in judgment can also be made if the error has occurred due to mistake in pleadings. However, for rectifying the mistake in the judgment it is not necessary to first amend the pleadings.[1175]

The power of rectification of clerical, arithmetical errors, or accidental slips, does not empower the court to have a second thought over the matter, and to find that a better order or decree could, or should, be passed. There should not be a reconsideration of the merits of the matter to come to a conclusion that it would have been better, and in the fitness of things, to have passed an order, is as sought to be passed on rectification. On a second thought, the court may find that it may have committed a mistake in passing an order in certain terms, but every such mistake does not permit its rectification in the exercise of the court's inherent powers, as

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1166. *Satyanarayana v Purnaya*, AIR 1931 Mad 260 : (1931) 61 Mad LJ 805; *Ram Chandra v Jamna Prasad*, AIR 1935 Oudh 92 : (1934) 10 Luck 496; *Ranga Rao v Seth Balaksonlal*, (1941) 1 Mad 940 : (1941) 2 Mad LJ 452; *Shahzad Khan v Sheo Kumar*, AIR (1957) All 133 : 1957 All LJ 691; *N Venkayya v N Satyanarayana*, AIR 1959 Ker 386 : (1959) Ker LJ 111 : (1959) Ker LT 165.
1167. *Harihar v Maheshwari*, AIR 1925 Pat 47 : (1924) 3 Pat 654; *Shujaatmad v Govind*, AIR 1934 All 100; *Chandra v Billam Kanwar*, AIR 1953 Raj 914.
1168. *Latchayya v Seethamma*, AIR 1932 Mad 275 : (1930) 62 Mad LJ 350.
1169. *Aziz Ullah v Collector of Shahjahanpur*, AIR 1932 All 587 : (1932) 554 All 800; *Shiam Lal v Moona Kuar*, AIR 1934 Oudh 352 : (1934) 8 Luck 734; *Suraj Din v Ram Prasad*, AIR 1937 Oudh 144 : (1937) 12 Luck 167; *Krishnayya v Meghraj*, AIR 1940 Bom 10 : (1939) ILR Bom 708; *Dwarka Prasad v Rang Behari Lal*, AIR 1934 Lah 29.
1170. *Bharmal v Bai v Vishnubai*, AIR 1933 Bom 200 : (1933) 35 Bom LR 200.
1171. *Bela Debi v Bon Behary*, AIR 1952 Cal 86 : 88 Cal LJ 40.
1172. *Vimalamba v Ratnamma*, AIR 1966 AP 26.
1173. *Bela Devi v Bon Dehary*, AIR 1952 Cal 86 : 88 Cal LJ 40; *Shahzad Khan v Pt Sheo Kumar*, AIR 1957 All 133.
1174. *Perraju v Venkamma*, AIR 1971 AP 74.
1175. *Meena Kumari v General Public*, AIR 2007 P&H 51 : 2007 (4) Civil Court C 165.

contained under section 152 of the CPC. It is to be confined to something that was initially intended, but was left out or added, against such intention.[1176]

A revision petition was filed against the order of the learned *Munsiff* dismissing the execution on the ground that it was perverse and misconceived. The Hon'ble High Court of Jammu and Kashmir held that wherein it was held that the Executing Court can correct the decree under section 152 CPC so as to make the decree executable. It was further observed that a decree of a competent court should not, as far as practicable, be allowed to be defeated on accord of accidental slip or emotions. Since the decree became final because the Judgment Debtor did not challenge it, the Executing Court had a duty to correct the decree under section 152 of CPC so that it didn't give rise to any disputes.[1177]

[s 152.2] Basis—Two Principles

Section 152 is based on two principles, namely, that the act of the court should not prejudice any party and that the courts have the duty to see that records are true and present the correct state of affairs. An arithmetical mistake is a mistake in calculation, while a clerical mistake is a mistake of writing or typing error from an accidental slip or omission or an error due to careless mistake or omission, made unintentionally and unknowingly also. A matter, requiring elaborate arguments or evidence on question of facts or law, for its discovery, cannot be categorised as an error arising out of accidental slip or omission in order to bring it within the scope of section 152. Where the court considered a legal provision and came to a wrong conclusion, consciously thinking that conclusion to be correct and passed a wrong decree, it is evidently not an error arising from any accidental slip or omission, but a mistake consciously committed therefore, cannot be corrected under section 152. The only remedy open to the party aggrieved, in such a case would be to appeal.[1178]

The basis of the provision under section 152 of the CPC is founded on the maxim *actus curiae neminem gravabit*, i.e., an act of court shall prejudice no man. The maxim "is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law", said Cresswell J in *Freeman v Tranah*[1179] An unintentional mistake of the court which may prejudice the cause of any party must and alone could be rectified. In *Master Construction Co Pvt Ltd v State of Orissa*[1180] it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the court liable to be corrected. To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the court which may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as to, in effect, pass an effective judicial order after the judgment in the case.[1181]

1176. *Jayalakshmi Coelho v Oswald Joseph Coelho*, (2001) 2 LRI 109.
1177. *Suram Singh v Lal Chand*, CR No 26 of 2018.
1178. *Velayudhan Nair v Kerala KY Kuries Pvt Ltd, Trichur*, AIR 1988 Ker 223.
1179. *Freeman v Tranah*, 12 CB 406.
1180. *Master Construction Co Pvt Ltd v State of Orissa*, AIR 1966 SC 1047.
1181. *UPSRTC v Imtiaz Hussain*, AIR 2006 SC 649 : (2006) 1 SCC 380; See also *State of Punjab v Darshan Singh*, AIR 2003 SC 4179 : (2004) 1 SCC 328; *Jagdish Chand Gupta v Rajinder Parshad*, AIR 2002 P&H 251.

The maxim of equity, namely, *actus curiae neminem gravabit* (an act of court shall prejudice no man), shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, *lex non cogit ad impossibilia* (the law does not compel a man to do what he cannot possibly perform). The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by the Supreme Court in *Raj Kumar Dey v Tarapada Dey*,[1182] *Gursharan Singh v New Delhi Municipal Committee*[1183] and *Mohammod Gazi v State of Madhya Pradesh*.[1184]

Section 152 of the CPC is based on a laudable principle that an act of the court shall prejudice no party and that the courts have a duty to see that their records are true and represent the correct state of affairs. It is well settled that the power of the court under section 152 of the CPC is not restricted to correction of errors in decree drawn up by ministerial staff only, rather it can be exercised even to correct the judgments pronounced and signed by the court.[1185]

[s 152.3] Procedural Laws

It cannot be overlooked that the procedural laws are primarily meant to do justice between the parties. If there are mistakes which are capable of being rectified and they answer the description of the mistakes under section 152 of the CPC, the court should invariably rectify the mistakes and do justice between the parties.[1186]

[s 152.4] No Second Thought or Reconsideration

As a matter of fact such inherent powers would generally be available to all courts and authorities irrespective of the fact whether the provisions contained under section 152 may or may not strictly apply to any particular proceeding. In a matter where it is clear that something which the court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake, it would only advance the ends of justice to enable the court to rectify such mistake. But before exercise of such power the court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise, that is to say while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the court but unintentionally the same does mention in the order or the judgment or something which was intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed. There should not be reconsideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be

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1182. *Raj Kumar Dey v Tarapada Dey*, AIR 1987 SC 2195 : (1987) 4 SCC 398.
1183. *Gursharan Singh v New Delhi Municipal Committee*, AIR 1996 SCW 749 : (1996) 2 SCC 459.
1184. *Mohammod Gazi v State of Madhya Pradesh*, AIR SCW 1326 : (2000) 4 SCC 342 2000; See also *UPSRTC v Imtiaz Hussain*, AIR 2006 SC 649 : (2006) 1 SCC 380.
1185. *Sampuran Singh v Nandu*, AIR 2004 P&H 239.
1186. *Sampuran Singh v Nandu*, AIR 2004 P&H 239.

passed on rectification. On a second thought, the court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of the court's inherent powers as contained under section 152. It is to be confined to something initially intended but left out or added against such intention.[1187]

In a case under the UP Industrial Disputes Act, 1947, the Supreme Court held that the principles applicable to section 152 of the CPC are clearly applicable to section 6(6) of the UP Act of 1947 which provides for correction of any clerical or arithmetical error. The provision cannot be invoked to modify, alter or add to terms of original order or decree so as to, in effect, pass an effective judicial order after judgment in the case. Therefore, the Labour Court was not justified in modifying the award as was originally made.[1188]

Explaining the ambit of section 152, Arijit Pasayat, J speaking for the Bench in the above case, observed as follows:

> The exercise of this power contemplates the correction of mistakes by the Court of its own ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very Court or the tribunal cannot, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor any subject to the conditions or limitations provided therein. The powers under section 152 of the Code are neither to be equated with the power of nor can be said to be akin to review or even said to clothe the Court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirely or any portion or part of it. The correcting contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be correct which goes to the merits of the case is beyond the scope of Section 152 ...[1189]

The Supreme Court has held that the powers under section 152 cannot be equated with the power of review and cannot be said to be akin to review. section 152 can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in judgments or accidental omissions. To decide whether the court acted within the purview of section 152, one has to check what were the pleadings of the parties, what was the decree passed, and what corrections were made in it.[1190]

[s 152.5] Amendment of court proceedings

If the party has pleaded that stand taken by the party before the court was wrongly recorded in the judgment, the only course open to the appellant was to move the high court in line with what has been said in *State of Maharashtra v Ramdas Shrinivas Nayak*[1191] In *Bhavnagar University v Palitana Sugar Mill Pvt Ltd*,[1192] the view in the aforesaid case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in the court have been wrongly

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1187. *Jayalakshmi Coelho v Oswald Joseph Coelho*, AIR 2001 SC 1084 : (2001) 4 SCC 181.
1188. *UPSRTC v Imtiaz Hussain*, AIR 2006 SC 649 : (2006) 1 SCC 380.
1189. *UPSRTC v Intiaz Hussain*, AIR 2006 SC 649, para 7 at p 650 : (2006) 1 SCC 380.
1190. *Srihari v Syed Maqdoom Shah*, (2015) 1 SCC 607.
1191. *State of Maharashtra v Ramdas Shrinivas Nayak*, AIR 1982 SC 1249 : (1982) 2 SCC 463 : (1982) Cr LJ 1581.
1192. *Bhavnagar University v Palitana Sugar Mill Pvt Ltd*, AIR 2002 SCW 4939.

recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before Supreme Court to the contrary.[1193]

[s 152.6] Amendment in the Order to Express Meaning of the Court

A reading of the judgment of the high court shows that in its opinion the plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding in the suit. section 152 enables the court to vary its judgment so as to give effect to its meaning and intention. Power of the court to amend its orders so as to carry out the intention and express the meaning of the court at the time when the order was made was upheld by Bowen, LJ in re *Swire; Mellor v Swire*,[1194] subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice, Lindley, LJ observed that if the order of the court, though drawn up, did not express the order as intended to be made then "there is no such magic in passing and entering an order as to deprive the court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal".

In such a situation, the order of the trial court drawing up the decree was set aside by the Supreme Court and the parties were allowed liberty of moving the high court under section 152 seeking appropriate rectification in the judgment of the high court so as to clearly specify the extent and manner of reliefs to which in the opinion of the high court, the successful party was found entitled consistently with the intention expressed in the judgment. Once the operative part of the judgment is rectified there would be no difficulty in drawing up a decree by the high court itself in conformity with the operative part of the judgment.[1195]

[s 152.7] Inherent Power to Amend Decrees and Orders

Every court has an inherent power to vary or amend its own decree or order so as to carry out its own meaning. In so doing, it does nothing but exercise a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up;[1196] it only insists that the decree drawn up in the office of the court should correctly express the judgment given by the court.[1197] The basis of this power is the principle that no party should suffer any detriment on account of a mistake or an error committed by the adjudicating authority.[1198] "It would be perfectly shocking if the court could not rectify an error which is really the error of its own minister";[1199] Lord Penzance said in *Lawrie v Lees*.[1200] Furthermore, it was observed:

1193. *Shankar K Mandal v State of Bihar*, AIR 2003 SC 4043 : (2003) 9 SCC 519.
1194. *Mellor v Swire*, (1885) 30 Chapter D 239.
1195. *Lakshmi Ram Bhuyan v Hari Prasad Bhuyan*, AIR 2003 SC 351 : (2003) 1 SCC 197.
1196. *Mellor v Swire*, (1885) 30 Chapter D 239, 246.
1197. *Re St Nazaire Co*, (1879) 12 Chapter D 88; *Preston Banking Co v Allsup*, (1895) 1 Chapter D 141; *Namdeo v Narayan*, AIR 1971 Bom 121 : (1970) Mah LJ 797; *Bishnu Charan Das v Dhani Biswal*, AIR 1977 Ori 68.
1198. *Tulsipur Sugar Co v State of Uttar Pradesh*, AIR 1970 SC 70 : (1970) 1 SCR 220.
1199. *Mellor v Swire*, (1885) 30 Chapter D 239, 247.
1200. *Lawrie v Lees*, (1881) 7 App Cas 19, pp 34, 35.

> I cannot doubt that under the original powers of the court independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court, to *vary them in such a way as to carry out its own meaning*, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.

In *Hatton v Harris*[1201] Lord Watson said:

> When an error of that kind has been committed, it is always within the competence of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce.

A decree has been defined in section 2 as the formal expression of an adjudication which completely determines the rights of the parties with regard to the matters in controversy in a suit. Order XX, rule 6 provides that a decree shall be in conformity with the judgment. Where a decree is at variance with the judgment, the court has power to set right the decree and to bring it into conformity with the judgment.[1202] If judgment and decree shows some typographical errors and these are not legal errors which can modify judgment so as to require review of judgment and decree the court has inherent power under sections 151 and 152 to correct such errors or mistakes which crept in through inadvertence and which were only clerical in nature.[1203] This is so even where the decree has been executed and satisfied, provided, of course, neither an innocent third party has acquired any right under the erroneous decree nor any principle of equity is offended. Where the decree is fully satisfied the court may be *functus officio* as regards execution but not as regards the power of correction.[1204]

ILLUSTRATIONS

(i) *A* sues *B* for Rs 5000 and interest. The judgment is for Rs 4000 without more. The decree is drawn up in accordance with the judgment. *A*, then applies to amend the decree by adding an order for payment of interest. The application must be refused, for, the decree is not at variance with the judgment. If *A* is aggrieved by the decree, the proper course for him is to apply for a review of judgment or to appeal from the decree.[1205]

(ii) *A* and *B* enter into an agreement for partition of certain properties. *B* fails to convey to *A*, the properties of *A*'s share. *A* sues *B* for specific performance of the agreement and a decree is passed declaring only that "*A* is entitled to specific performance of the agreement." The usual form is to declare that "the agreement ought to be specifically performed, and the court does order and decree that the same be specifically performed (ie, both, by *A* and *B*)." The decree may be amended so as to put it in the usual form. *Karim Mahomed v Rajooma*. In a case, the amendment was necessary, for the decree as drawn up did not contain any direction to *A* to convey to *B* the properties of *B*'s share, but declared only that *A* was entitled to specific performance.[1206]

(iii) *A* sues *B* and *C* for Rs 5000. The judgment awards Rs 5000 to *A* "as prayed" (ie, as against *B* and *C*). The decree is drawn up so as to render the amount payable by *B* alone. The decree may be amended and brought into conformity with the judgment.[1207]

1201. *Hatton v Harris*, (1892) Cal 547, 560.
1202. *Karin Mahomed v Rajooma*, (1888) 12 Bom 174; *Irappa v Bhimappa*, (1902) 4 Bom LR 909; *Brijiratan v Jaynarain*, (1910) 37 Cal 649; *Harmange Singh v Ram Gopal*, (1914) 20 Cal LJ 18; *Chandra Kumar v Sudhansu*, AIR 1924 Cal 895 (partition) : (1924) 28 WN 873; *Pydel v Chathappan*, (1891) 14 Mad 150.
1203. *National Rubber Works v Daisy Mantosh*, AIR 2003 Cal 284.
1204. *Sankaran Nair v P Namboodiripad*, AIR 1970 Ker 57 : (1969) 2 Ker 37 : (1969) Ker LR 1044.
1205. *Hasan v Sheo Prasad*, (1893) 15 All 121; *Abdul v Chunia*, (1886) All 377.
1206. *Karim Mahomed v Rajooma*, (1888) 12 Bom 174.
1207. *Chathappan v Pydel*, (1892) 15 Mad 403; *Pherozsha v Sun Mills Ltd*, (1898) 22 Bom 370.

[s 152.8] Application for Amendment not a Continuation of the Suit

An amendment petition is not a continuation of the suit or proceedings in which it is made but an independent proceeding governed by the law then in force.[1208]

[s 152.9] Accidental Omission

This section enables the court to correct errors arising from an accidental omission.[1209] Thus, where directions as to costs were inadvertently omitted,[1210] or where the directions as to mesne profits were accidentally omitted,[1211] the decree was set right by adding the directions. Where an omission to provide for costs is due to an accidental slip, it has been held that the only remedy open to the party is to move for amendment and not appeal.[1212] Further, no court can grant a relief which is not claimed and the act of a court shall prejudice no man, hence, where the decree grants more amount than claimed in the suit, the same can be rectified by an application under section 152.[1213] Similarly, where the date from which payment ordered to be made were to run was inadvertently omitted; the decree was perfected by adding the date.[1214] Where a mortgage decree did not specify the mortgaged properties, the omission could be rectified under this section.[1215] Likewise, an omission to calculate the actual area of land of which the decree directed possession or its erroneous calculation can be rectified under this section.[1216] So also, an omission in a decree for redemption to provide for interest from the date fixed for redemption.[1217] There was omission by the trial judge to fix the time for depositing money under a pre-emption decree. Application for rectification was made, but rejected. It was held that the trial court was wrong in not exercising its undoubted jurisdiction under section 152 of the CPC. In this case, both the appeals filed were still pending in the court of the Additional District Judge. It was directed that the first appellate court shall fix a date for depositing the pre-emption amount by the petitioner and necessary rectification shall also be made in the decree awarded by the trial court in this respect.[1218] Where a decree for specific performance omitted to give a direction for possession being given of the properties, it was held that this omission can be made good under this section.[1219] When the decree did not contain the order contemplated by O XX, rule 12, clause 1(i), it could be inserted by an amendment under this section.[1220] When the defendant company went into liquidation, pending the suit, but consequential amendments had not been carried out in the decrees, it was held that that could be done on an application under this section.[1221] But where the objection was that the

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1208. *Ganpat Rai Hiralal v Aggarwal Chamber of Commerce*, AIR 1952 SC 409 : (1953) SCR 752 : 1952 SCJ 564 : 1953 SCA 1.
1209. *Ram Chand v Chhajju Ram*, AIR 1929 Lah 317 : (1929) 11 Lah LJ 37.
1210. *Re Rudd* (1887) WN 251; *Re Roper* (1890) 45 Chapter D 126; *Chessum & Sons v Gordon*, (1901) 1 KB 694.
1211. *Puttu Lal v Sripal Singh*, AIR 1937 Pat 191 : (1937) 12 Luck 759.
1212. *Madanlal v Kishanlal*, AIR 1953 Raj 187.
1213. *Vijaya Bank v S Bhatija*, AIR 1994 Kant 123.
1214. *E v E*, (1903) p 88.
1215. *Banka Behari v United Bank of India*, AIR 1957 Tri 50.
1216. *Gurudial Kaur v Pritam Singh*, AIR 1966 P&H 212 : 67 Punj LR 1972.
1217. *Devidas Khushal Rao v Yeotmal Central Bank Ltd*, AIR 1965 Ngp 239 : (1956) ILR Nag 535.
1218. *Madan Lal v Khushi Ram*, AIR 1988 Raj 190.
1219. *Ramanna v Sriramulu*, AIR 1958 AP 768 : (1958) 2 WR 304 : (1958) ILR AP 553.
1220. *Dwarka Prasad v Jahuri Sah*, AIR 1963 Pat 158.
1221. *Tarak Dasi v Batta Krishna Roy*, AIR 1964 Cal 42 : 67 Cal WN 601.

court omitted to consider the Fourth Amendment of the Constitution, it was held that it did not fall within this section.[1222]

Sections 151–53 do not authorise the correction of a judgment, alleged to be wrong on the merits. The proper remedy in such cases is appeal.[1223] In a Patna case, one plaintiff died during the pendency of the suit. Application for substitution of heir was made and noticed by the court. However, through inadvertence, no formal order was passed. It was held that the mistake in the decree (under the old name) could be corrected under sections 151 and 152.[1224] There was omission by the trial judge to fix the time for depositing money under a pre-emption decree. Application for rectification was made, but rejected. It was held that the trial court was wrong in not exercising its undoubted jurisdiction under section 152 of the CPC. In this case, both the appeals filed were still pending in the court of the Additional District Judge. It was directed that the first appellate court shall fix a date for depositing the pre-emption amount by the petitioner and necessary rectification shall also be made in the decree awarded by the trial court. in this respect.[1225]

The power under section 152 is confined only to the kind of mistakes, errors, slips or omissions mentioned therein. If the decree or order is sought to be varied in any other manner, it can be done only by review under O XLVII or appeal.[1226]

[s 152.10] Accidental Slip

The court has power under this section to correct accidental slips.[1227] The expression "accidental" means, any happening by chance or unexpectedly taking place, not according to the usual course of things, unintentional, something unforeseen and unexpected and casual. Further an effect is said to be accidental when the act by which it is caused is not done with intention of causing it and when its occurrence, as a consequence of such act, is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it. Therefore, the expression "accidental" cannot be equated to the expression "negligence" or "willful negligence" on the part of a party.[1228] The test to determine whether the slip or omission is accidental or not, can be gathered from the intention of the judge in preparing the judgment or order. If on a cursory reading of the judgment, one find that the grant of a specific relief is writ large, the omission thereof in the decree sheet would obviously be an accidental omission falling within the four corners of section 152.[1229] An error in the sense of mistaken identity of a property and not a mere misdescription thereof, is not an accidental slip and cannot be corrected under this section.[1230] The test is "Does the decree as drafted represent the intentions of the Judge?"[1231] The word "accidental" qualifies omission also, so that the section can only be resorted to rectify omissions which are accidental.[1232] Where the trial judge omitted to fix the time for depositing the money, and an application is made for rectification, he cannot reject the application on the ground of want

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1222. *S Barrow v State of Uttar Pradesh*, AIR 1958 All 154.
1223. *Emani Venkata Subba Rao v K Nagabhushanam*, AIR 1984 AP 352.
1224. *Rajeshwar Singh v Lakhrajo Kunwar*, AIR 1984 Pat 354.
1225. *Madan Lal v Khushi Ram*, AIR 1988 Raj 190.
1226. *Laj Kaur v Shanti Devi*, AIR 2006 Raj 115 : 2006 (1) Raj LW 562 (Jaipur Bench).
1227. *Hukum Singh v Surajpal*, AIR 1929 All 337 : (1929) 51 All 672.
1228. *State Bank of Hydrabad v B Rangaswamy*, AIR 2004 AP 91.
1229. *Sampuran Singh v Nandu*, AIR 2004 P&H 239.
1230. *KP Rangaiah v KK Krishnaiah*, AIR 1974 AP 201 : (1973) 2 Andh WR 253.
1231. *Tarsem v Sm Jagindro*, AIR 1959 P&H 88 : (1958) ILR Punj 1173 : 60 Punj LR 185.
1232. *Gulab Bai v Ram Pratap*, AIR 1973 Raj 307.

of jurisdiction.[1233] This section cannot be used to correct an omission which is intentional, however, erroneous. Thus, where the court failed to give a direction in terms of section 36, clause 2(e) of the Bengal Money Lenders Act, 1946, and it could not be said that it was not conscious of the consequences of the omission; the decree could not be amended under this section.[1234] Where a title suit and an appeal therefrom were dismissed with costs and costs were determined on the valuation of the suit, given by the plaintiff himself, the court refused to exercise its power of correction as the mistake was not an accidental slip or omission.[1235] But every mistake made by a court cannot be assumed to be on account of accidental slip.[1236] The court can exercise the power even in cases where the mistake could be corrected in appeal for the object of the section is to provide a speedy and inexpensive relief,[1237] and when a court erroneously dismissed an execution application as time barred, omitting to notice that the last day of presentation was a Sunday, the court had power to readmit the application.[1238] A *bona fide* error as to the amount of interest due to the defendant may be corrected under this section.[1239] In a case where the pre-emption decree through an accidental slip set out the pre-emption amount as Rs 16,770 instead of Rs 16,730 and execution thereof was dismissed on the ground that full pre-emption amount was not paid, the court held that the remedy of the plaintiff was by way of an application under this section and not an appeal against dismissal of execution.[1240] Where a decree passed by a single judge of the high court contained a patent error of including interest on future salary and that error was not pointed out by counsel to the Division Bench in appeal, the high court held that such an error could be corrected later on, under this section and not in review.[1241] Similarly, an error as to pleader's fee can be amended under this section.[1242] But where the judgment had fixed the pleader's fee and that was incorporated in the decree, the court cannot, thereafter, amend it on the ground that the amount fixed is wrong.[1243] An omission to provide for mesne profits in a decree in a title suit is not an error which can be corrected under this section.[1244] And so also, an error as to the period for which an injunction is to continue.[1245] It is not an accidental slip or error, merely because two of the three guarantors are exonerated from the suit liability while the third one, who remained *ex parte* was not.[1246] Where, in a suit for redemption, the plaintiff asked for possession n of item 2 but the decree mentioned by mistake item 1, it could be corrected under this section.[1247] Where, as a result of a clerical or arithmetic mistake in the plaint, the same mistake has crept in the decree, such mistake can be rectified even after a final decree has been

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1233. *Mohanlal v Khushi Ram*, AIR 1988 Raj 307.
1234. *Krishna Mohan v Nripendra Nath*, AIR 1952 Cal 577 : 56 Cal WN 531.
1235. *Ranbir v Parwati Devi*, AIR 1969 Pat 336.
1236. *Jangali Singh v Ramjag Singh*, AIR 1944 All 198 : (1944) ILR All 588.
1237. *Jamwanti v Chetan Das*, AIR 1933 Oudh 291 : (1933) 8 Luck 93; *Khandesh Lakshmi Vilas v Graduate Coal*, AIR 1935 Bom 75 : (1935) 59 Bom 158.
1238. *Jamwanti v Chetan Das*, AIR 1933 Oudh 291.
1239. *Barker v Purvis*, (1886) 56 LT 131.
1240. *Balwant Singh v Jagdish Singh*, AIR 1971 P&H 474.
1241. *UOI v Sudhir Kumar Ray*, AIR 1975 Ori 64.
1242. *Puttu Lal v Sahu*, AIR 1938 Oudh 7.
1243. *Abdul Razack Sahib v Abdul Hameed*, (1950) 2 Mad LJ 282; *Hanumantha v Ananthiah*, AIR 1953 Mys 106.
1244. *Debeswar Sarma v Uttam Chandra*, AIR 1968 Assam & Nag 66; *Umesh Chandra Karan v Shail Kumari Devi*, AIR 2007 Pat 10 : 2006 (3) Pat LJR 553.
1245. *Shipwright v Clements*, (1890) 38 WR (Eng) 746.
1246. *SMA Haq v MSJ Corp*, AIR 1973 AP 39 : (1973) 2 Andh WR 253.
1247. *Muniyappa v Hanumantha*, AIR 1953 Mys 43.

passed.[1248] Misdescription of a property in a decree where its identity is not in dispute can be corrected under this section.[1249]

Suit was filed for injunction against the defendants in representative capacity, for restraining them from trespassing upon the management of a private temple belonging to the plaintiff. Judgment and decree did not specify that it was against the defendants in their representative capacity (owing to a clerical mistake). Amendment of the decree was sought, without seeking amendment of the judgment. It was held that even if the judgment did not specify that the suit was decreed against the defendants in a representative capacity, the effect of O I, rule 8(6) would be, that it was binding on all persons for whose benefit the suit was defended. The omission arising from clerical mistake could be corrected under section 152. Further, the pendency of appeal would not, in any way, disentitle the trial court to amend the decree to make it in conformity with the judgment.[1250]

[s 152.11] May

As to this word, the High Court of Calcutta said:

> The word "may" in the section does not make it discretionary with the court to order the correction but merely enlarges the power of the court by providing that such correction can be done *at any time*, or, in other words, the section simply emphasises that no lapse of time would disentitle the court to make the correction.[1251]

According to the Gauhati High Court, if the court finds an error of the type mentioned in section 152, it is the imperative duty of the court to correct the error forthwith.[1252] The correct view, it is submitted, is the one taken by the High Court of Allahabad, and the Chief Court of Oudh, namely, that under this section, "there is no right in any party, to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the court and the discretion has to be exercised in view of the peculiar facts of each case".[1253] Even if all the conditions laid down in this section are satisfied, the court may not order correction in some cases.[1254] In later cases, the Calcutta High Court has adopted this view, for, it refused to allow an amendment when the applicant had been guilty of laches and delay.[1255] Again, Rankin, CJ said that in dealing with applications for amendment, courts should bear in mind that under Article 182 of the Limitation Act, [now Article 136 of the Act of 1963], the amendment has the consequence of extending time for execution.[1256]

[s 152.12] At Any Time

There is no dispute as to the fact that there is no prescribed period of limitation for filing an application under section 152.[1257]

1248. *KP Rangaiah v KK Krishnaiah*, AIR 1974 AP 201.
1249. *Ganesh v Sri Ram Lalaji Maharaj*, AIR 1973 All 116 : 1972 All WR 878.
1250. *Soman v Apputty*, AIR 1988 Ker 212.
1251. *Chandra Kumar v Sudhansu*, AIR 1924 Cal 895 : (1924) 28 Cal WN 873, 875.
1252. *Assam Tea Corp Ltd v Narayan Singh*, AIR 1981 Gau 41.
1253. *Kishori v Chhanga*, AIR 1925 All 187 : (1925) 47 All 44, p 49; *Pitam Lal v Balwant Singh*, AIR 1925 All 556 : (1925) 23 All LJ 518, p 519; *Munshi Raghubir v Rajeshwari Devi*, AIR 1933 Oudh 466; *Ala Baksha v Durga Baksha*, AIR 1933 Oudh 529.
1254. *Sankaran Nair v P Namboodiripad*, AIR 1970 Ker 57.
1255. *Mukerjee v Amuddin*, AIR 1932 Cal 563 : (1932) 36 Cal WN 97; but see *Bishnu Charan v Dhani Biswal*, AIR 1977 Ori 68.
1256. *Nagendranath v Ambicacharan*, AIR 1929 Cal 676 : (1929) 57 All 549.
1257. *State Bank of Hyderabad v B Rangaswamy*, AIR 2004 AP 91.

A decree may be amended under this section at any time, although the time for appealing from the decree has expired.[1258] There is no limitation for an application to amend the decree.[1259] Under the corresponding English rule, an error in a decree was in one case amended after 39 years,[1260] and in other cases after 19 years[1261] and 10 years.[1262] In a Bombay case, an application was made to the high court to rectify a decree in the exercise of its inherent powers, 10 years after the date of the decree, and the application was allowed.[1263] In a Patna case, the decree was rectified under this section even after execution[1264] and even after sale had been confirmed and sale certificate issued and satisfaction of the decree entered.[1265] But no amendment should be allowed by the court either under this section or in the exercise of its inherent powers, if it is inexpedient or inequitable to do so, as where third parties have acquired rights under the erroneous decree without the knowledge of the circumstances which would tend to show that the decree was erroneous[1266] or when it would be inequitable and unfair to one of the parties.[1267] Further, laches may, in the particular circumstances of a case, disentitle a party to relief under this section.[1268]

Application for rectifying a mistake in a judgment delivered 13 years ago would not be entertained, particularly where the file had been destroyed. The alleged mistake in this case related to reproduction of the statement of the applicant in the judgment.[1269]

However, section 152 does not fix any time limit for incorporating amendment in the judgment and decree. Clerical and arithmetical error in the judgment and decree can be corrected even during the pendency of appeal.[1270]

[s 152.13] Amendment and its Effect on Limitation

If limitation is under the residuary Article 181 [now Article 137 of the Act of 1963], the amendment of the decree does not furnish a fresh starting point for limitation.[1271] If Article

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1258. *Barker v Purvis*, (1886) 56 LT 131; *Pydel v Chathappan*, (1891) 14 Mad 150 (amendment after court sale); *Shyamal Bihari v Girish Narain*, AIR 1962 Pat 116.
1259. *Shivappa v Shivpanch*, (1887) 11 Bom 284; *Kalu v Latu*, (1893) 21 Cal 259; *Jivraji v Pragji*, (1887) 10 Mad 51; Darbo Kesho (1887) 9 All 364; *Midnapore Zemindary Co v Abdul Zalil*, AIR 1933 Cal 627 : (1933) 60 Cal 681; *Devi Roop v Smt Devku*, AIR 2006 H P 114.
1260. *Hatton v Harris*, AIR 1992 Cal 547.
1261. *Shipwright v Clements*, (1890) 38 WR (Eng) 746.
1262. *State Bank of Hyderabad v B Rangaswamy*, AIR 2004 AP 91.
1263. *Karim Mahomed v Rajooma*, (1888) 12 Bom 174.
1264. *Khudu Mahto v Bhim Mahto*, AIR 1950 Pat 183; *Jai Narain v Chhedalal*, AIR 1960 All 385.
1265. *Becha Lal v Hem Singh*, AIR 1953 All 485 : 1953 All LJ 355; *Jai Narain v Chhedalal*, AIR 1960 All 385; *Shyamal Bihari v Girish Narain*; *Narayandas v Vishnu*, AIR 1963 MP 158 contra: *Pitamlal v Balwant Singh*, AIR 1925 All 556; *Munuswami Pillai v Husain Khan*, AIR 1926 Mad 516 : 50 Mad LJ 655.
1266. *Hatton v Harris*, AIR 1892 Cal 547, 558; *Stewart v Rhodes*, [1900] 1 Chapter 386, 3pp. 94, 395; *Pandurang v Narhar*, AIR 1925 Bom 389 : (1925) 27 Bom LR 657; *Narayana v Biyari*, AIR 1923 Mad 57 : (1922) Mad LJ 559; *Midnapore Zamindary Co v Abdul Zalil*, AIR 1933 Cal 627 : (1933) 60 Cal 753; *Laxman v Maruti*, AIR 1939 Bom 389 : (1938) 40 Bom LR 800; *Indrani v Maharaj Narain*, AIR 1937 Oudh 218 (FB); *Abid Hussain v RK Paul*, AIR 1961 AP 508 : (1961) 1 Andh WR 313; *Bachalal v Hemsingh*, AIR 1953 All 485; *Prema v Dhanya*, AIR 1972 MP 211 : (1972) MPLJ 378; *Sankaran Nair v P Namboodiripad*, AIR 1970 Ker 57 : (1969) 2 Ker 37 : (1969) Ker L R 1044.
1267. *Sathappa v Umayal Achi*, AIR 1960 Mad 564 : (1960) 2 Mad LJ 550 : (1960) ILR Mad 1130 : 73 LW 401.
1268. *Khisori v Chhanga*, AIR 1925 All 187 : (1925) 47 All 44, p 49; *Mukerjee v Ainuddin*, AIR 1932 Cal 563 : (1932) 26 Cal WN 97; *Mani v Leutin*, AIR 1955 Mys 2.
1269. *Sir Sahabji Maharaji Mills v Chuni Lal*, AIR 1983 P&H 283.
1270. *Umesh Chandra Karan v Shail Kumari Devi*, AIR 2007 Pat 10 : 2006 (3) Pat LJR 553.
1271. *Ramchandra v Jai Mal*, AIR 1923 All 22 : (1923) 20 All LJ 640.

182 [now Article 136 of 1963 Act] applies, clause 4 of that article enacts that limitation for execution runs from the date of the amendment. The amendment of the decree does not, however, extend the time for appealing, though in such a case recourse might be had to section 5 of the Limitation Act.[1272] The Madhya Pradesh High Court has, however, said that if the correction is a substantial one, the right of appeal against the amended decree would be from the date of such amendment, and has added that in any case the appellant can invoke section 5 of the Limitation Act.[1273] Entry under Land Ceiling Act showed wrong land survey number and was corrected subsequently. Original order was not replaced or superseded, nor the same was materially altered. It was held that limitation commenced from the date of original order and not when clerical error was rectified.[1274]

[s 152.14] Parties to the Application

A person, not a party to the proceedings and to the decree, cannot apply for amendment under this section.[1275] An application by a party to a partition suit for amending the decree which had been passed therein by inclusion of new items of properties in the possession of persons not parties to the suit, is not maintainable under this section.[1276]

[s 152.15] By which Court Amendment Could be Made

Even if the jurisdiction of the trial court, to make such correction under section 152, is available after the decree is affirmed by the appellate court by reason of section 153-A, it is confined only to the scope and ambit within the confines of section 152.[1277]

The court to amend a decree is the court that passed it. Where an appeal is preferred from a decree of a court of first instance the appellate court may—

(a) dismiss the appeal under O XLI, rule 11(1), without issuing any notice to the respondents; or it may

(b) confirm, reverse or vary the decree of the court of first instance [O XLI, rule 32].

In case (a), it has been held by the High Courts of Calcutta, Madras, Allahabad and Rangoon, that it is the appellate court alone that can amend the decree.[1278] On the other hand, it has been held by the Bombay and Patna High Courts that it is the court of the first instance, and not the appellate court, that can amend the decree, the reason given being that a dismissal under O XLI, rule 11 leaves the decree of the lower court untouched.[1279] Parliament has now, by enacting, section 153A resolved this controversy by accepting the Bombay and Patna view. See notes to section 36 above.

1272. *Nagendranath v Ambicacharan*, AIR 1929 Cal 676 : (1929) 57 Cal 549.
1273. *Ram Singh v Ramo Bai*, AIR 1968 MP 220 : 1968 MPLJ 19.
1274. *Himatlal v Urban Land Tribunal*, AIR 1988 Guj 135.
1275. *Waman Rao v Daulat Rao*, AIR 1953 Hyd 3 : (1952) ILR Hyd 738.
1276. *Ammi Raju v Kondalrayudu*, AIR 1951 Mad 877 : (1951) 1 Mad LJ 682.
1277. *Mehta Suraya v United Investment Corp*, AIR 2002 Cal 108.
1278. *Umasundari v Bindu*, (1897) 24 Cal 759; *Munisami v Munisami*, (1899) 22 Mad 293; *Asmabibi v Ahmad Hussain*, (1908) 30 All 290.
1279. *Bapu v Vajir*, (1897) 21 Bom 548; *Batuk v Ambika*, AIR 1932 Pat 238 : (1932) 11 Pat 409; *Hussein Sab v Sitaram Vighneswar*, AIR 1953 Bom 122 : (1953) ILR Bom 309.

In case (b), the appellate court alone can amend the decree.[1280] The view taken in *Gowrishankar v Umraochand*[1281] that where the appeal is dismissed as barred by limitation, it is lower court that can amend the decree does not appear to be sound. But in a case where the district dourt amended a decree after it had been confirmed on appeal, the high court, in revision made the same amendment *suo motu*.[1282] In another case, it was held that court of first instance has power to amend a merely clerical or arithmetical mistake.[1283] On appeal, the decree under appeal merges in the decree passed on appeal. Thereafter, only the appellate court can correct or amend the decree.[1284] Suit was decreed by the appeal court, which reversed the decree of dismissal passed by the trial court. But the decree of appeal court was not in conformity with the judgment of the appellate court. It was held that amendment of the decree could be ordered by the appellate court and not by the trial court;[1285] *Hussain Sab v Sitarani*[1286] followed. In a money decree inaccuracy in calculation and accounting made by trial court, noticed in appeal, should be corrected by appellate court notwithstanding that no cross objection is filed by the other party.[1287]

The Calcutta High Court has allowed an amendment of a clerical error in its decree after the decree had been affirmed by the Privy Council.[1288] Under sections 151, 152 and 153, the executing court has jurisdiction and power to correct its own mistake, if it is factually found that there was a mistake in any order made by it. The court is bound to correct its own mistake when once the same is brought to its notice and it would be failing in its duty, if it does not do so and sticks to its previous order, as if it is infallible.[1289]

The court which passed the decree, has power to amend it even after an appeal is filed; it is only when the appellate court passes a decree which supersedes the decree of the trial court, that its power to amend ceases.[1290] When the decree of the trial court merges in the decree passed by the high court, it is the high court alone which has the power to rectify mistakes.[1291] This is in accordance with the principle that it is the court which commits the mistake which must remedy its error. Where the decree had, by mistake, provided for the ascertainment of "mesne profits" instead of "net profits" it was held by the Supreme Court that the high court could amend the decree even though an appeal against the decision has been admitted by the Supreme Court.[1292]

1280. *Muhammad v Muhammad*, (1889) 11 All 267; *Gajadhar v Kishan*, (1917) 39 All 641; *Brij Narain v Tejpal*, (1910) 32 All 295 : 37 IA 70; *Shivlal v Jumaklal*, (1894) 18 Bom 542; *Vichuvayyangar v Seshayyangar*, (1895) 18 Mad 214; *Sara Bibi v Hamid*, (1926) 4 Rang 347 : AIR 1927 Rang 57; *Chettyar Firm v Ko Yin Gye*, AIR 1929 Rang 158 : (1929) 7 Rang 88; *Yenkamma v Rajiah*, (1955) ILR Hyd 759; *Pathani v Chandiperumal*, AIR 1951 TC 107; *Kulwanti Devi v Ajodhi Singh*, AIR 1959 Pat 591; *Chandrakalavathi Devi v Central Bank of India* 62 Cal WN 881; *Nandlal Tanti v Jagdeosingh*, AIR 1962 Pat 36; *Debanand v Jaydanand*, (1961) 2 All 486 : (1962) All LJ 105.
1281. *Gowrishankar v Umraochand*, AIR 1956 Ajm 38. This decision follows *Chintamani v Devi Prasad*, AIR 1934 All 971 : (1934) All LJ 937 dissented from in *Debanand v Jayanand*, (1961) 2 All 486.
1282. *Bhagvant Singh v Bhao Singh*, AIR 1932 All 337 : (1932) 54 All 490.
1283. *Chinta Mani v Debi Prasad*, AIR 1934 All 971 : (1934) All LJ 937.
1284. *Kannan v Narayani*, AIR 1980 Ker 76; *Dipak Saha v Bakul Bala Saha*, AIR 2006 Gau 151; *Devi Roop v Devku*, AIR 2006 H P 114.
1285. *Sunil v Shiv Prasad*, AIR 1985 Bom 369.
1286. *Hussain Sab v Sitarani*, AIR 1953 Bom 122.
1287. *Kulamani Mohanty v Indl Devpt Corp of Orissa Ltd* Bargarh, AIR 2002 Ori 38.
1288. *Ahidhar v Secretary of State*, AIR 1933 Cal 335 : (1933) 36 Cal WN 665.
1289. *Kariyanna v Tsthun Subbaiahsetty*, AIR 1981 Kant 234.
1290. *Bachan v Raghunath*, AIR 1926 All 304 : (1926) 48 All 224.
1291. *Bachan Singh v Harbans Kaur*, AIR 1973 P&H 103; *Dipak Saha v Bakul Bala Seha*, AIR 2006 Gau 151.
1292. *Janakirama Iyer v Nilakanta Iyer*, AIR 1962 SC 663.

In a partition suit preliminary decree had been passed. The matter went up to the Supreme Court. When a mistake was detected in the description of the property, an application under section 152 of the Code was filed for correcting the mistake. It was argued that since the decree of the trial court merged with the decree of the appellate court, the trial court had no authority to correct the mistake in the preliminary. However, the proceedings for final decree was pending before the trial court. It was held that the trial court can exercise powers under section 152 of the Code.[1293]

A full Bench of the Kerala High Court has further clarified the issue by holding that even where the first and the second appellate court merely discussed the appeal confirming the decree of the trial court, it is the second appellate court which has jurisdiction to allow such amendment.[1294]

In an eviction suit, where the second appeal by landlord was allowed granting six month's time to tenant to vacate the premises and the review application of the tenant was dismissed for default, it was held that the tenant's application for amendment of judgment in second appeal was not maintainable.[1295]

In a partition suit where the shares allotted to respective parties while drafting the judgment were altered due to mistake committed by the office. It was held by the Andhra Pradesh High Court that the court does not become *functus officio* and to meet the ends of justice, the court which passed the judgment can amend the said decree.[1296]

When an appeal is withdrawn, the decree of the lower court is left intact and that court alone has power to amend.[1297] Where an appeal is rejected for non-payment of court fees the trial court has jurisdiction to amend the decree.[1298]

An arithmetical error in the decree of the lower court repeated in a confirming decree of the appellate court, may, it is submitted, be corrected by the appellate court.

Where an application for revision of a decree of a provincial small cause court is rejected by the high court *in limine*, the proper court to amend the decree is the small cause court, and not the high court.[1299]

The court to which a decree is transferred for execution cannot correct an error therein relating to the identity of the judgment-debtor.[1300]

See also notes under section 153-A.

[s 152.16] Revision

A decision under this section granting an application for amendment, is an order and not a decree. The decision may, therefore, be the subject of revision under section 115, but it cannot be the subject of an appeal.[1301] It has been so held by the High Courts of Calcutta, Allahabad

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1293. *H Krishnan v Mohammad alias Kunhan*, AIR 2006 Ker 135 : (2006) 1 Ker LT 156.
1294. *Thomas v Kunjamma*, AIR 2006 Ker 40 : (2005) 5 Ker LJ 327 (F.B.)
1295. *Laj Kaur v Shanti Devi*, AIR 2006 Raj 115 : 2006(1) Raj LW 562 (Jaipur Bench).
1296. *Kalasani Venkata Laxmi v Bommineni Aruna*, AIR 2008 AP 107 : 2008 (2) ALT 14.
1297. *Deooki v Jwala Prasasd*, AIR 1928 All 679 : (1928) 50 All 608.
1298. *Kalayani Amma v Ichikutty Amma*, AIR 1955 TC 181 : (1955) II R TC 17 : 1955 Ker LJ 89; *Shabzad Khan v Sheo Kumar*, AIR 1957 All 133.
1299. *Khuda Baksh v Allah Ditta*, (1920) 1 Lah 342.
1300. *Ganeshlal v Famylal*, AIR 1959 Raj 663.
1301. *Nalinakshya v Mafakshar*, (1901) 28 Cal 177; *Sunta v Ganga*, (1885) 7 All 875; *Hasan v Shiv Prasad*, (1893) 15 All 121; *Bai Shri Vaktuba v Agarsangji*, (1907) 31 Bom 447.

and Bombay in cases under the corresponding section 206 of the Code of 1882. A different view has been taken by the High Court of Madras. According to that court, where a decree is amended, the aggrieved party has the right to appeal from the decree as amended. Hence, if no appeal is preferred within the period of limitation, he cannot afterwards apply for a revision of the order allowing the amendment.[1302] It has been held by the Kerala High Court that a revision lies against an order for amendment, even though an appeal lies against the amended decree.[1303]

Where a case is one of "accidental slip" within the meaning of this section but the court which passed the decree refuses to amend it on the ground that the case does not fall under this section, the refusal amounts to a failure to exercise a jurisdiction vested in the court, within the meaning of section 115, and the high court has power to interfere in revision.[1304] Similarly, where the lower court amends a decree in a case in which, according to its own view, the amendment should be refused stating as a reason for the amendment that it was bound under this section to bring the decree into conformity with the judgment, the high court is entitled to interfere in revision under section 115(c) of the Code.[1305]

These decisions must, now, be read in the light of the amended section 115 (see commentary under section 115).

[s 152.17] Amendment: When to be Refused

A mere perusal of section 152 makes it clear that section 152 can be invoked for the limited purposes of correcting clerical errors or arithmetical mistakes in the judgment. The same cannot be invoked for claiming a substantive relief which was not granted under the decree, or as a pretext to get the order which has attained finality, reviewed.[1306]

Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot, on mere change of view, vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under section 152 are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned, under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party if at all is to file appeal or revision before the higher

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1302. *Visvanathan v Ramanathan*, (1901) 24 Mad 646.
1303. *Patti Amma v Raman Nair*, AIR 1962 Ker 6; but see *Simbhagiri v Zamindari of Chemudu*, AIR 1950 Mad 15 : (1949) 1 Mad LJ 171; *Pullappa v Venkatanarappa*, AIR 1950 Mad 578 : (1950) 1 Mad LJ 667.
1304. *Sahadeo v Deo Dutt*, (1915) 37 All 323.
1305. *Pitam Lal v Balwant Singh*, AIR 1925 All 556 : (1925) 23 All LJ 518.
1306. *Bijay Kumar Saraogi v State of Jharkhand*, AIR 2005 SC 2435 : (2005) 7 SCC 748. See also *State of Punjab v Darshan Singh*, AIR 2003 SC 4179 : AIR 2003 SCW 5488 : (2004) 1 SCC 328.

forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the section cannot be pressed into service to correct an omission, which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of sections 151 and 152 of the CPC even after passing of effective orders in the lis pending before them.[1307]

Where the application for correction of decree was rejected till the stage of appeal, it was held by the Andhra Pradesh High Court that the rejection of the application of petitioner for correction of decree by the executing court was proper.[1308]

For correcting clerical or typographical error in decree, the condition precedent is that the error must have occurred on the part of the court. If the error occurs on the part of a party, resort to section 152 is not permissible. Thus, where rectification in a compromise decree was sought, the remedy is not under section 152 but through a declaration by a civil court.[1309]

Where the order, as drawn up, represents the real decision of the court, the court has no jurisdiction to rehear or alter it.[1310] "Even when an order has been obtained by fraud... the court has no jurisdiction to rehear it. If such a jurisdiction existed, it would be most mischievous".[1311] The Supreme Court has, however, disagreed on the point.[1312] Where there is no mistake or slip in the decree or order, it cannot be amended under this section, the proper remedy of the party being either to apply for review or to appeal.[1313] Where a decree is drafted not providing any interest prior to institution of suit. It is not a ground for amendment of decree.[1314]

[s 152.18] Consent Decree

Where a decree founded on a compromise does not embody the true terms of the compromise, the only remedy is by an independent suit to set aside the decree either on the ground of mistake, or fraud, or some other ground *ejusdem generis* with it.[1315] But if the mistake is merely clerical or arithmetical, it can be amended under this section.[1316] See note to section 96: "Procedure for setting aside consent-decrees".

[s 152.19] Amendment of a Decree Which is a Nullity

Where a decree passed is without jurisdiction and is null and void, the defect cannot be cured by an amendment.[1317]

Non-incorporation of the relief of mesne profits in judgment and decree is not an accidental omission. Yet an order granting such relief cannot be termed as nullity as the same was not

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1307. *State of Punjab v Darshan Singh*, AIR 2003 SC 4179; See also *Dwaraka Das v State of Madhya Pradesh*, AIR 1999 SC 1031 : AIR 1999 SCW 663 : (1999) 3 SCC 500; *Jayalakshmi Coelho v Oswald Joseph Coelho*, AIR 2001 SC 1084 : AIR 2001 SCW 1013 : (2001) 4 SCC 181.
1308. *Bandi Prasada Rao v P Hari Kesavulu*, AIR 2007 AP 125 : 2007 (1) Andh LT 629.
1309. *Gopal Dass v Pawan Kumar*, AIR 2009 P&H 172 : (2009) 155 PLR 519.
1310. *Preston Banking Co v William Allsup & Sons*, (1895) 1 Chapter 141.
1311. *Preston Banking Co v William Allsup & Sons*, (1895) 1 Ch Chapter 141, p 143.
1312. *United India Ins Co Ltd v Rajendra Singh*, (2000) 2 LRI 12.
1313. *Lakshmi Narayanappa v Batchayya*, 53 Mad LJ 38; *Ramakrishnan v Radhakrishnan*, AIR 1948 Mad 13.
1314. *TR Sivaprakasa v Sethrandra*, AIR 1996 Mad 176.
1315. *Ram Lagan v Ram Birich*, (1919) 4 Pat LJ 205; *Galstaun v Promotha*, AIR 1929 Cal 470 : (1929) 57 Cal 154.
1316. *Karimunnisa Begam v Mir Jamaluddin*, AIR 1937 Bom 457 : (1937) Bom 837; *Ramayya v Ramaswami*, AIR 1959 Mad 194 : (1958) 2 Mad LJ 514; *Venkataseshaiah v Pullaiah*, AIR 1962 AP 412 : 1962 (1) Andh WR 223.
1317. *Darshanlal v Happy Valley Tea Co Ltd*, AIR 1958 Cal 691 : 62 Cal WN 523.

wholly without jurisdiction. To avoid such an order, it is necessary to get it set aside. Thus, in a case where the appellants having accepted the validity of the order adding the relief of mense profits in judgment and decree, waived their right to challenge it, the same cannot be challenged in the appeal against the order fixing the amount of mense profits.[1318]

[s 152.20] Defect in Court Record as to Identity of Immovable Property

When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in O VII, rule 3 and O XX, rule 3 of the CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to section 152 or section 47 of the CPC depending on the facts and circumstances of each case, which ever of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under section 152 by the court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the executing court as a question relating to execution, discharge or satisfaction of decree within the meaning of section 47. A decree of a competent court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission.[1319]

It has been held by the Supreme Court that where the statements in the body of the plaint sufficiently described the suit property, correction of schedule of the suit property in the decree accordingly by the executing Court is proper and no interference is called for.[1320]

Speaking for the Bench in the above case, Sinha J observed as follows:

> Code of Civil Procedure recognises the inherent power of the Court. It is not only confined to the amendment of the judgment or decree as envisaged under Section 152 of the Code but also inherent power in general. The Courts also have duty to see that the records are true and present the correct state of affair. There cannot, however, be any doubt whatsoever that the Court cannot exercise the said jurisdiction so as to review its judgment. It cannot also exercise its jurisdiction when no mistake or slip occurred in the decree or order. This provision, in our opinion, should however, not be construed in a pedantic manner. A decree may, therefore, be corrected by the court both in exercise of its power under section 152 as also under Section 151 of the Code of Civil Procedure. Such a power of the Court is well recognised.[1321]

In another case, the Supreme Court held that in case of a genuine and *bona fide* mistake regarding khasra number of the suit property in decree, direction can be given by the court for correction of the mistake in order to cut short litigation.[1322] A suit for partition was decreed and after passing of decree amendment of the decree was sought seeking change in the survey number of suit property. The said amendment was objected to by purchasers *pendente lite*. The Supreme Court held that none of the party claimed that the survey number as originally stated was a joint family property which could be subject matter of partition suit and therefore it is not a case of substitution of the property. As such the order allowing amendment of decree cannot be interfered with.[1323]

1318. *Umesh Chandra Karan v Shail Kumari Devi*, AIR 2007 Pat 10 : 2006 (3) Pat LJR 553.
1319. *Pratibha Singh v Shanti Devi Prasad*, AIR 2003 SC 643 : (2003) 2 SCC 330.
1320. *Niyamat Ali Molla v Sonargon Housing Co-op Society Ltd*, AIR 2008 SC 225 : (2007) 13 SCC 421.
1321. *Niyamat Ali Molla v Sonargon Housing Co-op Society Ltd*, AIR 2008 SC 225, para 19 at p 229 : (2007) 13 SCC 421.
1322. *Tilan Raj v Baikun thi Devi*, AIR 2009 SC 2136 : (2010) 12 SCC 585.
1323. *Peethani Suryanarayana v Repaka Venkata Ramana Kishore*, AIR 2009 SC 2141 : (2009) 11 SCC 308.

Where the decree in an eviction suit overlooked to mention the description of the suit premises by reference to its boundaries, although the same was mentioned in the body of the judgment, it was held by the Jharkhand High Court that the same can be rectified by the Executing Court under section 152 of the Code.[1324] Explaining the principle, DGR Patnaik J observed in the above case as follows:

> It may be noted that under the provisions of order 20 Rule 6 CPC, decree has to be prepared in consonance with the judgment and it has to contain all the necessary particulars, as required in the Rule. Rule 9 of Order 20 CPC, lays down that where the decree is for recovery of immovable property, it shall contain the description of such property sufficient to identify the same and where such property can be identified by boundaries or by its number in the Record of Settlement or Survey the decree shall specify such boundary or number. In the present case, as it appears, the decree has overlooked to mention the description of the suit premises by reference to its boundaries and other particulars, though mentioned in the body of the judgment. This being apparently an accidental omission, it was certainly within the competence and jurisdiction of the Executing Court, under the provisions of Section 152 CPC, to rectify such error in the decree by adding the description of the suit premises by reference to its boundary, as mentioned in the body of the judgment.[1325]

When even the defendants were aware all along about the correct survey number of the property in respect of which decree was prayed for by the original plaintiff, even the defendants were aware about the description of the property in respect of which decree was being prayed for and passed, it appears that there is accidental error and/or slip in describing the survey number in the suit, the said error ought to have been permitted to be corrected by the learned trial judge by exercising powers under section 152 read with sections 151 and 153 of the said CPC. Merely because the petitioners have purported to apply only under section 152 of the CPC, relief cannot be denied to the petitioners.[1326]

[s 152.21] Amendment Without Notice

An order amending the decree without notice to the party affected is a nullity, an execution proceeding taken pursuant thereto must be treated as void.[1327]

[s 152.22] Successive Applications for Amendment: *Res Judicata*

In the order passed by the executing court, the view taken was that the executing court had no jurisdiction to review the finding recorded in the judgment and decree and it also held that the executing court was duty-bound to pass final decree in accordance with the preliminary decree drawn in that case which was to the effect that each of the plaintiff-petitioner, defendant-respondent and defendant-petitioner were entitled to one-third share. Therefore, it was held that the executing court had no jurisdiction to modify the decree. It is, thus, clear that the principle of *res judicata* would not have any application in the afore-mentioned situation.[1328]

Where in an eviction suit the trial court had no jurisdiction to entertain an application under section 152 of the Code, because the decree having been merged with the decree of the

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1324. *Lokmanya Prasad v Jamila Khatoon*, AIR 2010 Jhar 77 : 2010 (1) Civ LJ 836.
1325. *Lokmanya Prasad v Jamila Khatoon*, AIR 2010 Jhar 77, para 15 at p 81 : 2010 (1) Civ LJ 836.
1326. *Narhari Balku Kavade v Hanmanta Timma Pujari*, AIR 2004 Bom 342.
1327. *P Ankinnedu v Sri Bavaji Mutt*, AIR 1962 AP 134.
1328. *Jagdish Chand Gupta v Rajinder Parshad*, AIR 2002 P&H 251.

first appellate court and the high court, the rejection of the application for correction of decree would not operate as *res judicata* for filing a fresh application before the high court.[1329]

Where the plaintiff in a suit had not claimed the relief of mesne profits in the plaint, but sought to add the said relief in the plaint by way of amendment which was not allowed, it cannot be said that the relief was refused by the court. It was held by the Patna High Court that the petition for amendment of the judgment can be said to be barred under Explanation (v) of section 11 of the Code.[1330]

See notes to section 11, "Application for amendment of decree", above.

[s 152.23] Omission in Granting Interest

The omission in not granting the pendente lite interest could not be held to be accidental omission or mistake and therefore, neither the trial court nor the appellate court has power to award pendente lite interest under section 152 of the CPC.[1331] No court can, under the cover of sections 151 and 152 of the CPC, modify, alter or add to the terms of its original judgment, decree or order. If the trial court had specifically held the respondent liable to pay future interest only, despite the prayer of the appellant for grant of interest with effect from the date of alleged breach, which impliedly meant that the court had rejected the claim of the appellant in so far as pendente lite interest was concerned, the omission, in not granting the pendente lite interest, could not be held to be accidental omission or mistake, as done by the trial court, and hence the high court was justified in setting aside that order.[1332]

However, the position would be different where the judgment of a court provides for pendente lite interest and decree and omits to mention such interest. Such a mistake could be corrected under section 152. The correct position of law is that a decree cannot add or subtract any relief except what has been provided in the judgment.[1333]

[s 152.24] Proceedings Under the Land Acquisition Act

The identification of the land is not a clerical or arithmetical mistake within the meaning of section 13A of Land Acquisition Act, 1894, and section 152 of the CPC.[1334] The courts would not be justified in permitting payment of deficit court fees after a gap of six years and granting the enhanced compensation under the Land Acquisition Act by amending the judgment and decree.[1335] The civil court has the power under sections 151–53 to indicate the Khasra number omitted by collector in his statement and directing that the collector to file a revised statement under section 19 of the Land Acquisition Act giving details of the entire land.[1336]

In a case under the Land Acquisition Act, 1894 a reference was made under the Act for enhancement of the compensation. In the claim for compensation of the acquired land and trees, the claimant for the first time claimed enhancement of the number of trees on the ground

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1329. *Dipak Saha v Bakul Bala Saha*, AIR 2006 Gau 151 : (2006) 3 Gau LT 773 (Agartala Bench).
1330. *Umesh Chandra Karan v Shail kumari Devi*, AIR 2007 Pat 10 : 2006 (3) Pat LJR 553.
1331. *K Rajamouli v AVKN Swamy*, (2001) 2 LRI 1351; *Dwarka Das v State of Madhya Pradesh*, (1999) 3 SCC 500; *K Rajamouli v AVKN Swamy*, AIR 2001 SC 2316 : (2001) 5 SCC 37.
1332. *Dwaraka Das v State of Madhya Pradesh*, (1999) 1 LRI 241.
1333. *Rajamouli v AVKN Swamy*, AIR 2001 SC 2316 : (2001) 5 SCC 37.
1334. *UOI v Pratap Kaur*, (1995) 3 SCC 263; *UOI v Rangeela Rao*, (1995) 5 SCC 585; *State of Punjab v Babu Singh*, (1995) Supp 2 SCC 406.
1335. *SC Co-op Land Owing Society Ltd v UOI*, (1991) 1 SCC 174.
1336. *Ram Kumar v UOI*, (1991) 2 SCC 247.

that there was typographical mistake. The claim for enhancement of the number of trees was rejected but in revision the high court allowed the same. It was held by the Supreme Court that the order of the high court in revision was not legal as appeals by both parties in respect of compensation were pending before the high court. Moreover, the case of the claimant was based on the alleged variance between the judgment of court and the decree, which variation was not apparent on perusal of the judgment and the decree.[1337]

An award and decree having become final under the Land Acquisition Act cannot be amended or altered seeking enhancement of the statutory benefits under the amended provisions brought in by the Amendment in the Act by filing petitions under sections 151 and 152 of the CPC.[1338]

[s 152.25] Appeal

No appeal lies from an order directing an amendment either under the Code[1339] or under the Charter.[1340] In a case, however, where the whole method of calculation adopted by the first court was challenged in the plaintiff's application, which purported to be an application under section 152, and the first court allowed the amendment, it was held that the order allowing the amendment must be regarded as one made under O XLVII, and the order was, therefore, appealable.[1341]

It has been held by the High Courts of Madras and Lahore that though no appeal lies from an order of amendment, an appeal would lie from the amended decree.[1342]

Where the order fixing the quantum of mesne profit was challenged in second appeal, but no perversity was noticed in the order, it was held by the Patna High Court that the court is not entitled to interfere with the concurrent findings of the court below. Adverse findings recorded against the plaintiff while deciding the substantial questions of law and while interpreting the scope of section 152 of the Code, do not affect the merit of the case. It was held that on that basis the findings of the court below on the point of quantum of mesne profits cannot be challenged.[1343]

Where correct khasra number of land and extent of the property belonging to the claimant was not mentioned in the land reference under Land Acquisition Act by mistake of the counsel and the mistake was perpetuated while passing the award, it was held by the Punjab and Haryana High Court that the mistake can be corrected by way of filing an application under sections 151, 152 and 153 of the Code.[1344]

[S 153] General power to amend.—The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by depending on such proceeding.

1337. *Deputy Director, Land Acquisition v Malia Atchinaidu*, AIR 2007 SC 740 : (2006) 12 SCC 87.
1338. *State of Haryana v Kartar Singh*, (2013) 11 SCC 375.
1339. *Nalinakshya v Mafakshar*, (1900) 28 Cal 177; *Narayanaswami v Natesa*, (1892) 16 Mad 424, 425.
1340. *Muthammad v Ihsan-ullah Khan*, (1892) 14 All 226.
1341. *Ramji v Giani*, AIR 1921 Lah 250 : (1921) 3 Lah LJ 341.
1342. *Viswanathan v Ramanathan*, (1901) 24 Mad 646; *Abdul Sattar v Fadzal-ul-Rahmand*, AIR 1938 Lah 331; *Ram Singh v Ramo Bai*, AIR 1968 MP 220 : (1968) MPLJ 19.
1343. *Umesh Chandra Kapur v Sheil Kumari Devi*, AIR 2007 Pat 10 : 2006 (3) Pat LJR 553.
1344. *State of Punjab v Dilbhajan Singh*, AIR 2009 P&H 184 : (2009) 156 PLR 252.

SYNOPSIS

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[s 153.1] Corresponding Provision

This section was taken from O XXVIII, rule 12 of the Rules of the Supreme Court of England. The only difference is that the words "in a suit" after the words "proceeding" do not occur in the England rule.

[s 153.2] Scope of the Section

Order VI, rule 17 is confined to amendments of "pleadings"; and section 152 to correcting errors in "judgments, decrees or orders". The present section confers a general power on the court to amend defects and errors in "any proceeding in a suit" and to make "all necessary amendments" for the purpose of determining the real question at issue between the parties to the suit. The section was referred to in a case where an incorrect description of a property in a mortgage deed was repeated in the plaint, judgment and decree and the court allowed an amendment of the decree and connected proceedings.[1345] This power is vested in the original as well as the appellate court.[1346] Where an appellant desires to implead the legal representative of a respondent who was dead at the time of filing the appeal, the appellate court can permit him to amend the appeal. But, as regards limitation, the appeal (as against the parties) will be deemed to have been filed on the date of the application. Appellate Court will decide:

(a) whether the appeal is within time; and

(b) whether the delay, if any, should be condoned.[1347]

In *Australian Steam Navigation Co v Smith & Sons*,[1348] Their Lordships of the Privy Council said:

> Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties.

An omission of the *Vakil*'s name in the *Vakalatnama* can be supplemented under this section,[1349] as also an incorrect description of the plaintiff in a plaint.[1350] An ambiguity in a direction given in the decree as to the procedure to be adopted by the parties, can be clarified under this section.[1351] When a petition to bring the legal representatives of a deceased party on record had remained undisposed of and the decree had been drafted without adverting

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1345. *Aziz Ullah v Court of Wards*, AIR 1932 All 587 : (1932) 54 All 800.
1346. *Mukunda Lal v Jogesh Chandra*, (1916) 1 Pat LJ 393, 397.
1347. *State of Himachal Pradesh v Dhuru Ram*, AIR 1981 HP 34.
1348. *Australian Steam Navigation Co v Smith & Sons*, (1889) 14 App Cas 318.
1349. *Baldeo v Lachhmi Narain*, AIR 1934 All 810.
1350. *Raghunathsing v Radhaballabji*, AIR 1937 Nag 173 : (1937) ILR Nag 514.
1351. *Manohar v Chandulal*, AIR 1958 MP 257.

to it, it can be amended so as to substitute them in the record.[1352] If an appeal is presented against a person, who is dead at the date of the presentation, under section 153 of the CPC, permit the appellant to amend the cause title by filing appropriate petition.[1353] Where a suit had been instituted in the name of a foreign firm, the court can permit an amendment of the cause title by substituting the names of the partners for that of the firm.[1354] An amendment of the pleadings can be allowed under this section, even though a preliminary decree has been passed.[1355] An application was filed by the claimant under sections 151 and 153 of the CPC indicating the *Khasra* Nos omitted by the collector in his statement, and praying that the collector be directed to file a revised statement under section 19 of Land Acquisition Act, 1884. The Additional District Judge allowed the application, whose order was also upheld by the Supreme Court.[1356]

But the power of correction is circumscribed by the condition that it can be used only for determining the real question in controversy between the parties. There is no power, therefore, to allow a plaint to be so amended as to include a cause of action which had not accrued at the date of the institution of the suit.[1357] For the same reason, an application to amend the title of the memo of first appeal to strike out therefrom the name of the deceased plaintiff, was held to be not maintainable since it was made at the stage when the second appeal was closed for judgment.[1358] An application under sections 149, 152, 153 read with section 151 of the CPC was moved for seeking permission to make good the deficiency in the court fees, after a lapse of six years and granting the enhanced compensation by amending the judgement and decree, the application was rejected by the high court and the same was confirmed by the Hon"ble Supreme Court on the ground that to permit payment of deficit court fees for recovering enhanced compensation after a lapse of almost six years, under its inherent jurisdiction would encourage the practice of not paying the court fees in the hope that, as and when the valuation is determined in appeal, the jurisdiction of the court can be invoked under section 151 of the Code and the benefit of enhanced compensation can be reaped by making good the deficit court fees.[1359] An application for amendment of objections filed under section 33 of Arbitration Act, 1940, to incorporate certain grounds to challenge the validity of award is not maintainable.[1360] The question before the Supreme Court was what is the legal remedy when a party to a judgement or order of court later discover that it was obtained by fraud. It was held that the remedy to move for recalling of an order on the basis of a newly discovered fact under sections 151, 152 and 153 of CPC, like, where it amounts to fraud of high decree, cannot be foreclosed in a situation. No court or tribunal can be regarded as powerless to recall its own order, if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as it would effect the very basis of the claim.[1361]

The Gauhati High Court has held that amendment of pleadings which are barred in view of the proviso to O VI, rule 17 of the Code, can be allowed under section 153 for *bana fide* reasons provided the same is necessary for determining the real issues involved and the party seeking amendment is not trying to stall the proceedings. Thus, where in a suit for declaration

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1352. *Dwarka Prasad v Safura Bai*, AIR 1958 MP 307.
1353. *The Oriental Insurance Co Ltd v Pandu Rangan*, AIR 1997 Mad 195 (DB).
1354. *Manilal & Sons v Purushottam Umed Bhai & Co*, AIR 1960 Cal 15.
1355. *S Burrayya v S Atchayamma*, AIR 1959 AP 26 : (1958) 2 Andh WR 208 : (1958) II R AP 546.
1356. *Ram Kumar v UOI*, (1991) 2 SCC 247.
1357. *Rajeshwar Dayal v PK Kothari*, AIR 1970 Raj 77.
1358. *Natabar v Gobinda*, AIR 1974 Ori 34 : (1972) ILR Cut 1397.
1359. *SC Co-op Land Owning Society Ltd v UOI*, (1991) 1 SCC 174.
1360. *HS Vedi v KS Kler*, AIR 1996 Del 44.
1361. *United India Insurance Co Ltd v Rajendra Singh*, (2002) LRI 12.

of share on the basis of Will, correction of the date of execution of the Will was sought, the amendment was allowed invoking section 153 of the Code.[1362]

[s 153.3] Any Proceeding in a Suit

The following are some of the cases under the corresponding English rule and the present rule:

[s 153.3.1] Answers to Interrogatories

Where it was admitted by the defendant, a solicitor, in answer to interrogatories that his partner had paid into the banking account of the firm money received by the latter for investment, the defendant was allowed to amend the answer, it being shown that the admission had been made by mistake.[1363] In another case, where the defendant charged the plaintiff (his manager) with misconduct, and the plaintiff exhibited interrogatories of which the substance was to ask the defendant to specify the acts of misconduct on which he relied, it was said by Thesiger LJ that if the defendant answered the interrogatories, and it was subsequently discovered by him that there were other acts of misconduct on which he could rely, there was nothing to prevent his being allowed to amend his answers to the interrogatories.[1364] See as to interrogatories O XI, rule 111, below.

[s 153.3.2] Particulars

An application to amend particulars, if made a reasonable time before the trial, will generally be allowed on terms.[1365] But leave to amend particulars, when it is applied for at the trial, will as a rule be refused.[1366]

[s 153.3.3] Notice of Motion

A notice of motion in an action for the rescission of an agreement for the sale of land was allowed to be amended at the hearing by asking for the appointment of a receiver.[1367]

[s 153.4] Proceedings Against a Dead Person

Where a suit is filed against a dead person, the plaint can be amended by substituting the legal representatives of the deceased defendant but the suit must be treated as instituted on the date of the application for amendment.[1368] Likewise, if an appeal is presented against a person who is dead on the date of the presentation, the court may, under this section, permit the title of the appeal to be amended.[1369] But if, on the date of the application, the period of limitation for filing the appeal, or for bringing the legal representatives on record has expired, then the

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1362. *Jagnabalkya Chakraborty v Bidyarthi Chakraborty*, AIR 2006 Gau 120 : (2006) 1 Gau LT 560.
1363. *Hollis v Burton*, (1892) 3 Chapter 226
1364. *Sounders v Jones*, (1877) 7 Chapter D 435, p 452.
1365. *Yorkshire Provident Co v Gilbert*, (1895) 2 QB 148.
1366. *Moss v Malings*, (1886) 33 Chapter D 603.
1367. *Cook v Andrews*, (1897) 1 Chapter 266.
1368. *K Ismail v Pavu Amma*, AIR 1955 Mad 644 : (1955) 2 Mad LJ 184 : 68, 68 LW 500; *Raju v Dinshaji Dadhabai*, AIR 1961 AP 239 : (1960) 2 Andh WR 268; *Jagannath Raut v Commr, Buxor Municipality*, AIR 1961 Pat 480, wherein the authorities are reviewed.
1369. *Bachan v Raghunath*, AIR 1926 All 304 : (1962) 48 All 224; *Dodda Mallappa v Ganappa*, AIR 1962 Mys 44; *Travancore Devoswam Board v Vasudevaru*, AIR 1955 Tr & Coch 1222.

delay will have to be excused before the appeal can be admitted.[1370] That is also the position when a revision petition is filed against a dead person.[1371] An appeal, which is presented in the name of an appellant who is dead at the date of the presentation, is itself incompetent. In such cases, the memorandum itself would be non-existent in law and cannot be amended.[1372]

[s 153.5] Pauper Application

The court can allow the amendment of technical defects in an application for leave to appeal in *forma pauperis*.[1373]

[1374]**[S 153A] Power to amend decree or order where appeal is summarily dismissed.**—Where an Appellate Court dismisses an appeal under rule 11 of Order XLI, the power of the Court to amend, under Section 152, the decree or order appealed against may be exercised by the Court which had passed the decree or order in the first instance, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order, as the case may be, passed by the Court of first instance.]

SYNOPSIS

[s 153A.1]	Genesis 1696	[s 153A.3]	Section 153-A and Section 152.... 1697
[s 153A.2]	Principle 1696	[s 153A.4]	Confirming the Decree or Order... 1697

[s 153A.1] Genesis

This section has been introduced to resolve the difference of opinion amongst different high courts on the question as to which of the courts, the court of first instance or the appellate court, can amend the decree under section 152, when the appellate court dismissed the appeal summarily under O XLI, rule 11. The view held by the Calcutta, Madras, Allahabad and Rangoon High Courts was that it is the appellate court alone that can amend the decree, while the Bombay and Patna High Courts held the view that it is the court of first instance and not the appellate court that can amend the decree, since the summary dismissal of the appeal leaves the decree of the lower court untouched. (See the commentary under section 152. Parliament, by enacting this section, has now legislatively affirmed the view taken by the Bombay and Patna High Courts.

[s 153A.2] Principle

The principle underlying section 153-A of the CPC is the doctrine of merger. As per this doctrine when an appeal is heard and disposed off after a contested hearing, the judgment of the trial court merges in the judgment of the appellate court.[1375]

Section 153A does not affect the power of the appellate court to correct an error in a decree. It merely saves the power of the trial court.[1376]

1370. *Sachindra Chandra v Jnanendra Narayan Singh*, AIR 1963 Cal 417.
1371. *Abdul Wahed v Shukdev Wasti*, AIR 1963 Tri 44.
1372. *Radhabai v Mangia*, AIR 1934 Nag 274.
1373. *Anupchand v Bhonrilal*, AIR 1955 Raj 78 : (1953) ILR Raj 239.
1374. Inserted by CPC (Amendment) Act 104 of 1976, section 51 (w.e.f. 1-2-1977).
1375. *Devi Roop v Smt Devku And Ors*, AIR 2006 H P 114.
1376. *Ram Bharosey Lal v Rameshwar Dayal Chakkiwala*, AIR 1984 All 167.

Where an appeal is dismissed on technical ground that it was not properly constituted as it did not reflect the correct name of the defendant-appellant, the doctrine of merger as contemplated under section 153-A would not be attracted as the decision of the appellate court was not on merit. Therefore, the trial court can amend its judgment under section 152 so as to reflect the correct name of the defendant-appellant.[1377]

[s 153A.3] Section 153-A and Section 152

Even if the jurisdiction of the trial court, to make such correction under section 152, is available after the decree is affirmed by the appellate court by reason of section 153 A, it is confined only to the scope and ambit within the confines of section 152.[1378]

[s 153A.4] Confirming the Decree or Order

Prior to the Amendment Act of 1976, by virtue of the operation of principle of merger, the appellate court has the power to amend the decree passed by the trial court, irrespective of its confirmation or modification or reversion. After the Amendment Act of 1976 and by virtue of introduction of section 153-A, the expression "confirmation" had attained two connotations; first, confirmation of the decree of the trial court by the appellate court in exercise of powers under O XLI, rule 11 of the CPC, i.e., by summarily dismissing the appeal even without hearing the respondent or his counsel and secondly confirmation of the decree of the trial court on merits, after hearing both the sides. In other words, after amendments, a clear distinction had been drawn between the confirmation of the decree of the trial court by the appellate court in dismissing the appeal in limine and confirmation of the decree of the trial court on merits. In the latter case, on application of principle of merger, it is only the appellate court which has the jurisdiction under section 152 to correct or amend the decree, as if it has passed the decree; and in the former case, since the decree of the trial court has been confirmed by the appellate court in exercise of jurisdiction under O XLI, rule 11 of the CPC, i.e., by way of dismissal of the appeal in limine, the jurisdiction under section 152 can be exercised by the court of first instance, which passed the original decree. This position is made clear by the explicit language employed in section 153-A of the CPC.[1379]

[1380][**[S 153B] Place of trial to be deemed to be open Court**.—The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them:

Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.]

So far there was no express provision in the Code that the sittings of the court shall be open to the public. The Code also did not contain any express provision regarding the discretion of the presiding judge to hold a trial or a proceeding or part thereof in camera. This power was

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1377. *Devi Roop v Smt Devku*, AIR 2006 HP 114 : (2006) 2 Shim LC 158.
1378. *Mehta Suraya And IPM v United Investment Corp*, AIR 2002 Cal 108.
1379. *Maldar Mahaboob Sab v Allabaksh*, AIR 2004 AP 193.
1380. Inserted by Act 104 of 1976, section 51 (w.e.f. 1-2-1977).

so far exercised, as part of the inherent power under section 151 where interest of justice so required. Express provision on both the points is now made.

In an Orissa case, it was held that in exceptional and appropriate cases, after exercise of due care and caution, the court may direct that a part or whole of the proceedings shall be conducted in camera. In the instant case,[1381] (suit for defamation), the allegations sued upon as defamatory, were mostly obscene. A picture had been depicted that the plaintiff was a sex pervert who loved unnatural sex. In view of the nature of the pleading in the plaint, the plaintiff would deny each and every allegation in which obscenity had been attributed to him. Some other witnesses were also likely to repeat obscenity in their evidence. The allegations, the words and the sentences were so filthy and obscene that generally a normal person, much less children, adolescents, young girls, ladies and men, will hate to hear and read. They are not literature, depicting the sexual behaviour of the hero. Nor are the Indians so modern, in the sense in which modernity is understood in Western countries, that they will hear and read trash and obscene matters and forget it. It will be embarrassing for the court to record the statements and those who will be present in court will not enjoy such events. In the background of the peculiar facts of the case, and keeping the principles of the law in the background, administration of justice will not suffer, if part of the proceedings of the suit are tried in camera. The court gave directions as under:

(i) Evidence of the plaintiff, and of other witnesses (to be indicated by the court from time to time) shall be recorded in camera. The evidence of other witnesses shall be recorded in open court.

(ii) When the suit is heard in camera, general public shall not remain present.

(iii) There shall be no bar of entry for advocates, their clerks, witnesses and officers of the court.

(iv) The evidence recorded in camera, inclusive of facts stated in pleadings, applications, affidavits and documents filed in court relating to obscene matters and evidence shall not be printed and published by the defendants or any other person in any newspaper, magazine, periodical, pamphlet, book or otherwise.

(v) Any such publication (prohibited by the order) if made, shall be deemed to be contempt of court.

[S 154] Saving of present right of appeal.—[*Rep. by the Repealing and Amending Act, 1952 (48 of 1952), section 2 and Sch I.*].

The section ran thus:

> Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencements.

This section was repealed by The Repealing and Amending Act, 1952 (No XLVIII of 1952).

[S 155] Amendment of certain Acts.—[*Rep. by the Repealing and Amending Act, 1952 (48 of 1952), section 2 and Sch I.*] The section ran thus:

> The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

This section was repealed by The Repealing and Amending Act, 1952 (No XLVIII of 1952).

1381. *Janaki Ballav Patnaik v Bennett Coleman And Co Ltd*, AIR 1989 Ori 225.

[S 156] Repeals.—[*Rep. by the Second Repealing and Amending Act, 1914 (17 of 1914), section 3 and Sch II.*]

The section ran thus:

> The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof.

This section and the Fifth Schedule to the Code have been repealed by the Second Repealing and Amending Act 17 of 1914, section 3.

[S 157] Continuance of orders under repealed enactments.— Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act 8 of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force, and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

> **1. Notes.**—Civil Rules of Practice made under the Code of 1882 but not re-enacted and published in accordance with the procedure in Part X of the Code of 1908 are invalid in so far as they are inconsistent with any of the rules in Sch I of the Code [*Bademian v Jonkan,* A 1938 M 438 FB; *Arunachala v Muthusadasisiva,* A 1950 M 261].

On the scope of this section, see *Laxmikumar v Krishnaram Baldev Bank.*[1382]

[S 158] Reference to Code of Civil Procedure and other repealed enactments.— In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act 8 of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

The "Code" includes, not only sections but also rules in first Schedule and amending rules made by the high court in first Schedule.[1383]

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1382. *Laxmi Kumar Srinivas Das v Krishnaram Baldev Bank, Lashkar,* AIR 1954 MB 156.
1383. *State Of Uttar Pradesh v Pt. Chandra Bhushan Misra*, 1980 AIR 591 : 1980 SCR (1)1131; *State of Uttar Pradesh v Chandra Bhusan Misra*, (1980) 1 SCC 198.

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